HADLEY v. BAXENDALE

9 Ex. 341, 156 Eng. Rep. 145 (1854)

At the trial before Crompton, J., at the last Gloucester Assizes, it appeared that the plaintiffs carried on an extensive business as millers at Gloucester; and that, on the 11th of May, their mill was stopped by a breakage of the crank shaft by which the mill was worked. The steam-engine was manufactured by Messrs. Joyce & Co., the engineers, at Greenwich, and it became necessary to send the shaft as a pattern for a new one to Greenwich. The fracture was discovered on the 12th, and on the 13th the plaintiffs sent one of their servants to the office of the defendants, who are the well-known carriers trading under the name of Pickford & Co., for the purpose of having the shaft carried to Greenwich. The plaintiffs' servant told the clerk that the mill was stopped, and that the shaft must be sent immediately; and in answer to the inquiry when the shaft would be taken, the answer was, that if it was sent up by twelve o'clock any day, it would be delivered at Greenwich the following day. On the following day the shaft was taken by the defendants, before noon, for the purpose of being conveyed to Greenwich, and the sum of 2*l.* 4*s.* was paid for its carriage for the whole distance; at the same time the defendants' clerk was told that a special entry, if required, should be made to hasten its delivery. The delivery of the shaft at Greenwich was delayed by

some neglect; and the consequence was, that the plaintiffs did not receive the new shaft for several days after they would otherwise have done, and the working of their mill was thereby delayed, and they thereby lost the profits they would otherwise have received.

On the part of the defendants, it was objected that these damages were too remote, and that the defendants were not liable with respect to them. The learned Judge left the case generally to the jury, who found a verdict with 25*l.* damages beyond the amount paid into Court.

Whateley, in last Michaelmas Term, obtained a rule nisi for a new trial, on the ground of misdirection. . . .

ALDERSON, B. — We think that there ought to be a new trial in this case; but, in so doing, we deem it to be expedient and necessary to state explicitly the rule which the Judge, at the next trial, ought, in our opinion, to direct the jury to be governed by when they estimate the damages.

It is, indeed, of the last importance that we should do this; for, if the jury are left without any definite rule to guide them, it will in such cases as these, manifestly lead to the greatest injustice. The Courts have done this on several occasions; and, in Blake v. Midland Railway Company, 21 L.J., Q.B., 237, the Court granted a new trial on this very ground, that the rule had not been definitely laid down to the jury by the learned Judge at Nisi Prius.

"There are certain established rules," this Court says, in Alder v. Keighley, 15 M. & W. 117, "according to which the jury ought to find." And the Court, in that case, adds: "and here there is a clear rule, that the amount which would have been received if the contract had been kept, is the measure of damages if the contract is broken."

Now we think the proper rule in such a case as the present is this: — Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special

circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them. Now the above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract. It is said, that other cases, such as breaches of contract in the non-payment of money, or in the not making a good title to land, are to be treated as exceptions from this, and as governed by a conventional rule. But as, in such cases, both parties must be supposed to be cognizant of that well-known rule, these cases may, we think, be more properly classed under the rule above enunciated as to cases under known special circumstances, because there both parties may reasonably be presumed to contemplate the estimation of the amount of damages according to the conventional rule. Now, in the present case, if we are to apply the principles above laid down, we find that the only circumstances here communicated by the plaintiffs to the defendants at the time the contract was made, were, that the article to be carried was the broken shaft of a mill, and that the plaintiffs were the millers of that mill. But how do these circumstances show reasonably that the profits of the mill must be stopped by an unreasonable delay in the delivery of the broken shaft by the carrier to the third person? Suppose the plaintiffs had another shaft in their possession put up or putting up at the time, and that they only wished to send back the broken shaft to the engineer who made it; it is clear that this would be quite consistent with the above circumstances, and yet the unreasonable delay in the delivery would have no effect upon the intermediate profits of the mill. Or, again, suppose that, at the time of the delivery to the carrier, the machinery of the mill had been in other respects defective, then, also, the same results would follow. Here it is true that the shaft was actually sent back to serve as a model for a new one, and that the want of a new one was the only cause of the stoppage of the mill, and that the loss of profits really arose from not sending down the new shaft in proper time, and that this arose from the delay in delivering the broken one to serve as a model. But it is obvious that, in the great multitude of cases of millers sending off broken shafts to third persons by a carrier under ordinary circumstances, such consequences would not, in all probability, have occurred; and these special circumstances were here never communicated by the plaintiffs to the defendants. It follows, therefore, that the loss of profits here cannot reasonably be considered such a consequence of the breach of contract as could have been fairly and reasonably contemplated by both the parties when they made this contract. For such loss would neither have flowed naturally from the breach of this contract in the great multitude of such cases occurring under ordinary circumstances, nor were the special circumstances, which, perhaps, would have made it a reasonable and natural consequence of such

breach of contract, communicated to or known by the defendants. The judge ought, therefore, to have told the jury that, upon the facts then before them, they ought not to take the loss of profits into consideration at all in estimating the damages. There must therefore be a new trial in this case.

Rule absolute.

NOTE

"[A]s the contract is by mutual consent, the parties themselves expressly or by implication, fix the rule by which damages are to be measured." Holmes, J., in Globe Refining Co. v. Landa Cotton Oil Co., 190 U.S. 540, 543 (1903), infra p. 1144.

The rule of Hadley v. Baxendale

> . . . by subjecting all contract claims to a test of foreseeability by the contract breaker of the loss at the time of the making of the contract, diminishes the risk of business enterprise, and the result harmonized well with the free-trade economic philosophy of the Victorian era during which our law of contracts became systematized.

C. T. McCormick, Law of Damages 566-567 (1935). For an excellent discussion of the rules in Hadley v. Baxendale, consult *The Heron II* and Victoria Laundry v. Newman Industries, pp. 1157 and 1164 *infra*.

> The scope of damage for breach of contract is much narrower than the "proximate consequence" rule which prevails in actions to recover for a tort. If we may assume that the defaulting promisor is usually an *entrepreneur*, a businessman who has undertaken a risky enterprise, the law here manifests a policy to encourage the *entrepreneur* by reducing the extent of his risk below that amount of damage which, it might be plausibly argued, the promisee has actually been caused to suffer.

Patterson, The Apportionment of Business Risks Through Legal Devices, 24 Colum. L. Rev. 335, 342 (1924). For a further discussion of the measure of damages in tort and contract, see 5 Corbin §1019. See, in general, Chapter 10.

In Hadley v. Baxendale: A Study in the Industrialization of the Law, 4 J. Legal Stud. 249 (1975), Professor Danzig offers some fascinating insights into the circumstances surrounding the case and suggests a variety of reasons for the rule, some turning on contemporary deficiencies in the substantive law and others on administrative needs of the judiciary. He further points out that however sensible the rule was for business enter-

prises in nineteenth-century England, "a survey of the most recent American cases brings home the fact that as the economy has become more diverse and complex, the rule has become less viable." Id. at 280. An extract from the Danzig article is reproduced *infra* p. 1140.

Despite criticism of the rule, Restatement Second §365 carries it forward, as does U.C.C. §2-715(2)(a), albeit in a modified form.

SHAW v. SHAW

2 Q.B. 429 (C.A. 1954)

[In 1937, Percy Shaw, a farmer, met the plaintiff, a widow, and later in that year proposed marriage to her, describing himself as a widower. She accepted him and on December 10, 1938 they went through a form of marriage at the Cannok Registry Office. For fourteen years, Percy Shaw and the plaintiff lived as husband and wife at Cannok during which time the plaintiff advanced to Shaw about £250 to buy stock, to assist him in acquiring land and to pay for agricultural machinery. In 1952, Shaw died intestate. After Shaw's death, the plaintiff became aware for the first time that she had not been legally married to him (his legal wife died in 1950) and she brought an action against the administrators, a son and daughter of the deceased, claiming damage for breach of a promise of marriage by the deceased. The lower court gave judgment for the defendants holding that the alleged promise to marry was unenforceable being contrary to public policy since at the time of the promise Shaw had a wife living. The plaintiff successfully appealed.]

DENNING, L.J. Every man who proposes marriage to a woman impliedly warrants that he is in a position to marry her, and that he is not himself a married man; and he reaffirms that warranty when he afterwards goes through a form of marriage with her — whether in church or in a registry office. To take the familiar words of the banns of marriage, he warrants that there is no "cause or just impediment" why he should not marry her. Every day of their married life he continues the warranty; he warrants that their marriage was valid and that there was no impediment to it.

In a present case the law imports that Percy Shaw gave such a warranty to the plaintiff. On the faith of it, she went through a form of marriage with him, she lived with him as his wife for 14 years, she put her money into the farm and did all the work of a farmer's wife, and when he died she followed his coffin to the grave as his widow. His estate was worth £1,500 or more, which she had helped to make; and yet the administrators now turn round and say that she was never his wife because he was already married, and that his real wife did not die until 1950. In my judgment Shaw broke his warranty at every point. He broke it when he proposed marriage; he broke it when he married the plaintiff; and he broke it throughout their married life. The breach continued all the time. The most important breach of all was at the moment of his death, because when he died she was not his widow, as she thought she was. She was in law a stranger. That is the breach for which, in my judgment, damages can be recovered.

But what is the proper measure of damages? If she had been his widow when he died intestate, as she thought she was, she would have received the widow's £1,000 and life interest in half of the remainder of the estate. Those are the direct damages which she has suffered by this breach of warranty, and which, in my judgment, she is entitled to recover. It is said that an implied warranty is not alleged in the pleadings, but all the material facts are alleged, and in these days, so long as those facts are alleged, that is sufficient for the court to proceed to judgment without putting any particular legal label upon the cause of action. . . .

[The concurring opinions of Singleton, L.J. and Morris, L.J. have been omitted.]

NOTE

For a discussion of the case, see 70 L.Q. Rev. 445 (1954). Consult In re Fox's Estate, 178 Wis. 369, 190 N.W. 90 (1922); Estate of Vargas, 36 Cal. App. 3d 714, 111 Cal. Rptr. 779, 81 A.L.R.3d 1 (1974), Comment, 20 Wash. & Lee L. Rev. 91 (1963).

The cause of action in *Shaw* has apparently been abolished by section 1 of the Law Reform (Miscellaneous Provisions) Act of 1970. See G. H. Treitel, The Law of Contract 326-327 (5th ed. 1979). A person in Mrs. Shaw's position is now protected by section 6 of the aforementioned act. See 33 Mod. L. Rev. 534, 538-539 (1970).

UPTON-ON-SEVERN RURAL DISTRICT COUNCIL v. POWELL

1 All E.R. 220 (C.A. 1942)

Appeal by the defendant from an order of His Honour, Judge Roope Reeve, K.C., the Great Malvern County Court, dated Oct. 13, 1941. The facts are fully set out in the judgment of Lord Greene, M.R.

Vick, K.C.: In the circumstances of the present case, the judge was quite wrong in inferring that any contract has been entered into. There is no evidence of animus contrahendi in anybody at all. The fire brigade went intending to render a gratuitous service. It was only when it was discovered that the fire was in another area that it was decided that a charge should be made. The police officer to whom the appellant telephoned was under a public duty to inform the fire brigade. He was not acting as the agent of the appellant.

Counsel for the respondents was not called upon.

LORD GREENE, M.R.: The appellant lives at Strensham, and in Nov., 1939 a fire broke out in his Dutch barn; he thereupon telephoned to the police inspector at the Upton police office and told him that there was a fire and asked for the fire brigade to be sent. The police inspector telephoned a garage near to the fire station at Upton, which itself had no telephone, the Upton brigade was informed and immediately went to the fire, where it remained for a long time engaged in putting it out. It so happens that, although the appellant's farm is in the Upton police district, it is not in the Upton fire district. It is in the Pershore fire district, and the appellant was entitled to have the services of the Pershore fire brigade without payment. The Upton fire brigade, on the other hand, was entitled to go to a fire outside its area and, if it did so, quite apart from its statutory rights, it could make a contract that it would be entitled to repayment of its expenses.

The sole question here is whether or not any contract was made by which the Upton fire brigade rendered services on an implied promise to pay for them made by or on behalf of the appellant. It appears that some 6 hours after the arrival of the Upton fire brigade, the officer of the Pershore brigade arrived on the scene, but without his brigade; he pointed out to the Upton officer that it was a Pershore fire, and not an Upton fire, but the Upton fire brigade continued rendering services until the next day when the Pershore fire brigade arrived and took over. In the view that I take in this case, what happened in relation to the arrival of the Pershore officer and his conversation with the Upton officer and the

subsequent arrival of the Pershore fire brigade has nothing whatever to do with the issue which we have to decide. The county court judge held that the appellant when he rang up the police inspector, asked for the "fire brigade" to be sent. He also held that the inspector summoned the local Upton fire brigade, which was perfectly natural, and that he took the order as being one for the fire brigade with which he was connected. It appears that neither the appellant, nor the police officer, nor the Upton fire brigade, until it was so informed by the Pershore officer, knew that the appellant's farm was, in fact, not in the Upton area, but was in the Pershore area. The county court judge then goes on to find that the inspector passed on the order and sent his fire brigade, and that was the fire brigade, I have no doubt, which the appellant expected. The county court judge said:

> The defendant did not know that if he sent for the Pershore fire brigade what advantage he would have obtained. In my view, there is no escape from the legal liability the defendant has incurred. I think he gave the order for the fire brigade he wanted, and he got it.

Now those findings are attacked, because it is said that, as the defendant did not know what fire brigade area he was in, what he really wanted was to get the fire brigade of his area, whatever it might be. It does not seem to me that there is any justification for attacking the finding of the judge on that basis. What the defendant wanted was somebody to put out his fire, and put it out as quickly as possible, and in ringing up the Upton police he must have intended that the inspector at Upton would get the Upton fire brigade; that is the brigade which he would naturally ask for when he rang up Upton. Even apart from that, it seems to me quite sufficient if the Upton inspector reasonably so construed the request made to him, and, indeed, I do not see what other construction the inspector could have put upon that request. It follows, therefore, that on any view the appellant must be treated as having asked for the Upton fire brigade. That request having been made to the Upton fire brigade by a person who was asking for its services, does it prevent there being a contractual relationship merely because the Upton fire brigade, which responds to that request and renders the services, thinks, at the time it starts out and for a considerable time afterwards, that the farm in question is in its area, as the officer in charge appears to have thought? In my opinion, that can make no difference. The real truth of the matter is that the appellant wanted the services of Upton; he asked for the services of Upton — that is the request he made — and Upton, in response to that request, provided those services. He cannot afterwards turn round and say: "Although I wanted Upton, although I did not concern myself when I asked for Upton as to whether I was entitled to get free services, or whether I would have to pay for them, nevertheless, when it turns out that Upton can demand payment, I am not going to pay them, because

Upton were under the erroneous impression that they were rendering gratuitous services in their own area." That, it seems to me, would be quite wrong on principle. In my opinion, the county court judge's finding cannot be assailed and the appeal must be dismissed with costs.

NOTE

1. For comments on the case, see 6 Mod. L. Rev. 157 (1943); 58 L.Q. Rev. 296 (1942); 20 Can. B. Rev. 557 (1942); 3 Corbin §§561, 597 (1960). See also Kessler, Some Thoughts on the Evolution of the German Law of Contracts — A Comparative Study, Pt. 1, 22 U.C.L.A.L. Rev. 1066, 1073-1074 (1975).

2. Did defendant intend to pay? Did plaintiff expect to be paid? If there is a contract, has it not been "created by life"?

3. Should the court not have rationalized recovery, if any, in terms of quasi contract? Was Powell unjustly enriched? Consult the *Cotnam* case, *supra* p. 163; 3 Corbin §561 (1960). Is plaintiff entitled to recovery under the Restatmeent of Restitution? Consult §117. Would not the best solution be to let Upton recover from Pershore? But can this be accomplished? Under the reasoning of the *Sommers* case, *supra* p. 168? Consult further Restatement of Restitution §§43, 54, 115; McClary v. Michigan R.R., 102 Mich. 312, 60 N.W. 695 (1894); Johnson v. Boston & Maine R.R., 69 Vt. 521, 38 A. 267 (1897). For an economic justification of the rule, see A. Kronman & R. Posner, The Economics of Contract Law 60-61 (1979).

4. Assume that the fire in Powell's barn was extinguished during Powell's absence by a neighbor at considerable expense. Is the neighbor entitled to compensation? The answer given in Bartholomew v. Jackson, 2 Johnson 28 (N.Y. 1822) is in the negative: if a man humanely bestows his labor and even risks his life in voluntarily preserving his neighbor's house from destruction by fire, the law considers the service rendered gratuitous and therefore no ground for compensation. Is this still true in light of Restatement of Restitution §117?

VICKERY v. RITCHIE

202 Mass. 247, 88 N.E. 835 (1909)

Contract for a balance of $10,467.16 alleged to be due for the erection of a Turkish bath house upon land of the defendant on Carver Street in Boston, with a count upon an alleged contract in writing and another count upon an account annexed. Writ dated January 9, 1904.

In the Superior Court the case was referred to Clarence H. Cooper, Esquire, as auditor. He filed a report containing the findings which are stated in the opinion. The case afterwards was tried before Pierce, J. The

defendant introduced no evidence. At the close of the plaintiff's evidence the judge ruled that the plaintiff could not recover, and ordered a verdict for the defendant. The plaintiff alleged exceptions.

KNOWLTON, C.J. This is an action to recover a balance of $10,467.16, alleged to be due to the plaintiff as a contractor, for the construction of a Turkish bath house on land of the defendant. The parties signed duplicate contracts in writing, covering the work. At the time when the plaintiff signed both copies of the contract the defendant's signature was attached, and the contract price therein named was $33,721. When the defendant signed them the contract price stated in each was $23,200. Until the building was completed the plaintiff held a contract under which he was to receive the larger sum, while the defendant held a contract for the same work, under which he was to pay only the smaller sum. This resulted from the fraud of the architect who drew the contracts, and did all the business and made all the payments for the defendant. The contracts were on typewritten sheets, and it is supposed that the architect accomplished the fraud by changing the sheets on which the price was written, before the signing by the plaintiff, and before the delivery to the defendant. The parties did not discover the discrepancy between the two writings until after the building was substantially completed. Each of them acted honestly and in good faith, trusting the statements of the architect. The architect was indicted, but he left the Commonwealth and escaped punishment.

The auditor found that the market value of the labor and materials furnished by the plaintiff, not including the customary charge for the supervision of the work, was $33,499.30, and that their total cost to the plaintiff was $32,950.96. He found that the land and building have cost the defendant much more than their market value. The findings indicate that it was bad judgment on the part of the defendant to build such a structure upon the lot, and that the increase in the market value of the real estate, by reason of that which the plaintiff put upon it, is only $22,000. The failure of the parties to discover the difference between their copies of the contract was caused by the frequently repeated fraudulent representations of the architect to each of them.

The plaintiff and the defendant were mistaken in supposing that they had made a binding contract for the construction of this building. Their minds never met in any agreement about the price. The labor and materials were furnished at the defendant's request and for the defendant's benefit. From this alone the law would imply a contract on the part of the defendant to pay for them. The fact that the parties supposed the price was fixed by a contract, when in fact there was no contract, does not prevent this implication, but leaves it as a natural result of their relations. Both parties understood and agreed that the work should be paid for, and both parties thought that they had agreed upon a price. Their mutual mistake in this particular left them with no express contract by which

their rights and liabilities could be determined. The law implies an obligation to pay for what has been done and furnished under such circumstances, and the defendant, upon whose property the work was done, has no right to say that it is not to be paid for. The doctrine is not applicable to work upon real estate alone. The rule would be the same if the work and materials were used in the repair of a carriage, or of any other article of personal property, under a supposed contract with the owner, if, through a mutual mistake as to the supposed agreement upon the price, the contract became unenforceable. [The discussion of several cases is omitted.]

If the law implies an agreement to pay, how much is to be paid? There is but one answer. The fair value of that which was furnished. No other rule can be applied. Under certain conditions the price fixed by the contract might control in such cases. In this case there was no price fixed. [The discussion of several cases is omitted.]

The right of recovery depends upon the plaintiff's having furnished property or labor, under circumstances which entitle him to be paid for it, not upon the ultimate benefit to the property of the owner at whose request it was furnished.

It follows that the plaintiff is entitled to recover the fair value of his labor and materials.

Exceptions sustained.

NOTE

For an argument that the contract in *Vickery* was an implied-in-fact contract, see Costigan, Implied-In-Fact Contracts and Mutual Assent, 33 Harv. L. Rev. 376, 386 (1920). In Vickery v. Ritchie, 207 Mass. 318, 93 N.E. 578, 579 (1911), the Massachusetts Supreme Judicial Court refused to enforce a liquidated damages clause favorable to defendant on the ground that the supposed contract containing the clause "never took effect between the parties." Does this mean that its earlier decision was based on the view that the contract between the parties was one implied in law?

See 12 Williston §1485 at 315 (1970); Restatement of Restitution §§40, 155; Seavey, Embezzlement by Agent of Two Principals: Contribution, 64 Harv. L. Rev. 431, 435 (1951).

LEFKOWITZ v. GREAT MINNEAPOLIS SURPLUS STORE, INC.

251 Minn. 188, 86 N.W.2d 689 (1957)

MURPHY, Justice. — This is an appeal from an order of the Municipal Court of Minneapolis denying the motion of the defendant for amended findings of fact, or, in the alternative, for a new trial. The order for judgment awarded the plaintiff the sum of $138.50 as damages for breach of contract.

This case grows out of the alleged refusal of the defendant to sell to the plaintiff a certain fur piece which it had offered for sale in a newspaper advertisement. It appears from the record that on April 6, 1956, the defendant published the following advertisement in a Minneapolis newspaper:

SATURDAY 9 A. M. SHARP
3 BRAND NEW
FUR COATS
Worth to $100.00
First Come
First Served
$1
EACH

On April 13, the defendant again published an advertisement in the same newspaper as follows:

SATURDAY 9 A. M.
2 BRAND NEW PASTEL
MINK 3-SKIN SCARFS
Selling for $89.50
Out they go
Saturday. Each $1.00
1 BLACK LAPIN STOLE
Beautiful,
worth $139.50 $1.00
FIRST COME
FIRST SERVED

The record supports the findings of the court that on each of the Saturdays following the publication of the above-described ads the plaintiff was the first to present himself at the appropriate counter in the defendant's store and on each occasion demanded the coat and the stole so advertised and indicated his readiness to pay the sale price of $1. On both occasions, the defendant refused to sell the merchandise to the plaintiff, stating on the first occasion that by a "house rule" the offer was intended for women only and sales would not be made to men, and on the second visit that plaintiff knew defendant's house rules.

The trial court properly disallowed plaintiff's claim for the value of the fur coats since the value of these articles was speculative and uncertain. The only evidence of value was the advertisement itself to the effect that the coats were "Worth to $100.00," how much less being speculative especially in view of the price for which they were offered for sale. With reference to the offer of the defendant on April 13, 1956, to sell the "1

Black Lapin Stole . . . worth $139.50 . . ." the trial court held that the value of this article was established and granted judgment in favor of the plaintiff for that amount less the $1 quoted purchase price.

The defendant contends that a newspaper advertisement offering items of merchandise for sale at a named price is a "unilateral offer" which may be withdrawn without notice. . . .

The defendant relies principally on Craft v. Elder & Johnston Co. [34 Ohio L.A. 603, 38 N.E.2d 416]. In that case, the court discussed the legal effect of an advertisement offering for sale, as a one-day special, an electric sewing machine at a named price. The view was expressed that the advertisement was (34 Ohio L.A. 605, 38 N.E.[2d] 417) "not an offer made to any specific person but was made to the public generally. Thereby it would be properly designated as a unilateral offer and not being supported by any consideration could be withdrawn at will and without notice." It is true that such an offer may be withdrawn before acceptance. Since all offers are by their nature unilateral because they are necessarily made by one party or on one side in the negotiation of a contract, the distinction made in that decision between a unilateral offer and a unilateral contract is not clear. On the facts before us we are concerned with whether the advertisement constituted an offer, and, if so, whether the plaintiff's conduct constituted an acceptance.

There are numerous authorities which hold that a particular advertisement in a newspaper or circular letter relating to a sale of articles may be construed by the court as constituting an offer, acceptance of which would complete a contract. [Citations.]

The test of whether a binding obligation may originate in advertisements addressed to the general public is "whether the facts show that some performance was promised in positive terms in return for something requested." 1 Williston, Contracts (Rev. ed.) §27.

The authorities above cited emphasize that, where the offer is clear, definite, and explicit, and leaves nothing open for negotiation, it constitutes an offer, acceptance of which will complete the contract. . . .

Whether in any individual instance a newspaper advertisement is an offer rather than an invitation to make an offer depends on the legal intention of the parties and the surrounding circumstances. Annotation, 157 A.L.R. 744, 751; 77 C.J.S., Sales, §25b; 17 C.J.S., Contracts, §389. We are of the view on the facts before us that the offer by the defendant of the sale of the Lapin fur was clear, definite, and explicit, and left nothing open for negotiation. The plaintiff having successfully managed to be the first one to appear at the seller's place of business to be served, as requested by the advertisement, and having offered the stated purchase price of the article, he was entitled to performance on the part of the defendant. We think the trial court was correct in holding that there was in the conduct of the parties a sufficient mutuality of obligation to constitute a contract of sale.

The defendant contends that the offer was modified by a "house rule" to the effect that only women were qualified to receive the bargains advertised. The advertisement contained no such restriction. This objection may be disposed of briefly by stating that, while an advertiser has the right at any time before acceptance to modify his offer, he does not have the right, after acceptance, to impose new or arbitrary conditions not contained in the published offer. Payne v. Lautz Bros. & Co., 166 N.Y.S. 844, 848; Mooney v. Daily News Co., 116 Minn. 212, 133 N.W. 573, 37 L.R.A. (N.S.) 183.

Affirmed.

NOTE

Consult 56 Mich. L. Rev. 1016. On bait advertising, see 69 Yale L.J. 830 (1960); see further New York General Business Law ch. 22-A.

A sees in the display window of a shop an article marked $5. When he asks for it, the shopkeeper realizes that the wrong price tag has been affixed and that the article should have been marked $15. He refuses to sell the article for $5. Is he bound? No, according to Professor Winfield, commenting on the South African case of Crawley v. Rex, [1909] Transvaal L.R. 1005. Some Aspects of Offer and Acceptance, 55 L.Q. Rev. 499, 516-518 (1939): "a shop is a place for bargaining and not for compulsory sales." See further, Pharmaceutical Society of Great Britain v. Boots Cash Chemists (Southern) Ltd., [1953] 1 Q.B. 401; Kahn, Some Mysteries of Offer and Acceptance, 72 S.A.L.J. 246, 251 (1955).

A newspaper invites its readers to submit letters on matters of public interest to its letters-to-the-editor column. A reader sends in a signed letter on a campaign issue, giving his address. Is the paper in breach of contract if it refuses to publish it? Wall v. World Pub. Co., 263 P.2d 1010 (Okla. 1953).

On sales by auction, see U.C.C. §2-328.

JENKINS TOWEL SERVICE, INC. v. FIDELITY-PHILADELPHIA TRUST CO.

400 Pa. 98, 161 A.2d 334 (1960)

[The Trust Company, after many unsuccessful attempts to sell a piece of real estate owned as trustee, on June 18, 1959 circulated a letter in which it requested interested parties to submit sealed bids for the property. The letter provided that on June 24, 1959 the bids were to be opened and that an agreement of sale would be tendered "to the highest acceptable bidder whose offer is in excess of $92,000." The Trust Company

reserved to itself the right to "approve or disapprove of any or all offers, or to withdraw the properties from the market." It also emphasized its fiduciary duty to recommend "the most advantageous offer." Plaintiff submitted a bid of $95,600 meeting all the terms of the letter. The only other bid was a bid by the Esso Standard Oil Corporation for the same amount conditioned however on a change in zoning and subject to approval by its home office in New York. When the Trust Company refused to effect an agreement of sale with plaintiff, preferring Esso to plaintiff, the latter sued for specific performance. The Court of Common Pleas dismissed the bill and plaintiff appealed.]

BELL, J. . . . The rights of the parties depend upon the proper construction of Fidelity's letter of June 18, 1959. Plaintiff claims the letter was an offer, which it unconditionally accepted. Defendants claim that the letter was merely "preliminary negotiations" and "an invitation to bid."

Fidelity's letter of June 18 is ambiguous and therefore it must be interpreted most strongly against the Fidelity, which drew it: Betterman v. American Stores Co., 367 Pa. 193, 80 A.2d 66. [Quotations from the case and several others are omitted.]

Plaintiff's sealed bid of $95,600 was unequivocal, unconditional, and in full compliance with all the terms and conditions set forth by the Fidelity in its letter-offer dated June 18, 1959. On the other hand the bid of Esso Standard Oil Company was conditional and qualified. Esso's bid was not an acceptance of the offer made by Fidelity; on the contrary it was a rejection of this offer and a counter-offer. Restatement, Contracts, §60, and particularly comment *a*; §27, Illustration 3. It is clear that plaintiff was the only party which accepted the Fidelity's offer.

If, as defendants contend, Fidelity's letter of June 18 was merely an invitation to prospective purchasers who had been negotiating unsuccessfully for several years to submit a higher bid or offer which it could accept or reject in its sole and arbitrary discretion, why did Fidelity ask for "sealed bids" from all interested parties on or before June 24, 1959, and further state "at that time the bids will be opened and an *Agreement of Sale tendered* to the highest acceptable bidder, provided the offer is in excess of $92,000 cash, free and clear of all brokerage commissions," and then specify in detail the other provisions which were to be incorporated in the agreement of sale? On its face, and especially in the light of the prior negotiations, the surrounding circumstances and the objects which the parties apparently had in view, the contention of defendants that this was merely an invitation to bid, which Fidelity could reject in its unfettered discretion, is unreasonable.

In an attempt to support Fidelity's construction and position, defendants have overlooked not only the law as to the interpretation of a contract which must be considered in its entirety, but also the most important provision, viz. that after the bids are opened it will tender to

the highest acceptable bidder[45] an agreement of sale, the details of which are set forth in Fidelity's letter of June 18.

Defendants rely upon the statement in Fidelity's letter that it was acting as fiduciary and was "obligated to recommend the offer which it believed most advantageous to its estate." This contention is devoid of merit. Plaintiff unconditionally and unqualifiedly accepted all the terms and conditions of Fidelity's offer, and no other party did; and there was no higher or more advantageous offer. Defendants also rely upon the following sentence — "The Trustees, of course, reserve the right to approve or disapprove of any and all offers, or to withdraw the properties from the market." This sentence standing alone is what creates a possible ambiguity. This sentence must be interpreted, we repeat, by considering the surrounding circumstances, the objects Fidelity apparently had in view, and the contract in its entirety, and if there is any ambiguity which is reasonably susceptible of two interpretations, the ambiguity must be resolved against the Fidelity which drew the letter-offer. So interpreted, we believe the sentence means that Fidelity can withdraw the properties from the market at any time before the opening of the sealed bids, and can approve or disapprove any offer which does not *fully* comply with all the conditions set forth by the Fidelity, or which complies but adds unsatisfactory terms. . . .

We are convinced that the letter of Fidelity Trust Company dated June 18, 1959, was an offer of the properties in question by Fidelity, subject to the terms and conditions therein set forth and that the offer was duly and unconditionally accepted by plaintiff alone. The Court below therefore erred in sustaining the defendants' preliminary objections and in dismissing plaintiff's amended bill of complaint. If the defendants are unable to controvert the facts set forth in the amended complaint, the plaintiff should be awarded specific performance of the contract.

Decree reversed with a procedendo at the cost of the trust estate of which Fidelity-Philadelphia Trust Company is trustee or co-trustee.

Dissenting Opinion by Mr. Justice BENJAMIN R. JONES: The crux of my disagreement with the majority of this Court lies in the interpretation of the letter of June 18, 1959 from Fidelity to Jenkins. The majority construes this letter as a firm *offer* on the part of Fidelity to sell this real estate to the highest bidder, whereas I construe this letter as an *invitation for an offer* to be submitted to purchase this real estate.

Fidelity held title to this property as a fiduciary: such fact, known to Jenkins, required that in the disposal of such property Fidelity exercise a high degree of care: Herbert Estate, 356 Pa. 107, 110, 51 A.2d 753. In recognition of its fiduciary duty, Fidelity warned Jenkins that, as a fiduciary, it was "obligated to *recommend* the offer which it believes most advantageous to its Estate." (Emphasis added).

45. There is no contention that plaintiff was not acceptable.

Four different times the letter employs the words "offer" or "offers" to describe that which Jenkins is to submit. The letter requests the addressee to "forward your highest offer"; it states that all "*offers*" were to be made on a cash basis: it directs that a check should accompany the offer "in the amount of at least 10% of the *offer*"; lastly, Fidelity reserved the right to approve or disapprove of "any or all *offers*."

The majority bases its interpretation of the letter as an "offer" on two facets of its language: first, the letter asks for "sealed bids" and, second, the letter state that "at that time [June 24, 1959] the bids will be opened and an Agreement of Sale tendered". A "sealed bid" is simply an "offer" of a "bid" submitted in such form that its contents are concealed until the time of opening, a cautionary measure which insures to bidders an equality of treatment at the hands of the person who invites such offers or bids. The mere fact that a "bid" is sealed does not determine whether the bid is an "offer" or "an acceptance of an offer." The employment of the word "sealed" adds no magic to the situation.

Had the letter stated an "Agreement of Sale [will be] tendered to the highest bidder" the majority view *might* be supportable, but the majority overlooks an all-important word in the phrase actually employed, i.e., the word "acceptable." An Agreement of Sale was not to be tendered to "the *highest* bidder," but to "the *highest acceptable* bidder." The word "acceptable" certainly and clearly modifies the word "highest" and reveals a clear intent on the part of Fidelity that an agreement of sale will be tendered to the highest bidder *only if such bidder is "acceptable."* This phrase does support not the majority, but my view that *Fidelity* reserved the right of rejection of any bid that was not *acceptable* to it.

Finally, Fidelity's letter expressly states: "The Trustees, of course, reserve the right to approve or disapprove of any or all offers, or to withdraw the properties from the market." The majority states that this "sentence means that Fidelity can withdraw the properties from the market at any time before the opening of the sealed bids, and can approve or disapprove any offer which does not *fully* comply with all the conditions set forth by Fidelity, or which complies but adds unsatisfactory terms." Such a construction is absolutely unjustified under the clear language employed by Fidelity. If a bid did not *fully* comply with the terms of the letter, or, if it complied, but added any terms, whether satisfactory or unsatisfactory, such a bid, even if called an "acceptance," would not constitute an acceptance to any offer contained in the letter. As to the interpretation by the majority that Fidelity's right to withdraw ceased at the time the sealed bids were opened, such a construction rewrites the language of the letter and imposes on Fidelity's part a condition judge-created and not Fidelity intended and expressed.

If the English language ever was effectively employed to express a fiduciary's reservation of the right to reject any and all bids it appears in this letter. Fundamental concepts inherent in the law of contracts should not be lightly cast aside for the sake of expediency in the determination of a particular case. Instead of construing this letter as *written* the majority, under the guise of a supposed ambiguity of language, now undertakes to rewrite the letter and to create a contract where no contract exists.

I, accordingly, dissent.

NOTE

Besides the Trust Co., defendants included Esso and an agent of Esso. In addition to specific performance, plaintiff prayed for an injunction restraining the defendants from seeking a change in the zoning to permit the erection of a gasoline station.

MOULTON v. KERSHAW

59 Wis. 316, 18 N.W. 172 (1884)

[The defendants, dealers in salt in the city of Milwaukee, including salt of the Michigan Salt Association wrote to the plaintiff, also a dealer in salt in the city of La Crosse, the following letter:

> Dear Sir: In consequence of a rupture in the salt trade, we are authorized to offer Michigan fine salt, in full car-load lots of eighty to ninety-five bbls., delivered at your city, at 85c. per bbl., to be shipped per C. & N.W.R.R. Co. only. At this price it is a bargain, as the price in general remains unchanged. Shall be pleased to receive your order.

Plaintiff immediately wired as follows: "Your letter of yesterday received and noted. You may ship me two thousand (2,000) barrels Michigan fine salt, as offered in your letter. Answer."

Defendants on the receipt of telegram withdrew the offer and failed to ship the salt. The defendants interposed a general demurrer to plaintiff's suit for damages. The Circuit Court overruled the demurrer and the defendants appealed.]

TAYLOR, J. The only question presented is whether the appellants' letter, and the telegram sent by the respondent in reply thereto, constitute a contract for the sale of 2,000 barrels of Michigan fine salt by the appellants to the respondent at the price named in such letter.

We are very clear that no contract was perfected by the order telegraphed by the respondent in answer to appellants' letter. The learned

counsel for the respondent clearly appreciated the necessity of putting a construction upon the letter which is not apparent on its face, and in their complaint have interpreted the letter to mean that the appellants by said letter made an express offer to sell the respondent, on the terms stated, such reasonable amount of salt as he might order, and as the appellants might reasonably expect him to order, in response thereto. If in order to entitle the plaintiff to recover in this action it is necessary to prove these allegations then it seems clear to us that the writings between the parties do not show the contract. It is not insisted by the learned counsel for the respondent that any recovery can be had unless a proper construction of the letter and telegram constitute a binding contract between the parties. The alleged contract being for the sale and delivery of personal property of a value exceeding $50, is void by the statute of frauds, unless in writing. Sec. 2308. R.S. 1878.

The counsel for the respondent claims that the letter of appellants is an offer to sell to the respondent, on the terms mentioned, any reasonable quantity of Michigan fine salt that he might see fit to order, not less than one car-load. On the other hand, the counsel for the appellants claim that the letter is not an offer to sell any specific quantity of salt, but simply a letter such as a business man would send out to customers or those with whom he desired to trade, soliciting their patronage. To give the letter of appellants the construction claimed for it by the learned counsel for the respondent, would introduce such an element of uncertainty into the contract as would necessarily render its enforcement a matter of difficulty, and in every case the jury trying the case would be called upon to determine whether the quantity ordered was such as the appellants might reasonably expect from the party. This question would necessarily involve an inquiry into the nature and extent of the business of the person to whom the letter was addressed, as well as to the extent of the business of the appellants. So that it would be a question of fact for the jury in each case to determine whether there was a binding contract between the parties. And this question would not in any way depend upon the language used in the written contract, but upon proofs to be made outside of the writings. As the only communications between the parties, upon which a contract can be predicated, are the letter and the reply of the respondent, we must look to them, and nothing else, in order to determine whether there was a contract in fact. We are not at liberty to help out the written contract, if there be one, by adding by parol evidence additional facts to help out the writing so as to make out a contract not expressed therein. If the letter of the appellant is an offer to sell salt to the respondent on the terms stated, then it must be held to be an offer to sell any quantity at the option of the respondent not less than one car-load. The difficulty and injustice of construing the letter into such an offer is so apparent that the learned counsel for the respondent do not insist upon it, and consequently insist that it ought to be construed as an offer to sell

such quantity as the appellants, from their knowledge of the business of the respondents might reasonably expect him to order.

Rather than introduce such an element of uncertainty into the contract, we deem it much more reasonable to construe the letter as a simple notice to those dealing in salt that the appellants were in a condition to supply that article for the prices named, and requested the person to whom it was addressed to deal with them. This case is one where it is eminently proper to heed the injunction of Justice Foster in the opinion in Lyman v. Robinson, 14 Allen, 254: "That care should always be taken not to construe as an agreement letters which the parties intended only as preliminary negotiations."

We do not wish to be understood as holding that a party may not be bound by an offer to sell personal property, where the amount or quantity is left to be fixed by the person to whom the offer is made, when the offer is accepted and the amount or quantity fixed before the offer is withdrawn. We simply hold that the letter of the appellants in this case was not such an offer. If the letter had said to the respondent we will sell you all the Michigan fine salt you will order, at the price and on the terms named, then it is undoubtedly the law that the appellants would have been bound to deliver any reasonable amount the respondent might have ordered, possibly any amount, or make good their default in damages. The case cited by the counsel decided by the California supreme court (Keller v. Ybarru, 3 Cal., 147) was an offer of this kind with an additional limitation. The defendant in that case had a crop growing grapes, and he offered to pick from the vines and deliver to the plaintiff, at defendant's vineyard, so many grapes then growing in said vineyard as the plaintiff should wish to take during the present year at ten cents per pound on delivery. The plaintiff, within the time and before the offer was withdrawn, notified the defendant that he wished to take 1,900 pounds of his grapes on the terms stated. The court held there was a contract to deliver the 1,900 pounds. In this case the fixing of the quantity was left to the person to whom the offer was made, but the amount which the defendant offered, beyond which he could not be bound, was also fixed by the amount of grapes he might have in his vineyard in that year. The case is quite different in its facts from the case at the bar.

The cases cited by the learned counsel for the appellant, (Beaupre v. P. & A. Tel. Co., 21 Minn., 155, and Kinghorne v. Montreal Tel. Co., U.C., 18 Q.B. 60), are nearer in their main facts to the case at bar, and in both it was held there was no contract. We, however, place our opinion upon the language of the letter of the appellants, and hold that it cannot be fairly construed into an offer to sell to the respondent any quantity of salt he might order, nor any reasonable amount he might see fit to order. The language is not such as a business man would use in making an offer to sell to an individual a definite amount of property. The word "sell" is not used. They say, "we are authorized to offer Michigan fine salt," etc., and volunteer an opinion that at the terms stated it is a bargain. They do not say, we offer to sell to you. They use general language proper to be addressed generally to those who were interested in the salt trade. It is clearly in the nature of an advertisement or business circular, to attract the attention of those interested in that business to the fact that good bargains in salt could be had by applying to them, and not as an offer by which they were to be bound, if accepted, for any amount the persons to whom it was addressed might see fit to order. We think the complaint fails to show any contract between the parties, and the demurrer should have been sustained.

By the Court. — The order of the circuit court is reversed, and the cause remanded for further proceedings according to law.