[CIVIL JURISDICTION.]

1919.
Feb. 28.

[ACTION NO. 37, 1918.]

GEORGE A. MOORE AND COMPANY (INC.) *v.* HENRY MARKS AND COMPANY.

Breach of contract.

Held, parties not *ad idem* about interpretation of contract.

Sir CHARLES DAVSON, C.J. On the pleadings as filed plaintiffs claimed damages in respect of the breach by defendants of a contract under which they had agreed to sell and deliver to plaintiffs about 600 tons of copra at $87 per ton in United States gold; but when the case came on for hearing plaintiffs' counsel asked that this amount should be changed to $86 and, defendants not objecting, the statement of claim was amended accordingly. Defendants deny the existence of the contract and plead alternatively that they did enter into negotiations with plaintiffs to sell at $86·75 which negotiations plaintiffs subsequently elected to treat as no contract, suggesting a variation in price as to which there was no final agreement; and by way of further alternative that they were prevented from performing the contract, if there was a contract, by a Government Proclamation prohibiting the export of copra from Fiji to (among other places) the United States.

The parties carry on business in San Francisco and Suva, respectively, and the question of the alleged contract and its terms falls to be decided entirely on the letters and cablegrams, admitted by both sides, which passed between them.

The following cablegrams, in code, passed between the parties:—

Marks to Moore.

September 11, 1915.

Cable firm offer including your commission cost freight insurance exchange San Francisco or other Western port about 600 tons sundried copra sailer loading early December.

Geo. A. Moore & Co., San Francisco to Henry Marks & Co., Suva, Fiji,

(ABC Code, 5th Ed.) September 13, 1915.

Code word.	*Translation.*
MARKS, SUVA.	....
OBSOLEVI . .	. . We give you firm offer.
ORZESE . .	. . $86.
MOTRICE .	. . ·75 per ton of 2,240 lb
WESTERNER	. . Net weight.
BACHEBO .	. . In bags.
TANYPEZE	. . According to our terms.
JAHDEI . .	. . July 8th.
RECRASTINO	. . Subject to immediate reply by wire.
GEO. MOORE.	....

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Geo. A. Moore & Co., San Francisco, from Messrs. Henry Marks & Co., Suva, Fiji,

(ABC Code, 5th Ed.) September 15, 1915.

Code word.	*Translation.*
GAMOOR, SAN FRANCISCO.	....
OBTENONS	Offer not sufficient inducement.
ABKOCHEN	Will accept.
ORZURA	$87·00.
RECRASTINO	Subject to immediate reply by wire.
MARKS.	....

Geo. A. Moore & Co., San Francisco, to Messrs. Henry Marks & Co., Suva, Fiji.

(ABC Code, 5th Ed.) September 16, 1915.

Code word.	*Translation.*
MARKS, SUVA.	....
OBTORTUM	We repeat our last offer.
BALGKOPF	It is the best that can be done.
RECRASTINO	Subject to immediate reply by wire.
GEO. MOORE.	....

Geo A. Moore & Co., San Francisco, from Messrs. Henry Marks & Co., Suva Fiji.

September 17, 1915.

Code word.	*Translation.*
GAMOOR, SAN FRANCISCO ..	.. Offer accepted, Marks.

The expression "According to our terms July 8th" refers to certain terms governing the contract, as to which there is no dispute. These cablegrams, it seems clear, constituted a binding contract at $86·75; but it was contended for plaintiffs that, taken with subsequent correspondence, to be presently set forth, it was a contract at $86·00. In a letter of the 18th September to defendants plaintiffs confirmed their offer stating the selling price, correctly, as $86·75 and this was acknowledged by defendants in a letter of 19th October in which they say "everything appears to be quite in order." Thus far the parties were clearly at one, but a misunderstanding, of which these proceedings are the result, arose through Defendants' letter to plaintiffs of 17th September purporting to confirm, on their side, the cable correspondence above referred to. This letter is as follows:—

Henry Marks & Co. Ltd.

Suva, Fiji, 17th September, 1915.

Messrs. Geo. A. Moore & Co, San Francisco.

Dear Sirs,

We confirm the cable correspondence that has passed between your good selves and us as follows:—

We wired you on the 11th instant:—"Cable firm offer including your commission bulk and bagged cost freight

insurance exchange San Francisco or other Western Port about six hundred tons sundried copra sailer loading early December." And received your reply on the 14th:—

OBSOLEVI	.. ..	We give you firm offer.
ORZESE	.. ..	$86·00.
MOTRICE	.. ..	Per ton 2,240 lb
WESTERNER	.. ..	Net weight.
BACHEBO	.. ..	In bags.
TANYPEZE	.. ..	According to your terms.
JAHDAI	.. ..	8th day of July.
RECRASTINO	.. ..	Subject to immediate reply by wire.

We then cabled you:—

OBTENONS	.. ..	Offer not sufficient inducement.
ABKOCHEN	.. ..	Will accept.
ORZURA.	.. ..	$87·00.
RECRASTINO	.. ..	Subject to immediate reply by wire.

To-day we received:—

OBTORTUM	.. ..	I repeat my last offer.
BALGKOPF	.. ..	It is the best that can be done.
RECRASTINO	.. ..	Subject to immediate reply by wire.

To this we answered:—" Offer accepted."

We now place on record the contract as follows:—We have sold to you for shipment per sailing vessel " Cecelia Sudden," loading early December (subject to war conditions not preventing) about 600 tons of sundried copra in bags c.i.f.e. San Francisco at $86·00 (eighty-six dollars) gold per ton of 2,240 lb net weight on shipment, and we undertake that shrinkage shall not exceed 2 per cent. Shipping documents to be forwarded through the Anglo London–Paris and National Bank, which are to be surrendered on payment of our draft, which will be drawn at sixty days usance. We shall be glad to have your confirmation in due course.

We are,
Yours faithfully,
HENRY MARKS & COMPANY LIMITED.
HENRY MARKS,
Man. Director.

Now, a reference to the cable of 13th September shows at once that the person who prepared this letter omitted to copy a part of the meaning of the word " Motrice," which is " ·75 per ton of 2,240 lb." This error in quoting the price ($86·00 instead of $86·75) occurs again in a letter from defendants dated 21st September and defendants' counsel suggested that this was written by defendants with their letter of the 17th under their eyes and the mistake thus repeated. Dr. Brough, for plaintiffs, contends that there was no error and that defendants had in their mind $86·00 as the selling price and that it was to this price that their " acceptance " in the cable of 17th September referred; a somewhat bold contention

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in view of plaintiffs' specific offer of $86·75 in the cable of 13th September. But even if I could accept this view I do not see how it would help plaintiffs, for then defendants would have accepted a different price from that offered, and there would have been no contract.

Now, when plaintiffs received defendants' letter of 17th September (on or before the 15th October) they must have seen, and their reply shows that they did see, that the price, $86·00, was not in accordance with the negotiations by cable. Defendants subsequently, on 25th November, wrote to plaintiffs explaining that the quotation of $86·00 instead of $86·75 was due to the mistake of a clerk in omitting to copy part of the code word "Motrice" and stating that the price was correctly entered in their contract book as $86·75.

In the meantime there were two courses open to plaintiffs:—

1. To treat the quotation of $86·00 as an obvious mistake and point it out to defendants, abiding by the contract already made; or
2. To regard it as a fresh offer and close with it; though it would have been difficult to understand why defendants, having agreed to sell at $86·75 should, for no apparent reason, knock ·75 cents per ton off their selling price.

Plaintiffs, however, did neither of these things. They wrote a letter on the 15th October, while the contract was still executory, which re-opened the question of price; the letter reads:—

(*From Geo. A. Moore & Company's letter of Oct.* 15, 1915, *to Henry Marks & Co., Suva.*)

We note your confirmation of our purchase of you completed by your cable of September 17th of about 600 tons of sundried copra in bags for early December loading, subject to maximum shrinkage of two and a half per cent., all other conditions as therein stated covered by your letter of July 8th. Owing to your misinterpretation of our cable offer however there exists a lack of unanimity with respect to the price at which this sales purchase was effected, in view of the fact that while we were content to offer you eighty-six and 75/100 ($86·75) dollars you on the other hand were content to accept eighty-six ($86·00) dollars; in other words, while we bought at eighty-six ($86·75) and 75/100 dollars per ton, you sold at eighty-six ($86·00) dollars, and we therefore recommend as a just and equitable adjustment of this discrepancy that the difference be divided between us; in other words, that the shipment be invoiced to us at eighty-six and 37½/100 ($86·37½) dollars per ton; in the circumstances we have no doubt this proposal will meet with your entire approval.

This letter is relied on by Dr. Brough to establish the contract at $86·00 on which plaintiffs sue, for he says it is an acceptance by plaintiffs of defendants' alleged offer to sell at this price. How this can be passes my comprehension; there is no acceptance of anything, but the letter, after referring to the "lack of unanimity" between the parties, "recommends" "a just and equitable adjustment of the discrepancy" (between plaintiffs' offer of $86·75 and defendants' apparent acceptance of the lower price of $86·00) and practically offers to buy at $86·37½, thus re-opening the negotiation as to price. I find it impossible to regard this letter as an acceptance of defendants' alleged offer of $86·00 as his selling price.

Some time before the 21st December plaintiffs received defendants' letter of 25th November, 1915, above referred to, explaining the mistake in these terms:—

Henry Marks & Co. Ltd.

Suva, Fiji, 25th November, 1915.

Messrs. G. A. Moore & Co., San Francisco, Cal.

Dear Sirs,

We have to acknowledge receipt of yours of the 15th ult., and note contents. We were surprised upon reading same to find that we had quoted $86·00 instead of $86·75. There was no question in our minds regarding your offer, but one of the clerks in our office in acknowledging the receipt of your cable omitted to copy the full meaning of the word "Motrice," leaving out the figures 75 cents, but on the translation of your cable it was quite correctly put, and in our cabled reply to yours of the 16th September we immediately answered "Offer accepted," and it is entered up in our contract book as $86·75, which was your original offer, and we need scarcely tell you shows us a big loss, as very shortly after we accepted the price here advanced materially and we had to buy the balance to fill the quantity at far more than we had sold for. Fortunately for us we had a fair quantity bought before the extreme rise. We regret that we cannot see our way clear to allow you half of the difference, because the only difference is a clerical error in acknowledgment by letter of your offer, which speaks for itself.

We are,

Yours faithfully,

HENRY MARKS & COMPANY LIMITED.

HENRY MARKS,
Man. Director.

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To this letter plaintiffs, on 21st December, replied as follows:

Messrs. Henry Marks & Co., Suva, Fiji.

Gentlemen,

All orders and contracts are subject to the condition that we shall not be liable for delays in performance, nor failure to perform in whole or in part by reason of strikes, lockouts, fires, floods, earthquakes, inability to secure transportation, or any cause of any similar or other kind beyond our control. The following is subject to the foregoing conditions.

We confirm our previous lines under date of the 18th instant, since which we are favoured by your several valued letters of the 17th, 25th, and 26th of November, the contents of which have had our interested attention.

We note what you say in your letter of November 25th with respect to our "sales purchase" of about 600 tons of sundried copra for December loading by the "Cecelia Sudden," which however is not entirely convincing in view of the fact that your letter of September 17th confirming this sales purchase, signed by your Mr. Henry Marks, aside from giving a translation of our cablegram, distinctly confirms the sale separately at $86·00, nor does it appear reasonable to us that in replying to us by cable under date of September 15th that "our offer was not sufficient inducement," you would have bargained with us in this manner for difference of only twenty-five cents per ton. In the interim the shipment will have been effected and your draft with shipping documents attached will come forward through our bank here, but as the sixty days usance will give us ample time to adjust this matter, we shall of course protect your signature and would recommend that you reconsider the matter and accept the suggested method of adjustment of the controversy, as set forth in our letter of October 15th.

Your claim that the sale at this price leaves you a big loss has reference only to the fact that the market subsequently advanced, and had the occasion arisen where we claimed a big loss on the purchase by a decline in the market, this certainly could not be accepted as grounds for accepting our claim in a similar controversy; on the other hand, we are handling this cargo for very little over 1s. per ton, and if it is really true that in your negotiations you were figuring to make 3s. per ton less than subsequently develops, we certainly feel that we should participate in this profit. We put this matter up to your sense of fairness and justice.

We note the other contents of your letters of the 17th and 26th of November confirming cable exchanges between us, and note with interest your remarks with respect thereto.

Otherwise we have nothing of interest to add and wishing you the compliments of the season, we remain

Yours very truly,

GEO. A. MOORE & CO.

FREDK. W. PETERS,
Vice-President.

It will be seen that in this letter plaintiffs flatly decline to accept defendants' explanation, that is, they persist in regarding the quotation of $86·00 by defendants as an offer on their part to accept that price; but they do not, even now, accept those terms, they merely repeat the suggestion in their letter of 15th October to " split the difference."

To sum up: there was, as the result of the cablegrams above set out, a binding contract to buy and sell at $86·75. Then, while the contract was still executory, there came defendants' letter of 17th September quoting a lower price; it is clear to me that this was an error, as explained by defendants (they being business men and not, at any rate when selling copra, philanthropists), but if it was not an error it was an offer to accept a lower price than they had bargained for; if that was so and if the offer was accepted by plaintiffs, as contended, then the contract on which they found their amended claim is established; otherwise it is not.

There is no evidence that this offer, assuming it to be such, was ever accepted; on the contrary the correspondence negatives this assumption.

I think, however, that the matter may be put more strongly; the letter of defendants of 17th September cannot in any case be called an offer to sell at $86·00; it is a confirmation of an agreement by cable with plaintiffs in which their offer to buy at $86·75 is erroneously quoted as an offer to buy at $86·00; that is to say, plaintiffs' case rests on the alleged acceptance by defendants of an offer (to buy at $86·00) which was never made by plaintiffs and which they (plaintiffs) do not and cannot assert was ever made.

From either point of view there was no contract as set up in the statement of claim.

There is no difficulty in applying the law to these facts. This case is not quite on all fours with *Hussey* v. *Horne Payne* (4 Appeal Cases, 311), which was referred to in the argument. There, though the contract was complete up to a certain point, there remained certain conditions which had to be settled before it could be concluded; here there was a complete contract; though not that set up by plaintiffs; but while it was still executory the negotiations were re-opened by plaintiffs as to price and no agreement was arrived at.

Much nearer to the present case is *Thornton* v. *Kempton* (5 Taunton, 786). There was an agreement to buy and sell rice of a certain quality, but, by a mistake, the sale notes, exchanged between the parties, referred to two different

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qualities. The Court held, and it is an elementary proposition, that the contract must be on one side to sell and on the other side to buy one and the same thing.

The principle applies equally where not the thing but the price is in question, and in this case the price of $86·00, assuming it to have been offered, which was not the case, was never accepted. This being so plaintiffs' case fails and it is unnecessary to consider the very interesting points raised and ably argued as to the effect of the embargo against the export of copra from the Colony to the United States.

I give judgement for defendants with costs.

Note.—The above judgment was affirmed on appeal to the Privy Council (26th February, 1920) and is as follows:—

Their Lordships think it unnecessary to take time to make their report in this case.

The appeal is brought from the Supreme Court of Fiji, where the Chief Justice gave judgment for the respondents with costs in an action brought against them for damages for breach of a contract for the sale of copra. The appellants are a company incorporated in the United States and they carry on business at San Francisco. The appellants made an offer to the respondents and in the result a contract was supposed to have been concluded by cablegram, and it was only subsequently that difficulties arose as to whether the parties were *ad idem* about the interpretation of the contract. It is not necessary to go into the character of the dispute, because for another reason their Lordships find themselves unable to take any course except to dismiss this appeal. Various defences were put in in the action, one of which was based on a proclamation and another was as to damages. It is not necessary to go into any of those questions because they were not reached in the Court below and, in their Lordships' opinion, they cannot be reached here. The action was launched as an action by the appellants for damages for breach of contract, and their claim was that they had bought from the defendants, the respondents, about 600 tons of sun-dried copra to be shipped to San Francisco on certain terms at the price of $87 per ton. That was the contract they set up in the first instance. Then, after an interval, their pleader amended this allegation in their statement of claim and made it a contract at $86 per ton. The learned Judge who tried the case said there was some reason for saying there might have been a contract at $86·75 per ton, but he was unable to say there was one at either $87 or $86, and

the plaintiffs had not proved their case. If the case had been put on the footing of $86·75 it is not clear, and their Lordships cannot tell, what course the defendants, the respondents, might have taken in the Court below. Their Lordships are now asked to try a case which is put to-day on the footing that $86·75 will do. That is a new case and it is really a new contract that is being set up. Their Lordships feel that, while they are always disposed, if they can, to put aside technicalities, in order to try a substantial issue, it is essential that the real and substantial issue should not only be raised but that the other side should have an opportunity of taking the course they may be advised in dealing with it. That has not been done in this case, so their Lordships feel that no other course is open to them but to say they agree with the Chief Justice in the Court below, and that they must humbly advise His Majesty that the appeal should be dismissed with costs.

NOTE.—The cause of action in this case arose more than three years ago, and an application was made by defendants on the 11th February to have the hearing fixed for Tuesday, the 18th February, in the ordinary course it would not have come on before the 1st March. Plaintiffs' counsel asked for a later day, if possible, and the 20th was accordingly fixed for the hearing. It was agreed that the correspondence constituting the alleged contract on which plaintiffs action was based should be admitted by both sides and a copy of the correspondence so admitted was supplied to the Court. Dr. Brough for plaintiffs, however, pointed out that, apart from the question of the making of the contract and its terms, it might be necessary for him to call a witness (or witnesses) who would not be available on the date fixed, on other points raised in the pleadings, *e.g.*, on the question of damages or of the possibility of defendants fulfilling the alleged contract in spite of the embargo against the shipping of copra to the United States and it was understood that should necessity arise a reasonable opportunity would be afforded him of adducing such evidence.

Before proceeding with the Cause List I should like to refer to a report in yesterday's paper purporting to give the effect of my judgment in the case of *Moore* v. *Marks*, but containing a grave perversion of it. I refer to the words "By the cablegrams there was a contract at $86·75, but the error by defendants offering to sell at $86·00 waived the contract." It tends to bring the administration of justice into contempt when arrant nonsense of this sort is put into the mouth of the Judge. It would be arrant nonsense to say that a party to a contract could put an end to it by misquoting its terms to the other party. Of course I said nothing of the kind; nor did I find that any offer came from defendants. In accepting plaintiffs' offer defendants misquoted its terms and plaintiffs, attempting to take advantage of this, re-opened the negotiations. A typed copy of the judgment is at the disposal of the paper; there is no obligation to publish this, but its effect must not be mis-represented. I am willing to suppose that the mis-representation was not intentional and do not, therefore, propose to take any further steps.