v. *Sauerwein*, 10 Wall. 218; *Erskine* v. *Hohnbach*, 14 Id. 613; *Cheatham* v. *United States*, 92 U. S. Rep. 85; *Macklot* v. *Davenport*, 17 Iowa 383; *Dean* v. *Todd*, 20 Mo. 92; *Hughes* v. *Kline*, 30 Penn. St. 227; but it cannot take away all remedy without providing a new one, and whatever is provided it is conceived must recognise the same equitable principles which governed before: *Hubbard* v. *Brainard*, 35 Conn. 563; *Wilson* v. *McKenna*, 52 Ill. 44; *Bryan* v. *Walker*, 64 N. C. 146; *Hart* v. *Henderson*, 17 Mich. 218; *Dean* v. *Borchsenins*, 30 Wis. 236; *Penrose* v. *Erie Canal Co.*, 56 Penn. St. 46.[1]

T. M. COOLEY.

RECENT ENGLISH DECISIONS.

High Court of Justice—Queen's Bench Division.

STEVENSON, JAQUES & CO. *v.* McLEAN.

Where negotiations for the sale of goods are pending between parties, and an offer of terms is made by one party, such offer remains in force as a continuing offer until the time for accepting or rejecting it has arrived, unless it be revoked before acceptance. And a revocation in order to be operative must be communicated to the other party before he dispatches his acceptance.

Byrne & Co. v. *Leon Van Trienhoven & Co.*, 49 L. J. C. P. 316, followed and approved.

THE facts and arguments appear at length in the judgment.

Waddy, Q. C., and *H. Shield*, for the plaintiffs.

Cave, Q. C., and *Wormald*, for the defendant.

LUSH, J.—This is an action for non-delivery of a quantity of iron which it was alleged the defendant contracted to sell to the plaintiffs at forty shillings per ton net cash. The trial took place before me at the last assizes at Leeds, when a verdict was given for the plaintiffs for 1900*l.*, subject to further consideration on the question whether, under the circumstances, the correspondence between the parties amounted to a contract, and subject also, if

[1] Since the foregoing was written, it has been decided in Michigan—*Moss* v. *Cummins*, 6 N. W. Rep. 843—that money paid to a tax collector, under compulsion of process valid on its face, cannot be recovered back as an illegal exaction, upon the ground that the supervisor, in making the assessment, in violation of his oath, deliberately assessed all the property of the township at a rate much below its actual value.

the verdict should stand, to a reference, if required by the defendant, to ascertain the amount of the damages.

The plaintiffs are makers of iron and iron merchants at Middlesborough. The defendant being possessed of warrants for iron which he had originally bought of the plaintiffs, wrote on the 24th of September to the plaintiffs from London, where he carries on his business: "I see that No. 3 has been sold for immediate delivery at thirty-nine shillings, which means a higher price for warrants. Could you get me an offer for the whole or part of my warrants? I have 3800 tons, and the brands you know."

On the 26th one of the plaintiffs wrote from Liverpool: "Your letter has followed me here. The pig-iron trade is at present very excited, and it is difficult to decide whether prices will be maintained or fall as suddenly as they have advanced. Sales are being made freely, for forward delivery chiefly, but not in warrants. It may, however, be found advisable to sell the warrants as maker's iron. I would recommend you to fix your price, and if you will write me your limit to Middlesborough, I shall probably be able to wire you something definite on Monday."

This letter was crossed by a letter written on the same day by the clerk of one Fossick, the defendant's broker in London, and which was in these terms:—

"Referring to R. A. Machan's letter to you *re* warrants, I have seen him again to-day, and he considers thirty-nine shillings too low for same. At forty shillings he says he would consider an offer. However, I shall be obliged by your kindly wiring me, if possible, your best offer for all or part of the warrants he has to dispose of."

On the 27th (Saturday) the plaintiffs sent to Fossick the following telegram:—

"Cannot make an offer to-day; warrants rather easier. Several sellers think might get thirty-nine shillings and sixpence if you could wire firm offer, subject reply. Tuesday, noon."

In answer to this Fossick wrote on the same day:—

"Your telegram duly to hand *re* warrants. I have seen Mr. Machan, but he is not inclined to make a firm offer. I do not think he is likely to sell at thirty-nine shillings and sixpence, but will probably prefer to wait. Please let me know immediately you get any likely offer."

On the same day the defendant, who had then received the

Liverpool letter of the 26th, wrote himself to the plaintiffs, as follows:—

"Mr. Fossick's clerk showed me a telegram from him yesterday, mentioning thirty-nine shillings for No. 3, as present price, forty shillings for forward delivery. I instructed the clerk to wire you that I would now sell for forty shillings, net cash, open till Monday." No such telegram was sent by Fossick's clerk.

The plaintiffs were thus, on the 28th (Sunday), in possession of both letters, the one from Fossick stating that the defendant was not inclined to make a firm offer; and the other from the defendant himself, to the effect that he would sell for forty shillings, net cash, and would hold it open all Monday. This, it was admitted, must have been the meaning of "open till Monday."

On the Monday morning, at 9.42, the plaintiffs telegraphed to the defendant: "Please wire whether you would accept forty for delivery over two months; or, if not, longest limit you would give."

This telegram was received at the office at Moorgate at 10.1 A. M., and was delivered at the defendant's office in the Old Jewry shortly afterwards.

No answer to this telegram was sent by the defendant, but after its receipt he sold the warrants, through Fossick, for forty shillings, net cash, and at 1.25 sent off a telegram to the plaintiffs: "Have sold all my warrants here for forty, net, to-day." This telegram reached Middlesborough at 1.46, and was delivered in due course.

Before its arrival at Middlesborough, however, and at 1.34, the plaintiffs telegraphed to defendant: "Have received your price for payment next Monday. Write you fully by post."

By the usage of the iron market at Middlesborough, contracts made on a Monday for cash are payable on the following Monday.

At 2.6 on the same day, after receipt of the defendant's telegram announcing the sale through Fossick, the plaintiffs telegraphed: "Have your telegram following our advice to you of sale, per your instructions, which we cannot revoke, but rely upon your carrying out."

The defendant replied: "Your two telegrams received; but your sale was too late. Your sale was not per my instructions." And to this the plaintiffs rejoined: "Have sold your warrants on terms stated in your letter of 27th."

The iron was sold by the plaintiffs to one Walker at forty-one shillings and sixpence, and the contract-note was signed before one o'clock on Monday. The price of iron rapidly rose, and the plaintiffs had to buy in fulfilment of their contract at a considerable advance on forty shillings.

The only question of fact raised at the trial was, whether the relation between the parties was that of principal and agent, or that of buyer and seller.

The jury found it was that of buyer and seller, and no objection has been taken to this finding.

Two objections were relied on by the defendant—first, it was contended that the telegram sent by the plaintiffs on the Monday morning was a rejection of the defendant's offer, and a new proposal on the plaintiffs' part, and that the defendant had therefore a right to regard it as putting an end to the original negotiation.

Looking at the form of the telegram, the time when it was sent, and the state of the iron market, I cannot think this is its fair meaning. The plaintiff Stevenson said he meant it only as an inquiry, expecting an answer for his guidance, and this, I think, is the sense in which the defendant ought to have regarded it.

It is apparent throughout the correspondence, that the plaintiffs did not contemplate buying the iron on speculation, but that their acceptance of the defendant's offer depended on their finding some one to take the warrants off their hands. All parties knew that the market was in an unsettled state, and that no one could predict at the early hour when the telegram was sent how the prices would range during the day. It was reasonable that, under these circumstances, they should desire to know before business began whether they were to be at liberty in case of, and to make any and what, concession as to the time or times of delivery, which would be the time or times of payment, or whether the defendant was determined to adhere to the terms of his letter; and it was highly unreasonable that the plaintiffs should have intended to close the negotiation while it was uncertain whether they could find a buyer or not, having the whole of the business hours of the day to look for one. Then, again, the form of telegram is one of inquiry. It is not "I offer forty for delivery over two months," which would have likened the case to *Hyde* v. *Wrench*, 3 Beav. 334, where one party offered his estate for 1000*l*., and the other answered by offering 950*l*. Lord LANGDALE, in that case, held, that after the 950*l*. had been refused, the party offering it could not, by then

agreeing to the original proposal, claim the estate, for the negotiation was at an end by the refusal of his counter proposal. Here there is no counter proposal. The words are, "Please wire whether you would accept forty for delivery over two months, or, if not, the longest limit you would give." There is nothing specific by way of offer or rejection, but a mere inquiry, which should have been answered and not treated as a rejection of the offer. This ground of objection therefore fails.

The remaining objection was one founded on a well-known passage in Pothier, which was supposed to have been sanctioned by the Court of Queen's Bench in *Cooke* v. *Oxley*, 3 Term Rep. 653, that in order to constitute a contract there must be the assent or concurrence of the two minds at the moment when the offer is accepted; and if, when the offer is made, and time is given to the other party to determine whether he will accept or reject it, the proposer changes his mind before the time arrives, although no notice of the withdrawal has been given to the other party, the option of accepting it is gone. The case of *Cooke* v. *Oxley*, does not appear to me to warrant the inference which has been drawn from it, or the supposition that the judges ever intended to lay down such a doctrine. The declaration stated a proposal by the defendant to sell to the plaintiff two hundred and sixty-six hogsheads of sugar at a specific price, that the plaintiff desired time to agree to or dissent from the proposal till four in the afternoon, and that defendant agreed to give the time, and promised to sell and deliver, if the plaintiff would agree to purchase and give notice thereof before four o'clock. The court arrested the judgment, on the ground that there was no consideration for the defendant's agreement to wait till four o'clock, and that the alleged promise to wait was *nudum pactum*. All that the judgment affirms is, that a party who gives time to another to accept or reject a proposal is not bound to wait until the time expires. And this is perfectly consistent with legal principles and with subsequent authorities, which have been supposed to conflict with *Cooke* v. *Oxley*. It is clear that a unilateral promise is not binding, and that if the person who makes an offer revokes it before it has been accepted, which he is at liberty to do, the negotiation is at an end: see *Routledge* v. *Grant*, 4 Bing. 653. But in the absence of an intermediate revocation, a party who makes a proposal by letter to another is considered as repeating the offer every instant of time till the letter has reached its destination and the correspondent has

had a reasonable time to answer it: *Adams* v. *Lindsell*, 1 B. & Ald. 681. "Common sense tells us," said Lord COTTENHAM, in *Dunlop* v. *Higgins*, 1 H. L. C. 381, "that transactions cannot go on without such a rule." It cannot make any difference whether the negotiation is carried on by post, or by telegraph, or by oral message. If the offer is not retracted, it is in force as a continuing offer till the time for accepting or rejecting it has arrived. But if it is retracted, there is an end of the proposal. *Cooke* v. *Oxley*, if decided the other way, would have negatived the right of the proposing party to revoke his offer.

Taking this to be the effect of the decision in *Cooke* v. *Oxley*, the doctrine of Pothier, before alluded to, which is undoubtedly contrary to the spirit of the English law, has never been affirmed in our courts. Singularly enough, the very reasonable proposition that a revocation is nothing till it has been communicated to the other party, has not until recently been laid down, no case having apparently arisen to call for a decision upon the point. In America it was decided some years ago that "an offer cannot be withdrawn unless the withdrawal reaches the party to whom it is addressed before his letter of reply announcing the acceptance has been transmitted:" *Tayloe* v. *Merchant Fire Insurance Co.*, 9 How. Sup. Court Rep. 390; and in *Byrne & Co.* v. *Leon Van Trienhoven & Co.*, 49 L. J. C. P. 316, my brother LINDLEY, in an elaborate judgment, adopted this view, and held that an uncommunicated revocation is, for all practical purposes, and in point of law, no revocation at all.

It follows that, as no notice of withdrawal of his offer to sell at forty shillings, net cash, was given by the defendant before the plaintiffs sold to Walker, they had a right to regard it as a continuing offer, and their acceptance of it made the contract, which was initiated by the proposal, complete and binding on both parties.

My judgment must, therefore, be for the plaintiffs for 1900*l.*, but this amount is liable to be reduced by an arbitrator to be agreed on by the parties, or, if they cannot agree within a week, to be nominated by me. If no arbitrator is appointed, or if the amount be not reduced, the judgment will stand for 1900*l.* The costs of the arbitration to be in the arbitrator's discretion.

Judgment for the plaintiffs.

The case of *Byrne* v. *Van Tienhoven*, reported in Law Rep., 5 C. P. Div. 344, referred to in the foregoing case, also was this:

On the 1st of October 1879, the defendants wrote from Cardiff offering goods for sale, at a stated price, to the plaintiffs, who resided at New York. The plaintiffs received this offer on the 11th October, and accepted it by telegram on the same day, and also by letter posted on the 15th; but in the meantime, viz., on the 8th October, the defendants had posted another letter to the plaintiffs, withdrawing their offer of the 1st, which withdrawal reached the plaintiffs on the 18th, seven days after they had sent their telegram of acceptance. The defendants refusing to fulfil their offer, the plaintiffs brought suit, and upon full consideration it was held that the withdrawal was inoperative, it not reaching the plaintiffs before they had actually accepted the offer, both by telegram and letter; they having no reason to suppose it was withdrawn. But the same point had been long before decided by the Court of Sessions in Scotland, in *Thomson* v. *James*, 18 Dunl. 1 (1855), which decision was apparently not cited in either of the late cases stated above. The facts there were that on the 26th November 1853, the defendant sent a letter by mail to the plaintiff, offering him 6400*l.* for the purchase of an estate called "Renniston." On the 1st December, between 2.30 and 4.30 P. M., the plaintiff posted an acceptance of the offer, which was received by the defendant on the 2d, but in the meantime, viz., on the 1st, he had changed his mind, and before 3 P. M., he posted a withdrawal of his offer, which also reached the plaintiff on the 2d, and the defendant refusing to take the estate and pay the 6400*l.*, this action was brought for the purchase-money. The point was elaborately argued and fully considered, and the action was sustained; Lord President, saying, "The real question in issue between the parties is, whether the offer was recalled before it was accepted; I hold that the mere posting of a letter of recall does not make that letter effectual as a recall, so as from the moment of its posting to prevent the completion of the contract by the other's acceptance. An offer is nothing until it is communicated to the party to whom it is made. In like manner, I think the recall or withdrawal of an offer that has been communicated can have no effect until the recall or withdrawal has been communicated, or may be assumed to have been communicated to the party holding the offer. An offer, pure and unconditional, puts it in the power of the party to whom it is addressed to accept the offer, until, by the lapse of a reasonable time he has lost the right, or until the party who has made the offer gives notice,—that is, makes known—that he withdraws it. The purpose of the recall is to prevent the party to whom the offer was made from acting upon the offer by accepting it. This necessarily implies pre-communication to the party who is to be so prevented." He then proceeds to distinguish this kind of revocation—voluntary revocation—from that caused by death or insanity of the party making the offer. Admitting that in such cases the revocation, or rather interruption or suspension, takes effect immediately, and without notice to the adverse party, he shows conclusively the difference between those and a voluntary withdrawal by a living and sane man. Lord IVORY and Lord DEAS also delivered elaborate judgments to the same effect, and the case contains one of the best discussions of the subject to be found anywhere. The case is reprinted in Langdell's valuable Collection of Cases on Contracts, p. 125.

A few cases seem to incline the other way; the first of which is *Head* v. *Diggon*, 3 Man. & Ry. 97 (1828), in the King's Bench, and apparently not elsewhere reported. The facts there were that on Thursday, April 17th 1828, the plaintiff and defendant being in verbal negotiation for the purchase of a lot of wool, and after the defendant had fixed

his price, the plaintiff requested time to consider of his terms. The defendant said he would give him a week, to which the plaintiff replied that three or four days would be enough. The defendant then wrote and gave the plaintiff the following paper:

"Shelford, April 17, 1828.

Offered Mr. Head, the under wool, with three days' grace from the above date: forty Sussex head and lamb, &c., 9*l.* 10*s.* as per sample, delivered in good condition. F. DIGGON."

On Monday the 21st, the plaintiff called on the defendant to accept the wool and make arrangements for the delivery. The defendant said as the plaintiff had not seen him or written him on Sunday, he had given a price for the wool to a Mr. Fyson, and refused to deliver the wool. Being sued for non-delivery of the wool, HOLROYD, J., was of opinion the plaintiff had failed in proving a contract binding upon both parties, and on the authority of *Cooke* v. *Oxley*, directed a nonsuit, which was confirmed by the King's Bench; Lord TENTERDEN, C. J., saying, "Must not both parties be bound, or is it sufficient if only one is bound? You contend that the buyer was to be free during the three days, and that the seller was to be bound. If the contract is to be taken as made only at the time when the plaintiff signified his acceptance of the offer, it is disproved by the circumstance that the defendant did not then agree." BAYLEY, J., added, "I am of the same opinion; and in *Routledge* v. *Grant*, it was held by the Court of Common Pleas that unless both parties are bound, neither is bound."

Here the offer was accepted and made known to the offerer, within the time allowed (supposing Sunday to be not a business day), and before any notice of retraction or change of mind upon the part of the defendant; yet, under the influence of *Cooke* v. *Oxley*, the sale was held not binding upon the vendor.

Dickinson v. *Dodds*, 2 Ch. Div. 463 (1876), discusses this point quite fully. The defendant there, on Wednesday, June 10th, gave the plaintiff an offer to sell him an estate for 800*l.*, "this offer to be left over until Friday, 9 o'clock A. M." On the Thursday morning preceding, the plaintiff in fact decided to accept but did not immediately notify the defendant, supposing he had until 9 A. M. the next day to do so. On Thursday afternoon the defendant sold the property to another party, but sent no notice to the plaintiff. The latter, however, heard of it, and before 9 o'clock Friday morning, distinctly informed the defendant orally and in writing, that he accepted his offer; the defendant saying, "You are too late; I have sold the property."

On a bill in equity for a specific performance by the plaintiff, Vice-Chancellor BACON held that the contract was binding, and the acceptance being within the time limited, and before any notice given of any retraction, withdrawal, or sale to another, that the defendant was bound to fulfil. This judgment was, however, reversed on appeal, principally, it appears, because, although the defendant had not sent the plaintiff any notice of his change of mind; yet, in fact, the plaintiff had heard of it before giving any notice of acceptance, and that, therefore, there never was a union of minds at the same time, and so no completed contract.

How far these decisions as to revocation apply also to an acceptance of an offer, and whether that also should take effect *when received*, and not when posted in some distant city, as so many cases and judges seem to hold, may be considered in a future note.

EDMUND H. BENNETT.