

C. W. ROSENSTOCK, AS ADMINISTRATOR OF THE ESTATE OF H. W. ELSER, PLAINTIFF AND APPELLANT, VS. EDWIN BURKE, DEFENDANT AND APPELLANT. THE COOPER COMPANY, INTERVENOR AND APPELLEE.

G.R. No. 20732. September 26, 1924

Ponente: AVACEÑA, J.

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AVACEÑA, J.:

The defendant Edwin Burke owned a motor yacht, known as Bronzewing, which he acquired in Australia in the year 1920 for the purpose of selling it here. This yacht was purely for recreation and as no purchaser presented himself, it had been moored for several months until the plaintiff H. W. Elser, at the beginning of the year 1922, began negotiations with the defendant for the purchase thereof. At that time this yacht was mortgaged to the Asia Banking Corporation to secure the payment of a debt of P100,000 which was due and unpaid since one year prior thereto, contracted by the defendant in favor of said bank of which Mr. Avery was then the manager. The plan of the plaintiff was to organize a yacht club and sell it afterwards the yacht for P120,000, of which P20,000 was to be retained by him as commission and the remaining P100,000 to be paid to the defendant. To this end, on February 12, 1922, the defendant obtained from the plaintiff an option in writing in the following terms:

"For the purpose expressed by you of organizing a yacht club, I take pleasure in confirming my verbal offer to you of the motor yacht Bronzewing, at a price of one hundred and twenty thousand pesos (P120,000). This offer is open for thirty days from date."

To carry out his plan, the plaintiff proposed to the defendant to make a voyage on board the yacht to the south, with prominent business men for the purpose, undoubtedly, of making an advertisement of the vessel and paving the way to an advantageous sale. But as the yacht needed some repairs to make it seaworthy for this voyage, and as, on the other hand, the defendant said that he had no funds to make said repairs, the plaintiff paid almost all their amount. It has been stipulated that the plaintiff was not to pay anything for the use of the yacht. The cost of those repairs was P6,972.21, which was already paid by the plaintiff, plus P1,730.84 due to the Cooper Company which still remains unpaid, plus P832.93, due to the plaintiff, which also remains unpaid. Once the yacht was repaired, the plaintiff gave receptions on board, and on March 6, 1922, made his pleasure voyage to the south, coming back on the 23d of the same month. The plaintiff never accepted the offer of the defendant for the purchase of the yacht contained in the letter of option of February 12, 1922. The plaintiff believed, in view of the result of that voyage, that it was convenient to replace the engine of the yacht with a new one which would cost P20,000. In this connection the plaintiff had negotiated with Mr. Avery for another loan of P20,000 with which to purchase this new engine. On the 31st of that month of March the plaintiff wrote the defendant a letter informing him, among other things, that after he had tried to obtain from Mr. Avery said new loan of P20,000 for the purchase of the engine, and that he was not disposed to purchase the vessel for more than P70,000, Mr. Avery had told him that he was not in position to give one cent more. In this letter the plaintiff suggested to the defendant that he should speak with Mr. Avery about the matter. The defendant, after an interview with Mr. Avery held on

the same day, answered the plaintiff that he had arrived at an agreement with Mr. Avery about the sale of the yacht to the plaintiff for P80,000 payable as follows: P5,000 each month during the first six months and P10,000 thereafter until full payment of the price, the yacht to be mortgaged to secure payment thereof. On the first of April next, the plaintiff informed the defendant that he was not inclined to accept this proposition. On the morning of the 3d of the same month, the defendant called at the office of the plaintiff to speak with him about the matter and as a result of the interview held between them, the plaintiff in the presence of the defendant wrote a letter addressed to the latter which is literally as follows:

"MY DEAR MR. BURKE:

"In connection with the yacht Bronzewing, I am in position and am willing to entertain the purchase of it under the following terms:

"(a) The purchase price to be P80,000, Philippine currency.

"(b) Initial payment of P10,000 to be made within sixty (60) days.

" (c) Payment of the balance to be made in installments of P5,000 per month, with interest on deferred payments at 9 per cent payable semiannually.

"(d) As security for the above, I am to deposit with you P80,000, in stock of the J. K. Pickering Co., commercial value P400,000, book value P600,000. Statement covering this will be furnished you on request.

"Yours very truly,

(Sgd.) "H. W. ELSE

"Proposition Accepted.

` (Sgd.) "E. BURKE

"Manila, April 3,1922.

"ASIA BKG. CORP.

"Agreed to as above.

(Sgd.) "W. G. AVERY

"Mgr.

"Asia Bkg. Corp."

The defendant took this letter and went to the Asia Banking Corporation and after holding an interview with Mr. Avery, both of them signed at the bottom of the letter of Mr. Elser, as appears there. On the 5th of the same month of April the plaintiff sent the defendant another letter, telling him that in view of the attitude of Mr. Avery as to the loan of P20,000 in connection with the installation of a new engine in the yacht, it was impossible for him to take charge of the boat and he made delivery thereof to the defendant. On the 8th of the same month of April the defendant answered the plaintiff that as he had accepted, with the consent of the Asia Banking Corporation, through Mr. Avery, the offer for the purchase of the yacht made by the plaintiff in his letter of the 3d of April (Exhibit 1), he made demand on him for the performance thereof.

The plaintiff brings this action against the defendant to recover the sum of P6,139.28, the value of the repairs made on the yacht which he had paid for.

The defendant alleges as a defense against this action that the agreement he had had with the plaintiff about these repairs was that the latter was to pay for them for his own account in exchange of the gratuitous use of the yacht, and prays that he be absolved from the complaint. As a counterclaim he prays that the plaintiff be compelled to pay him the sum of P832.93, one-half of the price of the canvas used in the repair of the yacht, which has not as yet been paid by the plaintiff. Furthermore, alleging that the plaintiff purchased the vessel in accordance with his letter of April 3, 1922, he prays as a cross-complaint that the plaintiff be compelled to comply with the terms of this contract and to pay damages in the sum of P10,000.

The Cooper Company was admitted to intervene in this action and claims in turn its credit of P1,730.84 for the repairs made on the yacht, the amount of which has not as yet been paid.

The trial court rendered judgment sentencing the defendant to pay the plaintiff the sum of P6,139.28 with legal interest thereon at the rate of 6 per cent from April 18, 1922, and to pay the intervenor, the Cooper Company, the sum of P1,730.84 with legal interest at 6 per cent from May 19, 1922. The plaintiff was sentenced to comply in all its parts with the contract for the purchase of the yacht, according to the terms of his letter of April 3d (Exhibit 1). Both the plaintiff and the defendant appealed from this judgment.

The plaintiff appeals from the judgment in so far as it compels him to purchase the yacht upon the conditions stated in the letter of April 3, 1922 (Exhibit 1). This appeal raises the question whether or not this letter was a definite offer to purchase, and the same having been accepted by the defendant with the consent of Mr. Avery on behalf of the Asia Banking Corporation, whether or not it is a contract of sale valid and binding against the plaintiff. The trial court solved this question in the affirmative. We are of the opinion that this is an error.

As was seen, this letter begins as follows: "In connection with the yacht Bronzewing, I am in position and am willing to entertain the purchase of it under the following terms * * *." The whole question is reduced to determining what the intention of the plaintiff was in using that language.

To convey the idea of a resolution to purchase, a man of ordinary intelligence and common culture would use these clear and simple words, I offer to purchase, I want to purchase, I am in position to purchase. And the stronger is the reason why the plaintiff should have expressed his intention in the same way, because, according to the defendant, he was a prosperous and progressive merchant. It must be presumed that a man in his transactions in good faith uses the best means of expressing his mind that his intelligence and culture permit so as to convey and exteriorize his will faithfully and unequivocally. But the plaintiff instead of using in his letter the expression want to purchase, I offer to purchase, I am in position to purchase, or other similar language of easy and unequivocal meaning, used this other, I am in position and am willing to entertain the purchase of the yacht. The word "entertain" applied to an act does not mean the resolution to perform said act, but simply a position to deliberate for deciding to perform or not to perform said act. Taking into account only the literal and technical meaning of the word "entertain," it seems to us clear that the letter of the plaintiff cannot be interpreted as a definite offer to purchase the yacht, but simply a position to deliberate whether or not he would purchase the yacht. It was but a mere invitation to a proposal being made to him, which might be accepted by him or not.

Furthermore there are other circumstances which show that in writing this letter it was really not the intention of the plaintiff to make a definite offer. The plaintiff never thought of acquiring the yacht for his personal use, but for the purpose of selling it to another or to acquire it for another, thereby obtaining some gain from the transaction, and it can be said that the only thing the plaintiff wanted in connection with this yacht was that the defendant should procure its sale, naturally with some profit for himself. For this reason the original idea of the

plaintiff was to organize a yacht club that would afterwards acquire the yacht through him, realizing some gain from the sale. This is clearly stated in the letter containing the option that the defendant gave him on February 12, 1922. This accounts for the fact that the plaintiff was not in a position to make a definite offer to purchase, he being sure to be able to resell the yacht to another, and this explains why he did not say in his letter of the 3d of April that he was in position to purchase the yacht, but only to entertain this purchase.

On the other hand, the plaintiff thought it necessary to replace the engine of the yacht with a new one which was to cost P20,000 and has been negotiating with Mr. Avery a loan of P20,000 to make the replacing. When the plaintiff wrote his letter of the 3d of April, he knew that Mr. Avery was not in position to grant this loan. According to this, the resolution of the plaintiff to acquire the yacht depended upon him being able to replace the engine, and this, in turn, depended upon the plaintiff being successful in obtaining the P20,000 that the new engine was to cost. This accounts also for the fact that the plaintiff was not in position to make a definite offer.

But above all, there is in the record positive proof that in writing this letter of the 3d of April the plaintiff had no intention to make thereby a definite offer. This letter was written by his stenographer Mr. Parkins in his office and in the presence of the defendant who has been there precisely for the purpose of speaking about this purchase. According to the plaintiff when he was dictating that part wherein he said that he was in position to entertain the purchase of the yacht, the defendant interrupted him and suggested the elimination of the word entertain and the substitution therefor of a definite offer, but after a discussion between them, during which the plaintiff clearly said that he was not in position to make a definite offer, the word entertain now appearing in the letter was preserved. The stenographer Mr. Parkins and another employee of the plaintiff Mr. Guzman, who were present, corroborate this statement of the plaintiff.

The lower court seems to have been impressed by the consideration that it was anomalous for the plaintiff to write that letter if his purpose was only to indicate to the defendant that he wanted the latter to make a proposal which he (plaintiff) might reject or accept. We see nothing anomalous in this. A proposition may be acceptable in itself, but its acceptance may depend on other circumstances; thus one may say that a determinate proposition is acceptable, and yet he may not be in a position to accept the same at the moment.

The letter of the plaintiff not containing a definite offer but a mere invitation to an offer being made to him, the acceptance of the defendant placed at the bottom of this letter has no other meaning than that of accepting the proposition to make this offer, as must have been understood by the plaintiff.

The appeal of the defendant raises the question as to who must pay the repairs made on the yacht. The lower court decided that it is the defendant. We are of the opinion that this is also an error. The plaintiff was the one who directly and personally ordered these repairs. It was agreed between the plaintiff and the defendant that the former was not to pay anything for the use of the yacht. This, at the first glance, would make us believe that it was the plaintiff who was to pay for the repairs in exchange for the use of the yacht in order that the profit should be reciprocal. But the plaintiff claims that his agreement was that he had to advance only the amount of the repairs, and that the defendant was at last the one to pay therefor. The defendant, in turn, claims that the agreement was that the plaintiff was to pay for these repairs in exchange for the use of the yacht. Upon this contention there is, on the one hand, but the testimony of the plaintiff and, on the other, the testimony of the defendant. But it having been the plaintiff who ordered and made these repairs, and in view of the fact that he was not obliged to pay anything for the use of the yacht, his mere testimony contradicted by that of the defendant, cannot be considered as a sufficient evidence to establish the latter's obligation. Furthermore according to the defendant, nothing was agreed upon about the kind of the repairs to be made on the yacht and there was no limit to said repairs. It seems strange that the defendant should accept liability for the amount of these repairs, leaving their extent entirely to the discretion of the plaintiff. And this discretion, according to the contention of the plaintiff, includes even that,

of determining what repairs must be paid by the defendant, as evidenced by the fact that the plaintiff has not claimed the amount of any, such as the wireless telegraph that was installed in the yacht, and yet he claims as a part thereof the salaries of the officers and the crew which do not represent any improvement on the vessel.

Our conclusion is that the letter of the plaintiff of April 3, 1922, was not a definite offer and that the plaintiff is bound to pay the amount of the repairs of the yacht in exchange for the use thereof.

For all of the foregoing the judgment appealed from is reversed, the defendant is absolved from the complaint, the plaintiff is sentenced to pay to the Cooper Company the sum of P1,730.84 with interest and to the defendant the sum of P832.93, and the plaintiff is declared to be under no obligation to purchase the yacht upon the terms of his letter of April 3, 1922, without special pronouncement as to costs. So ordered.

Malcolm, Villamor, and Ostrand, JJ., concur.

Johnson, J., dissents.

Street, J., did not sign.

CONCURRING AND DISSENTING OPINION

JOHNS, J., with whom concurs ROMUALDEZ, J.:

I have read with much interest the opinion of Mr. Justice Avancena, and in so far as the facts are stated they are correctly stated. In my opinion many important and material facts are not stated.

The storm center in this case is the legal construction to be placed upon Exhibit 1. To arrive at a correct conclusion, it is necessary and important to analyze the preceding and subsequent letters which passed between the parties. The first is a letter from Mr. Burke written on February 12, 1922, known as Exhibit D, to the effect that for the purpose of organizing a yacht club, he placed a price on the yacht of P120,000, which was open for thirty days, P20,000 of which was to go to Mr. Elser as a commission for making the sale.

The testimony is conclusive that at the time the proposition was made, Mr. Burke told Mr. Elser that he had no faith that such a deal would ever be made, and that later it was abandoned.

On March 31, after his return from the southern islands trip, and after a conference with Avery, Elser wrote Burke a letter, known as Exhibit B, in which he said:

"I explained to him that I would take over the boat with your consent and be responsible to him for the payment for these engines as well as the other obligations to the bank. However, I told him I wasn't disposed to pay more than P70,000 for the boat as she now stands.

"After my talk with him in regard to the matter, he advised me that he wasn't disposed to advance another cent, and refused to advise me as what his attitude is towards the P100,000 which you now owe him on the boat, stating that he would settle the matter with you."

From this it clearly appears that Elser was then willing to pay Burke P70,000 for the yacht, and that the only thing which prevented the making of the deal at that time was the price, and the further fact that the bank was not willing to release its mortgage for P100,000, which it held on the yacht.

On receipt of this letter, and upon the same day, Burke had an interview with Avery, and on March 31, 1922, wrote Mr. Elser the following letter:

"I had a long talk this morning with Mr. Avery in regard to the Bronzewing. At first he was not inclined to discuss

the matter but after a while he decided that he would accept the proposition relative to the disposal of the boat and has agreed on the following terms:

"He will turn the boat over to you for P80,000, taking the mortgage on the same and you on your part will agree to pay P5,000 a month for the first six months and P10,000 a month until the balance is paid. This is absolutely the best he can do. I on my part am agreeable to accept this proposition and if you feel the same please advise me at once."

In answer to which, and on April 1, Elser wrote a letter to Burke, the material portion of which is as follows:

"With reference to your letter of March 31, I do not feel that I am in a position right now to accept the proposition of Mr. Avery, 01 paying him five thousand pesos monthly for the first six months and ten thousand a month until balance is paid."

April 3, Burke went to Elser's office and obtained from him the letter, known in the record as Exhibit 1, which is as follows:

"In connection with the yacht Bronzewing, I am in position and am willing to entertain the purchase of it under the following terms:

"(a) The purchase price to be P80,000, Philippine currency.

"(b) Initial payment of P10,000 to be made within sixty (60) days.

"(c) Payment of the balance to be made in installments of P5,000 per month, with interest on deferred payments at 9 per cent, payable semi-annually.

"(d) As security for the above, I am to deposit with you P80,000, in stock of the J. K. Pickering Co., commercial value P400,000, book value P600,000. Statement covering this will be furnished you on request."

Upon receipt of this letter, Burke went direct from Elser's office to Avery's office, and obtained from Avery the written consent of the bank to sell the yacht under the terms and conditions proposed by Elser, and then unconditionally accepted the offer, and on the same day notified Elser of the consent and acceptance. The acceptance and agreement was made in writing on the bottom of the same sheet of Elser's letter and are as follows:

"Proposition Accepted.

` (Sgd.) "E. BURKE

"Manila, April 3, 1922.

"ASIA BKG. CORP.

"Agreed to as above.

(Sgd.) "W. G. AVERY

"Mgr.

"Asia Bkg. Corp."

With such endorsements and in this form, the letter was returned to Elser's office on the day it was received.

April 5, two days later, Elser wrote Burke a letter, the material provisions of which are as follows:

"I have decided, because of the attitude of Mr. Avery regarding the advancement to me of P20,000 to install new engines and put the boat in first class condition, that it is impossible for me to assume the liability of the yacht Bronzewing."

But nowhere in this letter does Elser claim or assert that his letter of April 3 above quoted, known in the record as Exhibit 1, was not an offer to purchase the yacht, or that it was not intended as an offer.

Analyzing the combined letters, we are clearly of the opinion that the letter of April 3 should be construed as an offer to purchase, and that when it was accepted and agreed to by both Burke and the bank, it then became and is now a valid and binding contract to purchase.

Elser and Burke were not children. They were both men of affairs and experience in business. They were not fooling or flirting with one another. Neither were they playing marbles, but as businessmen, they were dealing with a business proposition which involved P80,000.

In this connection, Burke testified:

"I called on Mr. Elser personally in his office and asked him to make a proposition in writing that he would be agreeable to, and that I could take to Mr. Avery, and if he accepted would terminate the whole transaction."

It is very significant that this testimony is not denied, and that it stands as an admitted fact in the record.

Analyzing the letters above quoted, on March 31, speaking about a conference with Avery, Elser says to Burke:

"However, I told him I wasn't disposed to pay more than P70,000 for the boat as she now stands."

This can only be construed as an admission by Elser that he was then ready and willing to pay P70,000 for the boat as she now stands." In response to that letter and after a conference with Avery, Burke wrote Elser to the effect that they would sell the boat to him for P80,000, and take a mortgage upon it for the purchase price to be paid at the rate of P5,000 a month for the first six months, and P10,000 a month until the balance is paid. From this it appears that Burke and the bank were not willing to accept Elser's proposition to sell the boat for P70,000, but that they were ready and willing to sell it for P80,000 upon the terms and conditions stated. In answer to that, Elser wrote Burke as follows:

"I do not feel that I am in a position right now to accept the proposition of Mr. Avery, of paying him five thousand pesos monthly for the first six months and ten thousand a month until balance is paid."

From this letter it will be noted that Elser did not object to the price of P80,000, and that his only objection was to the terms of payment of P5,000 monthly for the first six months, and P10,000 a month until the balance is paid. The letters above quoted resulted in the conference between Burke and Elser in Elser's office in which Elser personally dictated and signed Exhibit 1, in which the price is P80,000, P10,000 of which is to be paid within sixty days, and the balance in installments of P5,000 per month, with interest, and, as security, Elser was to deposit P80,000 in stock of the J. K. Pickering Company. From which it will be noted that the only real difference between Burke's proposition to Elser, and Elser's proposition to Burke is in the terms and conditions of payment, and the fact that, as security, Elser was to pledge stock in the Pickering Company, as collateral, in lieu of the mortgage on the yacht. Both propositions were specific, definite and certain as to time, terms and conditions of payment, and the price to be paid.

When you take into consideration the previous negotiations between the parties, and the purpose and intent with which Exhibit 1 was written, and Elser's letter of April 6. Exhibit 1 must be construed as an offer to purchase the yacht upon the terms and conditions therein specified.

Suppose the conditions were the reverse, and after the offer had been made and accepted, Elser made a tender of performance, and that Burke and Avery refused to perform, would any member of this court claim that both Burke and Avery are not bound by the acceptance, or that either of them could refuse to carry put the contract? Suppose Elser had offered to perform and complete the purchase, and Burke had refused to complete the sale, would any member of this court claim that Elser could not enforce the specific performance of the contract? If it is legally binding upon Avery and Burke, then by the same token and for the same reason, the contract of purchase is legally binding upon Elser.

The acceptance was written on the offer and delivered to Elser on April 3. All of them were residents of Manila and had their respective offices in the city, and it is fair to assume that they could communicate with each other by telephone.

Applying the rule of everyday business dealings between businessmen, what would the ordinary businessman do under the same conditions? Here, the parties had been negotiating some little time for the purchase and sale of the yacht. To find out whether they could finally get together, Burke went to Elser's office and asked him to make him a written proposition "that he would be agreeable to," and that he would then submit it to Avery, "and if he accepted would terminate the whole transaction." With that end in view, and for that purpose, Elser wrote the letter in question.

It is very apparent that Burke understood it that way because upon receipt of the letter, he went direct to see Avery, and after some discussion between them, Avery agreed to the proposition, and Burke accepted it, and returned the letter to Elser's office the day it was written. Upon seeing the letter, with the acceptance of Mr. Burke and the conforme of Mr. Avery, what would the ordinary businessman have done, knowing that they treated it as a valid and binding contract? Would he have remained silent for two whole days? When he received and read the returned letter, he knew how Burke and Avery construed the transaction, and what they understood it to be. Yet, having that knowledge, he did not call either of them by 'phone and say that, I did not intend to make you a final proposition to purchase, and two days later notified them by letter that he did not then want to purchase the yacht on account of the attitude of Avery. Business is not done between businessmen in that way. If, upon the receipt of the returned letter, Elser had called either of them by phone, and said in effect that he never intended to make a final proposition to purchase, another and a different question would have been presented, and his position would be tenable, and it would have been far more forcible, if he had said that in substance in the letter which he wrote two days later.

In the final analysis, Elser said in his letter of March 31 that he was not "disposed to pay more than P70,000 for the boat as she now stands." That was after the conference which he had with Avery. Burke then had a conference with Avery in which they agreed upon and submitted the following terms to Elser:

"He will turn the boat over to you for P80,000, taking the mortgage on the same and you on your part will agree to pay P5,000 a month for the first six months and P10,000 a month until the balance is paid."

In other words, Burke and Avery made a proposition to Elser that they were ready and willing to sell the yacht for P80,000 upon those terms and conditions. In answer to that, Elser said:

"I do not feel that I am in a position right now to accept the proposition of Mr. Avery, of paying him five thousand pesos monthly for the first six months and ten thousand a month until balance is paid."

In other words, Elser apparently was satisfied with the price, but objected only to the terms and conditions of payment. This resulted in the final conference between Elser and Burke in which Elser made a proposition, specifying the terms and conditions upon which he was "willing to entertain the purchase" of the yacht, and Burke

and Avery accepted his proposition in and by which their proposition was modified only as to the terms and conditions of payment. No change was made in the price, and the only difference as to the payments was that in the Burke and Avery proposition, Elser was to pay P5,000 a month for the first six months, and ₱10,000 a month until the balance is paid, and in Elser's proposition, he was to make an initial payment of P10,000 within sixty days, and the payment of the balance was to be made in installments of P5,000 per month, with interest.

When Elser gave the letter to Burke, he knew that Burke would submit it to Avery, and he knew that if Avery gave his conforme, it would be accepted by Burke. Otherwise, why was the letter given to Burke? Why was it submitted to Avery?

In the light of preceding events, can this court assume that Elser intended to mislead and deceive Burke and to give him a blank piece of paper which would not have any legal force or effect? As a witness Elser testified:

"Q. And at Mr. Burke's request you wrote this letter Exhibit 1?—A. Yes."

Why was it written? Why was it signed by Elser? Why did Avery give his conforme? Why was it approved by Burke? And why was it returned on the same day to Elser? Why did he remain silent for two days after the receipt of the returned letter? And why, two days later when he did answer, he never said that he did not intend that the letter should be a final proposition? And why did he base his refusal to carry out the contract upon the sole ground of the attitude of Avery, and not for any other reason?

Under Elser's contention, and as sustained by Mr. Justice Avancena's opinion, all of the previous negotiations did not mean anything. The letter was a blank piece of paper which Elser gave to Burke to deceive and mislead him, and yet he knew that Burke took and received it in good faith as a proposition, which Elser was ready and willing to carry out, in the event that it received the con for me of Avery and was approved by Burke. That is a strained and unnatural construction, and imputes to Elser bad faith and a deceptive motive in the writing and the giving of the letter to Burke. Avery and Burke had made their proposition to which Elser had declined to agree. Then, as a result of a personal conference, Elser made his proposition to Avery and Burke in which the price, terms of payment and the security to be given for the sale and purchase of the yacht were all specified, and his proposition was by them accepted and approved and returned to Elser the day it was received. Everything was in writing and signed by the respective parties in interest. Why is that not a valid and binding contract? What more is required? When Elser's own proposition was accepted and approved and delivered to him, the minds of the parties had met, and they had mutually agreed in writing upon the price of the yacht, terms of payment and the security to be given.

There was a completed contract by which Elser proposed to purchase the yacht and Burke and Avery agreed to sell upon the terms and conditions specified in Elser's proposition. The yacht was then in Elser's possession, and nothing remained to be done, except the payment of the purchase price by Elser.

The record is conclusive that Elser remained silent for two whole days when he wrote Burke that because of the attitude of Mr. Avery regarding the advance to him of P20,000, "that he would not assume liability" or make the purchase. In other words, after a lapse of two days, and because of the attitude of Avery, and for no other or different reason, Elser declined to make the purchase. It will be noted that Exhibit 1 is unconditional, and that the proposition is not made contingent on the attitude of Avery or anything else, and that it expressly says:

"I am in position and am willing to entertain the purchase of it (the yacht) under the following term In his letter of April 1, he says:

"I do not feel that I am in a position right now to accept the proposition of Mr. Avery."

In his letter of April 3, he says:

"I am in position and am willing to entertain the purchase, etc."

In one letter he says in legal effect that "I am not in position to accept the proposition of Mr. Avery," and two days later, he says: "I am in position." The use of the words "I am not in position" on April 1, and the use of the words "I am in position" two days later are, indeed; very significant. Yet, in the face of those letters, on April 6, he declined to make the purchase solely on account of the attitude of Avery, and for no other or different reason.

The proof brings the case squarely within the provisions of Article 1254 of the Civil Code, which says:

"A contract exists from the moment one or more persons consent to be bound with respect to another or others to deliver something or to render some service."

Cyc, vol. 9, page 244, says:

"E. Agreement defined.—Agreement is the expression by two or more persons of a common intention to affect their legal relations; it consists in their being of the same mind and intention concerning the matter agreed upon."

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"2. Offer—(a) Definition.—An offer, as the term is used in the law of contracts, is a proposal to enter into a contract."

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"(d) Terms of offer—(I) In general.—One who makes an offer to enter into a contract may do so of course upon any terms he may see fit, so long as they are not illegal, and if the offer is accepted they are binding on both parties. If the terms are expressed and are legal, the only difficulty is in ascertaining the intention of the parties."

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"(VI) Acceptance by accepting paper containing terms— (A) In general.—A contract may be formed by accepting a paper containing terms. If an offer is made by delivering to another a paper containing the terms of a proposed contract, and the paper is accepted, the acceptor is bound by its terms; and this is true as a rule whether he reads the paper or not. * * *"

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"* * * On the other hand an agreement to make and execute a certain written agreement, the terms of which are mutually understood and agreed upon, is in all respects as valid and obligatory as the written contract itself would be if executed. If therefore it appears that the minds of the parties have met, that a proposition for a contract has been made by one party and accepted by the other, that the terms of this contract are in all respects definitely understood and agreed upon, and that a part of the mutual understanding is that a written contract embodying these terms shall be drawn and executed by the respective parties, this is an obligatory agreement."

Corpus Juris, vol. 13, page 263, says:

"(SEC. 48) 2. Common intention—(a) In general.—In order that there may be an agreement, the parties must have a distinct intention common to both and without doubt or difference. Until all understand alike, there can be no assent, and, therefore, no contract. Both parties must assent to the same thing in the same sense, and their minds must meet as to all the terms. * * *"

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"(SEC. 53) 2. Offer—(a) Definition.—An offer, as the term is used in the law of contracts, is a proposal to enter into a contract."

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"(SEC. 61) (d) Terms of offer—(1) In general.—One who makes an offer to enter into a contract may do so on any terms that he may see fit to make, as long as they are not illegal; and if the offer is accepted, such terms are binding on both parties. If the terms are expressed and are legal, the only difficulty is in ascertaining the intention of the parties."

Page 277—

"(SEC. 76) (6) Acceptance by accepting paper containing terms—(a) In general.—A contract may be formed by accepting a paper containing terms. If an offer is made by delivering to another a paper containing the terms of a proposed contract, and the paper is accepted, the acceptor is bound by its terms; and this is true as a rule whether he reads the paper or not. * * *"

Page 277 (Note)—

" 'A great number of contracts are in the present state of society made by the delivery by one of the contracting parties to the other of a document in a common form, stating the terms by which the person delivering it will enter into the proposed contract. Such a form constitutes the offer of the party who tenders it. If the form is accepted without objection by the person to whom it is tendered this person is as a general rule bound by its contents, and his act amounts to an acceptance of the offer made to him, whether he reads the document or otherwise informs himself of its contents or not.' " (Eng.—Watkins vs. Rymill, 10 Q. B. D., 178, 183.)

Ruling Case Law, vol. 6, page 599:

"21. Generally.—In order that a contract may be formed there must be, as has been seen, a concurrence of intention between a promisor and a promisee. Frequently this idea is expressed by saying that it is essential to the formation of a contract that there should be a 'meeting of the minds' of the parties. It must appear that their minds met on the same distinct and definite terms. * * * "

Page 600—

"23. Offer or 'proposal.—A contract is ordinarily formed by an offer and an acceptance. * * * "

Page 605—

"Necessity and effect of acceptance.—From the discussion in reference to the right to revoke an offer, it is apparent that the acceptance of an offer is essential. To constitute a contract there must be an acceptance of the offer, because until the offer is accepted both parties have not assented to the contract, or, in the figurative language frequently used by the courts, their minds have not met. The effect of acceptance is to convert the offer into a binding contract. * * *"

Upon the question of contemporaneous writings and agreements, Cyc, vol. 35, page 97, says:

"In construing contracts of sale all contemporaneous instruments and agreements in regard to the transaction should be construed together, and if possible so as to give effect to all of them. * * * "

Much has been said in this case about the definition of the word "entertain." It is contended that because the word "entertain" was used in Elser's letter, it should be construed to read, "I am now in a position to buy your yacht for P80,000 upon the specified terms and conditions, and if you will make me an offer to sell it at that price and upon

those conditions, I will purchase the yacht. But before I will enter into a formal agreement to purchase on those terms, you must submit a proposition to me that you are ready and willing to sell on those terms, and until such time as you do submit such a proposition and I formally accept it, I am not bound to purchase, even though we do agree upon the amount of the purchase price, the terms and conditions of payment, and the security to be given." That is a strained and unnatural construction, and nullifies the undisputed testimony of both Burke and Elser, and overlooks and does not take into consideration the purpose and intent with which the letter was written, and the language used in the previous letters and the subsequent letter of April 6. When they are considered, the meaning of the word "entertain" is very apparent. The minds of the parties had met. They had agreed upon the price, the terms and conditions of the sale, and the security to be given, all of which was reduced to writing, and signed by the respective parties, and when that is done, under the authorities above cited, it constitutes a valid and binding contract.

Stress is also laid upon the oral testimony of the employees of Elser, who were in his office at the time the contract was prepared and signed.

This case forcibly illustrates the reason for the inflexible rule that oral testimony is not admissible to change or vary the terms of a written contract. Here, the contract was in writing, and Elser admits that he signed it. There is no dispute about any one or either of the letters quoted in this opinion, and Burke's cause of action is founded upon that letter.

The complaint alleges:

"That on the 3d day of April, 1922, the said plaintiff made an offer in writing to this defendant to purchase from him the said yacht Bronzewing, in its then condition and including, of course, the repairs placed thereon by him, for the sum of P80,000, payable P10,000 within sixty days, and the balance in installments of P5,000 per month, with interest on deferred payments at 9 per cent per annum, payable semi-annually, and that as security for such purchase price, he would deposit P80,000 in stock of the J. K. Pickering Co., of a commercial value of P400,000, and a book value of P600,000, which said offer was on the same date and while it was in full force and effect unconditionally accepted by this defendant, with the written consent of the said Asia Banking Corporation, and which said offer and acceptance is more fully set out in a certain letter, a true copy of which is attached hereto, marked Exhibit 1, and made a part hereof, and constitutes a binding contract of purchase and sale and is obligatory on each of the parties thereto."

Yet, in the face of those allegations and over the vigorous protests and objections of Burke's attorneys, the oral testimony of Elser's employees was admitted, for the purpose of showing that the written contract does not mean what it says.

There is no rule of law by which oral testimony is admissible for any such purpose, and least of all should it be considered by an appellate court.

The stubborn fact remains that Elser wrote and signed the letter, and the specified terms of the purchase were accepted and approved by both Avery and Burke, and the letter was returned to Elser, and that all of the previous conversations between Elser and Burke were merged in that letter, and that it is in writing and speaks for itself. But it is contended that in preparing the letter, Burke wanted Elser to use the words "firm offer," and that Elser declined to do so. Assuming that to be true, what difference does it make? The fact remains that Elser did write and sign the letter as it was written, and that it was accepted as written, and that parol testimony is not admissible to change or alter the words or the meaning of the letter as it was written, and that plaintiff relies upon the contract as it was written.

It will be noted that all through this case, Burke relies upon evidence in writing, which is signed by the respective parties, and about which there is not and cannot be any dispute, because the writings speak for themselves. It will also be noted that Elser's defense is largely founded upon oral testimony. That is specially true as to the construction which should be placed upon Exhibit 1.

The rule is elementary that the court does not have any right to consider oral testimony for any such purpose.

Again, all of the dealings between Elser and Burke were confined to the sale and purchase of the yacht, and the repairs which were made upon it. Upon the question of repairs, Justice Avancena finds against Elser and in favor of Burke. If the parol testimony on behalf of Elser upon the question of repairs is not true, as the court finds, it should materially weaken his parol evidence as to the sale and purchase of the yacht. But the court finds that Elser's parol testimony as to the repairs upon the yacht is not true, and finds that his parol testimony as to the sale and purchase of the yacht is true.

Why should the court find that his testimony is true in one case and false in the other? All of the transactions in question arose out of, and pertained to, mutual dealings concerning the yacht. If Elser's testimony is not true as to the repairs, it is not true as to the sale and purchase of the yacht.

Upon all other matters, I agree with the opinion of Justice Avancena. But in the reversal of the judgment in favor of Burke and against Elser, I vigorously dissent.

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