ALTA.

S.C.
1912

WATEROUS ENGINE WORKS v. KELLER.

Stuart, J.

question was, apparently with plaintiffs' consent, framed in the way it was framed. I notice that one of the jurymen took part in the examination of Switzer as follows:—

> Q. I would like to ask you if at the time that you went there with this company's expert and Mr. Keller refused to get the help for you to try the machine, was that after the 10 days' trial was up?
>
> A. No, it had been 10 days after he started the machine, it was more than 10 days.
>
> Q. As I understand it then when this company's expert arrived, Mr. Keller's time of trial had expired.
>
> A. No answer.
>
> Q. At the time you came with this company's expert and Mr. Keller refused to help was not his time of trial expired?
>
> A. Well, it was more than 10 days from the time he had started the machine.

Noticing this and reading the Judge's charge I am very strongly of the opinion that the jury must have understood the first question to be whether or not at the date of the delivery of the notes there was an absolute final contract or not and that what they meant by their negative answer was that they found that the defendant's story was true and that he only agreed to buy on the condition that the machine did good work. Why a negative answer to this was treated as settling the matter I am unable to understand. I notice that in the plaintiff's factum it is said that the two first questions were answered in the negative. This suggests the question whether all parties at the trial did not look upon the two first questions as really one question in two parts. Yet the answer says there was no contract "*at the time* of the delivery of the notes."

I do not see any advantage in endeavouring to explain how such a misunderstanding of the position arose. It is sufficient to point out that taking the first question in the sense which must have been attached to it by every one at the time and taking the only answer given by the jury with the ordinary meaning that its words must bear there was certainly not a sufficient finding of fact made by the jury to base a judgment upon. The law is clear that there may be contract to sell goods conditional upon their proving satisfactory to the purchaser. It was in order to apply this law that the second question was asked. And it was not answered. Upon that second question the jury should, I think, have had some direction upon the law as to whether if they found the facts to be so and so the defendant had a right to reject arbitrarily, to express dissatisfaction arbitrarily, or whether if the machine did in fact work with reasonable satisfaction a contract should not then be held to have been concluded, and also upon the point whether the defendant was or was not bound, assuming his version of the affair to be correct, to return the machine to the plaintiffs, and, in the absence of his doing so, whether he should or should not