H. C. OF A. 1927. McKINNON v. THE KING.

than that mentioned. The gaoler must then release him by force of the law. The proviso operates automatically but in no wise affects the validity of the sentence imposed upon the appellant, nor does it require any correction by this Court.

In my opinion the appeal should be dismissed.

Appeal allowed. Sentence amended by adding after the word "paid" the words "but not for any period exceeding six months." Respondent to pay costs of appeal.

Solicitor for the appellant, *R. I. D. Mallam*, Darwin, by *McCay & Thwaites.*

Solicitor for the respondent, *W. H. Sharwood*, Crown Solicitor for the Commonwealth.

B. L.

Appl *Veivers v Cordingley* [1989] 2 QdR 278

Appl *Trident General Insurance Co Ltd v McNiece Bros* (1987) 8 NSWLR 270

Foll *Lyndel Nominees Pty Ltd v Mobil Oil Australia Ltd* (1997) 37 IPR 599

[HIGH COURT OF AUSTRALIA.]

THE CROWN . . . . . APPELLANT:
RESPONDENT,

AND

EVAN CLARKE . . . . . RESPONDENT.
PETITIONER,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1927. PERTH, *Sept.* 14, 15. SYDNEY, *Nov.* 22. Isaacs A.C.J., Higgins and Starke JJ.

Contract—Formation—Offer and acceptance—Information leading to arrest and conviction of murderers—Proclamation—Reward offered therein—Knowledge of offer—Intention to accept offer—Inducement to give information.

A reward was publicly offered by the Government of Western Australia "for such information as shall lead to the arrest and conviction of the person or persons who committed the murders" of two police officers. C., who knew of the offer, gave information that led to the arrest of one person, and the

H. C. OF A. 1927.

THE CROWN v. CLARKE.

conviction of that person and another, for the murder of one of those officers. By petition of right under the *Crown Suits Act* 1898 C. claimed payment of the reward.

Held, that unless the petitioner had performed the conditions of the offer acting on the faith of or in reliance upon the offer, there was no acceptance of the offer, and, therefore, no contract between the parties; and that as there was no reason for interfering with the finding of the trial Judge that the petitioner had not acted on the faith of or in reliance upon the offer, the petitioner was not entitled to recover payment of the reward.

Williams v. *Carwardine*, (1833) 4 B. & Ad. 621; 1 N. & M. 418; 2 L.J. K.B. (N.S.) 101, discussed.

Decision of the Supreme Court of Western Australia (Full Court) reversed.

APPEAL from the Supreme Court of Western Australia.

By petition of right under the *Crown Suits Act* 1898 (W.A.) Evan Clarke claimed £1,000 from the Crown in the following circumstances:—By proclamation dated 21st May 1926 R. Connell, Commissioner of Police, gave notice that he was authorized by the Government of Western Australia "to offer a reward of one thousand pounds for such information as shall lead to the arrest and conviction of the person or persons who committed the murders" of John Joseph Walsh, inspector of police, and Alexander Henry Pitman, sergeant of police," and that His Excellency the Governor will be advised to extend a free pardon to any accomplice not being the person who actually committed the murders who shall first give the required information." On 6th June a man named Philip John Treffene and the petitioner were arrested and charged in connection with the murder of Walsh. On 10th June the petitioner, who had seen the proclamation, made a statement to the police: that on 28th April a man named "Coulter said" to petitioner "'Pitman and Walsh came on us to-day and Phil shot Pitman before I knew what happened and then I shot Walsh,' and Treffene then spoke and said 'I shot Pitman and I then told Bill I had done my share and he could shoot Walsh; and he did so.'" Coulter was thereupon arrested. Subsequently, on the trial of Treffene and Coulter for the wilful murder of Walsh, the petitioner (who was called as a Crown witness) gave evidence in accordance with his statement. Treffene and Coulter were convicted on that

charge. No indictment was presented with reference to the murder of Pitman; and the petitioner was released from custody. After the final determination of the case by the Court of Criminal Appeal the petitioner claimed the reward. The defences set up by the Crown were (*inter alia*) (1) that the petitioner's statement was not made with a view to obtaining the reward; (2) that he gave no information leading to the arrest of the murderers; and (3) that the mere fact that the petitioner gave evidence at the trial which procured the conviction of the two accused for the murder of Walsh did not entitle him to succeed in the action.

The action was heard by *McMillan* C.J., who dismissed the petition with costs. His Honor found that Clarke had not acted on the faith of or in reliance upon the offer made in the proclamation or with any intention of entering into any contract; and he said: —"The inference that the petitioner accepted the contract which would have been drawn from his conduct in giving the information is negatived by the facts and by Clarke's own evidence. He never was and never intended to be an informer. . . . He only told the truth after his arrest in order to save himself from the unfounded charge of murder." From the judgment of the learned Chief Justice the petitioner appealed to the Full Court of the Supreme Court, which, by a majority (*Burnside* and *Draper* JJ., *Northmore* J. dissenting), allowed the appeal with costs and ordered that judgment be entered for the petitioner for the sum of £1,000 and costs in the Court below.

From the judgment of the Full Court the Crown now appealed to the High Court.

Further facts appear in the judgments hereunder.

Walker, for the appellant. There was no contract between the parties. When the petitioner gave the information to the police and also when he gave evidence on the criminal trial, he had no intention of acting in acceptance of the terms of the proclamation—in other words, he acted not in pursuance of the promise of reward contained in the proclamation, but for the purpose of safeguarding himself. Nor did he perform the conditions in the terms of the offer: his information did not lead to the arrest of Treffene; also,

H. C. OF A. 1927.

THE CROWN v. CLARKE.

it did not lead to the conviction of the murderer or murderers of Pitman as well as of Kelly—in fact, it showed that Coulter had not murdered Pitman. The inference that the performance of the conditions contained in an offer, by a person who knows of the offer, is prima facie an acceptance of that offer may be excluded by evidence, as it was in this case. [Counsel referred to *Williams* v. *Carwardine* (1); *Anson's Law of Contract*, 16th ed., pp. 3, 24, 25; *Encyclopædia of the Laws of England*, 2nd ed., vol. III., p. 534, par. 5; *Fitch* v. *Snedaker* (2); *Leake on Contracts*, 6th ed., p. 59; *Tarner* v. *Walker* (3); *Carlill* v. *Carbolic Smoke Ball Co.* (4).]

Keenan K.C. and *Roe*, for the respondent. The petitioner, when he supplied the information and when he gave evidence at the trial, had the intention to carry out what was required by the proclamation and he did in fact carry out that intention. The proclamation should be read as ordinary people would read it (*Williams* v. *Carwardine* (1)). On the arrest of Coulter and the conviction of both Treffene and Coulter for the murder of Walsh, there was a complete acceptance by the petitioner of, and compliance with, the terms of the proclamation by virtue of which he "became entitled to payment of the promised reward." His motive is immaterial (see *Williams* v. *Carwardine*; *Carlill* v. *Carbolic Smoke Ball Co.* (4)). Any admission made by the petitioner subsequently that he gave the information for a reason other than that of receiving payment of the award does not vitiate or in any way affect the contract. Petitioner never stated that he did not act upon the faith of the offer made in the proclamation. [*Cutter* v. *Powell* (5), *Lancaster* v. *Walsh* (6), *Smith* v. *Moore* (7) and *Bent* v. *Wakefield and Barnsley Union Bank* (8) were also referred to.]

Walker, in reply.

Cur. adv. vult.

(1) (1833) 4 B. & Ad. 621.
(2) (1868) 38 N.Y. 248.
(3) (1866) L.R. 1 Q.B. 641: (1867) L.R. 2 Q.B. 301.
(4) (1892) 2 Q.B. 484.
(5) (1795) 6 Ruling Cas. 627.
(6) (1838) 4 M. & W. 16.
(7) (1845) 1 C.B. 438.
(8) (1878) 4 C.P.D. 1.

The following written judgments were delivered :—

ISAACS A.C.J. This is an appeal from the judgment of the Full Court of Western Australia. Evan Clarke proceeded, by petition of right under the *Crown Suits Act* 1898, to sue the Crown for £1,000 promised by proclamation for such information as should lead to the arrest and conviction of the person or persons who committed the murders of two police officers, Walsh and Pitman. The defence was first a comprehensive denial of the petitioner's allegation that on 10th June 1926 he "gave the said information," and next an affirmative allegation that he made on that date a confession but not with the view of obtaining the reward. The petitioner was thus put to the proof of his case. At the trial the Chief Justice gave judgment for the Crown. In the Full Court, by a majority, the judgment of *McMillan* C.J., the trial Judge, was reversed. In the result, two learned Judges thought the Crown should succeed while two others thought Clarke should succeed. The difference of opinion arose with respect to the effect or the accuracy, or both, of the case of *Williams* v. *Carwardine* (1).

The facts of this case, including inferences, are not, as I understand, in dispute. They amount to this : The information for which Clarke claims the reward was given by him when he was under arrest with Treffene on a charge of murder, and was given by him in circumstances which show that in giving the information he was not acting on or in pursuance of or in reliance upon or in return for the consideration contained in the proclamation, but exclusively in order to clear himself from a false charge of murder. In other words, he was acting with reference to a specific criminal charge against himself, and not with reference to a general request by the community for information against other persons. It is true that without his information and evidence no conviction was probable, but it is also abundantly clear that he was not acting for the sake of justice or from any impulse of conscience or because he was asked to do so, but simply and solely on his own initiative, to secure his own safety from the hand of the law and altogether irrespective of the proclamation. He has, in my opinion, neither a legal nor a moral claim to the reward. The learned Chief Justice held that

(1) (1833) 4 B. & Ad. 621.

H. C. OF A. 1927.

THE CROWN v. CLARKE.

Isaacs A.C.J.

Clarke never accepted or intended to accept the offer in the proclamation, and, unless the mere giving of the information without such intention amounted in law to an acceptance of the offer or to performance of the condition, there was neither "acceptance" nor "performance," and therefore there was no contract. I do not understand either of the learned Judges who formed the majority to controvert this. But they held that *Williams* v. *Carwardine* (1) has stood so long that it should be regarded as accurate, and that, so regarded, it entitled the respondent to judgment. As reported in the four places where it is found (2), it is a difficult case to follow. I cannot help thinking that it is somewhat curtly reported. When the various reports in banc are compared, there are some discrepancies. But two circumstances are important. One is the pregnant question of *Denman* C.J. as to the plaintiff's knowledge of the handbill. The question appears in the reports in *Carrington & Payne* (3) and in *Nevile & Manning* (4), but is omitted from the report in *Barnewall & Adolphus*. The other circumstance is the stress placed on motive. The Lord Chief Justice clearly attached importance to the answer given to his question. He, doubtless, finally drew the inference that, having knowledge of the request in the handbill, the plaintiff at last determined to accede, and did accede, to that request, and so acted in response to it, although moved thereto by the incentive supplied by her stings of conscience. Making allowance for what is in all probability an abridged report of what was actually said, I cannot help thinking, on the whole, that not only *Denman* C.J. but also some at least of the other members of the Court considered that the motive of the informant was not inconsistent with, and did not in that case displace, the prima facie inference arising from the fact of knowledge of the request and the giving of the information it sought. Motive, though not to be confused with intention, is very often strong evidence of that state of mind, both in civil and criminal matters. The evidentiary force of motive in the circumstances of *Williams* v. *Carwardine* is no criterion of its force in the circumstances of any other case, and it can never usurp the legal place of intention.

(1) (1833) 4 B. & Ad. 621.
(2) (1833) 4 B. & Ad. 621; 1 N. & M. 418; 2 L.J. K.B. (N.S.) 101; 5 C. & P. 566.
(3) (1833) 5 C. & P., at p. 574.
(4) (1833) 1 N. & M., at p. 419.

If the decision in *Williams* v. *Carwardine* (1) went no further than I have said, it is in line with the acknowledged and settled theories of contract. If it goes so far as is contended for by the respondent, I am of opinion that it is opposed to unimpeachable authority, and I agree with the suggestion of Sir *Frederick Pollock*, in the preface to vol. 38 of the *Revised Reports*, that it should be disregarded. It is unquestionable—putting aside what are called formal contracts or quasi-contracts—that to create a contractual obligation there must be both offer and acceptance. It is the union of these which constitutes the binding tie, the *obligatio*. The present type of case is no exception. It is not true to say that since such an offer calls for information of a certain description, then, provided only information of that description is in fact given, the informant is entitled to the reward. That is not true unless the word "given" is interpreted as "given in exchange for the offer"—in other words, given in performance of the bargain which is contemplated by the offer and of which the offer is intended to form part. Performance in that case is the implied method of acceptance, and it simultaneously effects the double purpose of acceptance and performance. But acceptance is essential to contractual obligation, because without it there is no agreement, and in the absence of agreement, actual or imputed, there can be no contract. Lord *Kinnear* in *Jackson* v. *Broatch* (2) said: "It is an excellent definition of a contract that it is an agreement which produces an obligation."

That acceptance is necessary in a case of this kind is recognized in *General Accident Fire and Life Assurance Corporation* v. *Robertson* (3), a case sufficiently analogous to be illustrative here, though of course the mode of acceptance was very different. That difference constantly arises because the offeror may always prescribe the method of acceptance. In *Attorney-General for Trinidad* v. *Bourne* (4) the method was to tender payment of a balance of a price. In other cases it may be the posting of a letter, or the despatch of goods, or anything stipulated expressly or by implication, even by hanging out a flag, as suggested by *Bramwell* L.J. in *Household Fire Insurance Co.* v. *Grant* (5). The method indicated by the offeror may

(1) (1833) 4 B. & Ad. 621.
(2) (1900) 37 S.L.R. 707, at p. 714.
(3) (1909) A.C. 404, at p. 411.
(4) (1895) A.C. 83, at p. 88.
(5) (1879) 4 Ex. D. 216, at p. 233.

H. C. OF A. 1927.

THE CROWN v. CLARKE.

Isaacs A.C.J.

be one which either does or does not involve communication to him of the acceptance in order to form the contract and create the obligation, however necessary information of the fact may be required before default in payment, that is, in performance by the offeror, can arise. In *Carlill* v. *Carbolic Smoke Ball Co.* (1) *Lindley* L.J. thus states what he thinks, and what I respectfully accept as the true view in a case of that kind, which is in this respect the same as the present case: "The person who makes the offer shows by his language and from the nature of the transaction that he does not expect and does not require notice of the acceptance, apart from notice of the performance." As the learned Lord Justice said higher on the page (1): "the performance of the conditions is the acceptance of the offer." But the words "performance of the conditions" have reference to the offer, and are senseless without such reference. That this is the opinion of the Lord Justice is evident from his own words (2): "the person who acts upon this advertisement and accepts the offer." *Bowen* L.J. also said (3) that it was "an offer which was to be acted upon," and (4) that it was "sufficient to act upon the proposal without communicating acceptance." That is what the Lord Justice means when he speaks of performing the condition "on the faith of the advertisement" (3). Similarly, in *Offord* v. *Davies* (5), *Erle* C.J., speaking of what he called a promise to guarantee repayment of discounts, said:—"This promise by itself creates no obligation. It is in effect conditioned to be binding if the plaintiff acts upon it, either to the benefit of the defendants, or to the detriment of himself. But until the condition has been at least in part fulfilled, the defendants have the power of revoking it."

The controlling principle, then, is that to establish the *consensus* without which no true contract can exist, acceptance is as essential as offer, even in a case of the present class where the same act is at once sufficient for both acceptance and performance. But acceptance and performance of condition, as shown by the judicial

(1) (1893) 1 Q.B. 256, at p. 262.
(2) (1893) 1 Q.B., at p. 264.
(3) (1893) 1 Q.B., at p. 268.
(4) (1893) 1 Q.B., at p. 269.
(5) (1862) 12 C.B. (N.S.) 748, at p. 757.

reasoning quoted, involve that the person accepting and performing must act on the offer.

I may here refer to a weighty American authority, that of *Shaw* C.J. in *Loring v. City of Boston* (1). At p. 411 the learned Chief Justice said of an action to recover a reward offered for the conviction of an incendiary :—" There is now no question of the correctness of the legal principle on which this action is founded. The offer of a reward for the detection of an offender, the recovery of property, and the like, is an offer or proposal, which anyone, capable of performing the service, may accept at any time before it is revoked, and perform the service ; and such offer on one side, and acceptance and performance . . . on the other, is a valid contract made on good consideration, which the law will enforce." In the case then before the Court the offer was published more than three years before the information relied on was given, and in the circumstances the Court held the offer had ceased to operate. The important matter, however, is that the Court, in nonsuiting the plaintiff, said : " We are therefore of opinion, that the offer of the City had ceased before the plaintiffs accepted and acted upon it as such, and that consequently no contract existed upon which this action, founded on an alleged express promise, can be maintained." The reasoning quoted seems to me to be as exact and as modern as that in *Carlill's Case* (2), and to be hardly capable of advantageous alteration.

Instances easily suggest themselves where precisely the same act done with reference to an offer would be performance of the condition, but done with reference to a totally distinct object would not be such a performance. An offer of £100 to any person who should swim a hundred yards in the harbour on the first day of the year, would be met by voluntarily performing the feat with reference to the offer, but would not in my opinion be satisfied by a person who was accidentally or maliciously thrown overboard on that date and swam the distance simply to save his life, without any thought of the offer. The offeror might or might not feel morally impelled to give the sum in such a case, but would be under no contractual obligation to do so.

(1) (1844) 7 Metc. 409.

(2) (1893) 1 Q.B. 256.

H. C. OF A. 1927.

THE CROWN v. CLARKE.

Isaacs A.C.J.

We have had cited to us the case of *Fitch* v. *Snedaker* (1), decided in 1868. As is seen, it was twenty-four years later than the judgment of *Shaw* C.J. It was there held in a case of the present type that, in order to create a contract, there must be both offer and consent to the offer, that motive inducing consent may be immaterial but the consent is vital. *Clerke* J. (2) held that as no part of the plaintiff's conduct was " in reference to " the reward—since it was prior to the offer—he could not succeed. *Woodruff* J. said (3) that the plaintiff did not " act in any sense in reliance " on the offer, and added : " An offer cannot become a contract unless acted upon or assented to." In 1873, in *Howland* v. *Lounds* (4), the case of *Fitch* v. *Snedaker* was affirmed by the Commissioners of Appeal. In 1875, in *Shuey* v. *United States* (5), *Strong* J., speaking for the Supreme Court of the United States, said that an offer of a reward for the apprehension of a man was revocable " at any time before it was accepted, and before anything had been done in reliance upon it." These last-mentioned cases are entirely consonant with and illustrative of the general principles so clearly stated by *Shaw* C.J. in *Loring* v. *City of Boston* (6), and by the Court of Appeal in *Carlill's Case* (7). In *Holmes on the Common Law* the learned author, writing in 1881, says at pp. 293, 294 : " The root of the whole matter is the relation of reciprocal conventional inducement, each for the other, between consideration and promise." As to the reward cases, he says, with reference to something being done in ignorance of the offer :—" In such a case the reward cannot be claimed, because the alleged consideration has not been furnished on the faith of the offer. The tendered promise has not induced the furnishing of the consideration." The learned author also applied the term motive when it is the " conventional " motive, and not merely the independent motive of the person doing the act, as equivalent to acting on the faith of the offer. That may or not be accurate ; but it is not a necessary part of the problem with which we are concerned.

On the question of fact whether Clarke in making his statement of 10th June acted upon the offer in the proclamation, the learned

(1) (1868) 38 N.Y. 248.
(2) (1868) 38 N.Y., at p. 249.
(3) (1868) 38 N.Y., at p. 252.
(4) (1873) 51 N.Y. 604.
(5) (1875) 92 U.S. 73, at p. 76.
(6) (1844) 7 Metc. 409.
(7) (1893) 1 Q.B. 256.

Chief Justice, who saw and heard him give his testimony, answered that question in the negative. Reading the notes of the trial, which apparently are to some extent abbreviated, and reading also the statement itself, so far from finding anything which would lead me, with all the disadvantages of an appellate Court, to reverse that finding, I quite agree with it. The learned Judges of the Full Court do not appear to have thought differently on that point.

Reference should be made to a suggestion made during the argument. It appears that in the Full Court, in reply to one of the learned Judges, the Crown Solicitor said a pardon had been granted to Clarke. There is strong reason to think this statement either inadvertently an error or in need of some qualification. From the silence of the Full Court judgment on the point, I should gather their Honors attached little importance to the episode, either because they had on investigation discovered the error or found some other sound reason for disregarding the statement. No mention of any pardon was apparently made at the trial, none has ever been produced, no indication has ever been given of a *Gazette* or other official evidence of such a grant, and, when at the trial Clarke's intention with reference to the proclamation was closely tested, one would naturally have expected some reference to a pardon in pursuance of the proclamation, if any such existed. For the suggestion is that he was thereby recognized as acting on the proclamation, and pardoned as an accomplice. It may be observed that, even assuming that a pardon existed, it would not follow that it issued to him as an accomplice in the murder, and by virtue of the promise in the proclamation, rather than, as is frequently the case, by grace, when an informant tells the whole truth and so assists justice in fact. (See *Phillips on Evidence*, vol. I., p. 91.) I therefore reject the suggestion.

Other objections were raised by the Crown, based on the construction of the proclamation. It is not necessary, in the view I take, to pronounce on those points definitely, but I should say my strong impression is that, assuming a contract and performance under it, the performance was sufficient.

The appeal, however, should, in my opinion, for the reasons stated, be allowed, and the judgment of *McMillan* C.J. restored.

H. C. OF A. 1927.

THE CROWN v. CLARKE.

Higgins J.

HIGGINS J. In my opinion, this appeal should be allowed. It must be clearly understood, however, that we, as a Court, have no responsibility for the policy of the Government in resisting this claim. As the Chief Justice of the Supreme Court has said, Clarke gave evidence which was of the greatest value to the Crown in the prosecution of Coulter and Treffene, and without that evidence there would have been no case which could have been left to the jury against them. The refusal of the Crown to pay the reward in this case is likely to weaken the efficacy of such a bait when the Crown seeks information from accessories to crimes hereafter.

Clarke cannot succeed in this action unless he can establish a contract between the Crown and himself. I think that there was no contract. I prefer to deal with this main issue, the issue to which the learned Judges of the Supreme Court have mainly addressed themselves, involving, as it does, the very roots of the English law as to contract; and I shall assume, at present, that Clarke strictly fulfilled all the conditions of the promise held out by the proclamation. Considering the present state of the English authorities, it is not at all surprising that the Chief Justice and *Northmore* J. on the one side and *Burnside* and *Draper* JJ. on the other should differ in their conclusions, after their closely reasoned judgments.

The murders were committed towards the end of April 1926; the proclamation of reward was issued on 21st May; the information was given by Clarke on 10th June and at the trial. One of the murderers, Treffene, was arrested on 6th June, with Clarke; the other, Coulter, was arrested on 10th June; both were indicted in August and convicted in September of the murder of Walsh; there was an appeal to the Court of Criminal Appeal, which failed; and, after the failure of the appeal, Clarke, on the suggestion of Inspector Condon, for the first time thought of the reward and decided to claim it. But he had seen the proclamation in May. On 6th June, Clarke gave false information in order to screen the murderers; and, as he says, "I had no intention then of doing anything to earn the reward. . . . On 10th June, I began to break down under the strain. Manning took down my statement on 10th June at my request. I had no thought whatever then of the reward that had been offered. My object was my own protection against a false

charge of murder. . . . Up to 10th June I had no intention of doing anything to earn the reward. At the inquest" (where he gave evidence without asking to be allowed to give evidence) "I was committed for trial as an accessory. . . . *When I gave evidence in the Criminal Court I had no intention of claiming the reward. I first decided to claim the reward a few days after the appeal had been dealt with.* Inspector Condon told me to make application. *I had not intended to apply for the reward up to that date.* I did not know exactly the position I was in. Up to that time I had not considered the position . . . *I had not given the matter consideration at all.* My motive was to clear myself of the charge of murder. *I gave no consideration and formed no intention with regard to the reward.*" These statements of Clarke show clearly that he did not intend to accept the offer of the Crown, did not give the information on the faith of, or relying on, the proclamation. He did not mentally assent to the Crown's offer; there was no moment of time at which there was, till after the information was given, as between Clarke and the Crown, a *consensus* of mind. Most of the cases turn on the *communication* of assent, from the "offeree" to the "offeror"; communication is necessary, and it may be by act as well as by words; but there can be no *communication* of assent until there be assent. If the case so much relied on for Clarke, the case of *Williams* v. *Carwardine* (1), can be taken as deciding that mutual consent to the terms is not necessary, as well as communication of assent by the offeree, I can only point to higher and more recent authority, such as that of Lord *Westbury* L.C. in *Chinnock* v. *Marchioness of Ely* (2): "An agreement is the result of the mutual assent of two parties to certain terms, and if it be clear that there is no *consensus*, what may have been written or said becomes immaterial." This pronouncement is cited by *Leake on Contracts*, 7th ed., p. 2; and the author adds: "A *consensus ad idem* is a prime essential to the validity of a contract." The distinction should be clear between the essential mental assent, and the essential communication of that assent; as in *In re National Savings Bank Association*; *Hebb's*

(1) (1833) 5 C. & P., at p. 574; 4 B. & Ad. 621; 1 N. & M. 418; 2 L.J.K.B. (N.S.) 101.

(2) (1865) 4 DeG. J. & S. 638, at p. 643.

H. C. OF A. 1927.

THE CROWN v. CLARKE.

Higgins J.

Case (1): "I am of opinion that an offer does not bind the person who makes it until it has been accepted, *and* its acceptance has been communicated to him or his agent."

But I do not regard *Williams* v. *Carwardine* (2) as deciding anything to the contrary of this doctrine. That case seems to me not to deal with the essential elements for a contract at all: it shows merely that the *motive* of the informer in accepting the contract offered (and the performing the conditions is usually sufficient evidence of acceptance) has nothing to do with his right to recover under the contract. The reports show (as it was assumed by the Judges after the verdict of the jury in favour of the informer), that the informer *knew* of the offer when giving the information, and meant to accept the offer though she had also a *motive* in her guilty conscience. The distinguished jurist, Sir *Frederick Pollock*, in his preface to vol. 38 of the *Revised Reports*, makes comments adverse to the case; but I concur with *Burnside* J. in his view that we cannot treat such comments as equivalent to an overruling of a clear decision. The case of *Gibbons* v. *Proctor* (3) is much more difficult to explain. There a policeman was held entitled to recover a reward offered by handbills, for information given to the superintendent of police which led to arrest and conviction, although the policeman did not know of the handbills before he sent the information by his agents, or before the handbills reached the superintendent. This would seem to mean that a man can accept an offered contract before he knows that there is an offer—that knowledge of the offer before the informer supplies the information is immaterial to the existence of the contract. *Anson on Contracts* (16th ed.), p. 55, thinks that this decision must be wrong. I venture to think so too; and, though we cannot well overrule it, we ought not to follow it for the purposes of this Court. It should be noted in this connection that the great judgment of Lord *Blackburn* in *Brogden* v. *Metropolitan Railway Co.* (4) is addressed to the other condition of contract, that acceptance must be communicated; but the whole judgment assumes that *consensus* of mind pre-existed—"simple *acceptance in your own mind*, without any intimation to the

(1) (1867) L.R. 4 Eq. 12.
(2) (1833) 5 C. & P. 566; 4 B. & Ad. 621; 1 N. & M. 418; 2 L.J. K.B. (N.S.) 101.
(3) (1891) 64 L.T. 594.
(4) (1877) 2 App. Cas. 666, at p. 692.

other party, and expressed by a mere private act, such as putting a letter into a drawer," does not complete a contract (and see per Lord *Cairns* L.C. (1)). The reasoning of *Woodruff* J. in *Fitch* v. *Snedaker* (2) seems to me to be faultless ; and the decision is spoken of in *Anson* (p. 24) as being undoubtedly correct in principle :—" The motive inducing consent may be immaterial, but the consent is vital. Without that there is no contract. How then can there be consent or assent to that of which the party has never heard ? " Clarke had seen the offer, indeed ; but it was not present to his mind—he had forgotten it, and gave no consideration to it, in his intense excitement as to his own danger. There cannot be assent without knowledge of the offer ; and ignorance of the offer is the same thing whether it is due to never hearing of it or to forgetting it after hearing. But for this candid confession of Clarke's it might fairly be presumed that Clarke, having once seen the offer, acted on the faith of it, in reliance on it ; but he has himself rebutted that presumption.

I have been struck by the resemblance of the position to that of an action based on misrepresentation. The statement of claim must allege and show that the plaintiff acted in reliance on the misrepresentation. If the defendant can establish that the plaintiff did not rely on the misrepresentation, the plaintiff fails. In *Smith* v. *Chadwick* (3) *Jessel* M.R. said : " if the Court sees on the face of " the statement " that it is of such a nature as would induce a person to enter into the contract, or would tend to induce him to do so, . . . the inference is, if he entered into the contract, that he acted on the inducement so held out, . . . but even then you may show that in fact he did not so act, . . . by showing *that he avowedly did not rely upon* " *the misstatement* " *whether he knew the facts or not.*" This passage was approved of by Lord *Halsbury* L.C. in *Arnison* v. *Smith* (4) (see also *Smith* v. *Kay* (5) ; *In re Royal British Bank* ; *Nicol's Case* (6) ; *Jennings* v. *Broughton* (7)).

I need not dilate at length on the now classic case of *Carlill* v. *Carbolic Smoke Ball Co.* (8). It is quite consistent with the view

(1) (1877) 2 App. Cas., at pp. 672, 680.
(2) (1868) 38 N.Y. 248.
(3) (1882) 20 Ch. D. 27, at p. 44.
(4) (1889) 41 Ch. D. 348, at p. 369.
(5) (1859) 7 H.L.C. 750, at p. 775.
(6) (1859) 3 DeG. & J. 387, at p. 439.
(7) (1854) 5 DeG. M. & G. 126, at p. 138.
(8) (1892) 2 Q.B. 484 ; (1893) 1 Q.B. 256.

H. C. OF A. 1927.

THE CROWN v. CLARKE.

Higgins J.

which I have stated. The facts were not in dispute (1), and one of the facts was that the plaintiff had bought the smoke balls *on the faith of* the advertisement. This important fact is stated again in the report on appeal (2); and it is just the fact which is not, and could not be, found under the circumstances of this case. My view is that Clarke did not act *on the faith of, in reliance upon,* the proclamation; and that although the exact fulfilment of the conditions stated in the proclamation would raise a presumption that Clarke was acting on the faith of, in reliance upon, the proclamation, that presumption is rebutted by his own express admission.

For these reasons, I am of opinion that the judgment of the Chief Justice was right, and that this appeal ought to be allowed.

As for the argument of the Crown to the effect that the conditions of the offer have not been fulfilled by Clarke, the point becomes unnecessary to decide if Clarke has failed to establish the contract; but, if it should become necessary to express an opinion on these points, I have come to the conclusion that the Crown is right. The promise of the Crown was to pay the reward for "such information as *shall lead* to the *arrest and conviction* of the *person or persons who committed the murders.*" The information given did not lead to the arrest of Treffene, for he was arrested on 6th June *before* the information was given. Nor did the information given lead to the conviction of the persons who committed the murders—both murders: it lead only to the conviction of the persons who committed one murder, the murder of Walsh. It is no answer to say that the Crown could have had the men tried for the murder of Pitman if it chose. The proclamation here differs from the advertisement in *Williams* v. *Carwardine* (3), in that the words here are "such information as *shall* lead" &c., not "such information as *may* lead" &c. (see p. 571); and the information did not in fact lead to convictions for the two murders. This argument may involve the result that the proclamation was misleading and illusory; but that is no answer if the argument is sound.

STARKE J. The Government of Western Australia publicly offered "a reward of £1,000 for such information as should lead to

(1) (1892) 2 Q.B., at p. 488. (2) (1893) 1 Q.B., at p. 257.
(3) (1833) 5 C. & P. 566.

the arrest and conviction of the person or persons who murdered John Joseph Walsh, inspector of police, and Alexander Henry Pitman, sergeant of police." The petitioner knew of this offer and with that knowledge performed some at least of its conditions, but the learned Judge who tried the action—*McMillan* C.J.—found that he did not act on the faith of, or in reliance upon, the offer or with any intention of entering into any contract. Mutual assent or a *consensus* of wills is essential in English law to the formation of a contract. However, in the law of contract the offer of a reward addressed to the world at large stands in a somewhat anomalous position, and it is argued that the performance of the conditions of such an offer is an acceptance of it. This argument finds support in the case of *Williams* v. *Carwardine* (1). The jury found in that case that the plaintiff was not induced by the offer of the reward to give the information required and yet the plaintiff had a verdict. But the case has been criticized and said to be an authority only for the proposition that the motive of compliance with an offer is immaterial (*Anson on Contracts*, 15th ed., p. 55), and Professor *Langdell* boldly says that it seems to have been erroneously decided (*Cases on Contracts*, 2nd ed. (1879), Summary, p. 988, par. 3 ; see also *Pollock on Contract*, 9th ed., p. 23 ; *Benjamin on Sales*, 7th ed., pp. 71, 72). And, indeed, if it does set up "a contract without any privity between the parties" it certainly runs counter to well settled principles of the English law of contract and must be disregarded. In *Carlill* v. *Carbolic Smoke Ball Co.* (2) it is said that the general offer of a reward is an offer made to any person who acts upon the faith of or in reliance upon that offer and performs the conditions specified in it. (*Lindley* L.J. (3), *Bowen* L.J. (4), *A. L. Smith* L.J. (5)). Such an offer is capable of acceptance by a number of persons but the person entitled to the reward depends upon the terms and nature of the offer (*Lancaster* v. *Walsh* (6)). And previous communication of its acceptance is not required (*Carlill* v. *Carbolic Smoke Ball Co.*). A number of other cases, both English and American, relevant to the matter in hand, might be cited ; but I content myself with a

(1) (1833) 4 B. & Ad. 621.
(2) (1893) 1 Q.B. 256.
(3) (1893) 1 Q.B., at p. 261.
(4) (1893) 1 Q.B., at p. 268.
(5) (1893) 1 Q.B., at pp. 273, 274.
(6) (1838) 4 M. & W. 16.

H. C. OF A. 1927.

THE CROWN v. CLARKE.

Starke J.

reference to the collection made in the notes to *Williams* v. *Carwardine* (1) in *Ruling Cases*, vol. VI., Contract, pp. 133-139. In my opinion the true principle applicable to this type of case is that unless a person performs the conditions of the offer, acting upon its faith or in reliance upon it, he does not accept the offer and the offeror is not bound to him. As a matter of proof any person knowing of the offer who performs its conditions establishes prima facie an acceptance of that offer (see *Langdell on Contracts*, 2nd ed. (1879), Summary, p. 988, par. 3). And probably, as Professor *Langdell* suggests (*ibid.*), the performance of some of the conditions required by the offer also establishes prima facie an acceptance of that offer, but does not of course establish the right of the person so performing some of the conditions of the offer to the reward until he has completely performed them all according to the proper construction of the offer. From such facts an acceptance is probable but it is not, as was urged, "an absolute proposition of law" that one, who, having the offer before him, acts as one would naturally be induced to act, is deemed to have acted on the faith of or in reliance upon that offer. It is an inference of fact and may be excluded by evidence (cf. *Pollock on Torts*, 11th ed., p. 303). The statements or conduct of the party himself uncommunicated to the other party, or the circumstances of the case, may supply that evidence. Ordinarily, it is true, the law judges of the intention of a person in making a contract by outward expression only by words or acts communicated between them (cf. *Leake on Contracts*, 3rd ed., p. 2; *Brogden* v. *Metropolitan Railway Co.* (2)). But when the offeror, as in the anomalous case under consideration, has dispensed with any previous communication to himself of the acceptance of the offer the law is deprived of one of the means by which it judges of the intention of the parties, and the performance of the conditions of the offer is not in all cases conclusive for they may have been performed by one who never hears of the offer or who never intended to accept it. Hence the statements or conduct of the party himself uncommunicated to the other party are admissible to show the circumstances under which an act, seemingly within the terms of the offer, was done and the inducement which

(1) (1833) 4 B. & Ad. 621.

(2) (1877) 2 App. Cas., at pp. 691, 692.

led to the act. In the present case the statements of the petitioner himself satisfied the Chief Justice that he did not act on the faith of or in reliance upon the offer and we are unable to disturb that finding. I should have had more hesitation than the learned Judge in displacing the inference open on the facts that the petitioner knew of the offer and did in fact supply the Crown with most valuable information. Nowhere in the evidence is it said that he did not act upon the faith of or in reliance upon the offer, and it is unfortunate that no direct question was put to him upon the matter. The petitioner's statements are, I think, consistent with the position that he acted upon the offer but had not addressed his mind to the question whether he would or would not claim the reward. However, the proper inference of fact is essentially one for the learned Judge who saw and heard the petitioner.

This view disposes of the case; and it is undesirable and unnecessary, to my mind, to pronounce any opinion upon the proper construction of the offer or upon the propriety or otherwise of the Crown denying the petitioner's claim.

The appeal ought to be allowed.

Appeal allowed. Order appealed from discharged. Judgment of McMillan C.J. *restored.*

Solicitor for the appellant, *J. L. Walker*, Crown Solicitor for Western Australia.

Solicitors for the respondent, *Parker & Roe.*