[HIGH COURT OF AUSTRALIA.]

HARVEY . . . . . APPELLANT;
PLAINTIFF,

AND

DEVEREUX . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

Contract—Interpretation—Guarantee—Agreement to furnish "full account."

H. C. OF A. 1915.

HOBART, *Feb.* 15.

Griffith C.J., Isaacs and Gavan Duffy JJ.

By an agreement in writing between the plaintiff and the defendant which recited that the defendant had contracted to sell certain orchards to certain persons and during the negotiations had represented that he would guarantee that the orchards would yield 6,000 cases of fruit, and that the plaintiff had agreed with those persons to purchase the fruit in the orchards for a certain sum if the defendant would guarantee that the orchards would yield 6,000 cases of fruit, the defendant guaranteed accordingly and agreed that if the quantity of fruit should be less than 6,000 cases he would pay the plaintiff 2s. 9d. for each case short of that quantity. It was also agreed that the plaintiff should keep "an accurate account" of the fruit which the orchards should yield, that he should render to the defendant "a full account" of all fruit obtained from the orchards certified to as correct by the plaintiff's accountant, that the books of account of all fruit taken from the orchards should at all times be open to the defendant's inspection, and that he might nominate a person to be employed by the plaintiff to act as tallyman for the defendant.

Held, that the "full account" intended by the agreement was an account showing in full the number of cases to be paid for by the defendant in the event of there being less than 6,000 cases, and not a detailed list of all the varieties of the different fruits taken from the orchards and the quantity picked of each variety.

Decision of the Supreme Court of Tasmania: *Harvey* v. *Devereux*, 10 Tas. L.R., 105, reversed.

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APPEAL from the Supreme Court of Tasmania.

An action was brought in the Supreme Court by Robert Harvey against Alexander Percy Devereux claiming £456 4s. 6d. as being due under a contract between them. The contract was as follows:—

"This agreement made 19th February 1914 between Alexander Percy Devereux of Lovett in Tasmania orchardist of the one part and Robert Harvey of Lovett aforesaid storekeeper of the other part Whereas by a contract dated 9th December 1913 the said Alexander Percy Devereux contracted to sell to Mark Smith the said Robert Harvey and Henry Dobson his property situate at Nicholls Rivulet containing about 601 acres for the sum of £7,250 And whereas such property comprises extensive orchards and during the negotiations for the sale of the said properties the said Alexander Percy Devereux expressed his belief that the fruit in the said orchards represented a yield of 6,000 cases and he would guarantee they would yield 6,000 cases And whereas the benefit of the said contract is now vested in the said Mark Smith and Henry Dobson alone And whereas the said Robert Harvey has agreed with the said Mark Smith and Henry Dobson to buy the fruit in the said orchards for the sum of £700 if the said Alexander Percy Devereux would guarantee that the orchards would yield 6,000 cases of fruit as hereinafter contained Now this agreement witnesseth that in consideration of the premises and the said Robert Harvey Mark Smith and Henry Dobson signing the said contract of sale and purchase and the said Robert Harvey agreeing to purchase the said fruit as aforesaid he the said Alexander Percy Devereux doth hereby agree with and guarantee to the said Robert Harvey that the orchards on his said property and now about to be conveyed to the said Mark Smith and Henry Dobson will yield 6,000 cases of marketable fruit And that if the quantity of fruit shall be less than 6,000 cases he the said Alexander Percy Devereux will pay to the said Robert Harvey the sum of 2s. 9d. for each case which the said orchards may yield short of the guaranteed quantity of 6,000 cases. But it is hereby expressly agreed that with regard to apples and pears which are too small or are too diseased with black spot or other disease to be marketable and also with regard to

all windfalls up to 350 cases which are fit for sale for evaporating making cider or other commercial purposes shall be counted as part of the 6,000 cases so guaranteed as aforesaid but only in the proportion of two cases for one but it is expressly agreed that all windfalls in excess of 350 cases shall be regarded as marketable fruit and counted accordingly And further that the said Robert Harvey shall keep an accurate account of all marketable fruit which the said orchards yield and of every bushel or case of fruit sold by him for the purpose of evaporating or making cider or other commercial purposes and shall render a full account of all fruit obtained from the said orchards to the said Alexander Percy Devereux certified to as correct by the accountant of the said Robert Harvey And the books of accounts of all fruit taken from the said orchards shall be open to the inspection at all times of the said Alexander Percy Devereux And further it is agreed by and between the said Alexander Percy Devereux and Robert Harvey that the said Alexander Percy Devereux shall be entitled to nominate from time to time one person who shall be employed by and paid by the said Robert Harvey in picking the fruit from the said orchards who shall act as tallyman for the said Alexander Percy Devereux And if the said orchards shall not yield 6,000 cases of fruit calculated as aforesaid then the said Alexander Percy Devereux shall pay to the said Robert Harvey within seven days of the receiving of such certified account the sum of 2s. 9d. for every case of marketable fruit short of the number of 6,000 cases of fruit guaranteed as being in the said orchards And lastly that if any dispute arises under this agreement then the same shall be referred to arbitration in accordance with the *Arbitration Act* 1892."

After the fruit in the orchards had been picked and delivered a certificate was given by the plaintiff's accountant, which was as follows:—

"I the undersigned being accountant to Robert Harvey of Lovett in Tasmania storekeeper hereby certify and declare that I have kept in the books of the said Robert Harvey at Lovett an accurate account of all marketable fruit (apples and pears) and of all windfalls and all apples and pears too small but which were fit for sale for evaporating and which were received by the

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said Robert Harvey during the last season from the orchards situate on the property at Nicholls Rivulet near Lovett and lately belonging to one Percy Alexander Devereux And I declare that the quantity of marketable fruit so received was 2,322 cases of apples and 278 half cases of pears or 2,461 cases in all counting the half cases of pears as 139 cases And I further declare that the bag apples and pears received by the said Robert Harvey from the said orchards comprising windfalls damaged and cracked apples and pears and those affected badly with black spot amounted in weight to 22,128 lbs. or counting 50 lbs. per bushel case to 442 bushel cases And I certify that the above is a correct and accurate account of the apples and pears of every description received by the said Robert Harvey from the said orchards as disclosed by the said Robert Harvey's books kept by me."

The books kept by the plaintiff showed in detail the numbers of cases of apples and pears picked each day, distinguishing between the different varieties.

The action was heard before *Dobbie* J. and a jury, and in answer to certain questions put to them by the learned Judge the jury returned the following answers:—

1. The orchards did not yield 6,000 cases of fruit calculated in manner provided by the guarantee.

2. The plaintiff did keep an accurate account of all marketable fruit yielded by the said orchards and of every bushel or case of fruit sold by the plaintiff for the purpose of evaporating or making cider or other commercial purposes, with the exception of fifty-five bushels of plums and five bushels of quinces.

3. The plaintiff did not improperly cause apples to be picked and thus cause a shortage to the detriment of the defendant.

4. There is no custom as to the meaning of the expression "marketable apples" in the fruit trade.

Thereupon a verdict for the plaintiff for £417 11s. 9d. was entered, leave being reserved to the defendant to move for a nonsuit or for a verdict for the defendant upon the findings. The defendant accordingly moved for a nonsuit or for a verdict for the defendant upon the ground that the plaintiff did not prove that he kept an accurate account of all marketable fruit in

accordance with the agreement, and did not prove that he rendered to the defendant a full account of all fruit obtained from the orchards certified as correct by the accountant of the plaintiff, and that the keeping of such accurate account and the delivery of such full account were conditions precedent to the plaintiff's right of action.

The motion was heard by the Full Court, who set aside the judgment for the plaintiff and entered a nonsuit: *Harvey* v. *Devereux*, 10 Tas. L.R., 105.

From that decision the plaintiff now appealed to the High Court.

The other material facts are stated in the judgments hereunder.

L. L. Dobson, for the appellant.

C. S. Page, for the respondent.

GRIFFITH C.J. The only point raised before the Full Court was as to the meaning of the obligation to "render a full account of all fruit" contained in an agreement between the plaintiff and the defendant.

The defendant was the owner of certain orchards which he was desirous of selling, and the intending purchaser was anxious to know how much fruit he might expect to get from the orchards. The defendant was willing to make an agreement with the buyer of that year's crop of fruit from the purchaser of the orchards guaranteeing that the crop would be 6,000 cases, and a formal agreement was accordingly made. By it the defendant agreed with the plaintiff, who was the buyer of the fruit crop, to pay him 2s. 9d. a case for every case short of 6,000, and the plaintiff agreed to keep "an accurate account of all marketable fruit which the said orchards yield and of every bushel or case of fruit sold by him for the purpose of evaporating or making cider or other commercial purposes," and also to "render a full account of all fruit obtained from the said orchards to" the defendant certified to as correct by the plaintiff's accountant. After the end of the picking season the plaintiff sent to the defendant a document certified by his accountant declaring that the quantity of marketable fruit taken from the orchards was

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Griffith C.J.

2,322 cases of apples and 139 cases of pears, and further that the inferior fruit, describing it in the terms of the agreement, amounted to 442 cases. The defendant did not pay the 2s. 9d. a case for the deficiency, and thereupon the action was brought.

The objection is that the certificate given was not a "full account" as required by the agreement, and that that term meant a full detailed list of all the varieties of apples and pears taken from the orchards and the quantity of fruit picked of each kind, that is to say, the same kind of full account as a tradesman delivers of goods sold. On the other hand, it is urged that the "full account" intended by the agreement is an account showing in full the number of cases to be paid for by the defendant under the agreement in the event of there being less than 6,000. In my opinion that is the correct view. It is, of course, a simple matter of construction. It is to be noticed that the defendant was, under the agreement, entitled to inspection of the plaintiff's books of account showing the fruit taken from the orchard, and was also entitled to appoint a man to act for him as a tallyman while the picking was going on, but he did not do so. The question is whether the account delivered was a "full account." In my opinion it was. It was not strictly accurate, because fifty-five cases of plums and five cases of quinces were not included owing to a mistake on the plaintiff's part, but that matter was settled by agreement, and allowed for in the verdict. All, therefore, that is left to be decided is the meaning of the words.

Another incidental point raised was that the account delivered did not show with sufficient certainty how much was to be paid by the defendant. The certificate, as I have said, stated that there were 2,461 cases of marketable fruit consisting of 2,322 cases of apples and 139 cases of pears, and also 442 bushels of inferior fruit, and the plaintiff claimed that he was not bound under a stipulation in the agreement to give credit for more than one half of the number of cases of inferior fruit. It may be that the account or certificate was ambiguous; that upon one construction it did not show that the plaintiff had received less than the full number of 2,322 cases and 442 cases of marketable fruit, and

on another construction that he had received a less number. But taking it most adversely to the plaintiff—which appears to have been the course adopted at the trial—it only appears that the defendant was bound to account for a less number than the plaintiff claimed. As a matter of fact the verdict was for a less sum than the least possible amount for which the defendant was liable on any construction of the certificate. The defendant urges that there should nevertheless be a nonsuit, with the only result that a fresh account and certificate would be given, and more expense incurred in bringing another action. There are no real merits in the defendant's case, and I am glad to be able to say that there are no legal merits. We are told that one of the learned Judges of the Supreme Court expressed his regret at being compelled to allow the nonsuit. I feel no regret in being able to say that the nonsuit should be set aside and that the verdict should stand.

The appeal should therefore be allowed.

ISAACS J. I agree that the appeal should be allowed, and I share the opinion of the Chief Justice that there is no room for any regret so far as the merits are concerned. Whatever might be the view I might take as to the want of certainty in the notice given by the plaintiff to the defendant, that point is not now open because it was not raised at the trial or in the Full Court. One point only is really relied upon by the respondent, namely, that an account could not be a "full account" unless it was detailed. I agree with what has been said by the Chief Justice that that is not the meaning of a "full account," and, agreeing with him in that respect and also taking the view that that is the only point now open, I am of opinion that the appeal should be allowed.

GAVAN DUFFY J. The nonsuit point intended to be reserved for the defendant at the trial was whether under the agreement to give him a "full account" he was entitled to a detailed statement of the fruit gathered. I do not think he was so entitled, and therefore I do not think there should be a nonsuit.

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Appeal allowed. Order appealed from discharged. Motion for nonsuit dismissed with costs, and judgment restored. Respondent to pay costs of appeal.

Solicitors, for the appellant, *Dobson, Mitchell & Allport.*
Solicitor, for the respondent, *C. S. Page.*

B. L.

Appl *Joyce* v *Australasian United Steam Navigation Co Ltd* (1939) 62 CLR 160

[HIGH COURT OF AUSTRALIA.]

AUSTRALIAN STEAMSHIPS LIMITED . APPELLANTS; DEFENDANTS,

AND

MALCOLM . . . . . RESPONDENT. PLAINTIFF,

ON APPEAL FROM A DISTRICT COURT OF NEW SOUTH WALES.

H. C. OF A. 1914.

SYDNEY, *Aug.* 3, 4, 5; *Nov.* 30.

Griffith C.J., Barton, Isaacs, Gavan Duffy, Powers and Rich JJ.

Constitutional Law—Validity of Commonwealth legislation—Trade and commerce—Navigation and shipping—Accident to seaman—Compensation for injuries—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 51 (I.), (XXXIX.), 98—*Seamen's Compensation Act* 1911 (*No.* 13 *of* 1911), *sec.* 5.

Secs. 51 (I.) and 98 of the Constitution confer upon the Commonwealth Parliament power to legislate as to navigation and shipping so far as concerns foreign and inter-State traffic, and in particular to regulate the reciprocal rights and obligations of those engaged in carrying on that traffic by means of ships.

So *held* by *Isaacs*, *Gavan Duffy*, *Powers* and *Rich* JJ. (*Griffith* C.J. and *Barton* J. dissenting).

Held, therefore, by *Isaacs*, *Gavan Duffy*, *Powers* and *Rich* JJ. (*Griffith* C.J. and *Barton* J. dissenting), that the *Seamen's Compensation Act* 1911 is a valid exercise of the legislative power of the Commonwealth Parliament.