

[HIGH COURT OF AUSTRALIA.]

CHARLICK PLAINTIFF;

AND

FOLEY BROTHERS LIMITED DEFENDANTS.

Sale of Goods—Executory contract—Defence—Duty of legal adviser when pleading the Statute of Frauds—Effect of pleading the Statute—Statute of Frauds (29 Car. II. c. 3), sec. 17—Usury, Bills of Lading, and Written Memoranda Act 1902 (N.S.W.) (No. 43 of 1902), sec 11.

H. C. OF A.

1916.

SYDNEY,

April 13, 14,
17, 19.

Isaacs J.

It is the duty of the defendant's legal adviser before placing on the record a defence based upon the *Statute of Frauds* to explain fully such defence to his client, and point out its full meaning and effect, and the probable consequences of the defence in case the event turns upon a question of credibility.

TRIAL OF ACTION.

An action was brought in the High Court by Fred Charlick, trading as Charlick Brothers and resident in South Australia, against Foley Brothers Limited, of Sydney, to recover damages for the breach of a contract of sale and delivery of certain butter above the price of £10, to be despatched to the plaintiff on 17th April 1915.

The defendants pleaded (*inter alia*) that it was agreed by and between the plaintiff and the defendants that if the Attorney-General for New South Wales should prior to 17th April 1915 in any way interfere with or prohibit, or attempt to prohibit, the export of butter from the State of New South Wales, or should request the defendants not to export or attempt to export any butter from the said State, the defendants should be released from any liability to deliver to the plaintiff any butter as alleged in the statement of claim, and should no longer be bound by the alleged

H. C. OF A.
1916.

CHARLICK
v.
FOLEY
BROTHERS
LTD.

contract sued upon, and that prior to 17th April 1915 the Attorney-General for New South Wales did interfere with and prohibit the export of butter from New South Wales, and did request the defendants not to export any butter from the said State, whereby the defendants became released from their obligations. The defendants also pleaded the *Statute of Frauds* and the *Usury, Bills of Lading, and Written Memoranda Act 1902* (N.S.W.) (No. 43 of 1902), sec. 11.

It was proved at the trial of the action that the Attorney-General for the State of New South Wales, on 10th April 1915, purported to place certain restrictions upon the export of butter from New South Wales as from 12th April 1915, and that such restrictions were communicated to the defendants. The restrictions, if valid, would have prevented the performance by the defendants of the contract sued upon.

Other material facts sufficiently appear from the judgment hereunder.

Loxton K.C. and *Hammond*, for the plaintiff.

Curtis and *Weston*, for the defendants.

Cur. adv. vult.

April 19.

ISAACS J. read the following judgment:—This is an action brought by Fred Charlick, trading as Charlick Brothers, a resident of South Australia, against Foley Brothers Limited, a New South Wales trading corporation, to recover damages for non-delivery of butter pursuant to an oral contract of sale.

The terms of the contract, if there was a contract and an enforceable contract, are not reasonably open to dispute. They are, as I find, that the plaintiff verbally purchased from the defendants 60 boxes of first grade butter at 145s. per cwt., 25 boxes of second grade butter at 127s. per cwt. and 25 boxes of second grade butter at 123s. per cwt., to be despatched from Sydney to Adelaide by steamer leaving on 17th April 1915.

The transaction was effected, as others of a similar nature had been effected previously between the same parties, by word of

mouth only. They trusted each other, as honourable men of business not uncommonly do, and as they, by their conduct, led and encouraged each other to believe they safely might, to recognize and carry out the bargains actually made, without the formality of a written contract, particularizing the terms great and small, or a note or memorandum setting out the essential terms of the bargain and formally binding the parties by their respective signatures.

The two issues raised on the pleadings by the defendants were, first, whether the provisions of the *Statute of Frauds* were complied with, and second—the really meritorious defence—whether there was a definite binding contract at all, or, in other words, whether the order was accepted subject to a condition expressly stipulated which in the events that have happened has not been satisfied.

The *Statute of Frauds* or its local equivalent is frequently the means of protecting a person from fraud or from the consequences of a transaction into which he has been hastily drawn. It is couched in general terms, and applies no doubt, so far as legal effect is concerned, to such a bargain as the present. But in practice a great mass of business rests upon the word of the parties, or upon quite informal memoranda, sufficiently understood by the parties, but not sufficient to satisfy the *Statute of Frauds*. And in practice these understandings are faithfully recognized. Where a great mercantile firm in substance invites its customers to dispense with the formalities of written contracts, and to rely upon the business honesty and fidelity of the firm to the pledged word of its responsible agents, it is distinctly dishonourable to repudiate a transaction so entered into upon the ground that the customer was simple enough to place reliance on anything short of a written undertaking duly signed. And in my opinion it is not the duty of any legal adviser to compromise the honour and reputation of such a client, contracting in those circumstances, by placing on the record a defence of that nature without fully explaining it, and pointing out its full meaning and effect, and the probable consequences of the defence in case the event turns on a question of credibility. If the law is explained and the true position indicated, then, if the client instructs his adviser to set up the strict legal defence, let it be

H. C. OF A.
1916.

CHARLICK
v.
FOLEY
BROTHERS
LTD.

Isaacs J.

H. C. OF A.
1916.

CHARLICK

v.

FOLEY
BROTHERS
LTD.

—
Isaacs J.

done; but then the client runs the risk of being regarded as personally untrustworthy should the circumstances assume the appearance that they do in this case.

The facts before me rest so much upon the opinion I have to form of the personal integrity of the plaintiff and the defendants' managing director, Mr. Foley, that I felt bound to specially ask Mr. Foley his own individual view of that particular defence in this case.

I was not surprised, but extremely gratified, to hear him as a business man express his own view that to succeed on that plea, if a definite bargain were really found to have been made, would not have been honourable. Had he said the contrary, I should have doubted his honesty in other directions. Even as it is, as he said he nevertheless left the matter to his advisers' discretion, it to some extent weakened his other declaration. But on the whole I accept his personal statement as sincere.

[His Honor then dealt with the facts of the case, and decided them in favour of the defendants, holding that the contract made was conditional, and concluded:]

As the plaintiff fails on that substantial point, I see no reason to depart from the ordinary rule as to costs. If he had succeeded on this point, and had failed only on the defence of the *Statute of Frauds*, I should have made the direction as to costs accord with my view as to the propriety of that defence.

Judgment will be entered for the defendants with costs.

*Judgment directed to be entered for the defendants
with costs.*

Solicitor for the plaintiff, *D. L. Aitken*.

Solicitors for the defendants, *Sly & Russell*.

C. A. W.