

[HIGH COURT OF AUSTRALIA.]

CUMMING & COMPANY LIMITED . . . APPELLANT;
PLAINTIFF,

AND

HASELL RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE HIGH COURT IN ORIGINAL JURISDICTION.

H. C. OF A. *Contract—Formation—Uncertainty—Sale of goods—"F.O.B."—No place of ship-*
1920. *ment—Statute of Frauds.*

MELBOURNE,
Oct. 26, 27,
28.

An agreement for the sale of goods "f.o.b.," without any stipulation express or implied as to the port of shipment, is too uncertain to constitute a binding contract.

Decision of *Gavan Duffy J.* affirmed.

Knox C.J.,
Isaacs and
Rich JJ.

APPEAL from the High Court in its original jurisdiction.

An action was brought in the High Court by Cumming & Co. Ltd., a company registered in Tasmania, against Arthur H. Hasell. By the statement of claim the plaintiff, having alleged an agreement in writing, dated 15th November 1918, whereby the defendant agreed to purchase from the plaintiff 100,000 superficial feet of sassafras logs, alleged alternatively that "on or about 15th November 1918 the plaintiff agreed to sell to the defendant and the defendant agreed to buy from the plaintiff 100,000 feet of sassafras logs January/February/March shipment at 14s. 6d. per 100 feet f.o.b. Burnie (or alternatively f.o.b. Tasmanian ports) less 5 per cent. The said agreement is contained in the following documents:—14th November 1918, telegram, plaintiff to defendant, 'Informed you booked one

hundred thousand sassy logs each Alderson Blackwell fourteen six presume you have covered us for similar quantity at same price.

Reply.' 15th November 1918, telegram, defendant to plaintiff, 'Sassafras. Yes book hundred thousand January February March shipment fourteen sixpence f.o.b. less five wire confirmation can possibly fix buyer further hundred thousand could you supply.'

16th November 1918, telegram, plaintiff to defendant, 'Confirm sassy logs sell up to half million also half million celery logs four feet girth up million hardwood logs six feet girth up at list price wire prospect of selling.' The following also were terms of the said agreement implied from previous dealings between the parties: that girths should be 36 inches and upwards, that payment should be by 30 days sight draft, documents to be surrendered on acceptance, that insurance should be buyer's care, and that the logs should be consigned to order of buyer Sydney." The plaintiff alleged that it had at all times been ready and willing to perform the contract, but that the defendant had refused to make provision for taking delivery of the logs and had declined to accept any responsibility under the contract. The plaintiff then claimed £651 damages.

The action was heard by *Gavan Duffy J.* At the hearing it appeared that the plaintiff Company carried on business in Burnie, Tasmania, and the defendant in Sydney, New South Wales, and that the plaintiff Company was a member of the North-Western Sawmillers' Association, Burnie, Tasmania, for which the defendant was one of the agents in Sydney, and a document was put in evidence which purported to be a list of prices to be charged by members of the Association for timber sold through agents and stated, among other things, that "all prices are f.o.b. Tasmanian ports." Evidence was also given on behalf of the plaintiff that it had had other transactions with the defendant prior to that in question, some being sales of logs to the defendant as principal and others in which the defendant acted as agent for the sale of logs by the plaintiff, and that the previous sales by the plaintiff to the defendant had been expressed to be "f.o.b. Burnie." It also appeared that the logs to supply the contract were not cut, and that the plaintiff arranged on 15th or 16th November to have them cut about fifty miles away from Burnie,

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and about eight or nine miles away from the railway. Of the three telegrams referred to in the statement of claim, those from the plaintiff to the defendant were sent from Burnie to Sydney, and that from the defendant to the plaintiff from Sydney to Burnie. There was also put in evidence an order dated 15th November 1918, and written by the defendant to the plaintiff, in the following terms:—"Please supply the following: Sassafras logs 100,000 super. feet girths 36 inches and up. Price 14/6 per 100 f.o.b. Burnie less 5 per cent. commission. Terms 30 days sight draft documents to be surrendered on acceptance. Delivery spread January/February/March shipment 1919. Insurance—Buyer's care. Consign to order Sydney." This order was received by the plaintiff at Burnie on 19th November, and on the same day the plaintiff also received a telegram from the defendant cancelling the order.

Gavan Duffy J. held that the plaintiff had not satisfied him that any contract of sale had been made, and he gave judgment for the defendant.

The plaintiff now appealed from that decision to the Full Court.

Latham (with him *Ham*), for the appellant. The written order of 15th November is sufficiently connected with the telegrams to constitute a memorandum of the contract which satisfies the *Statute of Frauds* (*Boydell v. Drummond* (1); *Pearce v. Gardner* (2)). The uncontradicted evidence establishes a contract in the terms stated in the statement of claim.

Stanley Lewis (with him *Owen Dixon*), for the respondent. The appellant seeks to incorporate into the contract terms that are not to be found in the telegrams which he alleges constituted the contract. One of those terms is that the logs should be shipped at Burnie or in the alternative at Tasmanian ports, but there is nothing in the telegrams about the place of shipment. [He was stopped.]

Ham, in reply. The appellant's place of business is Burnie, and that should be taken to be the port of shipment (see *Railton v. Fleming* (3)). It is to be implied from the previous dealings and the

(1) 11 East, 142.
(2) (1897) 1 Q.B., 688.

(3) (1912) V.L.R., 113; 33 A.L.T., 180.

surrounding circumstances that Burnie was the port of shipment (*Maine Spinning Co. v. Sutcliffe & Co.* (1); *Wackerbarth v. Masson* (2)). The contract being for delivery f.o.b. was capable of being made certain, and it was afterwards made certain by the order of 15th November. That must at least mean that the delivery should be f.o.b. Tasmanian ports, and then, as the duty was on the appellant to provide the ship, he could choose the port of shipment.

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The COURT delivered the following judgment:—

The plaintiff Company bases its claim on an agreement alleged to be contained in three telegrams which are in the following words:—14th November 1918, plaintiff to defendant, "Informed you booked one hundred thousand sassy logs each Alderson Blackwell fourteen six presume you have covered us for similar quantity at same price. Reply." 15th November 1918, defendant to plaintiff, "Sassafras. Yes book hundred thousand January February March shipment fourteen sixpence f.o.b. less five wire confirmation can possibly fix buyer further hundred thousand could you supply." 16th November 1918, plaintiff to defendant, "Confirm sassy logs sell up to half million also half million celery logs four feet girth up million hardwood logs six feet girth up at list price wire prospect of selling." And it alleges that the following additional terms were implied in that agreement: "that girths should be 36 inches and upwards, that payment should be by 30 days sight draft, documents to be surrendered on acceptance, that insurance should be buyer's care, and that the logs should be consigned to order of buyer Sydney."

It is apparent that the agreement alleged was concluded (if at all) on 16th November 1918 at the latest. We think it is clear from the telegrams that at that date the parties had not arrived at any express agreement as to the place of shipment of the sassafras logs the subject matter of the negotiations, and there is no allegation that a term relating to the place of shipment ought to be implied. The only reference to shipment or delivery contained in the telegrams consists of the expression "f.o.b.," meaning free on board,

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but no port is named at which the logs are to be placed on board ship. In the absence of any stipulation express or implied as to the port of shipment, there is, in our opinion, no obligation sufficiently certain to be enforced in a Court of law even assuming the agreement to be one for sale by the plaintiff Company to the defendant. There is nothing in the evidence to show with reasonable certainty whether the agreement was for delivery f.o.b. Burnie or f.o.b. Tasmanian ports. There is no written reference to Burnie in the writings forming the alleged agreement. Prior course of conduct is relied on to supply the word Burnie after the letters f.o.b.; but that goes beyond interpretation, and adds a word which limits the effect of the letters f.o.b. The statute was therefore not complied with. It follows that there was not on 16th November any complete enforceable agreement for the sale of the logs by the plaintiff Company to the defendant.

In our opinion the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant, *Moule, Hamilton & Kiddle*, for *F. B. Edwards*, Burnie.

Solicitors for the respondent, *Blake & Riggall*.

B. L.