

**A. W. BEAN, ADMINISTRATOR OF THE ESTATE OF GEORGE CASE,
DECEASED, PLAINTIFF AND APPELLEE, VS. THE B. W.
CADWALLADER COMPANY, DEFENDANT AND APPELLANT.**

G.R. No. 4175. March 26, 1908

Ponente: JOHNSON, J.

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JOHNSON, J.:

On the 4th day of June, 1906, the plaintiff brought an action in the Court of First Instance of the city of Manila to recover of the defendant the following sums:

(a) The sum of P7,356.80, with interest thereon at the rate of 6 per cent per annum, from the 6th day of December, 1905, being the balance due for timber sold and delivered by the plaintiff to the defendant, under and pursuant to the contract set out in Exhibit A of the complaint.

(b) The sum of P2,782.75, the balance due for timber sold and delivered by the plaintiff to the defendant, under and pursuant to the agreement set out in Exhibit B of the complaint.

(c) The sum of 810, the actual damage suffered by the plaintiff by reason of the violation of said agreements (a) and (b), and for such other damages as the proof at the trial may show the plaintiff had suffered, etc. Said Exhibit A is as follows;

"MANILA, September 6, 1905.

"MR. GEORGE CASE, Manila, P. I.

"DEAR SIR : We wish to confirm our acceptance of your verbal offer to furnish us a cargo of ipil and molave (the molave to consist of 10 logs, more or less), said cargo to comprise from eight thousand to ten thousand cubic feet, English measurement, and the same to be delivered alongside our vessel at Basilan, for the sum of sixty cents (60 cents), Philippine currency, per English cubic foot. It is understood that we are to pay the forestry dues at Manila, the same to be charged against you, and it is also understood that delivery is to be made within three months from date of this letter, you to notify us by telegraph when delivery can be made.

"Very respectfully,

"THE B. W. CADWALLADER CO.,

"BY B. W. CADWALLADER, President.

"It is understood that the timber is to be round and that allowance will be made in measurement of same for the bark, which is to be removed.

"B. W. C."

Exhibit B is as follows:

"MANILA, P. I.; January 3, 1905.

"THE B. W. CADWALLADER CO., Manila, P. I.

"DEAR SIRS : I propose to furnish you the following native timber at the prices and under the conditions herein expressed, viz;

"Calantas, at twenty-five (25) cents per English cubic foot, all forestry charges to be paid by me.

"Calantas, short and crooked, at ten (10) cents per English cubic foot, all forestry charges to be paid by you.

"Ipil, at sixty (60) cents per English cubic foot, all forestry charges to be paid by me.

"Ipil, short pieces, at fifteen (15) cents per English cubic foot, all forestry charges to be paid by you.

"Mangachupay, No. 1, at twenty-five (25) cents per English cubic foot, all forestry charges to be paid by me.

"These prices are in Philippine currency and include delivery alongside ship or barge at Basilan, I to furnish the necessary men to load same, and you to furnish steam gear to assist in loading; the cargo to be mixed and consisting of approximately fifteen thousand cubic feet. Delivery to be made within three months from this date.

"Very respectfully,

"GEORGE CASE."

"MANILA, P. I., January 3, 1905.

"MR. GEORGE CASE, Manila, P. I.

"DEAR SIR: We beg to acknowledge receipt of your favor of even date proposing to furnish us calantas, ipil, and mangachupay, and state that we hereby accept the prices and conditions therein mentioned.

"Very respectfully,

"THE B. W. CADWALLADER CO.,

"BY B. W. CADWALLADER, President."

On February 6, 1906, the defendant and appellant wrote the following letter to George Case;

"MANILA, February 6, 1906.

"MR. GEO. CASE, Manila.

"DEAR SIR: Confirming our conversation of this morning, we will make you a further advance of P1,000 for the logs at your cuttings on Basilan Island, approximating 30,000 English cubic feet, more or less. It is understood that this timber is not otherwise encumbered, and that this payment of P1,000, as well as the other advance payment of P2,500 on December 29, 1905, shall draw interest at the rate of 10 per cent per annum, each from date of payment, until sufficient timber has been delivered to us under our contract to cover the amount. "It is further understood that these two payments are part payments on the entire 30,000 English cubic feet,

more or less, and that the timber shall be held subject to our order.

"If this is satisfactory to you, please confirm the same.

"Yours, faithfully,

"THE B. W. CADWALLADER CO.,

"BY B. W. CADWALLADER, President."

"MANILA, P. I., February 6, 1906.

"I hereby confirm acceptance of the above.

"GEO. CASE."

The plaintiff alleged and undertook to prove that, in accordance with the said agreement as represented by Exhibit A, he did, within three months from said 6th day of September, 1905, deliver at the port of Basilan, P. I., a cargo of native logs, consisting of 16,428 English cubic feet of ipil, and duly notified the defendant by telegram of such delivery; that the value of said logs so delivered at the price stipulated was P9,856.50; that on the 29th day of December, 1905, the defendant paid to the plaintiff the sum of P2,500 to apply on the said account, and that there was still due from the defendant to the plaintiff, upon said contract as represented by Exhibit A, the sum of P7,356.80, with interest at the rate of 6 per cent from the 6th day of December, 1905.

The plaintiff also alleged and attempted to prove that he did, in pursuance of the terms of the contract represented by Exhibit B, within three months from the said 3d day of January, 1906, deliver at the port of Basilan, P. I., 15,131 English cubic feet of mangachupay and calantas, and did notify the defendant of such delivery; that the value of said timber so delivered at the price agreed upon in said contract as represented by Exhibit B was P3,782.75; that on the 6th day of February, 1906, the defendant paid to the plaintiff, to apply on said account, the sum of P1,000, and that there is still due and owing to the plaintiff by the defendant the sum of P2,782.75, with interest at the rate of 6 per cent from the 3d day of April, 1906.

The plaintiff further alleges that, by reason of the violation on the part of the defendant of the said contracts as represented by Exhibits A and B, he, the said plaintiff, was obliged to borrow money from third persons and incur expenses in traveling, amounting to the sum of P810, and that, by reason of the violation of the said contracts on the part of the defendant, this sum was due and payable as damages by the defendant to the plaintiff.

On the 16th day of July, 1906, the defendant answered the complaint of the plaintiff and admitted the execution and delivery of the said contracts, but alleged that the plaintiff had made certain misrepresentations concerning the character of the coast of the Island of Basilan; that the plaintiff had represented that the harbor of said Island of Basilan, where said logs were to be delivered, was a safe harbor, and that it was easily practicable for a vessel to come alongside the land, whereas, in fact, said harbor was unsafe, and that it was impossible for the defendant to enter said harbor with the boats and to load said logs.

The defendant further alleged that the plaintiff had not, as a matter of fact, delivered to it the logs or timber, nor any part of the same, as represented by said contracts, and asked for a judgment against the plaintiff for the sum of P3,500, the money paid by the defendant to the plaintiff, and interest on the sum of P2,500 from the 29th of December, 1905, and interest on P1,000 from the 6th of February, 1906, at the rate of 10 per cent.

The cause was duly tried in the Court of First Instance of the city of Manila, and on the 27th day of June, 1907, the court rendered a judgment in favor of the plaintiff and against the defendant for the sum of P10,033.39, with interest at 6 per cent from the 3d day of April, 1906, and costs.

After hearing the evidence adduced during the trial of the cause, the lower court made the following findings of fact:

"First. That on September 6, 1906 [1905], the plaintiff and the defendants entered into a written contract (Exhibit A), by virtue of which the former bound himself to furnish and sell to the latter a cargo¹ of pieces of native wood, about eight to ten thousand (8,000 to 10,000) cubic feet, for the sum of sixty (60) cents, Philippine currency, per English cubic foot, and also bound himself to deliver said pieces of wood to the defendants alongside the latter's ship at Basilan, which delivery was to be Effected within three months from

the date of the contract, and the same plaintiff was to wire the defendants regarding the date on which the above delivery could be made.

"Second. That on January 3 of the following year, 1906, the plaintiff and the defendant entered into another contract, by which the former bound himself to deliver and sell to the defendants another cargo of native lumber consisting of calantas, ipil, and mangachupay, at the various prices mentioned in the same contract (Exhibit B), for a cubic foot, and agreeing also to deliver it to the defendants alongside the latter's vessel at Basilan, within the period of three months from the said date.

"Third. That, for the fulfillment of the first contract, the plaintiff cut a great quantity of lumber, sufficient for the purpose, and placed the same on and near the beach at Punta Material, Island of Basilan, where his cuttings were established, and had the lumber ready for delivery to the defendants within the period fixed in the above-mentioned Exhibit A; that on November 17 of the same year, 1905—that is, two months and eleven days after the date of the contract, and therefore within the fixed term of three months—he informed the defendants by a telegram (Exhibit 2), that the said cargo of lumber could be shipped on about December 6, a date within the period agreed to, and added that good and strong halyards were required; that some pieces weighed eight tons; and he asked the said defendants to wire him immediately the probable date on which their steamer would leave Manila for his port and the probable date of her arrival in Basilan. To this communication the defendants replied by telegram also, on the same date, stating that they could not fix the probable date of the departure of the steamer until after the 24th, and asked the plaintiff whether he was able to make contracts for transportation at Basilan, and at what rate. The plaintiff replied to this cable on the following day, the 18th, stating that he was unable to obtain the transportation there, and again requested the defendants to wire the probable date on which their steamer would arrive at Basilan.

"Fourth. That the defendants advised the plaintiff in Basilan, by telegram on December 8, that the ship Lillybonne was dismasted, that they had no means of transportation, and that they wished him to telegraph them the quantity of lumber ready for shipment, and to inform them if he could obtain transportation from there. The said plaintiff, after giving in his reply the particulars relating to the quantity and prices of lumber referred to by the defendants in their previous telegram, reported on the 18th of the same month that, as stated by the captain of the S. S. Robert K, the defendants might contract for transportation with the Atlantic, Gulf and Pacific Co., that they might leave the lighter Quince (Jan) at the starting point with a motor engine, which was very necessary, and pointed out, moreover, in the same telegram, that the defendants were very late in furnishing the transportation. The defendants, on the 20th of the same month of December, wired to the plaintiff again, stating that the Atlantic, Gulf and Pacific Co. could not supply them with transportation, and that there was at the time no other available way to secure it. (Exhibit B 1.)

"Fifth. That the plaintiff, having come to Manila on or about Christmas day of the same year, interviewed Mr. B. W. Cadwallader, the agent of the defendant company, for the purpose of getting a boat for Basilan in order to take away the lumber there ready for shipment, and, after an inquiry made by him at the office of the Atlantic, Gulf and Pacific Company, it was agreed by the defendants and the said Atlantic, Gulf and Pacific Company, that the lighter Primera, towed by the S. S. Robert K., would be sent there for the transportation of the lumber.

"Sixth. That the lighter Primera, towed by the S. S. Robert K, having arrived, on January 22, 1906, at the point of the eastern shore of Basilan where the cargo of lumber prepared by the plaintiff was to be shipped, it happened that, after the said lighter had been placed in the proper position for loading, and when a portion of the lumber was put on rafts (balsas) in order to be delivered alongside the said lighter Primera, the latter grounded on the beach on account of the breaking of the anchor chain, the said lighter thereby becoming useless for the shipment of the lumber.

"Seventh. That new steps were taken by the plaintiff, together with the defendants, about the beginning of February, 1906, in order to make arrangements with the Atlantic, Gulf and Pacific Company of this city for

the transportation of said lumber from Basilan to Manila, when the logs covered by the second contract were cut and ready at Basilan, and the Atlantic Gulf furnished the lighter Juanita, towed also by the same S. S. Robert K. That the lighter, after having appeared first on March 23 at the place fixed for the shipment of the lumber, without making any attempt at loading, on account of the unsettled condition of the sea, did attempt to effect the shipment during the early part of the following month of April, by anchoring near the place where the logs were placed on rafts, ready for delivery; but, on placing the gang planks necessary for loading, the anchor chain was broken at the moment when operations began, which resulted in the suspension of the shipment, and the return of the lumber to its original place on shore. The lighter Juanita, towed by the S. S. Robert K, left the place, and since that date no action has been taken or efforts made by the defendants for the purpose of taking away the two cargoes of lumber, purchased from the plaintiff, who had already received from the defendants P2,500 on December 29, 1905, and a further P1,000 on February 6, 1906, as an advance payment on the mentioned cargoes, and had bound himself to pay the same defendants interest at the rate of 10 per cent per annum on the above amounts."

From this judgment the defendant appealed and made a number of assignments of error, which are more specifically included within the following:

First. The defendant has never received or accepted the timber which is the object of the contracts.

Second. If the defendant has defaulted in receiving the property, the law has provided remedies and the plaintiff must pursue those remedies or fail.

Third; There has been no default upon the part of the defendant.

Fourth. The plaintiff has never had said timber ready for delivery at ship's side.

Fifth. The conditions at Punta Matanal are such that the plaintiff can not make delivery at ship's side, and the default is therefore on the part of the plaintiff and not on the part of the defendant.

Under the first, above-noted assignment of error the defendant and appellant argues that the contract between the parties was a contract de compraventa under the Civil Code, or an executory contract under the common law, and cites various provisions of the Civil Code as well as of the Commercial Code for the purpose of showing that, under a contract of this kind, an absolute and manual delivery of the property sold is necessary before the contract becomes an executed one upon which an action can be based. It will be remembered that, under the terms of the contract, the logs in question were only to be delivered by the plaintiff "alongside our (defendant's) vessel at Basilan, within three months from the date of this letter" (September 6, 1905). There is nothing in the contract which in any way required the plaintiff to do more than to place said logs alongside a vessel to be sent to the point of delivery by the defendant. To the above contention of the defendant and appellant the plaintiff and appellee contends that the following propositions are clearly established by the testimony:

(a) That the plaintiff cut the logs required by the contract.

(b) That plaintiff transported said logs to the beach.

(c) That plaintiff had said logs measured by the representative of the Forestry Bureau of the Government of the Philippine Islands.

(d) That plaintiff placed said logs in rafts to be floated alongside a vessel to be sent to the point of delivery by the defendant.

(e) That plaintiff did actually place the said logs along-side the vessel known as the Juanita in the month of April, 1906.

(f) That the crew of the Juanita did in fact actually proceed to place said logs on board said vessel, but failed because the anchor chain was not strong enough to sustain a 1 ½-ton skid, which the crew were trying to pull in place.

The plaintiff and appellee insists that he had done all that was required of him by the contract.

The evidence shows that at least on one occasion, if not more, the plaintiff had about eighty men at the point of delivery of said logs, for the purpose of assisting the defendant and appellant in loading said logs.

The evidence shows beyond peradventure of doubt that at the time the said Juanita, the vessel of the defendant, was at Basilan, some of the logs were placed alongside of the vessel, in accordance with the terms of the contract. It is not denied that all of the logs to be furnished by the plaintiff under the terms of the contract were placed in rafts in the water at or near the point of delivery. Certainly the plaintiff can not be required to show that he placed each log alongside the vessel, after he has shown that he had all the logs rafted in the water at the point of delivery and had placed some of them alongside the vessel in accordance with the terms of the contract. He could not be required to place others alongside the vessel until after the first had been loaded. (*Whitcomb vs. Whitney*, 24 Mich., 485.) The fact is not disputed that the plaintiff duly notified the defendant, within the period prescribed in the contract, that the said logs were ready for delivery.

Actual manual delivery of an article sold is not essential to the passing of the title thereto (art. 1450, Civil Code) unless made so by the terms of the contract or by an understanding of the parties. The parties to the contract may agree when and on what conditions the property in the subject of the contract was passed to the prospective owner. (*Andrews vs. Durant*, 11 N. Y., 42.) In the present case the parties agreed that the delivery of the logs should be made alongside a vessel of the defendant.

That was done by the plaintiff. The vessel of the defendant was sent to the point of delivery and the said defendant attempted to load on said vessel the logs delivered along its side by the plaintiff. It is a rule well established that a *lucre* contract for the sale of goods, where nothing remains to be done by the seller before making delivery, transfers the right of property, although the price has not been paid, nor the thing sold actually delivered to the purchaser. (*Olyphant vs. Baker*, 5 Denio, N. Y., 379; art. 1450, Civil Code.)

Suppose, for example, that after the vessel of the defendant had arrived at the point where the logs were delivered along its side, and the logs had actually been delivered at the side, as is claimed by the plaintiff in the present case, the plaintiff had thereafter sold the said logs to third persons. Could the defendant have maintained *replevin* for the same? If the title had not passed, he could not. If it had, he could. If the title had not passed at that moment the plaintiff might have sold said logs to a third person in the very presence of the defendant, even after defendant's vessel had arrived to take the logs away. If the title had not passed, the plaintiff would thus have subjected himself to an action for damages upon his contract upon a failure to perform it. We are of the opinion, however, that, if the plaintiff had sold said logs to a third person after the arrival of the vessel of the defendant, the defendant might have claimed and recovered said logs upon the theory that the same had been delivered. The defendant might have properly said to another purchaser of said logs: "These logs are mine; they have been delivered to me under a contract; everything has been done under said contract which the circumstances will permit of for the passing of the title of the same to me, and whoever buys said logs buys something which has not only been previously bought by me but which has been set apart for me and placed at my disposal by the most unequivocal acts, and I am, therefore, vested with title to the same which I have a right to maintain and enforce." And we believe that the law would have sustained the defendant in this contention. (*Whitcomb vs. Whitney*, 24 Mich., 485; *Hatch vs. Oil Company*, 100 U. S., 124; art. 339, Code of Commerce; *Noyes vs. Marlott*, 156 Fed. Rep., 753.)

The evidence shows that, when the Juanita arrived at the point of delivery, the parties in charge of said boat placed or attempted to place skids on said boat for the purpose of loading the logs. Certainly they believed that the logs had been delivered, or else why would they have actually made preparation for the loading of the same? The logs were fully at the disposal of the defendant, and the latter thereby became liable for the price of the same under the contract. (Art. 339, Code of Commerce; *Noyes vs. Marlott*, 156 Fed. Rep., 753.)

It was held in the case of *Nicholas vs. Morse* (100 Mass., 523) that in an action for goods sold and delivered, if the plaintiff proves delivery at the place agreed and that there remained nothing further for him to do, he need not show actual acceptance by the defendant. The mere fact that the defendant, by reason of the improper equipment of the vessel, was unable to take said logs aboard such vessel, can not relieve the latter from responsibility under the contract. No burden rested upon the plaintiff to furnish proper equipment for the vessel of the defendant with which to put on board said logs. That was the responsibility of the defendant. The responsibility of the plaintiff ceased when he placed the logs alongside the vessel of the defendant.

Under the second above assignment of error the defendant and appellant claims that the plaintiff, in bringing the form of action which was brought in this case, did not pursue the proper remedy afforded him by the law, and cites articles 325, 332, and 339 of the Commercial Code in support of this view. To this contention of the defendant and appellant the plaintiff replies that he is entitled to recover under the contract price by virtue of article 1451 of the Civil Code, insisting that the delivery of the logs in question had actually been made, and cites a letter of the defendant and appellant directed to the plaintiff, dated the 6th day of February, 1906, in which the defendant, after referring to the advancements which he had made, said that "it was further understood * * * that the logs should be held subject to our (defendant's) order." This letter of the defendant would seem to clearly indicate that the latter, at least, believed that the title to said logs had passed.

With reference to the third and fourth above-noted assignments of error, it would seem that we have said all that is necessary upon that question under the first above-noted assignment of error.

With reference to the fifth above-noted assignment of error, there is considerable conflict among the witnesses with reference to the conditions at the point where the logs were to be delivered. The witnesses for the defendant state that it was impossible to load logs at said point, while witnesses for the plaintiff assert that during several months of the year, at least, it was perfectly possible and feasible to load logs on boats such as were furnished by the defendant at the place designated for the delivery of said logs. It will be noted, from reading the testimony of the witnesses for the defendant, that many of them had no experience whatever concerning the general conditions of the sea in and about the point where the said logs were to be delivered, except on the particular occasions when they were there with boats of the defendant to receive the delivery of said logs; whereas, upon the contrary, the plaintiff presented some four or five witnesses, the experience of whom had covered several years, and who all testified that during several months of the year, especially during the months of December, January, and February, it was perfectly feasible and practicable by means of proper apparatus, to take on board cargo at the point where the logs were to be delivered. And it must not be forgotten that, under the terms of the contract, the defendant undertook to receive and put on board its vessel the logs in question at a time beyond the time provided for by the terms of the contract. Our conclusion is that a large preponderance of the evidence shows that it was perfectly feasible for the defendant, with proper apparatus, to take on board the logs in question at the point of delivery. We presume that at almost every point upon the coast of the Philippine Archipelago there are days when conditions are such as to prevent the loading of cargo upon vessels. This is true even in the Bay of Manila. However, it would not be just to conclude that, because on certain days it is impossible to load and unload ships in the Bay of Manila, one who had represented that ships might be loaded and unloaded in said bay had made misrepresentations, because of the fact that on a particular day ships could not be loaded or unloaded by reason of

the conditions of the sea resulting from wind or storm.

We are of the opinion, and so hold, under all of the facts, that the plaintiff is entitled to a confirmation of the judgment of the lower court. It is, therefore, hereby ordered that a judgment be entered in favor of the plaintiff and against the defendant for the sum of P10,033.39, with interest at the rate of 6 per cent per annum from the 3d day of April, 1906, and costs. So ordered.

Arellano, C. J., Torres, Carson, Willard, and Tracey, JJ., concur.

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