Privy Council Appeal No. 128 of 1919.

George A. Moore and Company (Incorporated) - - - *Appellants*

v.

Henry Marks and Company, Limited - - - - *Respondents*

FROM

THE SUPREME COURT OF FIJI.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 26TH FEBRUARY, 1920.

Present at the Hearing:

VISCOUNT HALDANE.
LORD MOULTON.
LORD SUMNER.
LORD PARMOOR.

[*Delivered by* VISCOUNT HALDANE.]

Their Lordships think it unnecessary to take time to make their report in this case.

The appeal is brought from the Supreme Court of Fiji, where the Chief Justice gave judgment for the respondents with costs in an action brought against them for damages for breach of a contract for the sale of copra. The appellants are a company incorporated in the United States and they carry on business at San Francisco. The appellants made an offer to the respondents and in the result a contract was supposed to have been concluded by cablegram, and it was only subsequently that difficulties arose as to whether the parties were *ad idem* about the interpretation of the contract. It is not necessary to go into the character of the dispute, because for another reason their Lordships find themselves unable to take any course except to dismiss this appeal. Various defences were put in in the action, one of which was based on a Proclamation and another was as to damages. It is not necessary to go into any of those questions because they were not reached in the Court below and, in their Lordships' opinion, they cannot be reached here. The action was launched as an

action by the appellants for damages for breach of contract, and their claim was that they had bought from the defendants, the respondents, about 600 tons of sun-dried copra to be shipped to San Francisco on certain terms at the price of $87 per ton. That was the contract they set up in the first instance. Then, after an interval, their pleader amended this allegation in their statement of claim and made it a contract at $86 per ton. The learned Judge who tried the case said there was some reason for saying there might have been a contract at $86·75 per ton, but he was unable to say there was one at either $87 or $86, and the plaintiffs had not proved their case. If the case had been put on the footing of $86·75 it is not clear, and their Lordships cannot tell, what course the defendants, the respondents, might have taken in the Court below. Their Lordships are now asked to try a case which is put to-day on the footing that $86·75 will do. That is a new case and it is really a new contract that is being set up. Their Lordships feel that, while they are always disposed, if they can, to put aside technicalities, in order to try a substantial issue, it is essential that the real and substantial issue should not only be raised but that the other side should have an opportunity of taking the course they may be advised in dealing with it. That has not been done in this case, so their Lordships feel that no other course is open to them but to say that they agree with the Chief Justice in the Court below, and that they must humbly advise His Majesty that the appeal should be dismissed with costs.

In the Privy Council.

GEORGE A. MOORE AND COMPANY
(INCORPORATED)

v.

HENRY MARKS AND COMPANY, LIMITED.

DELIVERED BY VISCOUNT HALDANE.

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1920