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CROOS *v.* DE SOYSA.

D. C., Colombo, 15,873.

Sale of arrack farm—Agreement to sell—Ordinance No. 11 of 1896, s. 11—Movables—Tangible or corporeal things—Goods—Interpretation.

An agreement between A and B for the sale of the right to sell arrack within a defined district and for a given period, which A had obtained from the Government as its " renter, " is good and valid although not in writing.

It is not a contract for the sale of " goods " within the meaning of section 4 of " The Sale of Goods Ordinance, 1896. "

The word " movables " as used in the definition for " goods " does not include anything more than corporeal movables, and the term " goods " in section 59 of that Ordinance means all tangible movable property, except money and in certain cases crops and things attached to the soil.

THE defendant, who had bought from the Government the rent of the arrack farm of the town and district of Negombo for 1902 and 1903, agreed verbally to sell to the plaintiff the said rent. The plaintiff complained of a breach of this agreement by the defendant and claimed damages.

The defendant took the objection that the agreement was not enforceable by action, inasmuch as it was a contract for the sale of " goods," and there was no note or memorandum of it in writing as required by sub-section 1 of section 4 of Ordinance No. 11 of 1896.

The District Judge over-ruled this objection.

The defendant appealed.

Dornhorst, K.C., for defendant, appellant.—The subject-matter of the agreement not being immovable properly must necessarily fall into the class " movable property, " and the agreement therefore required to be in writing under the Sale of Goods Ordinance.

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A chose in action was expressly excluded from what was comprehended in the term " goods " used in the English Sale of Goods Act, and the District Judge was therefore wrong in applying to the present case the law as to choses in action under the English Act. The present case was governed by Ordinance No. 11 of 1896, and in it " goods " were said to include all " movables. " Sub-section 3 of section 21 of Ordinance No. 7 of 1840 was repealed by Ordinance No. 11 of 1896, and the Legislature intended to make provision by the new Ordinance in respect of what was included in the term "movable property" used in the old Ordinance.

Walter Pereira (with him *Schneider*), for plaintiff, respondent.— The English Law does not govern the case. Only certain rules of that law were, by section 58 of the Ordinance, made to apply to contracts for the sale of goods, but the present question had to be looked at in the light of the Common Law of the land. Things, under the Roman-Dutch Law, were corporeal or incorporeal (*Grotius' Introduction, 2, 1, 10*), and only corporeal things were either movable or immovable. Rights of action were incorporeal things which did not admit of division into the movable and immovable. Voet also divides things into corporeal and incorporeal (*Com. ad Pand.* 1, 8, 11), and says that the former are things which by their nature are capable of being handled; the latter which cannot be handled and consist in a right (jus), such as servitudes, inheritances, debts, &c. This is the primary division, although later on he illustrates how all things may be divided into movables and immovables, and inquires under which class each incorporeal thing is to be accounted. Looking at the provisions of the Sale of Goods Ordinance as to delivery of part of the goods sold, as to the manufacture by the seller of goods to be sold, as to the perishing of goods before sale, as to sales by sample and description, as to the risk in respect of goods sold, &c., it is clear that the Ordinance was intended to apply to tangible or corporeal things only.

Dornhorst, K.C., in reply.

Cur. adv. vult.

12th May, 1903. LAYARD, C.J.—

In this case the plaintiff sued the defendant for the recovery of damages alleged to have been suffered by the plaintiff by reason of the breach on the part of the defendant of an alleged promise by the defendant to sell to the plaintiff the rent of the arrack farm of the town and district of Negombo for the years 1902 and 1903. At the trial on 8th day of December, 1902, it was admitted that the alleged promise was not in writing, and the only issue that was

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decided was, whether the agreement not being in writing and signed by the defendant was enforceable by action, the other issues in the case being reserved.

The District Judge of Colombo held that the alleged agreement was enforceable by action, although not in writing and not signed by defendant. The defendant has appealed against that judgment, and it is argued by the appellant's counsel that the provisions of section 4 of the Ordinance No. 11 of 1896 apply to this contract, and as no note or memorandum of it has been made in writing and signed by the defendant, it is not enforceable by action in view of the provisions of sub-section 1 of that section.

The Ordinance No. 11 of 1896 has been adapted from " The Sale of Goods Act, 1893." It is admitted that the provisions of that Act would not apply to such a contract as the present. It is, however argued that the Legislature in defining goods as including all movables except money extended the meaning of goods beyond corporeal movables, and that goods as defined by our Ordinance include incorporeal movables as well. Our law appears to divide things into two classes, corporeal or incorporeal; the former are divided into movables and immovables. Movables, again, are subdivided into things which move themselves and things which require to be moved. Incorporeal things are such as are not visible to the sense. The present action appears to me to be concerning an incorporeal thing. Van Leeuwen (*Koetze's Translation, vol. I., p. 145*) lays down: " But in order to decide whether debts, actions, and credits are to be deemed movable or immovable property, this distinction must be drawn, viz., that actions and the right which one has over immovables are themselves also to be considered as immovable, and all others are to be deemed movable property;" and it is argued that the Legislature in using the word " movables " intended to include therein not only what are actually movables, but what were deemed to be " movable property " under the Roman-Dutch Law. Bonser, C.J., in *Babapulle v. Rajaratnam* (*5 N. L. R. 1*), held that the right to recover a sum of money was movable property for the purpose of section 19 of Ordinance No. 15 of 1876. That decision does not appear to me to be in point, as the term " movable property " has been expressly defined by that Ordinance to " mean property of every description except immovable property." The right to recover a sum of money not being immovable property, is covered by the definition of movable property given in that Ordinance. We have also been referred in the course of argument to the judgment of this Court in *Dawson v. Van Geyzel* (*3 C.L.R.,p.35*), in which Justices Lawrie and Withers both express their opinion that " movable property " in section 2

of the Ordinance No. 8 of 1871 means only corporeal movables; and it is argued that that opinion was arrived at by the Judges, because under the provisions of section 7 of that Ordinance all movable property other than corporeal movables are expressly excluded from the operation of that Ordinance. That section, however, whilst expressly excluding " choses in action," does not mention or refer to all the other kinds of incorporeal movable property. The Judges, therefore, in expressing that opinion could not merely have relied on the provisions of that section, but must have looked at the general scope of the Ordinance.

The question to be decided by us is whether the Legislature in defining " goods " as including " all movables except money " intended to use the word " movables " as extending beyond the ordinary significance of the words, viz., things which move themselves and things which require to be moved, to such incorporeal things which, though not really movables, are deemed under the Roman-Dutch Law to be movable property.

It is not surprising on reading the Ordinance No. 11 of 1896, which has been copied from the English Act dealing only with corporeal movables, to find that it is inapplicable in almost every respect to incorporeal movables. I need only mention some of the provisions which seem to me inapplicable, viz., all that refer to " goods to be manufactured," the sale of goods in " market overt," the " seller's lien, " " stoppage in transaction, " " sales by sample, " " market price," and " breach of warranty."

It seems quite obvious to me that the word " movables," as used in the definition for goods in the Ordinance No. 11 of 1896, does not include anything more than corporeal movables, and that it was not the intention of the Legislature in using the word " movables " to include therein any incorporeal things which are not strictly movables, though they are " deemed " for certain purposes in our law to be movable property. I would therefore affirm the judgment of the District Judge, and remit the case to the District Court so that the trial may be proceeded with. The appellant must pay the costs of the appeal.

WENDT, J.—

The question in this case is whether the contract for breach of which the plaintiff sues is one which the law requires to be in writing before it can be enforced. Admittedly the contract in question was not in writing. The District Judge, having heard the question argued as a preliminary issue, has held in favour of the plaintiff, and the defendant has appealed.

The contract was for the sale by defendant to plaintiff of what is called an " arrack rent:" that is to say, a monopoly granted by

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the Government to the " renter " of the right to sell arrack to the public within a defined district and during a defined period. Defendant says the contract is not enforceable by action, because it is a contract for the sale of goods within the meaning of section 4 of " The Sale of Goods Ordinance, 1896," and there was no part acceptance, or part payment, or note or memorandum in writing. The question then is, whether the subject of the contract was " goods " within the meaning of the Ordinance.

Section 59 of the Ordinance enacts that in the Ordinance, unless the context or subject-matter otherwise requires, " goods " include all movables except moneys, and also include growing crops and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale. The effect of a definition in these terms is that the word defined is to have its ordinary meaning, and in addition to denote the things which the definition says it is to " include." (See the case of *Ludovici v. Nicholas, 4 N. L. R. 12; 1 Browne, 49.*) What then is the ordinary meaning of the term " goods "? It was apparently not intended to be a mere translation of the Latin term *bona*, which in our law includes land, for the intention to be gathered from the second branch of the definition is to exclude all interests in land. Goods, I think, in its ordinary signification, means tangible movable property. I have not been able to find in any English case a definition of the term apart from the definition contained in a statute. In the Statute of Frauds, section 17, the term " goods, wares, and merchandise " is said by Lord Blackburn, in summing up the effect of the cases, to comprehend all tangible, movable property (*Blackburn on Sale, pp. 6, 9*). In *Humble v. Mitchell* (*11 A and E, p. 205*) it was sought to bring shares in a joint stock company within the 17th section of the Statute of Frauds, upon the authority of several cases which had established that they came within the description in the Bankruptcy Act of " goods and chattels " of which a bankrupt may be the reputed owner so as to vest them in the assignees. But the Court of Queen's Bench held that the language and intention of the two Acts were distinguishable, and that the shares were mere " choses in action," incapable of delivery, and not within the scope of the 17th section. Now, section 4 of the Sale of Goods Ordinance, like section 17 of the Statute of Frauds, makes part delivery one of the alternative conditions precedent to the validity of the contract. The right which is the subject of the present contract is equally incapable of delivery with a share in a joint stock company, and I think the *ratio decidendi* of *Humble v. Mitchell* is therefore applicable. (It will be observed that in the English Sale of Goods Act of 1893, on which our Ordinance is based

" goods " include all *chattels personal* other than things in action and money. A share in a company would, I suppose, have fallen within this definition but for the exclusion of " things in action."

Next, what is the meaning of " movables "? In the Roman Law things were divided into corporeal and incorporeal the former being things which in their own nature were tangible, *e.g.*, land, slaves, clothing, &c., and things incorporeal being such as are intangible, *e.g.*, rights, such as inheritance, usufruct, and obligations. Grotius (*Maasdorp's Translation, p. 61*) shows that this division was accepted by the Roman-Dutch Law, and that corporeal things were subdivided into movable and immovable. Voet (*1, 8, 1—17*) bears this out, although he adds (*n. 18*) that the greatest portion of the Municipal Laws is content with the rough division into movables and immovables. Dealing with this latter division, Grotius, in one of his opinions (*De Bruyn, pp. 293, 296*), says: " Obligations and other personal claims are not placed in the same category with movables, but constitute a separate third class of property.....Notwithstanding the opinion of some that *actiones personales bonis mobilibus accenseri*, most lawyers hold that these *constitute tertia quædam species.*"

I therefore understand the term " movables " also to import tangible movable things. The exception of " moneys " (not money as in the English Act) seems to confirm this view, as though distinct and separate sums of money were contemplated, not money in the abstract. The nature of the provisions contained throughout the Ordinance, as pointed out by my lord, favour the construction which would limit its application to corporeal movables.

The case of *Babapulle v. Raja Ratnam* (*5 N. L. R. 1*) was decided upon the special definition in the Ordinance No. 15 of 1876 of movable property, which was very different from that with which we are concerned. Almost the same may be said of the case of *Dawson v. Van Geyzel* (*3 C.L.R. 35*), for although the term " movable property " was not defined in the Ordinance No. 8 of 1871, yet the decision proceeded upon the Court's view of the language and scope of that Ordinance. So far as it goes, however, that decision, ruling that the Ordinance which dealt with sales, among other dispositions of movable property, applied exclusively to corporeal movables, is in favour of the respondent.

In the case of *Markar v. Hassen* (*2 N. L. R. 218*) this Court had to interpret the term " goods " in section 9 of " The Prescription Ordinance, 1871," which provided for actions for " goods sold and delivered." Bonser, C.J., considered it to mean " movable property " the equivalent of goods, wares, and merchandise in the Statute of Frauds; and Lawrie, J., held it to mean all movables except money

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bonds, &c., sold and capable of physical delivery and actually delivered.

In the result, I am of opinion that the term "goods" in the Ordinance means all tangible movable property except moneys, and is also specially made to include in certain cases growing crops and things attached to the soil.

It follows that the provisions of section 4 of the Ordinance do not apply to the contract upon which plaintiff declares, and that the District Judge was right in holding the plaintiff entitled to proceed with his action.

The appeal should be dismissed, and with costs.