1962 *Present :* **Sansoni, J., and Sinnetamby, J.**

J. E. PERERA and another, Appellants, *and* M. M. ZAINUDEEN, Respondent

S. C. 355—D. C. Colombo, 41,477/M.

Sale of sweep tickets—Term of prescription for recovery of value—Meaning of expressions " chose in action " and " goods "—Sale of Goods Ordinance, s. 59—Prescription Ordinance, ss. 8, 10.

The plaintiffs, who were the trustees of the Galle Gymkhana Club, sold to the defendant, a member of the club, 20,000 sweep tickets priced at fifty cents each and sought, in the present action, to recover the value of the tickets. The defendant pleaded prescription.

Held, that the sale was the sale of a chose in action and that section 10, and not section 8, of the Prescription Ordinance was applicable. Section 8 applied only to goods which are capable of being physically delivered and not to the sale of incorporeal things such as a " chose in action ". In the latter case, section 10 applies and the period of prescription would be three years.

APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, Q.C., with *P. Navaratnarajah* and *S. Sharvananda*, for the plaintiffs-appellants.

C. Ranganathan, with *E. A. G. de Silva*, for the defendant-respondent.

Cur. adv. vult.

March 12, 1962. SINNETAMBY, J.—

The plaintiffs who are the trustees of the Galle Gymkhana Club sold to the defendant, a member of the club, 20,000 sweep tickets priced at 50 cents each on 25th February, 1955, which is the day on which the tickets were delivered to him. The plaintiffs in this action sought to recover a sum of Rs. 11,250 as the value of the said tickets less discount. The defendant pleaded prescription and the learned trial judge held with him. The present appeal was preferred against this decision.

The defendant's contention is that the action is an action for goods sold and delivered within the meaning of section 8 of the Prescription Ordinance. The appellant on the other hand contends that it was not a case of goods sold and delivered, but that the action is based on a cause of action not provided for expressly in the Prescription Ordinance and that Section 10 which prescribes a term of three years is applicable. The learned trial judge came to the conclusion that the sale in this case was the sale of a chose in action and that Section 8 applied inasmuch as the word "goods" in the Sale of Goods Ordinance includes "choses in action". He based his finding on a consideration of the definition of the term "goods" in Section 59 of the Sale of Goods Ordinance after comparing it with the definitions in the English Act and in the Indian Contract Act. In the English Act, choses in action are expressly excluded. The Indian Act, while excluding choses in action, includes stocks and shares. The Ceylon Act on the other hand defines the word "Goods" in the following terms :—

> "Goods include all movables except money. The term includes 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".

I am in agreement with the conclusion reached by the learned trial judge that the sale of the sweep tickets in this case was the sale of a chose in action, namely, the sale of a right on the part of the buyer to receive a prize from the seller on the happening of a certain event, the sweep ticket merely providing evidence of that contract of sale. The condition on which the buyer was entitled to receive a prize was contingent on one of his tickets drawing the prize in a draw that was to be subsequently held. The learned trial judge, however, thereafter, went on to hold that Section 8 of the Prescription Ordinance was applicable for the reason that the contract in this case was a contract for the sale of

goods. It must, however, be remembered that the Prescription Ordinance came into existence long before the Sale of Goods Ordinance and it would not be quite appropriate to adopt the definition of the word " goods " in the Sale of Goods Ordinance in order to construe the meaning of the term " goods sold and delivered " in the Prescription Ordinance.

The learned Counsel for the respondent further contended that in this case there was no sale of a chose in action. He submitted that for a chose in action to come into existence there should be three parties. First there should be the two principal persons, one of whom has a right of action against the other, and it is only on the assignment of that right that a chose in action comes into existence. He also submitted that there can be no sale of something which is not in existence and in the ownership of the seller at the time of the sale. With these propositions, however, I do not agree.

A chose in action is distinguishable from a chose in possession or a thing in possession : the expression " chose in action " means " a thing recoverable by action " as contrasted with a chose in possession namely, a thing of which a person has not only ownership but also actual physical possession. One may, therefore, have a right to recover by action something which at the time has no physical existence. In such a case, there exists a chose in action although there are only two parties to it. In *Jones v. Carter* [1] the plaintiff, the holder of a ticket in the Derby lottery, claimed as the winner but he was not the person to whom the ticket was issued by the defendant. The court held that there was a chose in action as between the defendant and the original purchaser but dismissed the plaintiff's action on the ground that the assignment to the plaintiff was not a valid assignment. At the time the case was decided, counsel informed us, the law had not recognised the right of an assignee to sue in his own name. The court, nevertheless, held that the purchaser of the ticket was the owner of a chose in action which he purported to assign. In *Knight v. Barber* [2] an order for 50 shares in a company was reduced to writing. The question that arose for decision was whether in the absence of correct stamping of the written document, oral evidence could be given of the parol agreement. The Stamp Act exempted from stamp duty "any agreement made for or relating to the sale of any goods, wares or merchandise." Counsel did not contend that the sale of shares which was admittedly the sale of a chose in action was the sale of " goods " within the meaning of the Stamp Act, but only contended that it was the sale of " merchandise " and, therefore, not liable to stamp duty. The court held that it was not a sale of merchandise and that it was no more than an agreement to transfer an interest in the capital of the company and that it did not come within the description of " goods, wares or merchandise."

In the present case, what was it that the member bought from the club ? Surely not pieces of paper on which certain words were printed ; for, if so,

[1] *115 English Repts. Q. B. 825.*

[2] *153 Eng. Repts. p. 1101.*

on delivery of the pieces of printed paper the contract would have been completed and the defendant would have had no further claim against the club. If this contention of the defendant that the goods consisted merely of pieces of paper is correct, there was a sale completed by delivery and the buyer would not be entitled to recover anything more from the seller even if one of his tickets drew a prize. What was sold in this case was the right of the holder of any one of those tickets to receive a prize on the happening of a certain event. That is the sense in which all parties understood the transaction. It is to be noted that the expression used in the Prescription Ordinance prescribes one year as the period of prescription in the case of " goods sold *and delivered* " and not merely " goods sold ". For section 8 to apply, there must be a delivery of goods which are capable of physical delivery. What kind of goods are capable of such delivery ? Clearly, the expression is intended to cover only goods in existence and material in nature, that is to say, goods which are " corporeal " and not goods which are " incorporeal ". Actual delivery is not possible of a chose in action and the term " goods " used in Section 8 of the Prescription Ordinance must be limited to a thing in the actual physical possession of the seller.

In my view, therefore, section 8 of the Prescription Ordinance only applies to " goods which are capable of being physically delivered " and not to the sale of incorporeal things such as a chose in action. In the latter case, Section 10 applies and the period of prescription would be three years.

The appeal is accordingly allowed and judgment entered for the plaintiff as prayed for with costs both here and in the court below.

SANSONI, J.—I agree.

Appeal allowed.