1908.
October 13.

Present: Mr. Justice Wendt and Mr. Justice Grenier.

DARLEY, BUTLER & CO. *v.* SILVA.

D. C., Colombo, 25,854.

Contract in writing—Oral evidence to vary written contract—Sale of goods—"Future goods"—Registration—Ordinance No. 8 of 1871—Evidence Ordinance, s. 92.

The defendant entered into the following contract with the plaintiffs:—"I have this day sold to Messrs. Darley, Butler & Co. 10 tons citronella oil, as per standard Schinel's test, at the rate of 76 cents per lb. of 16 oz., in galvanized drums not less than 7 cwt. each. Delivery at the wharf or at your stores ready for shipment, November, 1904, to April, 1905."

Held, that the defendant could not be allowed to prove that the plaintiffs undertook to supply the drums, as such proof would be at variance with the terms of the written contract.

Held, also, that the said contract need not be registered under the provisions of Ordinance No. 8 of 1871.

WENDT J.—The movable property contemplated by Ordinance No. 8 of 1871 must be definite and certain, so that it should be capable of being described and identified in a manner that would render the registration effectual. If the property dealt with by the instrument is "future goods" within the meaning of "The Sale of Goods Ordinance, 1896," then the instrument would not be a "bill of sale" within the purview of Ordinance No. 8 of 1871.

APPEAL by the defendant from an order of the District Judge refusing to frame certain issues. The facts material to the report sufficiently appear in the judgments.

Van Langenberg, for the defendant, appellant.

Bawa, for the plaintiffs, respondents.

Cur. adv. vult.

October 13, 1908. WENDT J.—

The facts have been so fully set out in my brother Grenier's judgment, which I have had the advantage of seeing, that it is unnecessary for me to recapitulate them. I will deal first with the objection to the validity of the contract, on the ground that it was not registered as required by Ordinance No. 8 of 1871. It is, I think, perfectly clear, from the terms of that Ordinance, that the movable property contemplated by it must be definite and certain, so that it should be capable of being described and identified in a manner that would render the registration effectual, which is the object of the whole Ordinance. If, therefore, the property dealt with by the

instrument in question is " future goods " within the meaning of " The Sale of Goods Ordinance, 1896, " that is to say, goods to be manufactured or acquired by the seller after the making of the contract, then the instrument would not be a " bill of sale " within the purview of the Ordinance of 1871. It is, I think, clear that the parties in making the contract now before us did not contemplate any specific *corpus* of oil, nor even any oil then *in esse*, but (if I may use the expression) oil at large. It was not even a sale by sample, but the quality was defined by reference to a test known to the trade. Defendant would have complied with his contract by proceeding to manufacture the oil and by delivering the specified quantity responding to the specified test. I hold that the contract sued upon was not obnoxious to the Ordinance No. 8 of 1871. I must not, however, be understood as assenting to the view which I understand the learned District Judge to have expressed, viz., that the Ordinance applies only to transactions which, whatever their form, are in effect no more than by hypothecations, and that therefore a *bona fide* out and out sale of movables need not be registered. On that point I express no opinion.

The other point argued before us, as to the admissibility of the suggested 4th and 5th issues, has, I think, to be decided by section 92 of the Evidence Ordinance. The state of facts which, as defendant's counsel informed us, these issues were intended to set up was this. Plaintiffs wanted to purchase oil ready for shipment, packed in drums of a particular kind. Defendant could supply the oil, but had not the drums, and did not see the way to getting them. Whereupon it was agreed that plaintiffs should procure the necessary drums and sell them to defendant, and defendant agreed that if they did so, he would fill them with 10 tons of citronella oil of the specified quality, and sell both oil and drums to plaintiffs at the price of 76 cents per lb. of the oil. This statement, apart from its variance from the written instrument, which I shall presently deal with, suggests that the sale and delivery of the drums was a condition precedent to defendant's obligation. Issue 4 is not apparently worded to raise that question, because the agreement it mentions might well have been by a distinct and separate contract, the breach of which, while it entitled defendants to damages, such damages conceivably including any damages payable by defendant to plaintiffs for non-performance of his contract, would afford no defence to the action. Paragraph 4 of the answer, too, is not definite upon this point; it speaks of two contracts. But let us take the statement of counsel.

Clearly the matter suggested in that statement is at least an " addition to " the terms of the written document, and must therefore be excluded by the principal enactment of section 92 of the Evidence Ordinance. But defendant seeks to introduce it under proviso 2 or proviso 3. Take proviso 2 first. In applying it we

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must have regard to the degree of formality of the document, which may vary between (say) a card with a few disconnected words written upon it and a regular notarial instrument [illustration (*h*)]. Here a notarial instrument was not required by law. The contract is, however, on the face of it complete, defining every point which one would expect the record of a transaction of the kind to provide for, and it is attested. It is not a mere hurried memorandum pencilled on a visiting card. *Primâ facie*, therefore, the Court would be disposed to regard an instrument prepared with so much care and deliberation as embodying the whole of the engagement between the parties and to shut out the evidence of any separate oral agreement. The suggested oral agreement, moreover, deals with a matter on which the document in question cannot be said to be " silent, " and in my opinion it contradicts the document. In the contract of sale embodied in the writing the drums are regarded as belonging to the vendor, and he is to sell them to the plaintiffs, while, according to the terms which are stated to represent the true and full contract between the parties, the drums are regarded as the property of the plaintiffs, which they are, in the first instance, to sell and deliver to defendant. The two contracts are inconsistent with each other, and to let in defendant's evidence would therefore be to contradict the written document signed by him.

The finding that the alleged term which defendant seeks to add to the written contract is inconsistent with it really disposes of the attempt to apply proviso 3, because the alleged condition precendent must be capable of standing side by side with the writing. In truth what is set up here is not such a " contingency " as illustration (*j*) to section 92 indicates, but a different agreement as to the subject of sale from that embodied in the writing.

For these reasons I think the appeal should be dismissed with costs.

GRENIER A.J.—

This is an appeal from an order made by the District Judge refusing to frame two issues of law suggested by the defendant's counsel in the following terms:—

(*a*) Did the plaintiffs agree to supply the defendant with galvanized drums to enable him to fulfil his contract?

(*b*) If so, can plaintiffs maintain this action?

The District Judge decided two other issues in favour of the plaintiffs, the first one being whether section 10 of Ordinance No. 22 of 1871 barred the action, and the other being whether the document sued on not having been registered under Ordinance No. 8 of 1871 any action could be maintained on it. Counsel for the appellant admitted that he was unable to support the appeal on the point of prescription, and we have therefore to deal only with issues (*a*)

and (*b*), and with the question as to the effect of non-registration of the document under Ordinance No. 8 of 1871.

The action was founded upon a contract dated October 21, 1904, by which the plaintiffs alleged the defendant agreed to sell to the plaintiffs 10 tons of citronella oil according to a certain standard, in galvanized iron drums not less than 7 cwt. each. The plaintiffs' cause of action was that the defendant wrongfully failed and neglected to deliver any oil in terms of the contract to plaintiffs' damage of Rs. 9,791.25. The defendant answered admitting the contract, but he averred that at the time that the contract was entered into the plaintiffs agreed to sell and deliver to the defendant galvanized iron drums of the size mentioned in the contract, to enable the defendant to fulfil the same. The defendant further averred that the plaintiffs failed to deliver the drums to the defendant, that the defendant was consequently unable to deliver oil in terms of his contract, and that subsequently the plaintiffs agreed to and actually did cancel the contract pleaded in the plaint, and the defendant on his part cancelled the contract for the sale and delivery to him by the plaintiffs of galvanized drums.

Primâ facie these averments in the answer introduce an element into the contract which the terms of it do not permit of. What the defendant says in effect is that the plaintiffs at the time the contract was entered into entered into another distinct and independent contract with him, whereby the plaintiffs were to supply the defendant with the means of fulfilling the contract pleaded in the plaint. The defendant says that because the plaintiffs did not supply him with a certain quantity of drums he could not fulfil the contract with them, but, singularly enough, he asks for no damages for the breach of the contract he alleges in his answer. He would rather suggest that he was excused from fulfilling the contract pleaded in the plaint by reason of the plaintiffs not fulfilling the contract pleaded in the answer.

Now let us see whether there is anything in the written instrument itself which would justify the defendant in his endeavour to introduce into it, under the provisions of section 92 of the Evidence Act, what he seeks to import into it. I may here refer to the words of section 92, which says that " where the terms of any such contract, grant, or other disposition of property required by law to be reduced to the form of a document have been proved, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instruments or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms." There are several provisos to this section, but, as stated by Ameer Ali in his work on the *Law of Evidence* at page 725, quoting from *Goodeve's Evidence, p. 365:* " In the application of the rule it is necessary to bear in mind rather the principle in which it originated than its formal character, and this principle is

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simply to make the instruments the record of the transaction conclusive of its obligations. Accordingly, the rule does not exclude contradictory evidence of mere formal matters, such as dates, recitals, and so forth, not being of the essence of the transaction; since, while presumable not to have been stated with formal precision, their correction would not trench on the obligatory portion of the instrument."

Having this principle in mind, let us now examine the instrument itself upon which this action is founded, to see what the parties themselves intended it to mean. The instrument is in the following terms:—"I have this day sold to Messrs. Darley, Butler & Co. 10 tons citronella oil, as per standard Schinel's test, at the rate of 76 cents per lb. of 16 oz., in galvanized drums not less than 7 cwt. each. Delivery at the wharf, or at your stores ready for shipment, November, 1904, to April, 1905." The words are very plain and can have only one meaning, and that is, that the defendant contracted to supply the plaintiffs with certain quantities of citronella oil in galvanized drums. There is nothing from which it may even be gathered or inferred that the drums were to be supplied by the plaintiffs. If that was a part of the contract, nothing would have been easier than to insert appropriate words to that effect, and I take it that both parties entered into the contract upon the distinct understanding that the defendant was to supply the oil in galvanized drums to be procured by himself. What the defendant is now seeking to do is to vary and contradict the terms of this written contract by desiring to lead evidence of an oral agreement that the drums were to be supplied by the plaintiffs. Such an oral agreement would, in my opinion, be entirely subversive of the original contract, and render it practically useless to the plaintiffs. I think, therefore, that the District Judge was right in refusing to frame issue (*a*).

As regards the question of non-registration, I entirely agree with the view taken by the District Judge. It is clear that there was no out and out sale of the oil in question, the oil then being in existence, but the document sued upon was intended to serve simply as evidence of the contract or agreement to deliver oil of a certain quality at a certain time at some future date. The concluding words of the document are sufficiently indicative of this. The words are, "Delivery at the wharf or at your stores ready for shipment. November, 1904, to April, 1905."

I would dismiss the appeal with costs.

Appeal dismissed.