PEYCKE & CO. v. ESTATE BAUMANN.

1905. *March* 14, 15. INNES, C.J., and WESSELS and CURLEWIS, J.J.

Prescription.—Placaat of Charles V.—Wholesale and retail purchases.—Appropriation of payment.

In deciding whether a claim for goods sold and delivered is prescribed under the Placaat of Charles V, the Court will inquire whether the articles were of a nature to be used up or consumed by use, and whether the sale was a retail one.

Where the appellants claimed an amount for goods sold and delivered to the proprietor of a brewery, and it appeared that the goods consisted of articles some of which would be consumed by use and others not, but where the sales were of such magnitude that they could not be called sales by retail, *Held*, on appeal, that the claim was not prescribed though more than two years had elapsed since the date of the transactions.

Appeal from the Resident Magistrate of Potchefstroom.

Baumann during his lifetime was engaged in a large brewing business in Potchefstroom. The appellants, who are large wholesale merchants in Johannesburg, opened an account and transacted business with him in the usual way during the years 1898–99. Baumann made purchases from time to time, and on a fairly large scale, of the class of goods required in a brewery. The detailed account put in included such items as corks, bristles, wire, hops, ice machines, beer pumps, capsuling machines and the like. Peycke & Co. now sued the estate of Baumann for payment of balance of the account with interest to date. In the lower court the defendant pleaded prescription under the Placaat of Charles V, which lays down that the recovery of the purchase-price of articles sold for consumption is barred by prescription after the lapse of two years from the date of purchase. The magistrate upheld this defence and granted absolution. Against this decision the plaintiffs appealed.

de Wet, for the appellants: The articles now in question are

not goods for consumption, and were not sold as such. Consumption in this connection means for the purchaser's own use; these were bought for manufacturing use in a large brewing business, and were consequently resold to the actual consumer. Throughout the currency of the account the transactions between the parties were of a wholesale nature. On the question of the appropriation of payment by the *legum definitio*, there is no authority to show whether payment must first be ascribed to debts which can be prescribed or to those which cannot be so absolved. But I contend that the benefit of prescription does not arise in this case, because the articles sold were not for consumption and the sales were not of a retail nature. See *Spiller* v. *Mostert* ([1904] T.S. 634); *Little* v. *Rothman* (2 Off. Rep. 197); *Loteryman & Co.* v. *Cowie* ([1904] T.S. 599).

Gregorowski, for the respondent: The articles purchased by Baumann were capable of consumption, that is, they were liable to deterioration and destruction by use, and are therefore entitled to the benefit of prescription under the Placaat. Whether the transactions were of a wholesale or retail nature, it is impossible for us on the evidence to decide. There can be no conclusive presumption on either side, and I submit, therefore, that the debtor is entitled to the benefit of the doubt. All the cases quoted by my learned friend were decided upon the particular facts of each case, and here I contend the facts are in my favour.

Cur. adv. vult.

Postea (March 15):—

INNES, C.J.: In this case the appellants sued the respondent for the value of goods sold and delivered and for interest. Various defences were raised, amongst others the defence that the claim was prescribed. The magistrate upheld that contention and gave absolution from the instance, and the Court has now to decide whether he was right.

The goods were supplied during the years 1898–99, and the only two points which were argued before the Court were: (1) Was this claim prescribed by the Placaat of Charles V in respect

of all or any of the items which made up the account; and (2) if it was prescribed in regard to some of the items only, what would be the plaintiffs' position in view of the particulars of his current account?

It has been several times decided by the late High Court, and more than once decided by this Court, that the Placaat of Charles V is in force in this country; the question is whether it affects any of the items of this claim.

The goods dealt in may be divided into two classes. First, there was a number of articles which consisted of bristles and wire, corks, hops and things of that kind, which were used for a brewery business, and which were from their nature perishable. The other class consisted of goods which were not perishable, such as a bottling machine, beer pumps, taps, a capsuling machine and various articles of that description. Into one or other of these two categories all the items in the account fall. Taking the first class, viz., the corks, bristles and wire, &c., we turn to the provisions of the Placaat to see whether the claim in respect of such articles is prescribed. The words of the Placaat were set out in the judgment of Chief Justice KOTZE in the case of *Little* v. *Rothman* (2 Off. Rep. 197) as follows: "The price of merchandise *ter slete gelevert*, and payments of sums borrowed, must be claimed by legal process within two years of the date of the service or work done, of the delivery of the goods, or of the borrowing of the sums of money, before the said period has expired, in order to be able to found an action at law thereon."

The CHIEF JUSTICE in that case interpreted those words. It was argued before him that they applied only to goods sold in retail and in small quantities, and that that was the conclusive test to be applied; but he did not agree. Voet was quoted as an authority in support of the proposition; but in spite of that authority he held that *koopmanschap ter slete gelevert* applied to goods sold not only in small quantities, but sold for consumption, or to be used up.

I take it, reading this judgment, that what he meant to lay down was this—that regard should be had to two considerations: were the goods of such a nature that they were sold to be used up or consumed, and were they sold by retail or in small quantities?

I do not think he meant to disregard either of these tests, but to apply both of them; and certainly that is the view this Court has adopted.

In the case of *Loteryman* v. *Cowie*, decided in August last, the rule was so stated. There the claim was for the price of two suits of clothes and twelve paper collars, and the Court laid down this proposition: "If the sale consists of *goederen ter slete gelevert*, that is to say, of goods sold in small quantities and of such a nature that they are consumed or become deteriorated by use, then such a sale falls within the section of the Placaat." That is a definite rule, and I think it is correct and should be followed.

Nor was it departed from in the subsequent case of *Spiller* v. *Mostert*. There, it is true, the quantity of goods the price of which was sued for was larger than in the first case; but they were not all supplied at the same time. If my recollection serves me, the five bags of mealie meal which formed one item in the account were not all supplied at one time, and the total price of the meal, the coal and the forage only came to £88. In the judgment the following passage occurs: "If the goods were bought for consumption, and if they were bought in the quantities we have before us here, we think the statute ought to apply, and that such a sale falls within the statute." There again the Court applied the same test; it did not neglect either of the two considerations: was the sale a retail one; and was it a sale of goods which would be used up or consumed? I think we should apply the same test in this case. And doing so, the inquiry presents itself: What is meant by goods to be used or consumed?

Clearly the expression does not merely mean goods purchased to be consumed in the sense of being eaten; it includes goods which perish by use, which are used up. A pair of shoes would be used up by wear, and the material of which the shoes were made would also be used up; and they would be consumed in that sense. What is meant then by goods sold in small quantities? That is a matter to be decided on the facts of each particular case; there is no statutory definition of it. All we can say is that it is one of the points to be considered in applying this Placaat whether the goods have been sold in small quantities, that is, have been disposed of by retail. The public

generally know what a retail sale is, and that appears to be the best working definition which we can lay down. It is important that buyers and sellers should have some idea of their respective rights in regard to this Placaat, and the most definite rule we can adopt is that for a transaction to be prescribed the goods sold must have been of a nature to be used up or consumed by use, and the sale must have been a retail one. More definite than that we cannot be; if the matter is to be put upon an entirely satisfactory footing it must be done by legislation. And in this connection I should like to associate myself entirely with the remarks made by CURLEWIS, J., in one of the cases which has been quoted, that the matter is one which cries for legislation.

Turning now to the articles supplied in this particular case, I do not think that the corks, bristles and wire can be said to have been bought or sold in small quantities or by retail. In my opinion the transactions in all these cases were of a wholesale nature. A bale of corks must contain a very large number; it costs £10, and corks are very cheap; it is to my mind not a retail purchase. The same with the bristles and the wire. £26, 17s. worth of bristles and wire is the amount of one item. Some of the items are very much larger. There are four bales of corks bought at one time and two cases of hops for £51. Two cases of hops do not constitute a retail purchase. A man who buys hops in small quantities does not buy two cases. That being so, it appears to me that, with respect to the first class I have mentioned, the sales of those articles were not retail transactions. With regard to the second class, it is an *à fortiori* case. In my opinion, to neither of these classes does the Placaat apply. The transaction was a large one; and I think that we should in cases under this Placaat give the benefit of the doubt as a general rule in favour of the person whose claim is sought to be barred. That being so, I think the magistrate was wrong; and we need not consider the other question which was argued yesterday with regard to the appropriation of payments. The magistrate found that if the claim was not prescribed, then £150, 16s. 8d. was due. It is quite possible that the magistrate was wrong in his calculation to the extent of £10; but we can-

not say for certain that he was. We do not know what item of £10 he intended to deduct and it is better to accept his figures upon the facts before us than to refer the matter back to him, and thus incur further expense and delay. I therefore propose to accept the magistrate's finding of £150, 16s. 8d. The appeal must be allowed, and the judgment of the court below altered to judgment for the plaintiffs for £150, 16s. 8d. with interest from the 26th September, 1904, at 6 per cent., with costs in this Court and in the court below.

WESSELS, J.: I concur. In deciding whether in a particular case things are sold by retail or wholesale, it depends entirely upon the goods bought and sold. If it is a bag of mealies, although it is a large quantity, it is not a wholesale purchase, because any householder who has horses has to feed them, and consequently a bag of mealies does not go very far and may be considered almost the unit at which mealies are sold. In that way this particular case that we have to deal with now differs very largely from the case of *Spiller* v. *Mostert*. As I say, the Court has to judge for itself in each particular instance whether a transaction is or is not a wholesale transaction, and its judgment must be formed after consideration of the nature of the things sold.

CURLEWIS, J.: I concur.

Appellants' Attorney: *S. K. H. Lingbeek;* Respondent's Attorney: *G. F. Mynhardt.*