## BRODIE *v.* ATTORNEY-GENERAL.

*D. C., Colombo, 16,697.*

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*Fixtures—Sale of land and building—Conveyance without express words as to fixtures—Agreement between agent of the Crown (the purchaser) and the owner of the premises—Conduct of such agent after conclusion of sale.*

Fixtures are articles which by being affixed or let into the ground, or annexed or attached to a building, acquire the character of immovables.

Counters, cooking range, water tanks, electric bells, batteries and indicators, baths, lavatory furniture, inquiry office, &c., fixed by bolts, screws, and other ways, as described below, are fixtures which, in the absence of a special agreement, pass with the building.

Where a "land and building" were put up for sale and purchased by the Crown through its agent, who some days after the sale was alleged by the owner of the land and building to have agreed with him to take over certain fixtures therein at a valuation on behalf of the Crown,

*Held*, that even if such an agreement were entered into, the Crown could not be made liable to pay for what was already its own.

THE plaintiff was the liquidator of the Stations Hotel Company. His cause of action against the Attorney-General was alleged to be the breach of an agreement entered into between the plaintiff and the Hon. Mr. Wace, acting as Agent of the Government of Ceylon, in regard to certain "furniture and fittings" which, together with the hotel buildings and land, had been seized by the Fiscal in execution of two judgments against the company. It was stated that at the Fiscal's sale Mr. Wace, as Agent of the Crown, purchased the buildings and the land on the 7th September, 1903, and that on the 12th and 26th October following agreed with the plaintiff to take over at a valuation certain articles of "furniture and fittings," namely, a structure in teakwood, called the inquiry office, fixed in the entrance hall of the hotel; a large teak counter called the saloon bar; several patent wash basins in the lavatories; several galvanized iron baths in the bathrooms; several galvanized iron water tanks poised on teak stands in the kitchen and bathrooms; electric bells, batteries, and indicators, &c.

The manner in which the articles were fixed was described by Mr. A. Fleming, the Engineer who had supervised the building of the hotel, as follows.

As regards the "inquiry office," he said: "Each of its four feet or posts has gone through a tile about 3 inches. That tile was removed to put the foot there. To replace that tile, if the foot were removed, would cost 75 cents. The cross frame of the panels of the door is sunk 3 inches into a wooden pillar in a hole

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about 4 inches square at the surface. It is tongued in. If the frame were removed a carpenter in half a day would, at the cost of a rupee, plug up the hole left. At the pillar the panel is let in between two beadings screwed on to the pillars. These beadings would have to be removed and the screw holes plugged with putty, which would cost Rs. 3. The mouldings on the walls would also have to be removed at a cost of Rs. 2. It could be removed from the hotel, and to do so would cause only slight injury to the building. Any injury done to the building in removing the office could be repaired at Rs. 6.75. The injury is only in appearance, by unsightly marks being left till obliterated.'

As regards the saloon bar counter, he said: "Each end of the counter was placed up against the wall before the wall was plastered with cement. This was done for appearance' sake, and not to give stability to the counter. If it were moved out, there would be where each end had been a gap in the cement of the wall, say 4 feet long (*i.e.*, the breadth of a table) and 1½ foot broad (for the thickness of it), and also where the front panel had been in like manner let into the wall. These damages to the appearance of the wall could be repaired for Rs. 10. There would be no substantial damage to the building. The bottom of the bar counter rested on the wooden floor without being attached to it, nor was the moulding which skirted the base of the counter fastened to the floor."

As regards the other counters, he said: "The long counter in the kitchen, which cost Rs. 175, was similarly fixed, and could be moved at about the same cost, and so were the two counters in the bar and billiard room."

As regards the electric bell, battery, and indicator, he said: "They could be disconnected from the wire and easily removed. After removing them there would be marks in the wall, which would cost some Rs. 3 to efface. No injury would be caused to the building by removing them. Upstairs were larger indicators with batteries and bells. They could be removed in the same way. The forty-five pushers were worth about Re. 1 each, say Rs. 50. They could be easily removed without injury."

As regards the five water tanks, he said: "They rest on stands in the kitchens and on each floor. The four tanks on the floor were all the same. The tank in the kitchen stood on a teak frame 10 feet high. The stand was against the wall. The outer two legs were sunk about 6 inches in the cement and concrete of the floor. The other two rested on the cement. The frame is bolted to the wall by two bolts, which go through the wall and have a screw on the outside of it. The tank still rests on the frame. The tank and

stand could be removed by drawing out the bolts and filling up the holes in the wall and the concrete at a cost of Rs. 8.10. The legs of the upstair tanks rested on wooden frames screwed to the floor. There were two bolts through the lath and plaster wall. Each tank could be removed at a of cost of, say, Rs. 7."

As regards the patent wash basins, he said: "They were fitted into stands, five of the same pattern; the two in the billiard room came out in a cast-iron frame. There was a wall between the gentlemen's and ladies' lavatories. The three basins in the latter and the two in the former were in teak frames. There was a bracket on either side of the wall supporting the teak shelves into which the basins were let, and there was a bolt through the brackets on each side of the wall and the wall itself. If you removed that bolt and disconnected the water service, the teak framework could be taken down, and there would be a hole in the wall about the size of your finger ($\frac{5}{8}$ inch) to be filled up. At the back of the wash basins were ornamental tilework, which would not necessarily have to be removed. The removal of the teak frames and basins would not cause any injury to the building. The wash basins themselves were of white enamelware. The two in the billiard room in iron stands were standing against the wall, not fixed to it, save by the connection with the water service."

As regards the baths, he said: "There were eleven steel ship's baths in the different bath-rooms. Apart from their connection with the water service, each bath stood on four iron lion's feet; two feet rested on one cement block about 9 inches, which rested on the cement floor. The blocks were put there to raise the baths, so that the syphon pipes under the baths might clear the floor; otherwise a hole would have had to be cut in the floor. To prevent the baths from shifting, the feet were cemented to the blocks, so that you could not see the toes of the lion's feet. To remove the bath it would be necessary only to uncouple the pipes and lift the bath away. It would chip the cement on the blocks to the value of Re. 1."

As regard the cooking range he said: "In the kitchen was a large cooking range, which was erected under my supervision. The cement floor of the kitchen was finished before the stove was put in there. The stove had no feet. It was a square one, and rested on the cement floor. It weighed about $1\frac{1}{2}$ ton. It was not at all fixed to the floor. There was a cement heading all round the bottom about an inch high to keep out cockroaches and musk rats, as the stove was not quite even with the floor. In the middle of the room was a brick chimney with an arch on

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either side of it, looking like a central pillar in the kitchen. The iron flue ran from the stove and was let into the brick chimney. To remove the range the floor would not have to be broken. The heading of cement would have to be removed, and the flue would have to be disconnected from the chimney. Then the stove could be taken to pieces and removed, and there would be no injury to the building beyond the mark on the floor where the cement heading had been taken and the hole in the chimney. The chimney and the two arches have now been taken away and a joint put across in their place. The stove has been removed into another room—a storeroom. It would cost about Rs. 3 to put that cement on the floor right."

The defendant denied the agreement alleged.

It appeared from a note made by the officer who held the Fiscal's sale, in the page reserved for " memoranda of bids offered," that it was " agreed that the buildings and land should be put up alone at Rs. 84,500;" that this note was made on the 7th September, 1901, after the conditions of sale had been read; that it was signed by the plaintiff and his two execution-creditors; and that Mr. Wace was not a party to this agreement.

At the trial, the plaintiff swore that on the morning of the 7th September his Proctor, Mr. Keith, and the Crown Proctor, Mr. Borrett, had a conversation at which he (the plaintiff) was not present; that one or other of them told him in the presence of both of them that the Government were prepared to offer at the sale Rs. 85,000 for the land and building only; and that he agreed to accept that offer. The plaintiff then deposed as follows:—" The Fiscal's sale then proceeded. The Fiscal's officer put up the building and land at Rs. 84,500. Mr. Borrett bid Rs. 85,000, and it was knocked down to him." Immediately under the memorandum of agreement signed as aforesaid by the plaintiff and his execution-creditors appeared the following memorandum:—" Amount bid: Rs. 85,000. Name of bidder: Mr. Borrett." This was signed by Mr. Wace. The conditions of sale were then completed as follows:—" Under the foregoing conditions the property was sold to Mr. H. Percy Borrett, on behalf of the Government of Ceylon.—(Signed) H. Wace, Government Agent."

"I, the undersigned, H. Percy Borrett, acknowledge to have purchased the land and premises with the building.—(Signed) H. Percy Borrett, on behalf of the Government of Ceylon."

" I hereby declare the Government of Ceylon to be the purchaser of the said premises for the sum of Rs. 85,000.—(Signed) R. A. G. Festing."

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The principal issue which the Court had to try was, What passed to the Government under the terms " building and lands " and " lands and premises with the building thereon "? The words " land and premises now converted into a hotel and called ' The Grand Hotel, Kandy ' " also occurred in the conditions of sale as settled and signed by the Deputy Fiscal. The question for determination was, Did the fixtures within the buildings pass to the Crown or not? If the fixtures passed to the Government, what were the specific articles which so passed?

Another issue raised in the pleadings was whether there was an agreement entered into on the 12th and 26th October, 1901, between the plaintiff and Mr. Wace, as Agent of the Government, that the articles mentioned in list A should be taken over by the Government at a fair valuation.

The learned District Judge (Mr. D. F. Browne) found that the articles mentioned in the list were more or less fixtures; that Mr. Wace did not decline to take them over at a valuation when, some weeks after the sale of the buildings and land, the plaintiff asked him to do so; and that the plaintiff and Mr. Wace never contemplated that the articles mentioned in the list would pass with the buildings and land as fixtures.

The District Judge gave judgment for the plaintiff in the alternative form prayed,—that the defendant do return the subjects of the plaintiff's claim to him in the condition in which they were when removed by Mr. Wace on the 31st October, 1901, and, if they shall be found to be now deteriorated in condition, do pay the difference between their value at date of return and Rs. 3,290, with legal interest thereon to that date; or, in default of returning them, do pay the said sum of Rs. 3,290 and legal interest to date of such payment.

The Attorney-General appealed. The argument in appeal took place on the 2nd and 5th October, 1903.

*Rámánathan, S.-G.*, for appellant.—The findings of the District Judge are not supported by the evidence on record. A sale of the " land and buildings " necessarily includes fixtures thereon, and such sale having been already concluded on the 7th September, 1903, the subsequent conduct of Mr. Wace or the plaintiff did not alter the legal effect of that transaction so far as the Crown is concerned. The evidence recorded shows that on the 7th September, when the Fiscal's sale was held, the Government was no party to any agreement regarding the furniture and fittings; that Mr. Wace, acting for the Government, bought certain buildings and lands; that according to law, all fixtures found in the

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building and described in list A passed to the Government; that more than a month afterwards, to wit, on the 12th and 26th October, 1901, the plaintiff requested Mr. Wace to take over certain of the articles included in the list at a valuation; that Mr. Wace declined to give him any answer on that point; and that when the plaintiff wrote to Mr. Wace that he had agreed with him to take those articles at a valuation, Mr. Wace forwarded the plaintiff's letter at once to the Director of Public Works, who was in charge of the buildings and lands purchased on behalf of the Government, and informed that officer that there was no such agreement arrived at.

As regards the law of the case on the subject of fixtures, the Roman maxim is *quicquid plantatur solo, solo cedit;* and movables become immovables *ratione distinctionis, finis, eventus, usus, relationis ad rem immobilem.* (P. Voet, *De Reb. mob. et immob., vol. I. p. 383*). Movables become attached to the realty by being let into the ground; or united by nails, screws, bolts, mortar, &c., or affixed to the land in other ways (*Dig. 19, 1, 17, § 17; 2 Burge, Col. Laws, 15*). We must go to the English Law for the law as to stoves, closets, washstands, kitchen ranges, &c., of the kind used in the hotel, for such articles of furniture were not in common use among the Romans. The earliest applicable case was decided in 1823 (*Colegrave v. Dias Santos, 2 B. & Cr. 76*). In this case, the plaintiff's house and estate being sold by auction, the defendant became purchaser, and conveyance and possession were duly given him. At that time stoves, grates, kitchen ranges, closets, shelves, washtubs, &c., remained in the house. The plaintiff afterwards desired that a valuation of them should be made, and that defendant should pay for them in terms of such valuation. The defendant contended that they passed to him as fixtures. It was held accordingly. The next case was decided in 1853 (*Wiltshear v. Cottrell, 22 L. J., Q. B., 117*). The Court held that a threshing machine fixed by bolts and screws to posts which were let into the ground, and which machine could not be got out without disturbing the soil, passed under a conveyance of the land. In the case of *Walmsley v. Milne* (*29 L. J. C. P. 97*), it was held that a steam engine and boiler with their adjuncts secured by bolts and nuts to the wall, though capable of being removed without injury to the machinery or to the fixtures, passed to the mortgagee as part of the freehold. In 1866, in *D'Eyncourt v. Gregory* (L. R. *3, Eq. Cas. 382*), it was held that tapestry, pictures in panels, frames filled with satin and attached to the walls, as also statues, figures, and vases resting in nitches and stone garden seats were essentially part of the house, whether easily removed or not. In

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*Longbottom v. Berry* (*L. R. 5., Q. B. 123*), it was held that all annexures to the floor, ceiling, or sides of a house by means of bolts and screws are all fixtures which go with the house, and it makes no difference that such fixtures could be removed without injury to them or to the freehold. In this case the owner of the house mortgaged it to A, and then erected a mill driven by steam power and set up machinery for woollen cloth manufacture. He sold the machinery to B, who had notice of the mortgage. It was held that the machinery, &c., passed to the mortgagee. In 1872, *Holland v. Hodson* (*L. R. 7, C. P. 328*) decided that looms attached by means of nails driven through holes in the feet of the looms into the floor, and which nails could be easily drawn and without serious damage to the flooring, formed part of the realty. The last case on the subject is *Hobson v. Corringe* (*66 L. J. Ch., 114*) decided in 1896. It was held there that an engine affixed by means of screws and bolts to a concrete bed in freehold land ceased to be chattel and became part of the freehold. This case affirmed the previous cases cited. It is clear that, according to these cases, the inquiry office, saloon bar, teak counters, water tanks, baths, electric bells, urinals, washbasins, cooking range, &c., attached by screws and bolts to the hotel, passed to the Crown as fixtures.

*H. J. C. Pereira* (with him *James Pieris*), for plaintiff, respondent.—Mr. Wace had agreed with the plaintiff to take over the articles of furniture and fittings at a valuation. Whether fixtures or movables, the parties intended to treat them separately from the land and buildings which were sold to the Crown on 7th September, 1901. The subsequent acts of the parties naturally flowed out of the proceedings of the 7th September, and must be looked upon as one transaction (*Traps v. Carter, 2 C. R. & M. 153*; *Ward v. Taylor, 1 L. R. Ch. Div. 523 & 534*).

30th October, 1903. LAYARD, C.J.—(after carefully reviewing the evidence for the plaintiff and the defendant) observed:—

A comparison of the evidence of the plaintiff and of Mr. Wace leaves me in little doubt that on the two dates in October the plaintiff saw Mr. Wace and had some conversation about Government taking over the inquiry office, counters, baths, and the latter, without promising any price, seems to have led plaintiff to understand that Government would take them at a valuation.

Mr. Wace's evidence in cross-examination, though generally denying any promise to purchase these articles, is not very satisfactory, and the probability certainly seems that he was not

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aware until informed by Mr. Borrett that these articles had been included in the general purchase of the building, and that he, if making no definite promise, led the plaintiff to believe he would take them at a valuation.

But the materiality of this is not very great, because Mr. Wace was not a private individual. He was acting solely for the Government, and the position of the Government depends on what was sold on the 7th September, and not on any casual words used by Mr. Wace in ignorance of what actually in point of law fell within the contract of purchase on the 7th September with reference to the taking over of any fittings.

The rest of plaintiff's evidence and that of the witness Fleming is as to the value of the alleged fixtures, and there was further evidence that certain articles were considered as "furniture and fittings" in the hotel business. The evidence for the defence is that of the Government Agent and the Assistant Government Agent, who deny any express promise to take over these things, but the evidence of Mr. Festing as to giving permission to let the stove and billiard table remain in the hotel clearly shows that it was not then supposed at the Kachcheri that these articles belonged to Government by right of their purchase, and a perusal of their evidence leads to a conviction that Mr. Wace probably regarded the baths, counters, basins, inquiry office, and stove as still unsold and the property of the vendors, until he had his attention called to the matter by the somewhat arbitrary action of Walker & Co. in seeking to remove the stove. The rest of the evidence for the defence is as to the value of certain articles claimed.

The documentary evidence I have reviewed. The question therefore is simply this: Does a sale of a building under Ceylon Law pass with it those fittings which are by English Law known as fixtures, and which pass with a conveyance of the freehold without express words?

If a sale does by our law pass fixtures, then it cannot be seriously denied that these articles are fixtures, and indeed no contrary contention was raised at the bar, and the consequence is that the appeal must succeed. For if our law recognizes the doctrine of fixtures, no words used in a general way by Mr. Wace as to Government taking over any of these things could possibly render the Government liable in any way to pay for what was already its own, although the Government Agent may not have known it, and of course there could be no liability for wrongfully detaining what was the Government's own.

In my view the matter is not affected by the Government being the purchaser, and not, say, the Bristol Hotel, to take the case

imagined by the learned District Judge. There might have been several bidders at the sale, one representing, say, the Bristol Hotel. Supposing this gentleman had bid Rs. 5,000 above Mr. Borrett's bid of Rs. 85,000, could it be said that he was bidding for one thing, viz., the building plus all that would be useful to a Hotels Company, while Mr. Borrett was bidding for the building plus only what would be useful to Government? Two bidders at one auction bidding against one another for substantially different things?

The question solely is, What passes under a Fiscal's sale purporting to be "of a building and lands only", excluding "the furniture?" The District Judge has found that the inquiry office was part of the building itself, and the other things claimed by the plaintiff were fixtures such as a tenant might remove against his landlord. The question here, however, is not one between landlord and tenant, but between vendor and vendee. Our law is that houses and other buildings erected on land are immovable corporeal things, and would pass by a sale of the land to the purchaser. Moveables affixed or let into the ground or annexed to or attached to a building are immovables. They acquire the quality of immovables by reason not alone of their being affixed, but of their being affixed with the intention of permanently remaining. Thus, movables if fixed by the owner become immovables, though this would not apply if affixed by a tenant merely for the purpose of his tenancy. Voet (*19. 2. 14*), clearly establishes the right of the tenant to remove fixtures which he has made at his own cost. For Voet says by the *actio conducti* the lessor may be sued to remove doors and other things which the tenant has made at his own cost, so far as they can be removed without detriment to the subject hired. I cannot find any provisions of our law which enables a vendor to remove from a house sold by him anything affixed to the building which is intended for the permanent use of the building and, as it were a part of it. I understand Voet to lay down in *19. 1. 5*, that when a house or building is sold, all things which were affixed to such house or building by the vendor prior to such sale and intended to be used in respect of such house or building must be delivered with the house or building as accessories thereof. The fixtures in this case, I hold, passed with the building, there being no explicit undertaking that they were to be excluded.

Respondent's counsel argued, because the Hotels Company in their books and balance sheet classified the fixtures under a different heading to "land and buildings", and because it was proved that certain hotel companies [illegible] the same, that when an hotel

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building is sold without the furniture the fixtures do not pass under such a sale. It appears to me that there are good reasons for hotel companies keeping such items separate in their accounts, and Mr. Link's evidence discloses that it is done for the purpose of writing off depreciation. The fixtures would most undoubtedly depreciate more quickly than the framework of the buildings. and consequently it is right that they should be classified under a different head in their books and accounts. There is, however, no evidence in this case to show that when a building used as an hotel is put up for sale there is any custom having the force of law which overrides the general principle of our Common Law that fixtures attached to the building pass with it to the vendee on the completion of the sale.

The defendant's appeal must succeed, and the plaintiff's action be dismissed with costs in both courts.

WENDT, J.—

Respondent's counsel was constrained to admit at the argument before us that in the absence of express agreement excluding them the articles would pass with a sale of the land and buildings. The admission is fully justified because those articles belonged to the proprietors of the soil and were by them affixed to the buildings for permanent use therewith. No such considerations therefore apply as are material where the question arises between landlord and tenant.

The question then is whether the terms and conditions of sale were such as to exclude the property in claim. I agree with the Chief Justice in thinking that they were not. The conditions of sale were drawn up so as to include in one lot the land (made up of six allotments) and " all the stock-in-trade, plant, furniture, crockery, cutlery, plate, linen, glass, china, pictures, goods, wares, billiard tables, with all and singular the fittings and appurtenances thereof, and all other goods, effects and things, live and dead stock, and all movable property now lying and being in and about the said Grand Hotel, Kandy, and all other stock, plant, goods, wares, live and dead stock, and all other effects and fittings and things of what kind or nature soever, nothing excepted, which shall be in or about the said Grand Hotel premises. " Nothing is expressly said about " fixtures. " Before the sale commenced it is recorded on the conditions that it was " agreed by the plaintiffs that the building and lands shall be put up alone at Rs. 84,500; " and after the memorandum of bids, and therefore probably after the hammer fell, is this record: " The plaintiffs are agreed that the sale of the furniture shall be stayed,

defendant consenting." So that, if we look at the written conditions alone, we have on the one hand the sale carried out of the "building and lands," and on the other the postponement of the sale of the "furniture" as apparently all that was left out of the whole property, which, besides the building and land and furniture, comprised "plant" and "fittings." I do not think the articles in question could fairly be brought within the description of "furniture." They are more in the nature of "fittings," which were not expressly excluded or their sale deferred.

So far as regards the parol evidence, I concur in the reasons which the Chief Justice has given for considering it inconclusive, and therefore I also agree that the appeal should be allowed.