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Present : The Hon. Sir Joseph T. Hutchinson, Chief Justice,
and Mr. Justice Wood Renton.

JOHN & CO., *v.* DE MEL.

D. C., Colombo, 26, 165.

Auctioneer and broker—Sale as auctioneer—Action for price—Limited authority of auctioneer—Sale as broker—Agent of owner—Right of owner to sue.

An auctioneer is entitled to sue the purchaser for the price of goods sold by him as auctioneer, unless there is something in the circumstances or in the conditions of sale to rebut the presumption that he is so-entitled.

Where a firm doing business as auctioneers and brokers sell goods by public auction, and circumstances show that in doing so they acted merely as brokers or as auctioneers with limited authority, they are not entitled to maintain an action for the price.

The extent of an auctioneer's authority in regard to any sale must be determined by the conditions of sale and by all the circumstances of that particular transaction.

THIS was an action by the plaintiffs, a firm of auctioneers and brokers, to recover from defendant a sum of Rs. 8,636-78, being the value of certain plumbago bought by the defendant at a public auction held by the plaintiffs on December 7, 1907. The circumstances attending the sale are fully set out in the judgment of the District Judge as well as in the judgments of the Supreme Court. The defendant denied that there was any contract between him and the plaintiffs, and pleaded that plaintiffs acted merely as the agents of the owner, and that they were not entitled to sue.

The following issues were agreed upon :—

- (1) Can plaintiffs as auctioneers maintain this action against the defendant ?
- (2) Did the plaintiffs act in this matter as auctioneers or merely as brokers ?
- (3) Have the plaintiffs been paid their brokerage ?

The Acting District Judge (F. R. Dias, Esq.) delivered the following judgment dismissing the plaintiffs' action (June 23, 1908) :—

“ The plaintiffs, Messrs. E. John & Co., who are described in the plaint as licensed auctioneers and brokers, are suing Mr. Jacob de Mel for the recovery of Rs. 8,636-78, the value of two lots of plumbago alleged to have been sold by them to him on December 7, 1907, in their capacity of auctioneers. The defendant admits that

he bought the stuff at the price named and even took delivery, but denies the right of the plaintiffs to maintain this action, as they did not act in this matter as auctioneers, but only as brokers or middlemen on behalf of a disclosed principal, viz., Mrs. D. C. G. Attygalle. In other words, his contract was with Mrs. Attygalle, the owner of the plumbago, and not with the plaintiffs at all.

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It has been urged on behalf of the plaintiff that this was an ordinary public auction, carried out by the plaintiffs after due advertisement, so that they are the proper parties to sue the purchaser, who refuses to pay. In support of this contention counsel has cited the case of *Williams v. Millington*,¹ where it was held that an auctioneer employed to sell the goods of a third person by auction may maintain an action for goods sold and delivered against a buyer, although the sale was held at the house of such third person, and the goods were publicly known to be the property of the latter. The principle upon which this and other cases of the same class have been decided is that an auctioneer has a special property in the goods which he is employed to sell, with a lien upon them and upon the price, when paid, for the charges of the sale and his commission, &c., so that he may make the contract of sale in his own name, and therefore sue the purchaser for the price. There can be no question as to the soundness of this law, and if the facts be as alleged by the plaintiffs, viz., that they sold this plumbago as auctioneers, they will certainly be entitled to succeed.

“Now, what are the facts of the case before us? The only evidence put forward by the plaintiffs is that of their assistant, Mr. Gratiaen, and, according to that evidence, it is quite clear that the position taken up by the plaintiffs is utterly untenable. They never professed to act as auctioneers at all in this matter, but expressly as brokers. The three gentlemen who compose the plaintiffs' firm are said to be licensed auctioneers and brokers. There is no evidence of this however, but, as the defendant has admitted that averment, we may take it as correct. Neither of these three gentlemen was present at the alleged auction sale, nor took the slightest part in it, but it would appear that Mr. Meaden, who is described as another assistant in the plaintiffs' firm, sat at a table with Mr. Gratiaen and Mr. T. G. Jayewardene (the son-in-law and local representative of the owner of the plumbago), called for bids for the various lots, of which there were some eight or ten, knocked down some of the lots to the highest bidders, and withdrew the other lots; but before the bidders left the room they were also privately settled on some of them, the defendant being one, after consultation with Mr. Jayewardene, who had full control of the sale. What right or authority Mr. Meaden or Mr. Gratiaen had to conduct an auction sale on behalf of the plaintiffs we have not been told, and

¹ 1 H. Bl. 81.

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so far as the legal effect of that performance goes for the purpose of binding either the plaintiffs, the owner of the goods, or the purchasers, it might equally well have been enacted by the firm's office boy or any clerk. Neither Mr. Meaden nor Mr. Gratiaen was a licensed broker or auctioneer, and in what they did they clearly violated the law. If the plaintiffs had been employed as auctioneers to sell the goods, they should have carried out the sale themselves. Their agency was personal, and cannot, without special authority (of which there is no evidence), be delegated to another: *Vicarius non habet vicarium*. It is true that in practice an auctioneer frequently employs his clerk or assistant to use the hammer and make the outcry, or even to write down in his book the names of the purchasers, but that can only be done under his own immediate direction and supervision. There are no doubt certain well-recognized exceptions where an authority to delegate an agent's powers will be implied, generally on the ground that there is no personal confidence reposed or still required, and that the duties are capable of being equally well discharged by any person, *e.g.*, in the case of purely ministerial acts, where no special discretion or skill is required, and of acts subsidiary to the main purpose; but in cases where an agent has implied authority to sign a contract for both parties (as an auctioneer or broker), his clerk or assistant will certainly be incompetent to represent him (*vide Peirce v. Corp.*¹ *Bell v. Balls*²). As Lord Eldon said, in the case of *Coles v. Trecothick*,³ 'the doctrine is very dangerous indeed, that if an auctioneer is authorized to sell, all his clerks, when he goes out of town, are, in consequence of any usage in that business, agents for the person who authorized him.' In my opinion, therefore, nothing that Mr. Meaden did on the day in question amounted to an auction sale carried out by the plaintiffs so as to entitle him to maintain an action.

"There are other grounds, too, for holding that the plaintiffs never intended in this matter to act as auctioneers. From start to finish, so far as the documentary evidence shows, the plaintiffs never once described themselves as auctioneers. The very notice in the newspapers (P 1), by which they advertised the intended sale of this plumbago, is signed by 'E. John & Co., Brokers.' The printed heading in their stationery nowhere describes them as auctioneers, but only as 'Produce, Exchange, and Share Brokers.' The conditions of sale (D 1) used at this sale refers to 'brokerage of 1 per cent. payable by seller,' and not to any auctioneer's commission; and lastly, the contract of sale (D 2), which is signed personally by the plaintiffs' firm, describes them as 'brokers' pure and simple. How in the face of all this it can for a moment be contended that they acted as auctioneers I utterly fail to see. It

¹ L. R. 9 Q. B. 210, 215.

² (1897) 1 Ch. 663.

³ 9 Ves. 234.

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surely cannot be that it was their sense of dignity alone or some such private reason which made them avoid the somewhat plebeian appellation of 'auctioneers,' and if that were so there is no evidence of it. On the contrary, it seems to me that they did not give themselves such a false description in this matter, because it was not an auctioneering transaction at all, but one of pure brokerage. The fact that the buyer in this instance was ascertained by putting up the lots for public competition, as alleged, cannot make the slightest difference, as there is nothing to prevent a broker from resorting to any expedient he likes to discover a buyer for introduction to the seller. Even if we assume that Mr. Meaden had a legal right as plaintiffs' representative to carry out the auction sale he is said to have done, it is quite clear that the part he played was no more than that of 'a mere crier or broker,' so that the plaintiffs were exactly in that same position as regards the owner. In such a case, says Benjamin on Sales (p. 741), 'it is plain that if the auctioneer acts as a mere crier or broker for a principal who has retained the possession of the goods, the auctioneer has no implied authority to receive payment of the price.' In the present case the goods were always in the possession of the owner at her store in Kurunegala, and the plaintiffs did no more than introduce the defendant to her as a buyer of two of the lots, and delivery was given to him by her on his letter addressed direct to her and not to the plaintiffs (D 9).

"The fallacy underlying the plaintiffs' case is this. The defendant made no contract with them, but he made one through them with Mrs. Attygalle, the disclosed owner of the plumbago. It is impossible to get over that fact, and the document D 2 signed by the plaintiffs' firm is fatal to the position they now try to assume. This is the best and only evidence admissible to show the true character of the contract which bound the parties. This is dated December 7, 1907, the very day on which the auction sale is said to have taken place, and is an ordinary broker's contract or 'Sold note.' It is headed 'Contract,' addressed to the defendant as buyer, and signed by the plaintiffs as 'Brokers' on behalf of the seller. It runs as follows :—

" 'Dear Sir,—We beg to advise having sold this day on account of Mrs. D. C. G. Attygalle to yourself of uncured plumbago by public auction as follows :—Tons 13, No. 2, &c. Delivery at Kurunegala without barrels within fourteen days. Payment within fourteen days, unless otherwise arranged with Mr. Jayewardene.

" 'Yours faithfully,

" 'E. John & Co.,

" 'Brokers.'

"Nothing can be plainer than this document, which was certainly not one which the plaintiffs would have sat down to prepare if the

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transaction they had with the defendant on that day was in the capacity of auctioneers knocking down a lot to the highest bidder at a public sale. It is the ordinary brokers' contract note, making the contract between the buyer and the seller. Their functions stopped there, and the contract does not render them liable either as purchaser or seller of the goods. They cannot sue or be sued on it, as they are not a contracting party, and the document on the face of it discloses who the contracting parties are.

“ What appears to have happened in the present case was this. Mr. Meaden, the plaintiffs' assistant, having secured the defendant as a buyer for two of these lots, the plaintiffs in their capacity of brokers introduced him to the owner of the goods, and made the contract D 2 in the usual course of business. This is the only contract which governs the parties before the Court, and no evidence is admissible to show that the plaintiffs acted in any other capacity but what this solemn document, duly stamped, shows, viz., as ‘ brokers.’ That being so, the law applicable to the case is quite clear, and I cannot do better than adopt the very words used by Kelly, C.B., in the case of *Fairlie v. Fenton*,¹ which exactly fit the case now before us: ‘ We know, of course, that a broker, or anybody else, may so frame a contract as to make himself personally liable, and to entitle himself to sue personally on the contract. But wherever the broker enters into a contract as broker, describing himself as a broker as in this contract, and naming his principal, the action is not maintainable by him. I know of no exception to this rule; and I may observe that no instance has ever occurred within my experience in which an action has been held maintainable by a broker, who describes himself as such upon a contract containing no words expressly or by necessary implication making him liable in his own person.’

“ No further comment is necessary as regards the law, but I may make one further observation on the facts, which show that the plaintiffs could never have intended to act except as brokers. As we all know, a broker is not entrusted with the possession of the goods, and ought not to sell in his own name, as the principal who trusts a broker has the right to expect that he will not sell in his own name (*Baring v. Corrie* ²). The plumbago in this case was never in plaintiffs' possession, and it was to be delivered and paid for as arranged with Mr. Jayewardene. As a matter of fact it was so delivered, and the person who sent the account to defendant for payment was not the plaintiffs, but Mr. Jayewardene (*vide* D 3). The defendant, who had another account against Mrs. Attygalle for Rs. 4,200 on some other transaction, naturally deducted that sum, and sent to Mr. Jayewardene a cheque in favour of Mrs. Attygalle for the difference, viz., Rs. 4,436-78. If Mrs. Attygalle was the plaintiff in this action, the defendant was clearly entitled

¹ *L. R. 5 Exch. 169.*

² *2 B. & Ald. 137, 143.*

to set off that item, and it is obvious that it is in order to prevent any discussion as to the validity of that counter-claim that the plaintiffs have been put forward to figure in this action.

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“ Even if they sold this stuff as auctioneers, the utmost extent of their lien over the goods or the proceeds sale is Rs. 86·36, and I can scarcely believe that they have come into Court and embarked on this litigation for the purpose of protecting that paltry interest. The evidence of Mr. Gratiaen shows that the plaintiffs have a running account with Mrs. Attygalle, and whatever brokerage or commission they were entitled to on this sale has already been settled.

“ I dismiss the plaintiffs’ action with costs.”

The plaintiffs appealed.

Bawa (with him *E. W. Jayewardene*), for the plaintiffs, appellants.

Sampayo, K.C. (with him *Cooray*), for the defendant, respondent.

Cur. adv. vult.

July 23, 1909. HUTCHINSON C.J.—

This is an appeal by the plaintiffs against a decree dismissing their action. They say in their plaint that they are licensed auctioneers and brokers, and that as such auctioneers they on December 7, 1907, at Colombo, sold by public auction certain plumbago, two lots of which the defendant bought at the sale ; that the defendant took delivery, but has not paid the price ; and they claim judgment for the price, Rs. 8,636·78.

The defendant in his answer admits the above averments, but says that the plaintiffs were with regard to the matters above stated agents of Mrs. Attygalle, and that the contract for the sale and purchase of the plumbago was between Mrs. Attygalle and the defendant ; that at the time of the sale the plumbago was in her possession in her store at Kurunegala, and that she delivered it to the defendant in pursuance of the contract ; that she was indebted to him on another account in the sum of Rs. 4,200, and that he tendered to her Rs. 4,436·78, being the said sum of Rs. 8,636·78, less the said debt of Rs. 4,200 ; and he denied the plaintiffs’ right to sue for the Rs. 8,636·78 or any part of it.

The issues settled were :—

- (1) Can the plaintiffs as auctioneers maintain this action ?
- (2) Did the plaintiffs act in this matter as auctioneers or merely as brokers ?
- (3) Have the plaintiffs been paid their brokerage ?

The plaintiffs’ counsel objected to the 2nd issue, but I think it is raised in the answer, which alleges that the plaintiffs were merely acting as Mrs. Attygalle’s agents, and that the defendant’s contract was with her and not with the plaintiffs.

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There was put in evidence an advertisement of the proposed sale, published in a local paper on December 2, which states that " We are instructed to sell by public auction on account of Mrs. Attygalle at our office 100 tons of uncured plumbago, lying at Polwattipitiya stores, Kurunegala ;" signed " E. John & Co., Brokers, Colombo." At the sale conditions of sale were read out ; they were on a printed form headed " E. John & Co., Produce, Exchange, and Share Brokers ;" the 3rd condition was " Brokerage of 1 per cent. payable by the seller ;" and the 5th, " Payment within ten days, or as arranged with Mr. Jayewardene." The plaintiffs distributed orders for drawing samples to intending bidders before the sale. The plumbago was sold in lots, of which the defendant bought two. There was no reserve on any lot ; but Mr. Jayewardene was in the sale room as representing the owner, and as the lots were put up and bid for, he indicated to the auctioneer whether any particular bid was to be accepted or not.

Immediately after the sale the plaintiffs sent to the defendant a letter in these terms : " We beg to advise having sold this day on account of Mrs. Attygalle to yourself of uncured plumbago by public auction as follows," describing the lots and the price ; " delivery at Kurunegala without barrels within fourteen days, unless otherwise arranged with Mr. Jayewardene. Yours faithfully, E. John & Co., Brokers." This is on a form with the same printed heading as the conditions of sale. A few days after the sale the defendant's agent, Henry de Mel, met Mr. Gratiaen, a representative of the plaintiffs' firm, who had been present at the sale, and asked for a delivery order, which Mr. Gratiaen says he instructed Mr. Jayewardene to send him. On December 11 Henry de Mel wrote to Mr. Jayewardene asking him to send a delivery order, or to instruct his men at Kurunegala to deliver the plumbago to the defendant's men there. On the 14th the plumbago was delivered to the defendant. On the 16th Mr. Jayewardene sent to the defendant an account for the plumbago, Rs. 8,636·78, which the defendant returned on the 20th with a cheque for Rs. 4,436·78, deducting the Rs. 4,200 which he claimed from Mrs. Attygalle. She refused to accept this ; and the plaintiffs then, on the 21st, wrote to the defendant asking him to send to the plaintiffs a cheque " in favour of Mr. Jayewardene" for the full amount. To this the defendant's proctor replied that his client had contracted with Mrs. Attygalle, and did not acknowledge any liability to the plaintiffs.

The plaintiffs have not been paid their commission in respect of the plumbago sold to the defendant. They had done a good deal of business for Mrs. Attygalle, and she has an account with them ; they did not know her personally, but in all their transactions with her they dealt with Mr. Jayewardene, who is her son-in-law, as her agent. This plumbago was never in their possession ; it was always at Kurunegala in Mrs. Attygalle's store.

The defendant's counsel, on the hearing of the appeal, urged that there is no evidence that the person who conducted the sale had an auctioneer's license. But there is no evidence that he had not, and it is too late to raise that objection now.

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An auctioneer is generally entitled to sue the purchaser for the price of goods sold by him as auctioneer, unless there is something in the circumstances or in the conditions of sale to rebut the presumption that he is so entitled. The plaintiffs in the conditions of sale and in the contract note of December 7 describe themselves as "brokers," and the 3rd condition speaks of their "brokerage" as payable by the seller; but that, of course, is not conclusive that they were acting merely as brokers. On the other hand, the sale was by auction; but that, again, is not conclusive, for there is nothing to prevent a broker from finding a purchaser by putting up the goods to auction instead of by going round to possible buyers privately and asking them to make offers. As Benjamin says, in his book on Sales (p. 792, 5th edition), "if the auctioneer acts as a mere crier or broker for a principal who has retained the possession of the goods, the auctioneer has no implied authority to receive payment of the price."

There is no evidence as to whether it is usual on sales made by brokers in Colombo by public auction for the buyer to deal directly with the auctioneer and take delivery of the goods from him and to pay him, or whether he takes delivery from and pays the seller of the goods. It seems clear, however, that in this case if the defendant had paid the full amount to Mrs. Attygalle, or her agent, Mr. Jayewardene, the plaintiffs would have been quite satisfied.

Having regard to the 3rd of the conditions of sale, that brokerage is to be paid by the seller, and the 5th condition, that payment is to be made within ten days, unless otherwise arranged with Mr. Jayewardene, and the terms of the contract note of December 7, and the fact that the plumbago was at Kurunegala in the possession of Mrs. Attygalle, and that it was delivered to the buyer by her, I am of opinion that the contract was between the buyer and Mrs. Attygalle: that the parties intended that payment should be made only to Mrs. Attygalle, or her agent, Mr. Jayewardene; and that the plaintiffs acted merely as brokers.

I think the appeal should be dismissed with costs.

WOOD RENTON J.—

The facts have been stated by my Lord, the Chief Justice, and I will not repeat them. I do not agree with Mr. de Sampayo that it is possible for the respondent in the present case to avail himself of the principle of law laid down in such cases as *Holmes v. Tutton*,¹ which decide that, if the lien of an auctioneer is proved to have been satisfied by the payment of his charges, he can no longer recover the

¹ (1855) 5 E. & B. 82.

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purchase price of the goods sold at the auction from the buyer. In this case there is nothing to show that the appellants' charges have been paid. It is true that there is some evidence of the existence of a running account between the appellants and Mrs. Attygalle. But there is no evidence on the record showing that the appellants, in connection with that account, have at present in their possession money belonging to Mrs. Attygalle, which they can utilize for the purpose of discharging her indebtedness to them in regard to the sale of the plumbago which has given rise to this action. I am also unable to accept Mr. de Sampayo's contention that this case can be treated as a simple sale by a broker on behalf of a client. There can be no real analogy between the proceedings of the appellants in the present case and the course of the business which an ordinary broker conducts. I do not think that it is possible to say that the act of the appellants in advertising the sale of the plumbago by public auction can be regarded as legally equivalent to that of a broker going round the market on the outlook for customers for his principal's goods. I have, however, come to the conclusion that the real position of the appellants in the present case was that of auctioneers, or of brokers selling by auction, but with a limited authority. There is no controversy as to what the legal position of an auctioneer with an authority so limited is. It is defined by Benjamin, in his treatise on Sale (5th edition, page 792), as follows :—" It is plain that if the auctioneer acts as a mere crier or broker for a principal who has retained the possession of the goods, the auctioneer has no implied authority to receive payment of the price." In further support of that proposition, I may refer to the cases of *Sykes v. Giles*¹ and *Mainprice v. Westley*,² which show, I may add, that the question of the extent of the auctioneer's authority is to be determined by the conditions of sale and by all the circumstances of the particular transaction that the Court has to interpret.

I proceed to apply this principle to the case now before us. In the first place, it is to be noted that the appellants, in their advertisement of the sale, not only, as is often the case in such advertisements, disclose the name of the vendor in connection with the property, but expressly state that the sale is to take place "on account of Mrs. D. C. G. Attygalle." In addition to that, the appellants signed the advertisement of the sale as "brokers." The conditions of the sale itself are even more significant of the capacity in which the appellants were acting. The 3rd condition, which has been quoted by my Lord, the Chief Justice, that brokerage of 1 per cent. is to be payable by the seller, and the 5th condition, stipulating that payment is to be made within ten days or as arranged with Mr. Jayewardene, point in the same direction. It is clear that Mr. Jayewardene was Mrs. Attygalle's agent. I am unable to construe the 5th condition of sale, as Mr. Bawa invited us to do, as meaning

¹ (1839) 5 M. & W. 645.

² (1865) 6 B. & S. 420.

that the payment was to be made to the appellants, either within ten days, or within such extended time as Mr. Jayewardene permitted. It is just here that we have to look to the conduct of the parties themselves for the purpose of interpreting the conditions of sale and the real nature of the contract. It is clear from the evidence adduced by the appellants themselves that Mr. Jayewardene attended the sale as the agent of Mrs. Attygalle, and that he controlled in every respect, except as regards the mechanical act of putting up and crying the various lots which were to be disposed of, its whole conduct and management. Moreover, in the advice note to the respondent by the appellants, they do not claim payment for themselves. They recite once more, in slightly varied language, the 5th condition of sale, and say that "payment is to be made within fourteen days, unless otherwise arranged with Mr. Jayewardene." In addition to all this, we find that the plumbago sold was never in the physical possession of the appellants—a circumstance which, of course, in itself would not defeat the appellants' lien if they were selling as auctioneers with a general authority, but which has to be taken account of in deciding whether or not they were acting in that capacity—and that Mr. Jayewardene himself sent in to the respondent a bill for the price of the plumbago which the appellants had sold. It is to be regretted, I think, that the parties in this case have not adduced evidence showing what the custom of the trade in regard to sales of this kind is. But we have to decide the case on the materials which they have thought fit to place before us, and on those materials I have come to the conclusion that the decision of the learned District Judge should, for the reasons I have given, be upheld.

I would dismiss the appeal with costs.

Appeal dismissed.

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