1943 *Present :* **Soertsz S.P.J. and Hearne J.**

ALARIS, Appellant, *and* WIJEYSEKERE, Respondent.

380—D. C. Colombo, 9,158.

Broker—Purchaser of goods himself—Not an agent of seller to attach liability to the latter on a memorandum signed by the former—Contract contained in several documents—Proof of contract—Sale of goods for payment against delivery—Delivery by instalments—Failure to pay on delivery—Breach of contract.

Where a broker purchased goods for himself he cannot sign a note or memorandum even under an assumed name as agent of the seller in order to make the latter liable to be charged on a contract evidenced by such note or memorandum within the meaning of section 5 of the Sale of Goods Ordinance.

Where it is proposed to prove the existence of a contract by several documents it must appear upon the face of the instrument signed by the party to be charged that reference is made to another document and this omission cannot be supplied by verbal evidence. If, however it appears from the instrument itself, that another document is referred to, that document may be identified by verbal evidence.

Where a contract for the sale of goods provides for payment against delivery and the buyer accepts delivery by instalments but refuses to pay on delivery, the other party is discharged from his obligations under the contract.

APPEAL from a Judgment of the District Judge of Colombo.

The facts appear from the argument and the judgment.

[1] *(1931) 33 N. L. R. 90.*

H. V. Perera, K.C. (with him *C. Thiagalingam* and *G. Thomas*), for the defendant, appellant.—Under contract No. 599, the defendant was to supply to the plaintiff 2,000 ply-wood chests, 750 of which were to be delivered during May, 1937, and the remainder in June. Payment was to be made "against delivery". Plaintiff, the purchaser, now claims damages resulting from the non-delivery of 1,200 out of the 2,000 chests. It is submitted that there was a repudiation of the contract at the moment when the plaintiff refused to make payment for the 800 chests already delivered under the contract. It is true that the defendant had committed breach of contract by not delivering the instalments within the time provided for in the contract. But what happened was that the plaintiff accepted the belated deliveries and gave time for the delivery of the remaining chests. In the circumstances there was no breach of contract on the part of the defendant. See the cases cited in *Leake on Contracts (8th ed.) p. 635.* It was the plaintiff who was in default in not paying for the chests which were actually delivered. It is clear, not only from the terms of the contract but also from the correspondence produced in evidence, that payment was to be made "against delivery". In consequence of the failure of the plaintiff to make payment for the chests which had already been delivered the defendant was entitled in law to be discharged from any obligation to supply the remainder of the chests. For the effect of the expression "Payment against delivery" see sections 31 and 28 of the Sale of Goods Ordinance (Cap. 70) and *Halsbury's Laws of England (2nd ed.), Vol. 29, para. 168.*

In regard to contract No. 800, we refused to supply the 1,000 chests which we undertook to sell under it in view of the attitude of the plaintiff in contract No. 599. Further, it cannot be enforced because it does not comply with the requirements of section 5 of the Sale of Goods Ordinance. The bought note P 2 referred to in the evidence does not constitute the necessary note or memorandum required under section 5. One of the parties to a contract cannot sign the name of the other as his agent so as to bind him; the signature as agent must be by a third person. See *Sharman v. Brandt et al.*[1].

W. S. de Saram for the plaintiff, respondent.—There was no provision in contract No. 599 for separate payments for each instalment. What was purchased was 2,000 chests. The payment was to be against "delivery" and not "deliveries". "Delivery" would mean the delivery of the full 2,000 chests. Before defendant can plead repudiation there must be clear intention intimated to the defendant that the plaintiff would never pay. In cases of this sort, where the question is whether the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of altogether refusing performance of the contract. Section 31 of the Sale of Goods Ordinance can be cited in my favour. See also *Benjamin on Sale (6th ed.) pp. 825, 828.*

As regards contract No. 800, the evidence is clear that P 2 was in reality a broker's bought note. Further, independently of the bought and sold notes, the document P 7 which contains the signature of the defendant read with P 2 and P 6 satisfies the requirements of a memorandum in writing.

[1] *L. R. (1871) 6 Q. B. 720.*

H. V. Perera, K.C., in reply.—In order to make a valid note or memorandum of a contract, the names of the parties to the contract must appear upon the document as such parties—*Vandenbergh v. Spooner* [1].

A memorandum has to set out all the terms of the contract. P 7 was a letter written in reply to P 6. The purchase price can in no way be ascertained for those two documents. P 7 merely refers to P 2 and does not incorporate it. It is not a case of incorporation by reference. The correspondence produced at the trial, although they speak of a pre-existing contract, do not contain the elements necessary to constitute a memorandum.

Cur. adv. vult.

March 4, 1943. HEARNE J.—

Alton Wijesekere, the sole proprietor of "Wijesekere & Co." which carried on "an export and import" business sued the defendant on three causes of action. On the 3rd cause of action he failed and it has no concern with this appeal.

On the 1st cause of action he alleged that on May 5, 1937, the defendant sold to him and he purchased from the defendant 2,000 ply-wood chests 750 of which were to be delivered during May and the balance in June. "Payment" was to be made "against delivery". In regard to this contract P 1 is the broker's bought note addressed to Wijesekere & Co., and D 3 the sold note addressed to the defendant. The person who purported to be the broker was in fact the plaintiff, who also conducted the business of "Produce, Exchange, Share and Freight Brokers" under the style and title of "Alton Wijesekere & Co.". P 1 and D 3 were, however, not signed "Alton Wijesekere & Co." but "Wijesekere & Co.". In consequence of this lapse the broker's so-called bought and sold notes were signed, not by the broker, but by the purchaser. The subsequent history of this contract, called contract 599, I shall deal with presently. The damages claimed were based on the non-delivery of 1,200 out of the 2,000 chests the subject-matter of the contract."

On the 2nd cause of action the plaintiff alleged that on June 17, 1937, the defendant sold to him and he bought from the defendant 1,000 cases in regard to which there was a complete default by the latter. Delivery was to be made during July. Once again Alton Wijesekere & Co. were the "brokers" but P 2, the bought note, addressed to Wijesekere & Co. in which there was a "payment against delivery" clause, was not signed Alton Wijesekere & Co., nor by any person *on behalf of* Alton Wijesekere & Co. but by "Alton Wijesekere" personally. Counsel for the plaintiff said this was a mistake for "Alton Wijesekere & Co."

Judgment was entered in favour of the plaintiff awarding him Rs. 914 damages on the 1st and Rs. 550 damages on the 2nd cause of action. The defendant has appealed. In regard tc the extent of the damages no argument was addressed to us. The claim of the appellant is that the respondent was not entitled to any damages at all.

I now turn to the contracts themselves—the first No. 599 and the second which was numbered 800. In breach of the former no delivery was made in May. In June 500 cases were delivered in three instalments of 200,

[1] *L. R. (1865–6) Exch. 316.*

200, and 100 on 18th, 19th and 21st respectively. There was thus in regard to No. 599 complete default of 750 cases in May and 750 cases in June. It will be noted that on June 17, at a time when the defendant had made no delivery at all against contract 599, contract 800 was made. In July 300 cases were delivered, 200 on the 2nd and 100 on the 28th on contract 599. No deliveries at all were made on contract 800.

It was stated by the appellant's Counsel that as his client had delivered and the respondent, as purchaser, had accepted part of the goods sold under contract 599, the enforceability of that contract was not questioned by reason of the provisions of section 5 of the Sale of Goods Ordinance. It was argued, however, that contract 800 was unenforceable, at the instance of the respondent, as there had been no delivery under that contract and as there was no note or memorandum in writing made and signed by the appellant "or his agent in that behalf". It was alternatively argued that the respondent was precluded from claiming damages as he had committed breaches of both contracts which entitled the appellant to treat them as having come to an end.

In the trial Court it was apparently argued that the bought note, P 2 constituted a sufficient compliance with the requirements of section 5 of the Sale of Goods Ordinance. Dealing with the matter the Judge remarked that "the defendant did not deny that such a contract was entered into". But this is irrelevant. The object of section 5 is to prevent the *enforcement* of a parol contract unless the defendant had executed it by partial performance or unless it can be shown that he or his agent had signed some note or memorandum of the bargain, though this need not necessarily be the bargain itself. The Judge held that "the bought note was a sufficient note or memorandum" and added that "as the defendant knew Alton Wijesekere was functioning in a dual capacity the absence of the sold note was not material". He appears not to have addressed his mind to the real issue that was involved. Assuming, as was admitted at the hearing of the appeal, that a sold note was sent to the appellant which was in the same terms as P 2, did that make the contract enforceable notwithstanding section 5? Was that a note or memorandum signed by Alton Wijesekere or, as has been argued, really by Alton Wijesekere & Co., *as the appellant's agent*? These questions require to be answered. It is clear, as the Judge has found, that Wijesekere & Co. and Alton Wijesekere & Co. are in reality a "one man show" belonging to Alton Wijesekere. In the absence of authority I am quite unable to subscribe to the view that Alton Wijesekere, the real purchaser, whether he adopted an alias to suit the occasion or whether, as was the case in P 2, he signed his own name unadorned by "& Co.", could sign a note or memorandum as the agent of the appellant so as to make the latter liable to be charged on a contract evidenced by such note or memorandum within the meaning of section 5.

The facts in *Sharman v. Brandt*[1] were somewhat different, but one of the grounds of the decision is instructive. The broker sent a contract note to the defendants mentioning B and H as his principals when in fact he had no principals as sellers. It was held, *inter alia*, that "the

[1] *(1870–71) L. R. 6 Q. B. 720.*

plaintiff, if a party to the contract, could not sign as agent for the defendants so as to bind them within the meaning of section 17 of the Statute of Frauds".

It was argued by the respondent's Counsel that, independently of the "bought and sold notes" considered by themselves, the Judge should have held that P 7 satisfied section 5 of the Sale of Goods Ordinance. The document, a letter, is signed by the appellant. It refers to contracts 599 and 800 and states "We beg to admit that 2,300 plywood cases are due to be delivered against the above contracts". It was pointed out by Counsel for the appellant that P 7 was in answer to P 6, that in the latter the respondent purported to set out the terms of 599 and 800 but omitted to mention the purchase price and that, therefore, P 7 cannot by reference to P 6 be said to contain all the terms of the contracts. But I do not regard P 7 as referring to P 6 which clearly did not set out the contracts in their entirety. In it reference was clearly made to *another document* (I confine myself to 800) which contained all the terms of contract 800; in other words to the contract note corresponding with P 2 which, although not produced by the appellant, was admittedly in the same terms as P 2. In my view the contents of P 7 are unambiguously connected by reference with the contents of P 2 and the sold note in the possession of the appellant. In *Long v. Miller*[1] Thesiger L.J. said "when it is proposed to prove the existence of a contract by several documents, it must appear upon the face of the instrument, signed by the party to be charged, that reference is made to another document, and this omission cannot be supplied by verbal evidence. If, however, it appears from the instrument itself that another document is referred to, that document may be identified by verbal evidence". In this case reference was made, as I hold, to a document containing the terms of contract 800 and its identification with the sold note in the appellant's possession, identical with P 2, is established by the admissions in the case and the fact that P 2 is marked "Contract 800" the terms of which are then set out.

In *Taylor v. Smith*[2] "the sellers" (I am quoting from *Benjamin on Sale*) "sent to the buyer an invoice in the following form: 'Mr. John Smith. Bought from Messrs. Charles Taylor, Sons, and Co., 1060 spruce deals. Free to flat, £100 11s. 4d.'; and an advice note was also sent, mentioning 1060 spruce deals, and the plaintiffs, the sellers, as consignor but stating no price, nor referring to any other document. The defendant, the buyer, wrote across the advice note and signed a memorandum: "Rejected; not according to representation". He also wrote a letter referring to "the spruce deals" rejected. Held, by the Court of Appeal, that the memorandum on the advice note, and the defendant's letter, were not a sufficient memorandum, as they did not set out the terms of the contract, and, not referring to any other document, could not be connected with the invoice".

In his judgment Lord Herschell said, "It is obvious that the advice note, the indorsed memorandum, and the letter do not by themselves constitute such a memorandum (that is a memorandum within the Statute),

[1] *4 C. P. D. 450, C. A. at 456.*

[2] *(1893) 2 Q. B. 65.*

for the terms of the bargain are not to be found in them. *If any of them had referred to or incorporated the invoice I think there would have been a sufficient memorandum".*

In the case before us P 7 mentioned contract 800, that is to say the document in which it was set out, and its terms were by reference incorporated in P 7. It was signed by the appellant. I therefore hold against the appellant in regard to his ground of appeal based on seetion 5 of the Sale of Goods Ordinance.

The second ground of appeal requires a consideration of the correspondence which passed between the parties.

In P 4 dated July 14, 1937, the plaintiff stated that 2,300 cases remained to be delivered under the two contracts—this is correct as, at that time, only 700 cases in all had been delivered—and offered to send a cheque in settlement of all deliveries to date on receipt of particulars.

In P 5 dated July 15, 1937, the defendant stated that he had not received "any advice of shipments" and, enclosing a statement, requested payment. The statement is P 5A and includes one item of Rs. 675 referrable to the chests delivered in June and another of Rs. 270 referrable to the chests delivered on 2nd July.

In P 6 dated July 27, 1937, the plaintiff wrote "unless you are able to complete all the deliveries before the 31st instant we shall be compelled to purchase same against you at the current market (? rates), and debit you the difference in value". No reference, it is to be noted, was made by the plaintiff to payment although he had asked for an account which has been sent.

In P 7 the defendant wrote apologetically "We beg to admit that 2,300 plywood cases are due to be delivered . . . ." He explained that he was not defaulting by reason of the fluctuation of the market but because he had no stock of cases at all. He did not press for payment of his account. This letter was in fact addressed to Alton Wijesekere & Co. and not to Wijesekere & Co.

On August 13 Wijesekere & Co. replied in P 8 requiring delivery on or before the 15th instant. "Should you fail to deliver by this date we shall be compelled to buy against you in the market at the best possible price".

P 9 dated August 16 is the reply to P 8 and merely pleads for time.

The plaintiff does not appear to have replied to that letter and in P 10, dated September 15, the defendant wrote again stating he was in a position to deliver 300 cases on 22nd instant. He requested payment for the 800 cases already delivered.

In P 11 dated September 29 the plaintiff informed the defendant that he had purchased 200 cases from E. B. Creasy & Co. at Rs. 2.67 and had debited the difference against the defendant's credit balance. He also informed him that he would purchase the balance "against your contracts as we require them". No cheque for the difference was sent.

In P 12 dated September 30 the defendant stated that he would deliver 300 cases on hand if the plaintiff settled his account for the 800 cases which had been delivered. If this was not done he (the defendant) would treat the contracts as being at an end and he would sue the plaintiff for what was due to him.

He did subsequently sue the plaintiff and obtained judgment for the contract price of the 800 cases.

The plaintiff replied through his proctor in P 13 dated October 2. In this letter the plaintiff clearly intimated that he would only pay for the chests delivered less the loss he had suffered by the purchase of 200 cases on the delivery of the remaining chests which the defendant had contracted to deliver.

In P 16 dated October 12 the defendant's proctor wrote "My client has in stock with him a sufficient number of chests to meet your client's demands and requirements and my client will deliver same to your client on your client's paying the amounts already due and the value of the chests now required.

In P 17 of October 16 the plaintiff stated his willingness to accept delivery of the balance of chests under the contracts but declined to pay anything till delivery in full had been completed.

The legal position that arises from the correspondence appears to be this. In the first place the appellant had committed breaches of contracts 599 and 800, and there was no new *binding* agreement with the respondent which entitled him to discharge his obligations by delivering chests after the time provided for in the contracts. The respondent, assuming he had not committed breaches of the contracts himself, was well within his rights in buying chests in the open market and holding the appellant liable for the difference in price. In point of fact it would appear that he would have had difficulty in purchasing chests locally. This seems to be what the Judge finds. So the respondent threatened to purchase chests against the contracts if the remaining chests were not delivered by certain dates. *Vide* P 6, P 8, P 11. In effect he had progressively extended the stipulated time for delivery, and if the appellant had delivered the remaining chests within the extended time, this would have been equivalent to punctual performance in discharging the contracts. *Ogle v. Vane* [1] *Hickman v. Haynes* [2], *Levey v. Goldberg* [3], referred to in *Leake on Contracts, 8th Ed. at page 635*. He did not do so and was clearly in default. So much for the appellant's position.

It was found by the Judge, and I am in agreement with his finding, that the respondent was in default in not paying for the chests delivered. Payment was to be made against delivery. The respondent, at his risk, may have refused to accept delivery by instalments if he felt justified in so doing under section 31 (1) Sale of Goods Ordinance. But having accepted instalments he was bound to pay on the receipt thereof. The contracts provided for payment against delivery and that is clearly what the respondent understood when he wrote P 4 although subsequently, as is evidenced by the correspondence, he took up a position completely inconsistent with what he then wrote.

What was the effect of the respondent's default? Did it discharge the appellant from his obligations under the contracts? They must be differentiated. I shall deal first with 599.

The Judge said "For the breach committed by the buyer he has been ordered to pay the defendant his damages" (this has reference to the case

[1] *L. R. 3 Q. B. 272.* [2] *L. R. 10 C. P. 598.*
[3] *(1922) 1 K. B. 688.*

in which the appellant was successful against the respondent when he sued him for the contract price of 800 cases). "For the breach committed by the defendant he is *equally* entitled to pay the buyer". I do not follow that the one depends upon the other but it occurs to me, as a point of law, that what was decided in the case referred to and the defences available to the respondent in that case may well be regarded as *res judicata* in this case, in regard to 599.

In another passage the Judge said "Both parties had acquiesced in each other's breaches". This, I find, the utmost difficulty in accepting. The appellant asked for payment in P 5, again in P 10 and in P 12 he made prepayment a condition of delivery of 300 cases which he had on hand.

In still another passage the Judge said, "I do not think that the fact that the buyer failed to make payment excused the defendant from delivering the rest of the chests under the contract". In other words he found that the respondent's breach of the contract did not amount to a repudiation of the whole contract: *vide* section 31 (2) of the Sale of Goods Ordinance. There is no doubt that this is a question of fact to be decided according to the circumstances of each case. In *(1919) 2 K. B. 581* failure to pay for the first instalment was held not to show an intention to repudiate the whole contract. But in the present case the respondent's intention to violate an important term going to the root of the contract, viz., payment on delivery, was not only indicated by his failure to send a cheque in settlement on demand being made, but in P 13 and P 17 he expressly stated that he would not pay for what had already been delivered. This was an undoubted refusal to be bound by the terms of the contract.

In my opinion the appellant was entitled thereafter to regard the respondent as having repudiated the contract. In regard to the 200 cases purchased by the respondent to which he refers in P 11 dated September 29, it is true that he had not then told the appellant in so many words that he would not pay for the instalments till delivery had been made in full, but it is obvious that that was what he had intended to convey. P 10 by the appellant stated he could deliver 300 cases and requested payment for the 800 cases. P 11 intimated that the appellant had been debited the difference on 200 cases purchased from E. B. Creasy & Co., also that further purchases would be made, and it ignored the request for payment. The appellant wrote P 12, and in P 13 the position the respondent had taken up antecedently (from July 27 when P 6 was written in reply to P 5 requesting payment) was made abundantly clear.

The respondent was in a strong position but he threw away his chances when he would not pay for the cases delivered to him. The appellant, initially at any rate, was unable to keep his contract out of necessity. Unless the respondent was not in funds he appears to have refused to be bound by the terms of the contract out of perversity.

For the reasons I have given the respondent is, in my opinion, not entitled to any damages in respect of contract 599.

The position is different in regard to contract 800. There had been no partial execution of that contract, no delivery of any instalment for which the respondent had declined to pay, and in consequence no breach

by him of any term of it. After the extended time given to the appellant had come to an end, he alone was in default. I have already said that the *quantum* of damages awarded was not challenged.

I would order that judgment be entered in favour of the respondent for Rs. 550 with costs based on this amount and I would allow the appeal with costs based on Rs. 914 the extent to which the appellant has succeeded.

SOERTSZ J.—I agree.

Judgment varied.