1944 *Present:* **Soertsz and Wijewardene JJ.**

JAYASINGHE, Appellant, *and* KEELL & WALDOCK, Respondents.

213—D. C. Colombo, 12,484.

Principal and agent—Broker employed to buy rubber coupons—Principal in default—Right of broker to sell without intervention of Court—Damages.

Where a broker is employed by a principal to purchase rubber coupons in pursuance of an express agreement between them by which the broker is authorised to sell the coupons for the purpose of recoupment in the event of the principal making default,—

Held, that the broker was entitled to sell the coupons without the intervention of a Court of Law.

APPEAL from a judgment of the District Judge of Colombo.

H. V. Perera, K.C. (with him *N. K. Choksy* and *Kingsley Herat*), for the defendant, appellant.

N. Nadarajah, K.C. (with him *D. W. Fernando*), for plaintiffs, respondents.

Cur. adv. vult.

May 3, 1944, SOERTSZ J.—

The plaintiffs, a Firm of Brokers, are suing the defendant to recover the difference between the price they paid for three lots of rubber coupons they purchased for the defendant on his instructions, and the price they realised when they sold those lots, in pursuance of an express agreement between them and the defendant, by which they were authorised to sell them for the purpose of recoupment, in the event of the defendant making respondefault.

The matters pressed on this appeal were—

(*a*) that, notwithstanding the agreement just referred to, the plaintiffs were not entitled in law to sell the three lots without the intervention of a Court inasmuch as such sales amount to parate execution and are void as being contrary to public policy;

(*b*) that, in any event, the sale of the coupons involved in the first contract P 1 was unlawful because, in respect of these, the defendant had paid the price.

For the first of these contentions reliance was placed on certain Roman-Dutch authorities which are to be found, collected and summarized, in *Wille on Mortgage and Pledge pp. 176 et seq* and on the local case of *Hong Kong and Shanghai Bank v. Krishnapillai*[1].

The effect of the writing of the jurists is that, in the absence of an express agreement, parate execution is not permissible, but in regard to the question of such execution by agreement, there appears to be a sharp conflict of views with, perhaps, a slight preponderance against it. But all the authorities are agreed that an exception is made in the case of scrip pledged with a bank and of movables of little value. In the case of *Hong Kong and Shanghai Bank v. Krishnapillai* (*supra*) however, a Bench of this Court refused to sanction the right of a bank to sell scrip which one of its debtors had pledged by way of security expressly agreeing to its sale in the event of his making default in his contract. But, it is unnecessary to examine that view for the purpose of this case and I have taken occasion to refer to these authorities only because a great deal of argument was addressed to us on them on the adroit assumption that the transactions between the defendant and the plaintiffs are of the nature of a mortgage or pledge or can be equated thereto whereas, upon analysis, they stand disclosed as nothing more than those familiar instances in which a purchaser commissions a broker to buy goods for him and at the same time authorises him to sell them in a certain contingency. If in the contingency contemplated the broker himself has an interest it is well established law that the authority to sell is irrevocable. This principle is stated by *Boustead (8th Edition) 456* as follows:—

"When an agent is employed to enter into any contract or do any other lawful act involving personal liability and is expressly or impliedly authorised to discharge such liability on behalf of the principal, the authority becomes irrevocable as soon as the liability is incurred by the agent."

I would, therefore, hold that in regard to contracts P 2 and P 3 the plaintiffs were within their rights when they sold the coupons covered by those contracts despite the protests of the defendant and they must be paid the difference. In regard to contract P 1, however, the position appears to be different. Payment was due in respect of it on the April 5, 1940; P 20 shows that the defendant paid Rs. 1,500 in part settlement on the April 17, 1940. P 29 and P 33 show that on instructions from the defendant the plaintiffs sold some of his tea coupons and applied the proceeds in payment of the balance due on account of P 1 and transferred to his credit the amount in excess. That contract must, therefore, be regarded as a completed and closed transaction and the Rs. 15,000 coupon pounds as the property of the defendant which the plaintiff at his request held for him pending his instructions for their disposal. The defendant gave no instructions for their sale. Indeed he objected to the sale, and when they sold despite objection they sold at their peril. They realised 13 cents a pound.

[1] *33 N. L. R. 249.*

The question then arises how the defendant's loss or damage has to be measured. In the case of *Elliot v. Huges* [1] *referred to in 10 Halsbury p. 334 (note) old edition* the rule adopted in a case in which the seller failed to deliver the goods sold to the buyer, was that he was liable to make good not the highest price at which they could have been sold in the interval but the price at the date of the trial. That rule has been consistently followed and might have been fairly applied, in the circumstances of this case, if there had been any evidence as to the price at that date. There is no such evidence, but rather than send the case back and involve the parties in further costs and the plaintiffs in greater delay I would fix twenty cents a pound as the basis for calculating damages. That was the amount at which the defendant was willing to sell on June 11, 1940, as is shown by P 60. The difference is six and three-quarter cents a pound or Rs. 1,012.50 for the whole lot. This sum will be deducted from the amount decreed in the Court below. The order for costs in the trial Court will stand. The defendant will pay two-thirds of the costs of appeal.

WIJEYEWARDENE J.—I agree.

Judgment varied.