1938 *Present :* **Poyser S.P.J. and Wijeyewardene A.J.**

BARTLEET & COMPANY v. EBRAHIM LEBBE MARIKAR

142—D. C. Colombo, 3,234

Contract—Broker employed for purchase of rubber in London—Purchaser's intention to speculate—Failure to take delivery of rubber—Sale at loss—Bond to pay amount of loss—Not a wagering contract.

The plaintiffs, as brokers, purchased rubber for the defendant on the London market under a contract entered into by the later in the following terms :—" As arranged please buy seven hundred tons rubber on London, June-December, 1929 at the rate of one hundred tons each month at the current market rate. Also I allow you to have the selling as well ".

The plaintiff carried out these terms of the contract but the rubber that could have been delivered each month was sold at a loss. The defendant had no intention of taking delivery, his object being to speculate on the differences in the prices. The defendant paid the loss for some months and defaulted later. He then entered into a bond to pay the loss due from him, upon which the plaintiff instituted the present action.

Held, that the contract was not a wagering contract and that the bond was enforceable.

Woodward et al. v. Wolfe (1936, 3 A.E.R. 529) followed.

Held, further, failure on the part of the plaintiffs to comply with the requirements of section 7 of the Business Names Registration Ordinance, No. 6 of 1918, subsequent to the institution of the action does not affect his right to enforce the contract, which must be determined as at the time at which the action was instituted.

Jamal Mohideen v. Meera Saibo (22 N.L.R. 268) followed.

THIS was an action instituted by the plaintiffs to recover a sum of Rs. 101,771 on a mortgage bond executed by the defendant. The defendant pleaded that the bond was given for an illegal consideration

and was not enforceable. The plea was based on the ground that the liability arose out of certain wagering contracts in respect of the purchase and sale of rubber. The learned District Judge held that the contracts were not wagering contracts and gave judgment for the plaintiffs.

H. V. Perera, K.C. (with him *E. F. N. Gratiaen* and *U. A. Jayasundere*), for first defendant, appellant.—Three points can be taken on behalf of the defendant.

The plaintiffs are partners. One of them died after the institution of the action and before date of judgment. The provisions of section 7 of the Registration of Business Names Ordinance, No. 6 of 1918, were not complied with, and section 9 would therefore be applicable. Under section 7, notice of the death should have been given to the Registrar of Business Names within fourteen days in the prescribed manner.

[WIJEYEWARDENE J.—There is a distinction between "enforceable" and "maintainable".]

The general principle is that rights must be determined as at the date of the action. *See Jamal Mohideen & Co. v. Meera Saibo et al.*[1]

It must be admitted that the default was subsequent to the contract in question and the institution of the action, but that case did not deal with the position resulting from a default occurring during the pendency of an action.

The procedure followed in the commission proceedings in London was irregular and the evidence recorded there should not have been admitted. The Commissioner administered the oath to himself. This was improper. The oath should have been taken before somebody else and the Commissioner should then have subscribed his name.

To come to the main point, the contract in question cannot be enforced as it is a wagering contract. The principles governing wagering contracts are stated in *Tarrant et al. v. Marikar*[2]. It is the substantial agreement which must be taken into consideration although the form of it may speak of a different agreement. As indicated by D 13-D 16, plaintiffs were acting as principals and not as brokers. One cannot be a principal in law and a broker in fact. On the face of the contract, plaintiffs have made themselves the principals. Parol evidence, therefore, is not admissible to show that they are in the position of agents—*Formby Brothers v. Formby*[3]. Nor can the contract be adopted subsequently by a third party—*Smith's Leading Cases (13th ed.), p. 376.* There was no privity of contract between the defendants and Yuille & Company; this is the best test and is conclusive—*Brandt & Co. v. Morris & Co., Limited;* illustration (3) of bought and sold notes in *Benjamin on Sale (7th ed.), p. 293.*

The contract in question is essentially a wagering contract. To pay differences and not to give or take delivery of rubber was clearly the intention behind the contract—*Kong Yoo Lone & Co. v. Lowjee Nanjee* (a Privy Council) decision[5]; *The Universal Stock Exchange, Limited v. David Strachan*[6]; *In re Gieve*[7]; *Smith's Leading Cases (13th ed., p. 266).*

[1] *(1920) 22 N. L. R. 268.*
[2] *(1934) 36 N. L. R. 145.*
[3] *(1910) 102 L. T. R. (N. S.) 116.*
[4] *(1917) 2 K. B. 794.*
[5] *(1901) 29 I. L. R. Calc. 461.*
[6] *(1896) A. C. 166.*
[7] *(1899) L. R. 1 Q. B. 794.*

F. A. Hayley, K.C. (with him *F. C. W. VanGeyzel*), for plaintiffs. respondents.—Certain important English decisions were not considered in *Tarrant et al. v. Marikar* (*supra*). The facts of the present case are very similar to those in *Woodward et al. v. Wolfe*[1]. The whole argument for the appellants has been based on a false conception of the actual transaction. The Chapter in *Benjamin on Sale* which has been referred to is not applicable. It has nothing to do with agents. It deals merely with formation of contracts. A broker's note in itself does not constitute a contract. Benjamin himself says so.

This was an action, pure and simple, for indemnity, not for the price of goods. Defendant, by his letter P 4, ordered plaintiffs to buy goods in England and to sell them. This case is precisely similar to *Woodward et al. v. Wolfe* (*supra*). In that case too the same argument was put forward as was urged in the present case.

[POYSER J.—There is is no need for further argument.]

H. V. Perera, K.C., in reply.—This case can be distinguished from *Woodward et al. v. Wolfe* (*supra*). Regarding the contract between plaintiffs and Yuille & Company, we were not consulted at all, and there is nothing to suggest that we could have had any say in it.

Cur. adv. vult.

October 7, 1938. POYSER S.P.J.—

In this action the plaintiffs obtained judgment against the defendant on the mortgage bond P 1. The bond in question was admittedly executed by the first defendant, but the latter in his defence alleged that it was executed on account of gambling transactions between himself and the plaintiffs. The District Judge has in a judgment which deals with every point raised in the lower Court come to the conclusion that the transactions between the plaintiffs and the defendant were not wagering contracts and consequently entered judgment for the plaintiffs as prayed.

The material facts are as follows:—The plaintiffs are brokers carrying on business in the Fort. The defendant employed the plaintiffs as his agents for the purchase of rubber on the London Market. The contracts which are material for the purposes of this case commence with the contract D 13 which was entered into on May 16, 1929, and by that and subsequent contracts the plaintiffs bought on behalf of the defendant and for his account 700 tons of rubber to be delivered on the London Market between the months of June and December, 1929.

The plaintiffs duly carried out their terms of the contract, but the rubber that could have been delivered each month was sold at a loss. The defendant paid such losses to the plaintiffs for the months of June to October but did not however pay the amount due to the plaintiffs for the months of November and December, and it is in regard to such non-payment that the bond P 1 was executed and that this action was brought.

On appeal the following points were taken : firstly, that the commission proceedings in London were irregular. It should be stated that a commission was issued to England on February 26, 1936, for the examination of certain witnesses. Such commission was duly carried out and returned

[1] *(1936) 3 A. E. R. 529.*

on July 7, 1936, and the evidence recorded on such commission was read at the trial. It was argued that it was improperly read and that the commission was irregularly carried out as the Commissioner had administered to himself the oath he was required to take by the terms of his commission and further that it did not appear that he had subscribed the oath of office as he was required to do. The District Judge in a separate order dated June 28, 1937, rejected this argument. I think he was perfectly correct in so doing. He points out that there were no special directions in regard to the mode of taking the oath and in the absence of such directions the Commissioner was entitled to administer the oath to himself. In regard to the argument that he did not subscribe the oath of office, the District Judge considered that he must presume that the Commissioner duly carried out the instructions he had received. I entirely agree with the reasons for which this argument was rejected.

A further point was taken that the provisions of the Registration of Business Names Ordinance, No. 6 of 1918, were not complied with. The grounds for this argument were that Mr. Boys, one of the partners of the plaintiff firm, died in July, 1936, but the plaintiff firm did not comply with the provisions of section 7 of the Ordinance within the statutory period of fourteen days. They actually did not inform the Registrar of Business Names in regard to the decease of Mr. Boys till November 20, 1936 (P 67), and having given such information they were told (P 68) by the Registrar-General that their certificate of registration need not for the present be altered. There may or may not be substance in this argument, but the fact remains that when the action was instituted, and that is the material date, there was no infringement by the plaintiffs of any of the provisions of that Ordinance.

It has already been held by this Court in the case of *Jamal Mohideen & Company v. Meera Saibo et al.*[1], that for the purposes of this Ordinance the plaintiffs' rights are to be determined as they existed at the date of the institution of the action. The argument, on this point therefore fails.

The principal point to be decided in the case was whether the contracts entered into between the plaintiffs and the defendant were wagering contracts and as such unenforceable. If they were wagering contracts, the principles enunciated in the local case of *Tarrant v. Marikar*[2], would no doubt be applicable and the plaintiffs would not be entitled to succeed. On the other hand, if such contracts were not wagering contracts, the plaintiffs, the execution of the bond in question being admitted, must succeed.

The District Judge's findings of fact, and there is abundant evidence both oral and documentary to support such findings, are briefly as follows: that the material contracts commencing with D 13 were entered into in consequence of conversations between the defendant and a Mr. Perera who was at the time in the plaintiff's office. The contracts provided, and for this purpose one must consider the form of the contract, that the plaintiffs bought on, the order of the defendant, rubber to be delivered in London or Liverpool, at any time or times, at seller's option, during the months of October to December, 1929. The contract was

[1] *22 N. L. R. 268.*

[2] *36 N. L. R. 145.*

made under and subject to the Constitution, By-laws and Rules of the Rubber Trade Association of London. As previously stated, the defendant did not take delivery of any of the rubber he purchased but such rubber was sold in accordance with the above by-laws and rules and such sales resulted in heavy losses to the defendant.

In regard to whether these contracts between the plaintiffs and the defendant were wagering contracts, the defendant gave evidence to the effect that he dealt with the plaintiffs as principals and that there was no question of taking the rubber he purchased. It was a pure speculation, gambling in differences between him and the plaintiffs. Mr. Parsons, who gave evidence for the plaintiff firm, on the other hand, stated that they were not concerned with whether the defendant intended to speculate or not ; that they acted merely as his brokers for the purchase and sale of 700 tons of rubber and that their position was purely that of brokers. As regards its being a wagering contract, they had no interest in the price at which the rubber was eventually sold and their only interest in the contracts was their brokerage.

The District Judge has entirely accepted the evidence called on behalf of the plaintiffs and there is no doubt that he is correct, for the documentary evidence, as stated before, amply supports his finding. I need only refer to one of such documents, namely P 4, which is as follows :— " Dear Sirs, As arranged please buy 700 (seven hundred) tons rubber on London, June-December, 1929, at the rate of 100 (one hundred) tons each month, at the current market rate and also I allow you to have the selling as well. Signed : E. L. Ebrahim Lebbe Marikar ".

The statement by the defendant in this letter that he allowed the plaintiffs to have the selling as well as the buying of the rubber clearly indicates what the relationship between the parties was.

In regard to the argument on behalf of the appellant that the plaintiffs were acting as principals, the form of the contract D 13, in my opinion, does not negative the argument that the plaintiffs were only acting as brokers. It does not establish that the plaintiffs acted as principals. What it does establish is that they made themselves liable to the defendant on this contract, and by executing the contract in this form, they assumed the obligation of principals and could not escape liability, assuming that differences had been due to the defendant, by parol proof that they were only acting as brokers.

The course of business is clearly indicated by the evidence that was taken on commission. The plaintiffs on receiving instructions to purchase rubber for the defendant cabled to their London agents and entered into a contract with them to purchase the rubber they were instructed to. When their agents had carried out these instructions, they completed the contract with the defendant, charging him the same price as they were charged by their London agents and at the same time adding on their commission which was all they would make out of the transaction. It appears from the evidence which was taken on commission that if a person buys rubber, as the defendant did, he can have it delivered to him in a certain month or he may resell it through the person he purchased it from or through anybody else and it is no concern of the broker how he disposes of his contract.

Those being the facts, were the contract D 13 and the subsequent contracts wagering contracts and unenforceable?

I think for the purposes of this appeal it may be accepted that the defendant had no intention of taking delivery of this rubber. He intended to speculate in differences and he hoped to sell it at a greater price than he paid for it. Assuming that to be so, that does not necessarily make these contracts unenforceable.

The first and one of the most important cases in regard to wagering contracts is the case of *The Universal Stock Exchange v. David Strachan* [1]. In that case Cave J. in the summing-up to the jury stated the law to be as follows: that if a man goes to a broker and directs him to buy or sell so much stock as the case may be, there may be in the eyes of the purchaser a gaming transaction or there may not. If the purchaser means to sell the stock before settling day, there may be a gaming transaction so far as he is concerned but it is not necessarily a gaming transaction so far as the broker is concerned and in order to be a gaming transaction such as the law will not enforce it must be a gaming transaction in the intention of both the parties to it. This summing-up was approved of by the House of Lords and it is still sound law.

As regards the present case, there is one authority, a recent case, which is directly in point and which in my opinion cannot be distinguished from this case. I refer to the case of *Woodward and another v. Wolfe* [2]. That was a case in which a person gambled on cotton futures and to do so he had to buy or sell cotton futures through members of the Liverpool Cotton Association. It was held that the true relationship between the parties was that of principal and broker and that there was no gaming or wagering contract between them. The following passages in the judgment of Hilbery J. are peculiarly applicable to this case:—

> "It was urged before me on behalf of the defendant that, as there was a contract made by the plaintiffs directly with the defendant of purchase and sale as principals, and as there was an express understanding that there should be no question of deliveries on either side but only an eventual payment of differences, the claim was one in respect of gaming and wagering contracts and was therefore unenforceable in law. Reliance was placed upon the decision in *Ironmonger & Co. v. Dyne*, and it was contended that that case established that once it was shown that, notwithstanding the forms of contract between the parties, the intention was that no deliveries were to be made and that nothing was to happen except payment of differences, the contracts were gaming and wagering contracts. But *Ironmonger & Co. v. Dyne* (*supra*) was a case in which foreign bankers whose business it was to buy and sell foreign currency were the contracting parties on the one side. I cannot find from an examination of that case that they acted in any way as brokers in the transactions. In the fullest sense of the word they were principals in the transactions with the defendant in that case. In such circumstances the Court of Appeal decided that the test applied by Cave J. in *Universal Stock Exchange, Ltd. v. Strachan* (*supra*) at page 167, *i.e.*, whether the bargains were real ones for purchase and delivery

[1] (1896) *A. C. 166.*

[2] (1936) *3 All England Law Rep. 529.*

or whether they were simply gambling transactions intended to end in the payment of differences, was the correct test for resolving the question whether the contracts in question were or were not gaming and wagering contracts. But the plaintiffs in the case before me did in fact act in every transaction as brokers. They made a genuine contract in the market binding them in respect of that and exactly that which the defendant was buying or selling" . . . .

"They (the plaintiffs) acted for the defendant to enable him to gamble and they acted in the capacity of brokers in the market in which the defendant wished to gamble in the only way in which the defendant could gamble in that market. If all that the plaintiffs had done was to pass a form of contract made directly between themselves and the defendant with an existing arrangement that only differences should be paid, the matter might well be concluded on the principle of the decision in *Universal Stock Exchange, Ltd. v. Strachan* (*supra*). It is not, however, what took place here. The plaintiffs made contracts on the market for the defendant to give effect to his orders. Those contracts I am satisfied in the evidence bound him and they have, I am satisfied, had to meet their obligations under them". . . . .

It is clear, therefore, adopting the judgment in that case, as I think we ought to, that the plaintiffs must succeed, for it is abundantly clear that they only acted as brokers on behalf of the defendant and in no sense did they enter into a gaming contract. The only consideration for their contract was their commission.

In my opinion the District Judge came to a correct conclusion and the appeal will be dismissed with costs.

WIJEYEWARDENE A.J.—

The plaintiffs-respondents instituted this action for the recovery of Rs. 101,771 with interest from the first defendant, due on a mortgage bond P 1 of March 27, 1930, executed by him. The second and third defendants were made parties to the action as they were puisne encumbrancers in respect of the property hypothecated by the bond. The District Judge entered judgment for the plaintiffs and the first defendant appeals from that judgment.

The appellant admitted the execution of the bond but pleading effect that the bond was given for an illegal consideration and was therefore unenforceable. This plea was put forward on the ground that the liability arose out of certain wagering contracts in respect of the purchase and sale of rubber made by the appellant with the respondents as principals. There were other pleas raised in the course of the proceedings and I shall deal with them later.

The respondents are a leading firm of brokers in Colombo who put through a large number of contracts for their clients for the purchase and sale of rubber. They do their business not only in Colombo but arrange for similar purchases in London and elsewhere. For their business in London they employ the firm of George White Yuille & Co. as their regular agent.

The appellant is an owner of rubber estates and has been a dealer in rubber.

After an interview with Mr. Perera, the Ceylonese broker then employed in the plaintiff's firm, the appellant wrote P 4 of May 15, 1929, to the respondents. P 4 reads :—

" Messrs. Bartleet & Co.,
Colombo.

Dear Sirs,

As arranged please buy 700 (seven hundred) tons rubber on London. June-December, 1929, at the rate 100 (one hundred) tons each month at the current market rate. Also I allow you to have the selling as well.

Yours faithfully,
(Sgd.) P. L. Ebrahim Lebbe Marikar ".

On receipt of P 4, the respondents immediately telegraphed their London Agent, Yuille & Co., " to buy for our account delivery in equal monthly lots 700 tons June-December delivery this year ". In reply Yuille & Co. forwarded to the respondents eleven contracts which showed that they had bought on account of the respondents the requisite quantity of rubber " to be ready for delivery in warehouse in London and/or Liverpool any time or times at seller's option " during the months in question. On receiving telegraphic information about these contracts from Yuille & Co., the respondents wrote on May 16, 1929, several letters (of which D 13 is one) to the appellant in the following terms:—

" We have this day bought by your order and for your account from ourselves . . . . . London Plantation Rubber at . . . . . per lb. . . . . to be ready for delivery in warehouse in London and/or Liverpool . . .

Brokerage, ½ per cent.

(Sgd.) Bartleet & Co.,
Brokers.

The sale prices of rubber given in D 13 and similar documents addressed to the appellant are exactly the prices mentioned in the corresponding relative documents received by the respondents from Yuille & Co., as may be seen by a comparison of D 13 with A. B. Y. 15.

In respect of these dealings with Yuille & Co., the respondents charged the appellant brokerage, though in Colombo contracts brokerage was payable by sellers and not buyers. This is the usual course of business of the respondents in dealing with foreign buyers and sellers and appears to be due to the peculiar situation created by these contracts. Mr. P. J. Parsons, one of the partners of the respondent's firm says :—

" The reason (for charging brokerage from the appellant) is because we had to guarantee him to Yuille & Co. Yuille & Co. had never heard of him. We are responsible to Yuille & Co. They only recognized us. They did not want to know him and the only firm or person they recognized in connection with this contract is ourselves. So that in this case we act as principals so far as they are concerned ".

The respondents did not give any specific instructions to Yuille & Co. as to the disposal of the rubber when tendered and therefore Yuille & Co. sold the rubber when it was tendered as there was a general arrangement that in the absence of specific instructions they should sell any rubber bought by them for the respondents. This arrangement is in consonance with the course of business of Yuille & Co., as stated by Mr. Chapman. Yuille & Co. informed the respondents about these sales from time to time (*vide* A. B. Y. 17 to A. B. Y. 118). In communicating this information to the appellant the respondents wrote letters similar to D 12 which reads :—

" E. L. Ebrahim Marikar, Esq.,

We have this day sold by your order and for your account to ourselves . . . . tons plantation rubber . . . . at . . . . per lb. . . . . to be ready for delivery in warehouse in London and/or Liverpool.

Brokerage, 1 per cent.

(Sgd.) *per pro* Bartleet & Co ".

The sale prices mentioned in the documents addressed to the appellant are the same as the prices in the relative documents received by the respondents from Yuille & Co.

In consequence of a falling market these transactions resulted in losses and Yuille & Co. sent to the respondents accounts from time to time showing the amount due on these transactions. The respondents wrote to the appellant showing the amount payable by him and for this purpose they adopted the figures given in the advices from London. D 25 is one of such documents sent to the appellant. It gives the purchase price of the rubber and its selling price. The amount due is made up by adding to the difference between the purchase price and selling price, the amounts due on account of brokerage, interest and incidental expenses.

It was understood that the appellant would make payment immediately after the account was rendered to him (*vide* P 25). Though the appellant at times delayed in making payment he met all the bills due except those in respect of losses incurred on sale of Forward Delivery Rubber for November and December, 1929. His attention was drawn to it by P 28 to which he replied by P 29 stating that he was making arrangements to settle the amount due by the end of December, 1929. It was ultimately agreed that the appellant should give a bond for the payment of the amount due and P 1 was executed by the appellant in March, 1930. He paid for some months the interest provided under the bond and then made default. The evidence does not show whether he stopped the payments because he was unable to meet his commitments or because the thought occurred to him that it would be against public policy to make payments on a bond given for making good the losses incurred by the respondents. On the other hand there is evidence to show that the respondents have settled all the amounts due to Yuille & Co. and the appellant was aware of the fact at the time that such payments were made.

The defence of the appellant that the consideration for the bond is illegal is based on the ground that the respondents did not act as brokers

in respect of the contracts in question but as principals. In order to appreciate this contention, it is best to consider the case as presented by the learned Counsel for the appellant. Up to 1926 the appellant's transactions in rubber have been what are referred to as "spot sales". About that time there was a boom in rubber and he began to enter into forward contracts without any intention of taking delivery or giving delivery of any rubber bought or sold by him. If the market was against him he paid the difference between the market price and the contract price. Even when the market was favourable there was no delivery but he got a cheque for the difference. He negotiated a number of such contracts through the respondents as brokers. About May, 1929, he arranged to enter into such forward contracts in London in respect of which the sum now claimed on the bond became due from him. With regard to the circumstances which led to the making of these contracts, he says :

> "In May, 1929, one Mr. Perera, a broker in plaintiff's firm came and spoke to me. He wanted me to buy rubber. He said he could supply any amount of rubber. I consented to buy rubber. It was arranged that Mr. Perera should buy rubber for me at the London Market. I do not know from whom he arranged to obtain the rubber for me. He came and spoke to me on behalf of Bartleet & Co. It was arranged to buy 100 tons of rubber every month totalling up to 700 tons at the London Market price. There was no delivery (to be made). It was Bartleet & Co. who sold that rubber to me. At the end of each month they would send to me an account of the profit or loss. There was to be no delivery. The arrangement was that I should pay the difference when the market was against me and that I should be paid the difference when the market was in my favour".

He says he regarded the respondents as principals on the contracts in question and he relies on the documents D 12 and D 13 as establishing this fact as these documents refer to a sale to him by respondents and a purchase by the respondents. There was no delivery under the contracts and the respondents, he says, should have been well aware that he did not intend to take delivery in London and that he could not make arrangements to receive such delivery. He defines the contracts made by the respondents with Yuille & Co. as independent wagering contracts by the respondents as principals in order to indemnify themselves against any losses that may be incurred by them in respect of the wagering contracts made by them with him. The evidence with regard to his transactions prior to 1929 may have been of some assistance to the appellant in proving the probability of his statement with regard to the contracts in question in the present case, if such evidence indicated a regular system of business for the payment of differences without delivery of the goods. Though the appellant made a general statement in his evidence-in-chief that there was not a single contract of his between 1926 and 1929, in which the ordinary obligations of the seller to deliver and of the purchaser to take delivery were enforced, he had to admit in cross-examination that a number of contracts about which he was cross-examined in detail were in fact ordinary contracts for the purchase and sale of rubber. Moreover he made the very significant admission that even in the case of forward

contracts put through locally in which there was no delivery but only an eventual payment of differences, the respondents never acted as sellers or purchasers but only as brokers. The evidence of the appellant as to the conversation between him and Mr. Perera, the Ceylonese broker, stands uncorroborated and is certainly in conflict with P 4. He could have called Mr. Perera to support him but he did not choose to do so. While it is not necessary to question the veracity of the appellant I do not think it prudent to accept his testimony on any material particular unless it is supported by some other evidence, in view of the scant regard shown by him for accuracy with regard to various matters on which he was examined.

I do not think that D 12 and D 13 could be construed as indicating that the respondents acted as principals and not as brokers as such a construction would be in conflict with all the facts of the case. The appellant was charged for the rubber purchased by him at the same rate at which the respondents secured the rubber in London and when the rubber was sold in London he was given credit at the same rate at which such resale took place. Moreover the documents sent to him by the respondents showed that they were charging him brokerage and incidental expenses. Those facts disprove the contention that they acted as principals with regard to these contracts with him and it is inconceivable that he could ever have been under the impression that they intended to act as principals notwithstanding the clear instructions given in his order P 4. Mr. Parsons has given evidence denying that the plaintiffs acted in any capacity other than as brokers in these contracts. I see no reason for rejecting this evidence. The true position appears to be that in order to give effect to P 4, the respondents were compelled to purchase the rubber through Yuille & Co. in the manner adopted by them in view of the fact that Yuille & Co., and those for whom they acted were not prepared to enter into contracts with the appellant who was unknown to them. The respondents acted in the only way it was open to them to act for the purpose of carrying out the order of the appellant to them as his brokers.

The present case is clearly distinguishable from *Tarrant v. Marikar*[1], where the plaintiffs entered into certain contracts with the defendant for the sale of rubber to him. The plaintiffs claimed a sum of money on a bond given to them by the defendant on account of moneys that became due to them in these contracts. The Court held on the evidence before it that the contracts were not genuine bargains for the sale and purchase of rubber but were wagering transactions intended to end only in the payment of differences. The plaintiffs in that case admitted they were the principals in the contracts. Garvin and Akbar JJ. held that as the contracts were wagering contracts to the knowledge of both the parties the plaintiff who was one of the parties to the contract could not enforce a claim on a bond the consideration for which was a sum due by the other party to the wagering contracts. The case of *Woodward and another v. Wolfe*[2], appears to be more in point. The plaintiffs in that case were members of the Liverpool Cotton Association. Only the members of the Association were permitted to enter into transactions for the purchase

[1] *(1934) 36 N. L. R. 145.*

[2] *(1936) 3 All England Reports 529.*

and sale of cotton futures on the Liverpool market and such transactions were governed by the regulations and usages of the association. The defendant who was not a member of the association requested the plaintiffs to deal in cotton future on his behalf. The plaintiff thereupon made purchases from other members of the association and according to the regulations made contracts on specified forms by which they bound themselves, as purchasers, and then filled in other specified forms under which they sold the particular lots of cotton to the defendant at the same price at which they were bought, in addition to their brokerage. Duplicates or counterfoils of the sale notes in the form of bought notes from the defendant to the plaintiffs were sent at the same time for signature and return by the defendant. The plaintiffs sued the defendant for money due on account of differences, interest and brokerage and were met by the plea that "as these were contracts made by the plaintiffs directly with the defendant for purchase and sale as principals, and as there was an express understanding that there should be no question of deliveries on either side, but only an eventual payment of differences, the claim was one in respect of gaming and wagering contracts and was therefore unenforceable in law". Hilbery J. rejected the plea and held that the plaintiffs acted in fact as brokers and merely allowed the defendant in form to buy from or sell to them and that therefore they could recover the amount claimed.

I hold that the respondents acted as the brokers of the appellant in respect of these contracts and they are therefore entitled to make the present claim on the bond.

The appellant has also questioned the rights of the plaintiffs to enforce their claim on the ground that they had not complied with the provisions of section 7 of the Registration of Business Names Ordinance, No. 6 of 1918. This contention is based on the following facts:—The third plaintiff died some time after the institution of the present action. The plaintiff firm thereupon wrote to the Registrar-General inquiring whether "the terms of registration should be altered" and received in reply P 68 from the Registrar-General intimating to them that the name of the third plaintiff could be allowed to remain in the Certificate of Registration "till his successor or successors are duly appointed". Though the reference to "successor or successors duly appointed" in P 68 is not clear yet the document may well be regarded as embodying an order by the Registrar-General extending the time for making the necessary application under section 7. As the question arises whether an application under section 7 for an extension of time should not have been made within fourteen days after the death of the third plaintiff I would consider the soundness of the objection on other grounds. Section 9 of the Ordinance is the relevant section which refers to proceedings instituted by persons who have failed to comply with the provisions of the Ordinance. This section reads: "Where any firm or person by this Ordinance required to furnish a statement of particulars or of any change in particulars shall have made default in so doing, then the rights of the defaulter under or arising out of any contract made or entered into by, or on behalf of such defaulter in relation to business, in respect of the carrying on of which particulars

were required to be furnished, shall not be enforceable at any time while he is in default, by action or other legal proceedings either in the business name or otherwise ".

In *Jamal Mohideen & Co. v. Meera Saibu* [1], Bertram C.J. considered the scope of this section and after comparing it with section 8 of the Registration of Business Names Act, 1916, reached the decision that the section should be restricted to transactions entered into by a person or firm while such person or firm was actually in default. He further held that the words " the rights of that defaulter . . . . . shall not be enforceable by action " meant that " the defaulter shall not be entitled to bring an action to enforce his rights " and that therefore this section should be construed in accordance with the general principle that a litigant's rights in an action are his rights at the date of the institution. In the present case the alleged default occurred after the institution of the action and long after the execution of P 1. I hold therefore that this objection fails.

The Counsel for the appellant further contended that the order of the District Judge admitting the evidence taken on Commission was erroneous. For the reasons given by the learned District Judge in his order of June 26, 1937, I hold that this evidence has been properly admitted.

I dismiss the appeal with costs.

Appeal dismissed.