[EXCHEQUER]
FAIRLIE v. FENTON AND ANOTHER.

1870 April 26.

KELLY, C.B., MARTIN, PIGOTT, and CLEASBY, BB.
Principal and Agent - Broker - Contract of Sale.

A broker cannot sue in his own name upon contracts made by him as broker.

The plaintiff, a broker, signed and delivered to the defendants a bought note for cotton in the following form, "I have this day sold you on account of T., &c. (Signed) E. F., broker":-
Held, that he was not a contracting party, and could not sue the defendants for breach of the contract in refusing to accept the cotton. (1)

ACTION for the non-acceptance of cotton, tried before Kelly, C.B., at Guildhall, on the 10th of December, 1869.

The contract sued on was one made by bought and sold notes, signed by the plaintiff, a broker in the city of London. The
(1) See Paice v. Walker, post, p. **173**.
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bought note was in the following words:- "London, Aug. 20, 1869. - Messrs. J. & R. Fenton, per Messrs. Ronaldson and Stringer. I have this day sold you on account of Mr.Illins A. Timmins, of Manchester, to arrive in Liverpool per *Evelyn*, from Bombay, on the terms of the printed rules of the Cotton Brokers' Association of Liverpool, as indorsed, 100 bales Omrawattie cotton, on the basis of 10¾*d.* per lb. for fair. No allowance to sellers, but in case of inferiority of quality the cotton to be taken by the buyers at an allowance to be settled by arbitration in the usual manner. To be taken from the warehouse. Any slight variation in marks not to vitiate the contract. Brokerage, per cent. (Signed) Evelyn Fairlie, broker."
The plaintiff obtained a verdict for 1748*l.*, leave being reserved to the defendants to move to enter a nonsuit, on the ground that the plaintiff only made the contract as broker, and was himself no party to it. A rule having been obtained accordingly,

Pollock, Q.C., and ***Barnard***, shewed cause. The plaintiff was himself a contracting party. There is nothing in the fact that a man is acting as agent to prevent him from contracting in his own name, and the use of the words "I have," shews that he was here doing so: *Sargent v. Morris* (1); *Parker v. Winlow*(2); *Tanner v. Christian* (3); *Lennard v. Robinson*(4); *Mahony v. Kekulé*. (5) Moreover, as a rule, a broker, like an auctioneer, can sue in his own name upon contracts made by him for his principal: *Williams v. Millington* (6); Chitty on Pleading, 7th ed. vol. i. p. 8.

[MARTIN, B., referred to Lush's Practice, vol. i. p. 11 (3rded.).]
Brown, Q.C., and ***Mellor***, in support of the rule. The case of an auctioneer is wholly distinct from that of a broker. His right to sue, like that of a factor, rests upon his interest in the contract, and his lien on the goods and on their price. This is clearly shewn in *Williams v. Millington* (6); *Robinson v. Rutter*(7); and*Fisher v. Marsh* (8);

(1) 3 B. & A. 277, per Bayley, J., at p. 280.

(2) 7 E. & B. 942; 27 L. J. (Q.B.) 49.

(3) 4 E. & B. 591; 24 L. J. (Q.B.) 91.

(4) 5 E. & B. 125; 24 L. J. (Q.B.) 275.

(5) 14 C. B. 390; 23 L. J. (C.P.) 54.

(6) 1 H. Bl. 81.

(7) 4 E. & B. 954; 24 L. J. (Q.B.) 250.

(8) 6 B. & S. 411; 34 L. J. (Q.B.) 177.

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which are all expressly based upon that ground. But a broker has no possession of the goods, and no lien on them or on the price, and has no right to sell in his own name or to receive payment. The case is therefore left to the general principle laid down by Blackburn, J., in *Fisher v. Marsh* (1), that where the principal's name is disclosed in a contract made by the agent, the principal only can sue, unless the agent, by distinct words, makes the contract his own. Here, on the contrary, the plaintiff both names his principal and signs as broker, the inference from which is that he acted merely as agent. The case is directly within the authority of *Bramwell v. Spiller* (2), and the only words in the contract which appear to lead to an opposite conclusion, "I have sold, &c.," are shewn by *Fawkes v. Lamb* (3) not to have any such operation.

KELLY, C.B. The numerous cases cited to us shew that in certain contracts the agent may himself sue as principal; but in none does it appear that a broker has successfully maintained an action on a contract made by him as broker. He may, no doubt, frame a contract in such a way as to make himself a party to it and entitled to sue, but when he contracts in the ordinary form, describing and signing himself as a broker, and naming his principal, no action is maintainable by him. Though innumerable contracts of this nature daily take place, yet no instance has occurred within my own recollection, nor has any instance been cited to us, where an action has been brought by a broker describing himself as such in the contract, and not using words which expressly or by necessary implication make him the contracting party. Without further arguing the point, it is enough to refer to this unbroken rule as the settled law upon the subject.

MARTIN, B. I am of the same opinion, though I had certainly been under the impression that a broker could sue in his own name. I find that it is so laid down in Chitty on Pleading, vol. i. p. 8. It was also so stated in Hammond on Parties (4), an extremely able work, from which the statement was probably

(1) 6 B. & S. at p. 416; 34 L. J. (Q.B.) at p. 178.

(2) 21 L. T. (N. S.) 672.

(3) 31 L. J. (Q.B.) 98.

(4) Hammond's Practical Treatise on Parties to Actions and Proceedings, Civil and Criminal, and of rights and liabilities with reference to that subject. 8vo. 1817.

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adopted by Mr. Justice Lush into his very valuable book of Practice (Lush's Practice, 3rd ed. p. 11). My opinion was probably founded on those authorities, and on a general notion that a broker had an interest in the contract which entitled him to maintain an action. But that can only be where he has such an interest in fact; and I am entirely satisfied, even without authority, that when he states on the face of the contract that he is acting as broker, that is, as a middle-man between the two parties, he has no interest, and cannot sue. If he could sue, he could also be sued; and it is obvious on the face of the contract that he does not contract to deliver the goods sold, but only that he has authority to enter into the contract on behalf of the principal he names. The words "I have," are of no importance to shew him a contracting party.

PIGOTT, B. I am of the same opinion. On the plain construction of the contract the plaintiff is no party to it; but only signs, as broker, bought and sold notes for the respective parties. *Baring v.*

Corrie (1) shews the difference between the position of a broker and a factor, and that the broker has no right to sell in his own name; in the present case, I do not think that he has, in fact, done so.

CLEASBY, B. I am of the same opinion. There is no doubt a broker cannot sue; he has no authority to sell in his own name, or to receive the money, and has nothing to do with the goods. This is so laid down in Story on Agency, ss. 28 - 34, 109:- "To use the brief but expressive language of an eminent judge, 'a broker is one who makes a bargain for another, and receives a commission for so doing.' Properly speaking, a broker is a mere negotiator between the other parties, and he never acts in his own name, but in the names of those who employ him. When he is employed to buy or to sell goods, he is not intrusted with the custody or possession of them, and is not authorized to buy or to sell them in his own name." (s. 28). "So, a broker has ordinarily no authority virtute officii, to receive payment for property sold by him." (s. 109). The distinction between a broker and an auctioneer has been already pointed out in argument. My only doubt has been whether the

(1) 2 B. & A. 137.

use of the words "I have," &c., ought to be held to import a personal participation in the contract, the usual course being departed from; but my opinion is, it ought not. The form is also in some other respects a little peculiar, as in its reference to the rules of the Cotton Brokers' Association; but it has not been shewn that those rules treat the broker as a principal in the transaction. The rule must, therefore, be made absolute.

Rule absolute.

Attorneys for plaintiff: *Phillips & Willicombe*.

Attorneys for defendants: *Walker & Sons*.