Friday, November 27.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

ANDERSON *v.* JOHN CROALL & SONS, LIMITED.

Agent and Principal—Auctioneer—Sale—Liability of Auctioneer—Warrandice of Authority to Sell—Sale of Horse by Mistake after a "Selling Race."

After a "selling race" at a race meeting the auctioneer by mistake, but in good faith, sold a horse without the authority of the owner. The mistake was discovered by the auctioneer within half-an-hour after the sale, and on the same day delivery of the horse was refused to the purchaser on the ground that it had been sold by mistake.

Held (*diss.* Lord Young) that the auctioneer must be held to have warranted his authority to sell, and that he was liable in damages to the purchaser.

Observed that an auctioneer is simply an agent for the seller till the fall of the hammer, and is entitled to no higher immunity than any other agent.

In November 1902 Mrs Annie Holmes or Anderson, with the consent and concurrence of her husband Harry Carnegie Anderson, raised an action against John Croall & Sons, Limited, Edinburgh. The action concluded for payment of the sum of £136, 15s., as damages for the defenders' failure to deliver to the pursuer a mare which had been purchased for her by her husband at a sale by the defenders as auctioneers at the Edinburgh Race Meeting at Musselburgh on 3rd October 1902.

A proof was led which disclosed the following circumstances:— On 3rd October 1902 at the Edinburgh Race Meeting there was a "selling race" in connection with which the defenders acted as auctioneers. Under the rules of racing the winner in such a race must be offered for sale by auction immediataly after the race. It is also the practice at such races for owners of other horses which have run in the race to put them up for sale if they so desire after the winner has been sold. Sometimes these horses are noted on the racing card as to be sold, and sometimes the owner brings forward his horse for sale without previous notice. The officials of the race meeting have no responsibility in connection with such "outside" horses. The auctioneer receives a commission of 5 per cent. on their sale, and it is his duty to receive the price and grant the purchaser a delivery order. On the present occasion after the auctioneer had sold the winner and two other horses which had been named as for sale on the racing card, he saw "Ethel May," a mare which had run in the race, standing close to the ring in charge of a stable boy. The stable boy had rightly brought the mare back to the paddock after the race until the weighing out was done and the result of the race declared. But he had failed to hear the cry of "All right," which was the customary intimation given that the winner had passed the scales, and that the horses which were not to be sold were to be taken out of the paddock. The auctioneer, seeing the mare still standing there, concluded that she was for sale, asked the stable boy for her name, and on getting it ordered the boy to lead her round. The boy thinking that the auctioneer had authority from his master did as he was bid. The auctioneer put up the mare, and knocked her down to the pursuer, who was the highest bidder, for £36, 15s. The pursuer at once paid the price at the office of the clerk of the course, and received a delivery order from him. The clerk of the course deponed that in taking the money and giving the delivery order he had acted not in his official capacity but to oblige the auctioneers. Within twenty minutes after the sale the trainer of the mare "Ethel May," who had been informed of the sale, ran up and told the auctioneer that she had been sold without authority. When on the same day delivery of the mare was demanded at the trainer's stables on behalf of the purchaser, delivery was refused on the ground that she had been sold by mistake. Next day the pursuer called at the offices of the defenders, and was told that the mare had been sold without the authority of the owner. This explanation was repeated in a letter written by the defenders to the pursuer's agents dated 9th October 1902. A tender of repayment of the price was made, but was refused by the pursuer. The trainer of "Ethel May" deponed that he had purchased the mare on behalf of the owner on 25th May 1902 at the price of 105 guineas, and that she was sold in May 1903 for seventy guineas.

The pursuer pleaded—"1. The defenders having, as agents for an undisclosed principal, exposed for sale the mare referred to, and the said mare having been purchased by the pursuer, the defenders are personally liable to implement the contract with the pursuer, or to make reparation for the breach thereof. 2. The defenders having entered into said contract without the authority of the owner of the mare sold, fall to be regarded as warranting their authority to sell, and are accordingly personally liable as contracting parties. 3. The defenders having wrongfully and illegally failed to implement the said contract, and the pursuer having suffered loss, injury, and damage in consequence of the defenders' breach of contract, the pursuer is entitled to decree as concluded for, with expenses."

The defenders pleaded—"2. The defenders (1) not being the exposers of the horse for sale, (2) not having contracted with the pursuer in reference to the said horse, and (3) the name of the owner having been fully disclosed, are entitled to absolvitor. 3. The defenders having, in the circumstances condescended on, neither expressly nor impliedly warranted their authority to sell

the horse in question, are not bound to implement the sale alleged by the pursuer, and, *separatim*, not having withheld delivery of the said horse from the pursuer, are entitled to be assoilzied."

On 12th June 1903 the Lord Ordinary (STORMONTH DARLING) decerned against the defenders for payment to the pursuer of the sum of £26, 5s. sterling in full of the conclusions of the summons.

Note.—"The pursuer here seeks damages for loss of bargain. He was present at the Musselburgh Races held on 3rd October 1902 when a mare called 'Ethel May,' described as the property of 'J. Cast,' ran second for the Carberry Selling Handicap. After the race the winner and two other horses, which had been named as for sale on the card, were sold by auction; and then the defenders, who acted as auctioneers at the meeting, put up 'Ethel May' for sale, and knocked her down to the pursuer for thirty-five guineas. The pursuer at once paid the price at the office of the Clerk of the Course, and obtained a delivery-order for the mare, but delivery was refused at the trainer's stables on the ground that she had been sold by mistake. Next day he called at the office of the defenders in Edinburgh and again demanded delivery, but was told that the mare had been sold without the authority of the owner, and this explanation was repeated in letters on the 6th and 9th, accompanied with a tender of repayment of the price, which in the meantime had been handed by the clerk of the course to the defenders. The pursuer, however, refused to accept repayment, and insisted on delivery or damages, asserting that the mare was worth much more than he had paid for her.

"He now sues the auctioneers for damages on alternative grounds—(1) That they, having sold the mare as agents for an undisclosed principal, are liable on the contract as if they had been themselves the sellers; and (2) that having sold without authority, they are liable on the ground that a person who so acts, even in good faith, and induces another to deal with him as an agent, is held to warrant the authority which he professes to have.

"On the first of these grounds I am against the pursuer. The principal was not undisclosed, for the owner was correctly said to be 'J. Cast,' which was the racing name, and known by the pursuer to be the racing name, of a certain Mr M'Lauchlan, of Glasgow, now deceased.

"But, on the second ground, I have come to be of opinion that the pursuer is entitled to succeed. At first sight it seemed to me a little hard that auctioneers, acting in good faith and without negligence except of a very venial kind, should incur this responsibility to a disappointed purchaser, especially when the mistake was so soon discovered and explained. The circumstances which led to the mistake were of the simplest character. The stable-boy in charge of the mare rightly brought her back to the paddock after the race, until the weighing-out was done and the result of the race declared. Then he ought to have led her away. But instead of that he kept her in the paddock while the winner and the other two horses were being sold, and the auctioneer, seeing a horse standing close to the ring, and jumping to the conclusion that she was intended for sale, asked the lad for her name, and on getting it told him to lead her round, which he, believing the auctioneer to have authority from his master, the trainer proceeded to do. In all this there was nothing but a misunderstanding between the lad and the auctioneer, betraying, perhaps, some haste and want of caution on the part of the latter, but nothing worse. Plainly on these facts it is impossible to represent that the mistake, so far as the lad contributed to it, in any way bound the owner, and indeed the defenders are barred from maintaining any such argument by the letters which they wrote before the action was raised.

"While I own that my first impression was rather unfavourable to the pursuer's demand, I cannot resist the authority of a whole series of English cases on a branch of commercial law in which there is no difference between the law of England and the law of Scotland. The authority of some of these cases was recently recognised by the Second Division, in circumstances no doubt very different from the present, in the case of *Salvesen & Company*, January 16, 1903, 40 S.L.R. 305. And the principle which the cases embody, as explained in the leading case of *Collen* v. *Wright*, 1857, 8 E. and B. 657, is that 'a person professing to contract as agent for another, impliedly, if not expressly, undertakes to or promises the person who enters into such contract, upon the faith of the professed agent being duly authorised, that the authority which he professes to have does in point of fact exist.' That this rule extends to cases of innocent misrepresentation is amply shown by such cases as *in re National Coffee Palace Company*, 24 Ch. Div. 367, and *Firbank's Executors* v. *Humphreys*, 18 Q.B. Div. 54. In the latter of these two cases Lord Lindley (then L.J.) said—'Speaking generally, an action for damages will not lie against a person who honestly makes a misrepresentation which misleads another. But to this general rule there is at least one well-established exception, viz., where an agent assumes an authority which he does not possess and induces another to deal with him upon the faith that he has the authority which he assumes.'

"I may add that both *Collen* v. *Wright* and *Firbank's* case were recently recognised by the House of Lords in the case of *Starkey* v. *Bank of England* [1903], A.C. 114, as good law.

"Now, an auctioneer is, in law, nothing but an agent for the seller down to the fall of the hammer. Indeed, the only respect in which he differs from some other commercial agents is that he is obviously and confessedly nothing else. Accordingly he never can be made liable on the contract as a principal, except in the single case of his acting for an undisclosed principal. But with respect to the undertaking or

warranty of authority which all agents are held to give I see no reason why he should receive exceptional treatment.

"If so, the only remaining question is as to the measure of damages. Here also the rule in England is fixed by authority. In the case of the *National Coffee Palace Company* Lord Esher quotes two cases (*Spedding* v. *Nevell*, 1869, L.R., 4 C.P. 212, and *Godwin* v. *Francis*, 1870, L.R., 5 C.P. 295) where the plaintiff was the intended purchaser, and says that in these, as well as in others, 'the measure of damages was what the plaintiff actually lost by losing the particular contract which was to have been made by the alleged principal if the defendant had had the authority he professed to have; in other words, what the plaintiff would have gained by the contract which the defendant warranted should be made.' Now, what would the pursuer here have gained if the contract had been made with authority and therefore had been enforceable? He would have become owner of a mare worth more than he paid for her. It is not easy to say how much more, for his own witnesses admit that the value of a racehorse is a very uncertain quantity. But we know that seven months later the mare fetched seventy guineas by auction at York, not having raced or done anything remarkable in the interval. That seems to me the safest guide to value in the evidence, and I see that it was adopted as the test in *Godwin's* case with regard to the sale of a landed estate. Something must come off for the cost of keep and transit, for I suppose it may be assumed that York at the beginning of a racing season was a better market than Musselburgh at the end of one. But I think I shall not be far wrong if I assess the damages, both for loss of bargain and for any trouble and outlay to which the pursuer was put before the action was raised, at twenty-five guineas. That is the sum for which I shall give decree with expenses; besides which the defenders undertake, through their counsel, to return the price of thirty-five guineas paid by the pursuer, he, on the other hand, being bound to return the delivery-order."

The defenders reclaimed, and argued—There was no responsibility in the present case on the part of the auctioneer. His duties were purely ministerial. The sale was conducted by a racing club under its own rules. The name of the owner of the horse was disclosed. It was on the racing card, and the matter must be looked at just as if the owner had brought the horse into the ring himself. If there was any fault it was on the part of the owner acting through his servant. Further, the auctioneer did not receive the money for the horse. It was collected by the clerk of the course, and the delivery-order was given out by him. The auctioneer had committed no actionable wrong. The mistake made by him did not amount to that. If an auctioneer assumed no exceptional liability, he had no responsibility beyond the fair performance of his duty, which was confined to ascertaining and announcing the highest bidder for goods or property put up for competition—Opinion of Lord Young in *Walker* v. *Linton*, October 24, 1892, 20 R. (J.C.) 4, 30 S.L.R. 40; *Mainprice* v. *Westley*, 1865, 34 L.J., Q.B. 229. The cases founded on by the Lord Ordinary did not apply, as the auctioneer had not in the present case done anything to assume the authority of an agent. In any case there was no damage done to the pursuer by the mistake. It was an innocent mistake, and had been discovered within half-an-hour and communicated to the purchaser on the same day. No damages were therefore due. If the defenders were found liable in damages, they had nothing to say against the amount awarded.

Argued for the pursuers and respondents—In the present case the only person with whom the purchaser was brought into contact was the auctioneer. The name of the owner in the racing card was an assumed name and a purchaser had no means of identifying him. The defenders were on the horns of a dilemma. If the principal was held to be disclosed, the auctioneers had not his authority to sell, and if the principal was held to be undisclosed they were liable as agents for an undisclosed principal. An auctioneer was presumably an agent, and was liable as such—*Ferrier* v. *Dods*, Feb. 23, 1865, 3 Macph. 561, opinion of Lord Justice-Clerk Moncreiff, 564. The question was not one of blameworthiness or wrong; it was a question of warranty. No doubt the horse here was sold on account of an innocent misunderstanding between the stable boy and the auctioneer, but an agent warranted his authority to sell, and if it afterwards appeared that he had no such authority he would be liable in damages to a purchaser, however innocent the mistake might be. It was the duty of an auctioneer before selling to make quite certain that he had authority to sell the thing put up for auction. There were no circumstances proved to suggest that the auctioneer was entitled to assume that a horse standing near the ring was to be sold. The cases quoted by the Lord Ordinary showed that an agent, contracting as such with another, guarantees that the authority which he professes to have in point of fact exists.

At advising—

LORD JUSTICE-CLERK — The circumstances of this case are that a certain race at a horse race meeting was what is called a selling race, the condition of which is that the winning horse shall be put up for sale after the race and go to the highest bidder. The defenders were employed to act as the auctioneers. In the case of such a race it is the practice that if any other owners of horses run in the race desire to do so, they may have their horses put up for sale after the winner has been knocked down. Sometimes these horses are noted on the racing card as to be sold after the race, and sometimes an owner brings forward his horse for sale without giving previous notice, but in such a case those holding the race meeting have nothing to do with the proceeding. On the occa-

sion in question, after the winner and other horses of which notice was given had been sold, a lad who was in charge of a horse that had been in the race, and was outside the ring formed round the auctioneer, brought it into the ring, and the auctioneer put it up and knocked it down to the highest bidder, who was the pursuer. It turned out that the owner had not intended to sell the horse, and had given no authority for the sale, and the purchaser was unable to get delivery. The question is whether the auctioneer's firm are liable in damages in respect they gave themselves out as having authority to sell, and did actually knock down the horse as sold. The Lord Ordinary has held that they are and has given decree. I see no ground for holding his judgment to be wrong. I think that it was the duty of the defenders, when a horse was brought forward as to which they had no notice that it was to be sold, to take reasonable care that in what they did they were truly acting for the owner, so that they had a right to sell and give delivery on payment of the price. In this they failed. They had no information except what consisted in the lad bringing in the horse and giving its name and the place it had taken in the race. I am of opinion that they did not act with reasonable care to prevent the mistake which occurred.

We were told from the bar that if the judgment of the Lord Ordinary was upheld on the main question no exception was taken to the amount of damages given, and I would therefore move your Lordships to adhere to the interlocutor of the Lord Ordinary.

LORD YOUNG—I am unable to agree with the opinion of your Lordship and that of the Lord Ordinary. I cannot concur in the view that there was here any actionable wrong on the part of the auctioneer. I think there was only an innocent and excusable mistake on his part and that this mistake was ascertained and intimated to the purchaser before any damage could possibly have resulted to him. It was an innocent mistake, and certainly no actionable wrong resulted from it.

Take the following illustration in argument. Suppose a person goes into a shop and seeing something lying on the counter asks its price of the shop-assistant and purchases it. Before anything further has happened the master of the shop comes forward and says, "Oh I sold that to another customer five minutes ago, so it is not for sale. There has been a mistake on the part of the shop-assistant in thinking it was still for sale." I do not think that an innocent mistake of this kind causing damage to no one would be held to be an actionable wrong—a good ground for an action of damages.

In my opinion it is impossible to bring the present case within the sphere of cases where a person falsely represents that he has authority to contract for another. I think there is sufficient legal authority that in any contract an excusable mistake immediately rectified before any damage is done to anyone will not be held binding by the Court.

LORD TRAYNER—I do not regard the pursuer's claim in this case with any favour, but I do not see my way to differ from the Lord Ordinary. The defenders sold the mare in question to the pursuer and were bound therefore to deliver it on payment of the price, which the pursuer made. The defenders admitted in their letter of 9th October 1902 that they had made a mistake in exposing the mare for sale without the authority or instructions of the owner. If that mistake resulted in damage to the pursuer the defenders must answer for it. The Lord Ordinary has held that the pursuer did suffer damage, and has awarded £26, 5s. This is the part of the Lord Ordinary's judgment that I find it most difficult to concur in. I doubt if damages to that extent have been proved. But the defenders do not complain of the amount for which decree has been given, if liability for damages is held to be established. On that question I agree with the Lord Ordinary and on the grounds which he has stated.

LORD MONCREIFF—Although this is rather a hard case for the defenders I am of opinion that the judgment of the Lord Ordinary is right. The reclaimers' counsel did not dispute the general law upon which the Lord Ordinary proceeds, namely, that an agent who, though innocently, contracts without authority of his principal, is liable in any damages which the other party to the contract can instruct that he has sustained through loss of the contract when absence of the authority is discovered. In the case of *Salvesen & Co.*, January 16, 1903, 40 S.L.R. 305, I fully stated my views on the decisions and the law applicable to this case.

With that admission the defence, in my opinion, fails, because, first, an auctioneer is simply an agent for the seller till the fall of the hammer, though his duties are restricted and rapidly performed. If he has the seller's authority he binds the seller, and through him (the auctioneer) the successful bidder is bound to the seller. But if he sells without such authority I agree with the Lord Ordinary in thinking that he is entitled to no higher immunity than any other agent.

Secondly, in this case it is not proved that the auctioneer had authority from the owner, or from anyone entitled to bind him, to sell the Ethel May. Under the Rules of Racing the winner in a selling race must be offered for sale by auction immediately after the race, and therefore in such a case the auctioneer is probably entitled to assume that he has the owner's authority to sell. But horses which are not winners are in a different position. They are sold entirely on the responsibility of the auctioneer on the instructions of the owner or his trainer. On such sales the auctioneer receives a commission of 5 per cent., and he receives the price and gives the purchaser

the delivery order. Now, the Ethel May was not a winner, and therefore the auctioneer should not have proceeded to sell her without the authority of the owner or some responsible representative. But what he did was this—he saw the Ethel May standing outside the ring near the door of the weighing-room in charge of a stable boy, and erroneously assuming that it was there for sale he called to the boy to bring the mare into the ring to be sold. The boy, naturally supposing that his master had told the auctioneer that the mare was to be sold, did what he was bid, and the auctioneer without any communication with the owner or trainer knocked the mare down to the pursuer. I cannot acquit the auctioneer of rashness in acting as he did, though the misunderstanding is quite intelligible.

Thirdly, it does not seem to me that the legal rights of parties can be affected by the length or shortness of the time which elapses between such a sale and the discovery of the mistake. The supposed contract was completed when the hammer fell. The purchaser could not thereafter have repudiated it, neither could the seller if he had authorised the sale.

The amount of damages is another matter. But on this head it is unnecessary that I should say anything, because the defender's counsel admitted that if damages were to be awarded the sum named by the Lord Ordinary, twenty-five guineas, is not excessive, and good reason is disclosed in the evidence for the defenders not objecting to the award.

The Court adhered.

Counsel for the Pursuer and Respondent —Campbell, K.C.—Maclennan. Agents—Gunn & Mulcaster, S.S.C.

Counsel for the Defenders and Reclaimers —Shaw, K.C.—T. B. Morison. Agents—P. Morison & Son, S.S.C.

REGISTRATION APPEAL COURT.

Thursday, November 26.

(Before Lord Kinnear, Lord Trayner, and Lord Kincairney.)

JOHNSTONE *v.* HOOLE.

Election Law—County Franchise—Notice of Objection sent to the Assessor—Burgh Registration Act 1856 (19 *and* 20 *Vict. c.* 58), *sec* 4.

Held that a notice of objection to the name of a person being retained on the voters roll, sent to the assessor in terms of sec. 4 of the Burgh Registration Act 1856, which contained neither the nature of the supposed qualification of the person objected to, nor the name of the street, lane, or other place where the property (qualifying) was situated, nor particulars to a like effect, was not in conformity with the statute, and that the objection was consequently incompetent.

At a Registration Court for the County of Peebles, held on 2nd October 1903, William Johnstone, Ettricklea, Wemyss Place, Peebles, whose name was in the List of Voters for the County of Peebles, objected to the name of Golan Ernest Hoole, teacher of singing, 197 Renfrew Street, Glasgow, being retained in the list of persons entitled to vote in the election of a member for the counties of Peebles and Selkirk. Hoole objected to the competency of the objection upon the ground that the notice of the objection given to the Assessor was not in terms of the Burgh Registration Act 1856, sec. 4, Schedule A, Form No. 4, in so far as the said notice of objection did not contain the nature of the said Golan Ernest Hoole's qualification, and the name of the street, lane, or other place where the property (qualifying) was situated, nor did it contain particulars to the like effect.

Section 4 of the Burgh Registration Act 1856, as amended by sec. 20 of the Representation of the People (Scotland) Act 1868, which was made applicable to counties by the Representation of the People Act 1884 (48 and 49 Vict. c. 3), sec. 8 (6), enacts:—"In every year every person whose name shall have been inserted in any list of voters for any burgh may object to any other person as not having been entitled on the last day of July next preceding to have his name inserted in any list of voters for such burgh, and every person so objecting shall, on or before the 21st day of September in each year, give or cause to be given to the assessor of such burgh a notice according to the Form No. 4 of the said Schedule A, or to the like effect." . . .

The Sheriff-Substitute (ORPHOOT) sustained the objection by Hoole to the competency of the objection stated by Johnstone and dismissed Johnstone's objection.

Johnstone obtained a stated case.

In the stated case the Sheriff-Substitute stated as follows:—"The said notice of objection given by the said William Johnstone to the Assessor did not, in point of fact, contain the nature of the qualification of the said Golan Ernest Hoole, and the street, lane, or other place where the property (qualifying) is situate, nor did the said notice contain particulars to the like effect.

"The notice of objection applicable to the said Golan Ernest Hoole given by the said William Johnstone to the Assessor is in the following terms:—

"The Representation of the People Acts,
Schedule A.—No. IV.
19 and 20 Vict., cap. 58, and 48 Vict., cap. 3.
"To the Assessor of the Counties of Peebles and Selkirk.

"I hereby give you notice that I object to the name of Golan Ernest Hoole, who is described as follows:—
Teacher of Singing,
197 Renfrew Street, Glasgow,
being retained in the list of persons entitled to vote in the election of a member for the counties of Peebles and Selkirk.

"Dated this 19th day of September 1903.
(Signature) WM. JOHNSTONE.
(Place of Abode) Ettricklea, Wemyss Place, Peebles.