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Having made these general observations I will now proceed to construe the various clauses in their order. (His Lordship then decided the issues raised on the clauses of the will and continued:—)

The construction I have put upon the various clauses of the will makes some of its provisions absolutely void and that causes intestacy, but under the peculiar circumstances of the testator's family it is clear to my mind that the intestacy will indirectly bring about practically the same results that the testator had in view. Under the intestacy the testator's five sons will inherit the property which must necessarily enure to the benefit of the testator's grandsons and grand-daughters and the widows of the testator's sons and grandsons, that is, for the benefit of the very persons whom the testator had intended to benefit. If, on the other hand, I had held the provisions to be good and valid in favour of the few members of the three classes who were in existence at the time of the testator's death, it is obvious that they would have absolutely taken the whole benefit of the estate and would have excluded many of those for whom the testator intended to provide.

I record my findings upon the issues in accordance with the above conclusions and I direct that the costs of all parties should come out of the estate as between attorney and client.

Attorneys for the plaintiff:—Messrs. *Thakurdas, Dharamsi and Cama.*

Attorneys for the defendants:—Messrs. *Little and Co.*

ORIGINAL CIVIL.

Before Mr. Justice Fulton.

W. B. STOKES, PLAINTIFF, v. SOONDERNATH D. KHOTE
AND ANOTHER, DEFENDANTS.*

Broker—Brokerage—Suit for brokerage—Contract effected by broker not carried out by purchaser—Quantum meruit.

The plaintiff was employed by the defendants as broker to sell certain property. The defendants' letter dated 3rd January, 1895, engaging him as

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broker stated as follows :—“ It is understood that the brokerage will be paid on receipt by us of the money, and that this transaction is to be completed within a fortnight from date.” The plaintiff negotiated with one Pestonji Patel and his brother, who eventually agreed to become purchasers, but stipulated for four or five months within which to pay the purchase-money. On the 1st February, 1895, the defendants, through the plaintiff, finally closed the contract with the purchasers, one of the terms of which provided that Rs. 10,000 should be paid immediately, as earnest, and the balance (Rs. 27,000) of the purchase-money should be paid within four months. The purchasers were, however, unable to pay the Rs. 10,000 earnest-money and they handed to the defendants three Bank of Bombay shares as security for the performance of the contract. One of the purchasers shortly afterwards died. The defendants apparently abandoned the idea of enforcing the contract, and at the end of the year they returned to the purchasers' family two of the Bank of Bombay shares, having (as they alleged) sold the third to defray the expenses which they had incurred in connection with the transaction. The plaintiff sued to recover Rs. 1,500 as brokerage from the defendants.

Held, that under the circumstances the plaintiff was not entitled to recover the Rs. 1,500, but only to a *quantum meruit*, there being no previous agreement as to the time when the brokerage was to be paid; and that he was only entitled to a percentage (5 per cent.) on the value of the shares which had been actually received by the defendants. Part of the business for which the plaintiff was employed was to find a solvent purchaser.

SUIT for brokerage. The plaintiff alleged that by a writing dated the 3rd January, 1895, he was employed by the defendants to procure a purchaser of their shares in the agency commission of the New Dholera Cotton Pressing and Ginning Company, Limited, and that for doing so he was to receive a brokerage of Rs. 1,500; that he had procured a purchaser and concluded a contract between him and the defendants, and he was, therefore, entitled to be paid his brokerage. He also claimed the said sum for work and labour under the ordinary money counts.

The defendants pleaded that they were not bound to pay any brokerage or commission to the plaintiff, as the purchase which he had negotiated had never been completed and the purchase-money had never been paid.

The writing of the 3rd January, 1895, mentioned in the plaint, was a letter addressed by the defendants to the plaintiff and was as follows :—

“ With reference to our talk *re* the sale of our shares in the agency commission of the New Dholera Cotton Press and Spinning Company, Limited.

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we agree to let you have, as bonus or brokerage, the sum of Rs. 1,500 only, if you succeed in selling a twelve-annas' share in the commission for shares of the value of Rs. 42,000 of the said company at par value. If not, you may sell a six-annas' share in the said commission for shares of the said company of the value of Rs. 22,000 (sic) at par value, for which we shall be glad to let you have Rs. 750 for your trouble. *It is understood that the brokerage will be paid on receipt by us of the money, and that this transaction is to be completed within a fortnight from date.*"

It appeared that subsequently to the receipt of that letter the plaintiff negotiated with one Pestonji Patel and his brother Jamsetji, who eventually agreed to become purchasers.

They, however, stipulated for four or five months within which to pay the purchase-money. On the 30th January, 1895, the defendants wrote to the plaintiff to inquire who the proposed purchasers were, and having obtained the information from the plaintiff they wrote the following letter next day to the plaintiff:—

" 31st January, 1895.

" To Messrs. STOKES & Co.,
Bombay.

" Dear Sirs,—With reference to your letters to us dated 21st and 30th instant, informing us that Messrs. Pestonji and Jamsetji Dadabhoj Patel are willing to purchase from us a portion of our share in the agency commission and its emoluments of the New Dholera Cotton Pressing and Ginning Company, Limited, on certain conditions, we beg to inform you that we shall be glad to meet them on the following conditions" (then followed the conditions, of which the following are material):—

"(1) That they are to get a ten-annas' share in the agency commission of the company on their taking up 74 shares of the said company of Rs. 500 each at par value, their Mr. Ratilal retaining the remaining six-annas' share.

"(2) That a sum of Rs. 10,000 should be paid immediately down in cash as earnest-money; the balance of the purchase-money, namely, Rs. 37,000, to be paid within four months from date whereon interest is to run in the meantime at Rs. 6 per cent., but at the same time that it should open to Messrs. Patel to pay it up within that period."

On the following day the plaintiff wrote as follows to the defendants:—

"Dear Sirs,—We duly received yours of the 31st January and have submitted the contents to Messrs. Patel Brothers. The following items are their replies to yours" (the items are then set forth, but only the following is material):—

"2. That Messrs. Patel Brothers are ready to pay cash money on the completion of the agreement and pukka transfer of the shares.

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"Awaiting the favour of your confirmation."

On the same day the defendants wrote as follows to the plaintiff accepting the terms of purchase:—

"1st February, 1895.

"To Messrs. STOKES & Co.,
Brokers, Bombay.

"Dear Sirs,—We beg to acknowledge your letter of date and to inform you that we confirm the terms mentioned therein, with the variation contained in the para. in the postscript.

"2. As arranged personally with you, we shall request our solicitors, Messrs. Chitnis, Motilal and Malvi, to draw up the regular deed of agreement."

The Patels, however, were unable to pay the Rs. 10,000 earnest-money and they handed over to the defendants three Bank of Bombay shares as security for the performance of the contract. In May, 1895, Pestonji Patel died.

No brokerage was paid to the plaintiff, although (as he alleged) he repeatedly applied for it. On the 2nd August, 1895, he wrote the following letter to the defendants:—

"I think it is now time you paid me my brokerage, seeing that the late Mr. Pestonji Patel (the purchaser) paid you five (sic) Bank of Bombay shares as a deposit.

"You must know that as soon as the contract is finished, and deposit paid, I am entitled to my brokerage."

The defendants apparently abandoned the idea of enforcing the contract and at the end of the year they returned to the Patel family two of the Bank of Bombay shares. The third they sold for Rs. 1,300, in order (as they stated) to reimburse themselves for expenses which they had incurred in the transaction. Before they had returned the share, however, the plaintiff had written the following letter to the defendant:—

"7th December, 1895.

"Dear Mr. Khote,—I met Mr. Patel's uncle yesterday. He wants you to hasten to return the shares. I informed him that whatever was done, my commission would be deducted first.

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“Therefore I must ask you not to part with the shares until my commission is paid. I performed my part and I think you should square up now. I do not see why you should delay when you have the value in hand. Awaiting your reply.”

The plaintiff now sued to recover Rs. 1,500 as brokerage.

Russell for defendants :—The plaintiff is not entitled to any brokerage. The letter of 3rd January employing him clearly states that the brokerage is to be paid on receipt of the purchase-money. The defendants’ object in making that arrangement was to secure a solvent purchaser. The purchaser procured by the plaintiff was not solvent and the purchase-money was never paid. The receipt of the purchase-money by the defendants was a condition precedent to the plaintiff’s right to demand his brokerage.

Kirkpatrick for the plaintiff :—A broker does not ordinarily guarantee the completion of the contract which he makes for his principal. His work is done when the contract is made. The plaintiff did what he agreed to do, and the defendants accepted the purchaser he found. He could not enforce the contract. The defendants could have enforced it, but apparently they did not try. They have lost their money by their own default. The plaintiff ought not to suffer. In any case the plaintiff was entitled to be paid his brokerage out of the shares deposited by the purchasers. The defendants instead of insisting on the purchase-money consented to receive them in place of it, *i. e.* as security for it. He cited *Fisher v. Drewett*⁽¹⁾; *Pricket v. Badger*⁽²⁾; *Green v. Lucas*⁽³⁾; *Rimmer v. Knowles*⁽⁴⁾; *Municipal Corporation of Bombay v. Caverji Hirji*⁽⁵⁾.

FULTON, J. :—The plaintiff sues to recover brokerage on the sale of a certain agency commission belonging to the defendants. It appears that on 29th December, 1894, the defendants wrote to Mr. Stokes, asking him to find a purchaser, and said as follows :—“As regards your bonus or brokerage it would be much better if you made your demand, which, if deemed reasonable, I shall accept.” Some reply is stated to have been written, but the defendants’ papers are missing and plaintiff has no copy, and it is

(1) 48 L. J. (Ex.), 32.

(3) 33 L. T. (N. S.), 584.

(2) 1 C. B. (N. S.), 296.

(4) 30 L. T. (N. S.), 496.

(5) 1. L. R., 20 Bom., 124.

evident from the terms of the next letter that the amount of the brokerage was proposed in conversation. On the 3rd January the defendants sent a letter to the plaintiff, in which they wrote as follows:—

“With reference to our talk *re* the sale of our shares in the agency commission of the New Dholera Cotton Press and Spinning Company, Limited, we agree to let you have, as bonus or brokerage, the sum of Rs. 1,500 only if you succeed in selling a twelve-annas’ share in the commission for shares of the value of Rs. 42,000 of the said company at par value. If not, you may sell a six-annas’ share in the said commission for shares of the said company of the value of Rs. 22,000 at par value, for which we shall be glad to let you have Rs. 750 for your trouble. *It is understood that the brokerage will be paid on receipt by us of the money,* and that this transaction is to be completed within a fortnight from date.”

Subsequently terms were arranged with one Pestonji Patel, who stipulated for four or five months for payment in his letter of the 18th January. On the 21st January, Pestonji signed a “bought note” for 74 shares for which payment was to be made on or before four or five months at his option. A “sold note” in similar terms was presented to the defendants, but was not signed owing to the necessity of consulting certain directors. On 30th January the defendants wrote to ask who Pestonji D. Patel and others were; and on the same day the plaintiff wrote to say that the “others” were Pestonji’s brother Jansetji.

On 31st defendants wrote agreeing to sell on the following conditions to Messrs. Pestonji and Jansetji:—

“1. That they are to get a ten-annas’ share in the agency commission of the company on their taking up 74 shares of the aforesaid company of Rs. 500 each at par value, their Mr. Ratilal retaining the remaining six-annas’ share.

“2. That a sum of Rs. 10,000 should be paid immediately down in cash as earnest-money, the balance of the purchase-money, namely, Rs. 27,000, to be paid within four months from date whereon interest is to run in the meanwhile at Rs. 6 per cent., but at the same time that it should be open to Messrs. Patel to pay it up within that period.”

There were also certain other conditions which for the purposes of this case it is not necessary to recapitulate.

On the 1st February the plaintiff wrote to the defendants that Messrs. Pestonji and Jansetji Patel agreed to take twelve annas in eighty shares, and were ready “to pay cash money on the com-

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pletion of the agreement and pukka transfer of the shares. On the same day this proposal was accepted by the defendants.

After this, difficulties arose. The Patels were unable to pay the deposit of Rs. 10,000, and Pestonji, through his solicitors, gave three Bank of Bombay shares as security for his performance of the contract. About May Pestonji died. Then the defendants, apparently under some pressure, returned two of the Bank shares to Pestonji's grandmother, who claimed them and sold one for Rs. 1,300, out of which they re-imbursed themselves the expenses to which they had been put. The shares, it may be explained, stood in the grandmother's name, but were received by the defendants with blank transfer papers signed by her.

What the arrangements were about the payment of brokerage to Mr. Stokes it is difficult to say. The letter of the 3rd January, 1895, was clear. If that arrangement had held good, his brokerage was made conditional on the payment of the money by the purchaser. But it was argued, reasonably enough on his behalf, that the extension of time given for payment for the purchase-money necessarily implied some modification of this provision. Mr. Stokes says that Mr. Khote had verbally promised to pay the brokerage when the deposit of Rs. 10,000 was received, but apparently he thought himself entitled to the amount as soon as the agreement with the Patels was negotiated. On the other hand, Mr. Khote says he only promised to pay a proportionate part of the brokerage on Rs. 10,000 being received, and he considered that as the Patels never carried out their agreement, the plaintiff was not entitled to anything. It is very difficult to say, for certain, that any agreement on the subject was come to, or that the matter was ever discussed with any precision. No reference to such discussion is mentioned in letters K or L in which plaintiff claimed payment. In the circumstances I think the plaintiff can only recover a *quantum meruit*, there being no precise agreement as to the time when his brokerage was to be paid. Whether the condition about payment was inserted in the defendants' letter of 3rd January in special reference to Patel as stated by the defendants, or without such special reference as contended on behalf of the plaintiff, is not very material. That condition, I think,

clearly showed that the defendants only intended to pay brokerage in case a solvent purchaser was procured.

Mr. Kirkpatrick relied on the cases of *Pricket v. Badger*⁽¹⁾, *Rimmer v. Knowles*⁽²⁾, *Green v. Lucas*⁽³⁾, *Fisher v. Drewett*⁽⁴⁾ to show that, in the words of Lord Justice Bramwell in *Fisher v. Drewett*, "the current of modern opinion is to the effect that those who bargain to receive commission for introductions have a right to their commission as soon as they have completed their part of the bargain, irrespective of what may take place subsequently between the parties." But, after all, neither this case nor the others referred to above—any more than the case of the *Municipal Corporation of Bombay v. Caverji*⁽⁵⁾—is really in point. If the bargain is merely that the broker is to introduce the purchaser, and effect an agreement between him and the seller, it is clear that he is entitled to be paid when his part of the transaction is performed. But in each case I think the nature of the contract must be carefully considered, and if part of the business for which the broker is employed is to find a solvent purchaser, he will not, I think, be entitled to his brokerage till he has done so.

Now in the present case it seems that the stipulation in the letter of the 3rd January, that the brokerage was only to be paid when the money had been received, governed the whole of the subsequent dealings between the parties, and showed that the broker to the extent of his brokerage was to be answerable for the solvency of the purchaser. And I think that even when the terms of the sale were modified, and payment was deferred, Mr. Stokes, if he wished to get rid of this liability, ought to have got the matter clearly settled. Instead of this it is evident that nothing was definitely settled, and it was left in doubt whether he was to be paid in full or proportionately when the deposit of Rs. 10,000 was made. Doubtless if the contract with the Patels had fallen through, as in *Pricket v. Badger* and *Green v. Lucas* and *Fisher v. Drewett*, through the default of the defendants, the plaintiff would have had a strong case for the recovery of the whole of his commission; but here this was not the case. It is clear that the de-

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(1) 1 C. B. (N. S.), 296.

(3) 33 L. T. (N. S.), 581.

(2) 30 L. T. (N. S.), 496.

(4) 48 L. J., (Ex.), 32.

(5) I. L. R., 20 Bom., 121.

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defendants were anxious and willing to sell, and their failure to do so was due not to their own but to the default of the purchaser introduced by the plaintiff. It was said they ought to have sued Pestonji or his legal representatives, but the defendant Khote says that he knew it was useless to do so, and there is no evidence to contradict him. Whatever the agreement between the defendants and Stokes was, it cannot be suggested that it in any way required them to involve themselves in litigation, possibly of a hopeless nature.

Then it was urged that at any rate they ought not to have surrendered the two bank shares deposited with them. There is, I think, force in this contention. The Patels had deposited them as security for the fulfilment of their contract, and the circumstances under which they were surrendered to the grandmother have not been shown. The legal necessity for this surrender was not apparently sufficient to prevent the defendants insisting on retaining one share for their own expenses: and if they were entitled to do so I cannot see why they were not equally entitled to keep the other two. The Patels had handed them over to them as security for the performance of their contract with the grandmother's authority to transfer signed in blank, and it is doubtful whether she was legally entitled to have them back. In the absence of all evidence as to how Pestonji got the shares from her, I think the presumption is that the defendants were, at law, entitled to retain them, having obtained possession *bonâ fide*, and to the extent of the value of these shares the purchasers were solvent. (*Vide* Contract Act, section 108.) To that extent, then, the plaintiff seems entitled to his remuneration of 5 per cent., not on the whole bargain, but on the portion of it which the defendants could have enforced against the purchasers. The value of these three shares may be set down at Rs. 3,900, as one of them was sold for Rs. 1,300. There will be a decree for plaintiff for Rs. 195. Both parties being equally responsible for the vagueness of the contract, and neither party being, in my opinion, wholly right about it, I make no order as to costs.

Decree for plaintiff.

Attorney for the plaintiff:—Mr. M. N. Sakhlalvala.

Attorneys for the defendants:—Messrs. Bicknell, Merwanji and Motilal.