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Present : Lyall Grant and Akbar JJ.

TUDAWE *v.* KEPPITIGALA RUBBER ESTATE CO.

416—D. C. Colombo, 24,740.

Broker—Offer to obtain a purchaser for land—Failure of negotiations—No contract of sale—Right to commission.

Where the plaintiff, a broker, obtained from a prospective buyer an offer for the purchase of an estate belonging to the defendant company at a certain price, subject to the payment of brokerage,—

Held, that the plaintiff was not entitled to his commission till the purchase was concluded by a binding contract.

THIS was an action brought by the plaintiff, a licensed broker, for the recovery of his commission for having arranged a sale of a rubber estate belonging to the defendant company.

The parties went to trial on the following issues :—

(1) Did the plaintiff introduce to the defendant one Ebrahim Lebbe as the purchaser of Beddawella estate ?

(2) Did the defendant accept such purchaser and agree to pay the plaintiff brokerage at the rate of 2½ per cent. on the purchase price ?

(3) Was the refusal of the purchaser to complete the purchase due to the act and conduct of the defendant ?

The learned District Judge dismissed the plaintiff's action on the ground that he was not entitled to recover in the absence of a binding agreement.

De Zoysa, K.C. (with *Croos Da Brera*), for plaintiff, appellant.—The local authorities make it clear that no binding contract is necessary in order to enable the broker to recover his commission. A broker has merely to introduce a willing buyer and if the seller accepts him the broker has nothing more to do (*Perera v. Soysa*[1]). It is the duty of the seller to get the buyer to enter into a binding agreement. If the seller has been negligent the broker should not suffer. There has been delay on the part of the seller in getting the deeds ready. This gave the buyer an opportunity of backing out of the agreement.

H. V. Perera (with *Ameresekere*), for defendant, respondent.—It is the duty of the broker to get a buyer who is not merely willing to buy, but who will complete the contract (*Fernando v. Perera Hamine*[2]). The sale should be completed and the purchase price paid before the broker can ask for his commission. The documents produced show conclusively that the broker expected to be paid a percentage of the proceeds of sale. The sale has fallen

[1] *13 N. L. R. 85.* [2] *21 N. L. R. 79.*

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through owing to no fault of the seller. The English authorities show that there should be a contract binding in law. A contrary rule will enable a broker to act in collusion with a buyer in order to help the former to earn a commission.

Counsel cited *Holder and Partners v. Manx Isle Steamship Co., Ltd.*[1]

April 30, 1929. LYALL GRANT J.—

The facts in this case are fully set forth and the authorities examined at length in the judgment of my brother Akbar which I have had the advantage of reading.

I agree with him that the contract between the plaintiff and the defendant was that the defendants were to pay the plaintiff's brokerage when they received payment from Ibrahim Lebbe and that this payment was due on the completion of the title. (See documents P 21 and P 2.) That condition was not fulfilled and plaintiff is therefore not entitled to recover on the contract.

It was argued on the authority of a dictum of Bonser C.J. in *Simpson and Co. v. Soyza*[2] and of *Perera v. Soysa*[3] that where a broker has introduced the parties and they have come to an agreement in consequence of that introduction, and where the broker has done all in his power to bring about a completed contract he is entitled to commission or at any rate to a *quantum meruit*.

These cases were fully considered by Bertram C.J. in *Dissanayake v. Rajapakse*,[4] and he arrives at the conclusion that it is only when the principal by his own act or default absolutely refused to perform or rendered himself incapable of performing his part of the contract that a right to *quantum meruit* arises.

In the present case it is common ground that there was no binding agreement between the defendants and Ibrahim Lebbe. There was nothing more than a *nudum pactum*, and unless the plaintiff can establish in his favour that it is sufficient for him to bring the parties into such a relation in order to establish his right of action, it seems to me that his claim must fail.

According to his contract, if I read it correctly, he would become entitled to brokerage only on the completion of the sale by the payment of the purchase money.

No doubt according to all established principles he would become entitled to a *quantum meruit* if a binding contract had been entered into between buyer and seller and non-completion of that contract were due to the default of the defendants.

The English cases do not seem definitely to establish more than this, though some of them appear to indicate that if there is such a contract which is not completed owing to the default of the other

[1] *(1923) L. R. I, K. B. 110.*
[2] *4 N. L. R. 90.*
[3] *13 N. L. R. 85.*
[4] *20 N. L. R. 353.*

party, and where the defendant in consequence of such default is entitled to a remedy against the other party, then he may be liable to the broker.

I can find no case where a broker has been held entitled to his commission or to a *quantum meruit* in the absence of such a binding contract.

Assuming however that the plaintiff can get over this difficulty, there remains the question of whether the defendants were in default. It is clear from the authorities that they would have been in default if they had been unable to give a good title, or if their conduct otherwise had been such as to justify a breach of contract on the part of Ibrahim Lebbe. No objection has been taken to the title, and on the evidence I am not prepared to disagree with the learned District Judge in finding that there was not such delay on their part as would justify a breach of the contract.

It is however difficult to get away from the fact that there was no binding agreement between the defendants and Ibrahim Lebbe. There was *consensus in idem*, but by the terms of his contract the plaintiff undertook to obtain more than this. He undertook to obtain a completed contract. He cannot therefore sue on the contract, and he can only obtain a *quantum meruit* if the defendants entered into a binding agreement which they failed to carry out. The defendants never entered into such an agreement, and in such circumstances it is difficult to see how the question of deafault can arise.

I agree that the plaintiff's appeal must fail, and it is dismissed with costs.

AKBAR J.—

The appeal is by the plaintiff in this case, a licensed broker, who sued the defendant company for commission due to him in having arranged a sale of the defendant company's rubber estate at Kadugannawa.

The plaintiff alleged two causes of action in the plaint: firstly, that the contract between him and the defendant was an agreement to pay commission at the rate of 2½ per cent. on the purchase price in the event of plaintiff's finding a buyer, and that the defendant having accepted the purchaser introduced by him, and having confirmed this acceptance by placing his purchaser in possession, became liable to pay the commission. As an alternative cause of action the plaintiff claimed the commission above mentioned for having done his part of the contract, and that if the sale fell through it was due to the delay and default on the part of the defendant to give a valid and effectual title to the purchaser introduced by the plaintiff.

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The parties went to trial on the four following issues :—

(1) Did the plaintiff introduce to the defendant one Ebrahim Lebbe as the purchaser of Beddawella estate ?

(2) Did the defendant accept such purchaser and agree to pay the plaintiff brokerage at the rate of 2½ per cent. on the purchase price ?

(3) Was the refusal of the purchaser (Ebrahim Lebbe) to complete the purchase due to the act and conduct of the defendant ?

(4) If so, is the plaintiff entitled to claim the sum of Rs. 8,750 and interest as commission or compensation ?

It is clear from letters marked D 1 to D 9 that the plaintiff was not employed by the defendant company to find a purchaser, but that the offer came from the plaintiff (see letter P 21) on behalf of his " client. " The letters that followed (P 1, P 2, P 3, P 4, and P 5) make this clear, particularly P 2, wherein the plaintiff stated that he held the would-be purchaser's " confirmed letter " and that the purchaser was " prapared to pay the whole amount in cash at the completion of the title. "

These letters also show that the plaintiff knew that the estate belonged to a company incorporated in England and that the offer had to be communicated to the directors in London, who alone had the power to accept the offer.

The letters P 5, P 6, P 7, P 22, D 14, D 15, D 16, D 19, D 20, D 21, D 22, D 23, D 24, D 30, D 36, D 37, D 54, and D 57 indicate the history of the transactions that took place subsequently, till the draft deed of transfer was completed and the title looked into. The original suggestion (see P 5 and P 6) was that the purchaser should enter into possession of the estate on November 1, but in P 7 the plaintiff stated that his principal was willing to take over the estate on November 1 or as early as possible after the completion of the deeds. P 22, D 14, and D 15 show what the parties agreed to do finally, the transfer was to be ante-dated to November 1, but the possession of the estate was not to be given over until the purchase price was paid. In the meantime the estate was to be managed by the defendant's agents on behalf of the purchaser until the transfer was completed and the purchase money paid, whereupon the purchaser was to be placed in possession. On the completion of the transfer all necessary adjustments were to be made and the purchaser was to get the benefit of the estate crop harvested from November 1 in consideration of the purchaser paying 7 per cent. on the purchase money from November 1 until the completion of the transfer and the payment of the purchase money. The letter P 22, the terms of which were accepted by D 14 and D 15, further stated that this was the customary procedure in all cases of this sort.

All these elaborate precautionary measures are necessary, according to the law of Ceylon, for the transfer of immovable property, and it will be convenient here to state the law on the point. Under section 2 of Ordinance No. 7 of 1840, no contract or agreement for effecting a sale of immovable property nor any contract or agreement for the future sale of any immovable property is to be of any force or avail in law unless such contract or agreement is in a notarially attested document. The utmost extent to which the Supreme Court has gone in giving effect to an agreement to sell land which is not notarially executed is to be found in *Nagoor Pitche v. Usoof*,[1] where it was held that party who advanced money on such an informal agreement was entitled to a refund only if the other party refused or was incapable of completing the transaction. This is a Full Bench case and binding in Ceylon, but in the later case of *Peris v. Vieyra*[2] the Supreme Court followed the decision of the Privy Council in *Mayson v. Clouet*[3] and held that if, according to the terms of the agreement, the payment was by way of deposit in the nature of an earnest or *arrha*, then it was liable to forfeiture on the repudiation of the contract by the payer, but that when the money was paid in part payment of the purchase price, the payer was entitled to recover the money so paid even though the default was on his part in carrying out the terms of the agreement. Owing to the stringency of the provisions of section 2 of the local Frauds Ordinance, which goes beyond the corresponding section of the English Statute of Frauds, it is a well recognized fact that no contract to buy land, even though it may be in writing, is of force or avail in law and that therefore parties to such a contract may resile from it at the last moment. That is why solicitors in Ceylon, when arranging a sale of land, take every precaution, keeping in mind this contingency.

The series of letters which I have quoted above shows that the solicitors of the defendant and the would-be purchaser, Ebrahim Lebbe, had this contingency in mind. That is why by letters D 21 and D 22 the defendant made it quite clear that their "Superintendent was to remain in full charge of the estate until the handing over is completed, after the payment of the purchase price, the buyer's conductor having no say in the working of the property." And that is why, I take it, that Ebrahim Lebbe coolly ignored the request of the defendant contained in letter D 24 that he should provide the defendant with an advance of Rs. 1,500 for the payment of wages, &c., which was to be duly accounted for at the final settlement. That the fears of the defendant's solicitors were justified is shown by the subsequent events that took place in this transaction.

[1] *(1917) 20 N. L. R. 1.* [2] *(1926) 28 N. L. R. 278.*

[3] *(1924) A. C. 980.*

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The other letters produced by both parties and put in evidence in this case show that between October 4, 1926, and February 1, 1927, the solicitors of the defendant and the prospective purchaser, Ebrahim Lebbe, were busily engaged in looking into the title of the defendant, in scrutinizing the many deeds of the various lots of land which constituted the estate and in preparing the draft transfer which had to be annexed to the special power of attorney for transmission to England for the signatures of the Directors. These letters show that the various steps were taken with the approval of Ebrahim's solicitors and that part of the delay, if there was any that was not inevitable, was due to the illness of one of the members of Ebrahim's firm of solicitors. (See letters D 30, D 33, D 34, D 35, D 41, D 42, D 43, D 44, D 46, D 47, and D 48.)

It is true that by letter P 11 dated April 12, 1927, Ebrahim Lebbe's solicitors wrote asking the defendants' solicitors to cable to England at the purchaser's expense inquiring when the power of attorney was posted, but letters P 8 and the ones quoted above by me show that the defendants themselves were equally anxious to expedite matters and that the delay in getting the papers ready was unavoidable in the circumstances as the defendants are acompany incorporated in England and they had to send out a special power of attorney to Ceylon for the transfer.

In any event, on April 19, 1927, the necessary papers were received in Ceylon and the date for the signature of the deeds was fixed for May 2 (see letters D 51 and D 59), but as appears from D 60 to D 65 Ebrahim Lebbe backed out of the transaction without any warning on the very day on which the transaction was to have been completed because he had seen some bad omens and did not therefore like to purchase the property. The facts that I have narrated also show that the statement in the plaint that Ebrahim Lebbe was put in possession of the estate on November 1 is not true.

To come now to the main question at issue, the crucial letter containing the terms of this contract of brokerage is the letter P 21, which is as follows :—

No. 13, Norris road,
Colombo, September 17/18, 1926.

The Manager,
Estate Department,
Messrs. Harrisons & Crosfield, Ltd.,
Colombo.

Beddawala Estate.

SIR,—WITH reference to my previous correspondence, I have pleasure to offer you on behalf of my client Rs. 350,000 (Rupees Three hundred and Fifty thousand) for the outright purchase of the above estate.

My client wishes to inform you that this offer holds good up to the 30th instant only. Please let me have your reply before the date.

This offer is subject to 2½ per cent. brokerage.

Yours faithfully,
D. A. DE S. TUDAWE.

Here we have an offer on behalf of Ebrahim Lebbe of Rs. 350,000 "for an outright purchase" of the estate. The letter further states that the offer is subject to 2½ per cent. brokerage. Before I go on to discuss the point at issue as to the exact meaning of this offer and the law on the subject, it will be interesting to see how the parties themselves interpreted this letter at the time.

By letter P 1 the defendant wished to know the name of the plaintiff's principal and when and how he was prepared to pay the purchase money before the offer was cabled to the directors in London. Obviously this information was required by the defendant's agents in Ceylon to enable them to judge if the prospective purchaser was a man who was likely to stand by his offer. If he was not such a person, I take it that the defendants' agents would not have troubled to cable to England. The reply is in P 2, which is an important letter. After stating the name of the purchaser and that he was the owner of certain properties, the plaintiff went on to say "I hold his confirmed letter and he is prepared to pay the whole amount in cash at the completion of title." The expressions "outright purchase" and "completion of title" can, I think, only mean when a legal transfer on a notarial document had been made by the defendants to the satisfaction of the purchaser. It was this offer that was accepted by P 5. The question that has to be decided in this case is whether by P 5 the defendants agreed to pay the commission of 2½ per cent. when Ebrahim Lebbe had purchased the estate "at the completion of title" or whether the obligation arose on the receipt of P 5. A similar expression occurs in letter P 7. By P 9 dated December 22, 1926, the plaintiff wrote asking for his commission as "my business with regard to the sale of the above is over on November 1."

What took place on this letter is seen in letters D 31, D 32, and D 35 and the evidence of Mr. Leslie de Saram (recorded at page 36 of the record), who explained to the plaintiff that he was not entitled to his commission till the deeds were signed. The plaintiff then wrote letter P 12 on May 12, 1927, after Ebrahim Lebbe had backed out of his offer, and again repeated that the estate was given over to the purchaser on November 1, 1926, and

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he added that Ebrahim Lebbe was willing to pay the full amount on November 1. Then followed letters P 13, D 64, P 14, P 15, P 16, P 17, P 18, P 19, and P 20, which are explained by Mr. Leslie de Saram in his evidence at pages 38 and 39.

In my opinion the letters and conduct of the parties clearly show that the obligations was only to pay the commission on the completion of a legally binding contract between Ebrahim Lebbe and the defendant company. The offer was to pay Rs. 350,000 for an outright purchase and this was subject to a brokerage of 2½ per cent.; this can only mean that the defendant was liable to pay the commission on the payment of the purchase price.

The plaintiff in issues 3 and 4 has raised the question whether the refusal of Ebrahim Lebbe to complete the purchase was due to the act and conduct of the defendant, and if so, whether the plaintiff was entitled to claim this commission.

It will be seen that issue 3 is vague and general in its terms. What the particular acts of default were are not set out in the issue, but general allegations have been made by Counsel at the bar that the defendants had unnecessarily delayed the negotiations by insisting on a special power of attorney to which was to be attached the exact transfer which was to be signed by the attorneys. This was necessitated by the particular facts of the case, viz., by the facts that the owner of the estate was an English company, and for the protection of the shareholders it is obvious that a general power of attorney to sell is inadvisable and undesirable. It is also useful to remember in this connection that the plaintiff was not employed by the defendant to introduce a purchaser. It was also urged that the defendant should have insisted on a notarially attested agreement from Ebrahim Lebbe to buy, so as to safeguard the interests of the broker, but that was not the contract on letters P 21 and P 5, and even an agreement to sell would have required a special power of attorney from England.

The short answer to issue 3 is that Ebrahim Lebbe did not complain about the delay, nor did he back out of his offer for this reason. His reason was that it was due to bad omens, or, in other words, he insisted on his legal right to back out of an undertaking which did not bind him, as the rubber market was falling at the time. It remains now to discuss the law on the subject. There are four local decisions on the question of brokers' commission. In the first case, *Simpson & Co. v. Soysa*,[1] the defendant requested the plaintiff to raise him a loan of Rs. 10,000 on the mortgage of his property and promised him a commission of 2 per cent. The

[1] *(1900) 4 N. L. R. 90.*

plaintiff found a lender who was willing to lend the money, but as the deeds were not satisfactory the lender declined to go any further with the negotiations. In the course of his judgment Bonser C.J. states that if an agent does all that he is expected to do according to the terms of his contract and finds a person able and willing to lend the money, then the agent has earned his commission and it does not matter what happens afterwards, whether the lender capriciously refuses to complete the bargain or the bargain falls through from some other cause. If this is correct law, Bonser C.J. should have entered judgment for the plaintiff, but he went on to say that if the would-be lender was unable to lend the money owing to the fact that the defendant was unable to make out a good title to the property, the plaintiff was entitled to the commission as the failure of the loan was due to the fault of the defendant. He proceeded to state that the difficulty in the case seemed to be that there was neither a binding contract entered into with the lender, in which case the condition of the title would be immaterial, nor was there evidence that the title was in fact defective. He sent the case back for a decision on the latter point and directed the trial Judge to enter judgment for the defendant if the title was a good one, but that if it were otherwise, judgment was to be entered for the plaintiff.

The principle which I can deduce from this case is the one stated by Ennis A.C.J. in the last of the four cases, *Fernando v. Perera Hamine*,[1] namely, that the broker is only entitled to his commission in a negotiation that has fallen through if he can prove a direct default on part of the vendor or a binding agreement between the vendor and the vendee, binding the latter to buy the property. Ennis A.C.J. further stated that this seemed to be the principle of our own cases and the English cases. This principle was stated and approved by Wood Renton C.J. in *Perera v. Soysa*[2] as being the rule approved in a variety of English cases, but in applying the principle to the particular case he interpreted the words " a complete and binding contract " to mean nothing more than that the broker should bring the vendor into contract with a purchaser who was ready and willing to pay the price indicated by the vendor and that the broker's connection with the sale came to an end after he had done this. Wood Renton C.J. further stated that this was the effect of Bonser C.J.'s decision in the case of *Simpson & Co. v. Soyza*.[3] This is, therefore, a direct authority in favour of the broker in this case. But in the later case of *Dissanayake v. Rajapakse*[4] Bertram C.J. stated as follows :—" There are certain expressions, both in our cases and in the English reports, that seem to suggest that a commission agent has the right to sue for what in

1 (*1919*) *21 N. L. R. 79.*

2 (*1910*) *13 N. L. R. 85.*

3 (*1900*) *4 N.L. R. 90.*

4 (*1918*)) *20 N. L. R. 353.*

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English law is called a *quantum meruit* even in the cases in which the sale or loan goes off simply because the title to the property proves to be defective, whether the defect is due to the principal or not. Thus the principle as laid down by Wood Renton C.J. in *Perera v. Soysa* (*supra*) was as follows:—"Whenever the agent who is employed to negotiate such a bargain has introduced to his principal a person who is able and willing to enter into the contract so that nothing further remains for the agent to do, he is entitled to his commission although the negotiations afterwards fell through in consequence of circumstances over which the agent has no control" (see also the dicta of Bonser C.J. in *Simpson & Co. v. Soyza* (*supra*).

It appears to me, as at present advised, that these statements of the law go beyond the recognized English authorities which are based upon the principle laid down in Smith's leading cases, viz., that it is only when the principal has, by his own act or default, absolutely refused or rendered himself incapable of performing his part of the contract that the right to sue on a *quantum meruit* arises.

There is no doubt that the right of the commission agent to sue on a *quantum meruit* may be made dependent upon a special condition. This was so in the cases of *Beale v. Bond*,[1] *Bull v. Price*,[2] and *Chapman v. Wise*.[3] I have given this long extract to show that there is a conflict of authorities in Ceylon, the later cases being in favour of the defendant. As the Counsel for the appellant has urged that the opinion of the later Judges was *obiter*, it will be interesting to examine some of the English authorities.

All the authorities which I have examined are clear on one point, namely, that if there is an express contract the terms of the contract must be examined, and if the terms are clear no terms can be introduced by way of implication. (See *French & Co. v. Leeston Shipping Co.*[4])

As McCardie J. stated in *Howard Houlder and Partners, Ltd. v. Manx Isles Steamship Co., Ltd.*[5]: "It is a settled rule for the construction of commission notes and the like documents which refer to the remuneration of an agent, that a plaintiff cannot recover unless he shows that the conditions of the written bargain have been fulfilled. If he proves fulfilment he recovers. If not, he fails. There appears to be no halfway house, and it matters not that the plaintiff proves expenditure of time, money, or skill." This is the only question in this case, for no question of a *quantum meruit* arises either on an implied contract (see Lindley L.J.'s remarks in

[1] (*1901*) *84 L. T. 313.*
[2] (*1831*) *7 Bingham 237.*
[3] (*1904*) *91 L. T. 17.*
[4] (*1922*) *1 A. C. 451.*
[5] (*1923*) *L. R. 1, K. B. 110.*

Lott. v. Outhwaite[1]) or on a contract which has been broken by the default of the defendant (see Bertram C.J.'s remarks in *Dissanayake v. Rajapakse* (*supra*)).

As explained in the note of *Cutter v. Powell*,[2] an application for compensation on a *quantum meruit* is an action for work and labour done independently of the contract and the agent can only sue for this remuneration if the special contract has been rescinded by consent of the principal and agent or if the carrying out of the agent's contract has been rendered impossible by the act or default of his principal (see *Prickett v. Badger*[3]). As I have already stated in my opinion there was here an express contract in which there was no condition to pay for a *quantum meruit*. In fact there was no contract here engaging the plaintiff to seek out a purchaser on bahalf of the defendant company, nor is the breaking off of the contract to buy attributable to the defendant company ; it was broken off owing to the whim of Ebrahim Lebbe.

The only question, therefore, in this case is whether the agreement to pay brokerage on P 21 and P 5 was fulfilled by the mere introduction of Ebrahim Lebbe by the plaintiff and the acceptance of his offer, or whether the commission was payable on the completion of the purchase. No evidence has been led on custom regarding such contracts, and it is significant that the plaintiff has not called Ebrahim Lebbe, and plaintiff's Counsel objected to a postponement to enable defendant to call him as a witness. As I have already indicated, the contract is clear to my mind as pointing to the obligation to pay only in the event of the completion of the purchase. Even according to the authoritative English decisions, there must be a binding contract between the defendant and the person introduced by the plaintiff before the agent is entitled to his commission, unless, of course, the terms of the contract are clear that the broker is to be entitled to his commission for any less work done by him. It must be so by the very nature of a broker's business because he has the chance of making very large sums of money with comparatively little exertion on his part, and he must take the rough with the smooth in his calling. The plaintiff is here claiming Rs. 8,750 with interest, but had to admit that his total income for the last 8 years was only Rs. 4,000 or Rs. 5,000. That he clearly recognized that he had not earned his commission on November 1 is proved by his own evidence as recorded at pages 20 and 21 of the record showing the interest he took to force Ebrahim Lebbe to hand over the cheque to Mr. de Vos, but even here his evidence is shown up in lurid light, because Mr. de Vos flatly contradicts the evidence that Ebrahim Lebbe took any cheque for the purchase amount to him (see page 43).

[1] *(1893) 10 T. L. R. 76.*

[2] *Smith's Leading Cases 1.*

[3] *(1856) 1 C. B. (N. S.) 296.*

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In *Green and another v. Lucas*[1] the defendant employed the plaintiff to borrow money upon leasehold security and agreed to pay him a commission of 2 per cent. Upon examination of the lease it was discovered that the lease instead of being a lease for 99 years absolutely contained a proviso for re-entry under certain conditions which constituted a substantial deterioration of its value, whereupon the would-be lenders, who were introduced by the plaintiff, refused to make the advance. It was held that the plaintiffs were entitled to their commission. But this case is different to the one in appeal, in that there was a distinct employment of the plaintiffs by the defendant. Further, the Lord Chancellor in his judgment states as follows :—" I do not scan narrowly the amount of deterioration to the property ; suffice to say, it amounts to a substantial deterioration, and probably it was a sufficient reason to justify the company (the would-be lenders) in their refusal to complete the loan. Either it was a sufficient reason to justify the company in refusing to go on with the loan, or it was not. If they were not justified, the defendant ought to have proceeded against them, and if they were justified, then the failure of the loan was owing to the defendant's own default or the failure of the security he had proposed. " The two alternatives are clearly stated, there must be a binding contract on which the defendant can sue the would-be lenders, or there was no contract owing to the default of the defendant.

Kelly C.B. stated: "I agree with the dilemma put by the Chancellor. If the company (the would-be lenders) are justified in their refusal to complete the loan, it is because of the defendant's default in proposing a security that failed, and if they are not justified, the defendant has his remedy against them. "

Bramwell B. was of the opinion that the contract with the plaintiff was to procure a lender and not the money, and that the contract was completed, as far as the plaintiff were concerned, when they had procured a person who was ready and willing to lend the money. Blackburn J. agree with Bramwell B. on the meaning of the word " procure ", but added that the contract was to procure a person who was willing and ready to lend on the leaseholds and that as the leasehold was defective the contract failed through the failure of the security.

In the case before me there was no binding contract between Ebrahim Lebbe and the defendant, and the failure of these two parties to contract was due to the default of Ebrahim Lebbe and not to that of the defendant.

In *Fisher v. Drewett*[2] there was a contract to " procure " a loan on the security of house property, and the plaintiff procured a party willing to lend, but the negotiations went off as the defendant failed to show sufficient title. The Three Judges interpreted this contract

[1] *(1875) 33 L. T. 584*

[2] *(1878) 48 L. J. C. L. 32*

to mean nothing more than a contract to introduce a willing party, and that the plaintiff was entitled to his commission as he had procured a party who was willing to lend and that the contract to lend had fallen through owing to the default of the defendant in furnishing a further abstract of title, " a default which would have rendered him liable in an action for non-completion " (see the judgment of Thesiger L.J.). This case is entirely different to the one before me, because, as I have said, P 21 was not an offer to procure or introduce but an offer to buy, and the reason why there was no binding contract to buy was due to the default of Ebrahim Lebbe.

In *Harris v. Petherick*[1] the defendants agreed with the plaintiff to remunerate him " in the event of their taking into partnership " one Mowat, introduced by the plaintiff. The defendants afterwards actually entered into a written agreement with Mowat by which it was agreed that they should enter into partnership as, and from, a specified future date when a formal deed of partnership was to be executed. This agreement recognized and adopted the agreement between the plaintiff and the defendants. No partnership deed was ever executed, nor did Mowat ever act as a partner. The trial actually ended in a non-suit. Denman J., in setting aside the non-suit, stated as follows :—"It appears to me that what took place after May 19 is good evidence to go to the jury, that what was contemplated by this letter had been done, *i.e.*, that the defendants had so taken Mowat into partnership as to be dealing with him as a partner as between the defendants and the plaintiff . . . . I think there is good evidence of a taking into partnership within the meaning of this letter and therefore that there was a case which ought to have gone to the jury . . . . There is a further element in the case which has been relied on. It has been contended that there is evidence that the defendants prevented the partnership.

" As in all cases of agreement for commission the plaintiff is entitled to his commission if he does every thing that he contracted to do ; but I should hesitate to say that it is an immaterial question in all cases whether or not the defendant is at all in fault. In this case Mowat was called as a witness and said in effect that the defendants had always up to that time refused to take him into partnership . . . . . " The case was sent back for retrial on these two points. It will be seen that in this case there was actually a binding contract between the defendants and the person introduced by the plaintiff.

In the case of *Lookwood v. Lewick*[2] there was a binding contract between the defendant and the person introduced by the plaintiff, and further, default on the part of the defendant. In *Green and*

[1] *(1878) 39 L. T. 543*

[2] *29 L. J. C. P. 340*

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another v. Mules,[1] *Prickett v. Badger* (*supra*) was distinguished, and judgment went against the plaintiff because he was held strictly to his contract in spite of the fact that he had expended time and labour in his undertaking. *Knight, Frank, and Rutley v. Gordon and others*[2] is a case much more in point here. A printed leaflet was issued containing the terms of business of the plaintiff, and yet in spite of this Mr. Justice Acton held that the commission was only earned after completion of the sale and payment of the purchase price. The facts in that case were even stronger than the ones here, because as a result of the efforts of the plaintiff a purchaser was found who agree to buy the property and actually deposited £5,000. The defendants pleaded that this purchaser failed to complete the purchase and the property was sold subsequently to another purchaser, and they paid the plaintiffs' commission on the £5,000 into Court. In the course of his judgment Acton J. held that not only could the plaintiffs not succeed in their claim for commission, but that they failed in their claim for damages as for a breach of contract. The contract of sale was not followed by a completion of the sale and payment of the purchase price, and the default in completing the sale was not on the part of the defendants.

Even on the plaintiffs' Counsel's contention that the plaintiffs were entitled to their commission once they had introduced a purchaser who was ready, willing, and able to buy, the trial Judge held that the evidence did not satisfy him that the purchaser introduced by the plaintiffs answered to that description.

In this case before me Ebrahim Lebbe was not willing, ready, and able to purchase at the proper time, viz., on the date agreed upon (May 2, 1927). As this case involves a question of some importance, I have set forth my reasons at length, and the conclusion to which I have come is that the plaintiff cannot succeed in this action on P 21 and P 5 in the absence of a binding contract between Ebrahim Lebbe and the defendants or proof of default on the part of the defendants. I would dismiss the appeal with costs.

Appeal dismissed.

[1] *30 L. J. C. P. (N. S.) 343.* (*1923*) *39 T. L. R. 399.*