

DIVISIONAL COURT.

NOVEMBER 6TH, 1912.

## \*SMITH v. BARFF.

*Principal and Agent—Agent's Commission on Sale of Land—Cheque for Deposit Unpaid—Refusal of Purchaser to Complete—"Selling the Property"—Meaning of.*

Appeal by the plaintiff from the judgment of one of the Junior Judges of the County Court of the County of York in an action to recover commission on the sale of the defendant's house.

The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

L. C. Smith, for the plaintiff.

D. Inglis Grant, for the defendant.

RIDDELL, J.:—The plaintiff is a foreigner, who seems to act as real estate agent: the defendant was the owner of certain lots, three in number, in Toronto—at least they are in his name. He seems to have been desirous of selling the lots—and about the middle of March, 1911, the plaintiff and one Herman came to his house and asked Mrs. Barff if she wanted to sell—Barff seems to have been away from home during the daytime and Mrs. Barff to have transacted business in connection with the lots. She said: "We wanted to sell: of course if we got our price we would sell." It is apparently clear that at that time she said: "If you bring me a purchaser I will sell it." So Smith swears, and she does not contradict him—and she mentioned the price she wanted.

About two months thereafter the two men came to her house with one Heller, and he made an offer of \$2,500 for each of the lots: she wanted \$2,800. "I said, I would not accept it: that I knew Mr. Barff would not accept; we wanted \$2,800 or none at all." Then Heller offered \$2,600 for each lot, and she said, "I know Mr. Barff will not accept that;" and then Heller asked for pen and paper, and getting them wrote out an agreement of purchase and also a cheque for \$200 as a deposit—leaving the cheque, according to one story, taking it with them, according to another, the three went away: in the evening the two agents returned and saw Mr. Barff and "after a lot of talk" (to use his own words) "we decided that I would accept the agreement as made out and the \$200 cheque as a deposit. . . . Then I signed the agreement." Then the plaintiff produced an agreement which had been written or perhaps was then written out

\*To be reported in the Ontario Law Reports.