

HIGH COURT DIVISION.

MIDDLETON, J.

JUNE 7TH, 1915.

COOPER v. PARSONS REALTY CO.

Principal and Agent—Fraud of Agent—Purchase of Land for Principal—Responsibility of Vendor for Fraud of Purchaser's Agent—Evidence—Secret Commission—Rescission.

Action against the Parsons Realty Company and also against one Burnaby and wife to recover moneys which had been paid by the plaintiff to the Parsons Realty Company or to one Parsons, and part of which had been paid over to the Burnabys by Parsons for a conveyance of land made by them to the plaintiff.

The amount obtained by Parsons from the plaintiff was \$8,350, and the amount paid to the Burnabys was \$5,400.

The transaction was fraudulent on the part of Parsons; and the plaintiff at first charged that the Burnabys were parties to the fraud; but at the trial all charges of personal fraud against the Burnabys were expressly withdrawn; and the claim against them was confined to the allegation that they were responsible for the fraud of Parsons.

The action was tried without a jury at Toronto.

J. W. Bain, K.C., and Christopher C. Robinson, for the plaintiff.

J. E. Jones and V. H. Hattin, for the defendants the Burnabys.

The other defendants did not appear.

MIDDLETON, J., said that the Burnabys had acted in good faith throughout; but it was argued that Parsons became the agent of Burnaby by his receipt of a commission from Burnaby, and in that case Burnaby must be taken to have notice of Parsons's fraud; or that Burnaby, by paying a commission to the plaintiff's agent, Parsons, made the transaction voidable at the plaintiff's option: *Hitchcock v. Sykes* (1914), 49 S.C.R. 403. In regard to the latter contention, the learned Judge said that no such case was made upon the pleadings, and, having regard to the admissions made at the trial, it was not open to the plaintiff to rest his case upon this ground. Apart from that,