

Action to recover \$46,320.40 commission, alleged to be payable by virtue of an agreement in writing dated the 5th September, 1918.

The action was tried without a jury at a Toronto sittings.

A. G. Slaght, for the plaintiff.

Glyn Osler and G. R. Munnoch, for the defendant.

MIDDLETON, J., in a written judgment, said that the defendant was the owner, or potential owner under an option agreement, of certain stock in the Orr Gold Mines Limited, and, by agreement dated the 5th September, 1918, agreed to sell this stock to the Kirkland Porphyry Gold Mines Limited for \$513,200.40: \$100,000 upon the transfer of the shares; \$100,000 on the 1st September, 1919; and \$313,200.40 on the 1st September, 1920, the deferred payments being secured by the deposit of bonds charged upon all the assets of the Kirkland company.

The plaintiff had been instrumental in bringing about this transaction, and the agreement sued upon was entered into to define his rights as to commission. The initial \$100,000 was paid, and upon that Cecil received a commission of \$5,000. The balance of his commission—10 per cent. upon the whole purchase-price—was to be paid as follows: "\$10,000 out of the second payment to be made on the 1st September, 1919, when such payment shall have been made; \$36,320.04 out of the third payment of \$313,000.40, when such payment shall have been made. Should said payments not be made by the Kirkland company Wettlaufer shall be under no liability to Cecil for the payment of any commission by reason of said sale."

The Kirkland company made no such further payments, but went into liquidation absolutely insolvent; and this alone constituted a complete answer to the claim as put forward.

It was urged that, notwithstanding this, the plaintiff was entitled to recover, either upon the contract or upon the theory put forward in *Smith v. Upper Canada College* (1920), 48 O.L.R. 120, by reason of a supposed breach by the defendant of an implied obligation on his part not to do anything to prevent payment by the purchaser of the purchase-money out of which the plaintiff was to receive his commission.

The facts relied upon were that, upon the Kirkland company going into liquidation, negotiations took place between the defendant and one Wills, who had put into the company practically all the money it ever had, including most of the \$100,000 paid to the defendant, which resulted in an agreement for the purchase by them of the equity in the assets of the company, including the