

C.J.O., HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE HODGINS and HON. MR. JUSTICE LATCHFORD.

M. K. Cowan, K.C., and T. Hobson, K.C., for the appellant.

J. W. Bain, K.C., for the respondent.

HON. SIR WM. MEREDITH, C.J.O.:—The material facts are fully stated in the reasons for judgment of the learned trial Judge, 23 O. W. R. 592, and when the proper conclusion upon these facts is reached there will be no difficulty in determining the question in issue between the parties.

If, as contended by counsel for the appellants, the proper conclusion of fact is that the measure of the respondent's rights is to be found in the agreement of the 14th July, 1911, the action fails because in that case the right to payment for his services was contingent on an agreement in the terms of the writing of the 29th July, 1911, being concluded between the appellant and the Canada Machinery Corporation, Limited, and such an agreement was not made.

In my view, the agreement of the 29th July, 1911, is not the measure of the respondent's rights.

Before the making of that agreement, the respondent, who was a land agent or broker, had been retained by the appellant to endeavour to bring about a sale to the Canada Machinery Corporation Limited, of the business and property of the appellant, or as it was called a merger between that company and the appellant, and the proper conclusion upon the evidence is, I think, that the respondent was instrumental in bringing the two companies together after a suggestion rather than negotiations for the sale had been if not abandoned at least suspended.

The evidence satisfies me and the learned Judge must have thought that it was not part of the arrangement between the parties that commission should be paid only in the event of the sale resulting in a surplus to the appellant. The evidence of the respondent on this point is clear and that of Mr. Yeates, the managing director of the appellant company, is not satisfactory. When examined in chief as to the arrangement he says nothing about any such limitation, and it was not until his cross-examination that he stated that the commission was not to be paid unless there was a surplus.