

doubted whether any express contract for a specified rate of commission was proved, and thought that if it was the case that the parties had not agreed upon the amount of commission, the proper way to determine it would be to inquire if there was a usual rate in such transactions, which they thought would probably govern, but, if there was no such rate, then the inquiry should be what is a reasonable compensation. And they were of opinion that, as the evidence had not been directed to that view of the case, it would be more satisfactory that the inquiry should be at a trial rather than upon a reference.

They also expressed themselves as not at present satisfied that there was such a break in the transactions as disentitled the plaintiffs to commission upon the balance of the purchase money beyond the \$30,000.

On the argument of the appeal the principal questions discussed were whether there was an agreement as to commission; if so, what were the terms; and if there was an agreement for a stated commission, upon what amount of purchase money was it payable? In addition it was contended for the plaintiffs that the Divisional Court having, in the exercise of their discretion, directed a new trial, their decision ought not to be interfered with.

As to the first branch of the case, I am of opinion that the plaintiffs failed to establish an agreement to pay a commission at the rate of 10 per cent.

On the other hand, I think the correspondence and testimony shew a distinct offer by the defendants of a commission of 5 per cent. and an acceptance by the plaintiffs of the engagement at that rate of compensation. There is no doubt that they hoped that perhaps through pressure to be exercised by Mr. A. E. Osler, or from motives of friendship for the plaintiff Hutchins, or in some other way, the defendant Glendinning might be induced to increase the commission to 10 per cent., but there was no promise or agreement to that effect on which the plaintiffs were entitled to rely, and they undertook the employment, and proceeded to procure a purchaser on the basis of 5 per cent. I do not think, however, that it is so satisfactorily shewn that the right to be paid this commission was conditioned upon the receipt by the defendants of the purchase money, or that the plaintiffs were only to be paid as and when the moneys were received on account of the purchase price. It is true that the defendant Glendinning states in his evidence that that