

it, the defendant would be liable to the plaintiffs. In the acceptance of the offer by defendant, he acknowledges receipt of \$500 as deposit. This cheque of Foster's was payable to the order of the defendant—but it was not received by him—nor was it offered to him—nor was he asked to endorse it. It was retained by Mr. Bethune, one of the plaintiffs, for some time, and when presented, payment had been stopped, as Foster repudiated and refused to go on with his proposed purchase. Holding the cheque and all the dealings between plaintiffs and Foster convince me that the real agreement between plaintiffs and defendant was as defendant contends, viz., that the commission was to be paid out of the purchase money. The defendant has acted in perfect good faith throughout. He did his utmost to get Foster to complete the purchase.

The fair inference upon all the evidence is, that the defendant never agreed to pay and the plaintiffs did not intend to charge so large a commission for procuring a person to sign an agreement to purchase, for an amount which the defendant would accept.

No fraud or collusion in this transaction can be imputed to plaintiffs, but to accept their contention would offer a temptation to any real estate agent upon a general retainer or employment, who would be guilty of collusion to procure an offer at a price that vendor would gladly accept, and then have the proposed purchaser retreat or simply decline to carry out the purchase, allowing the agents to collect their commission from the responsible owner. My decision, however, is based upon my view of the evidence in this case and not because of what might happen in some other case.

Then, I am of opinion that the defendant is entitled to succeed upon the ground taken in the amended statement of defence.

The defendant did so draw this agreement as to give to the purchaser, Foster, an opportunity to resist the defendant's claim to have Foster's purchase carried out. It seems to me that the Statute of Frauds affords a good defence to Foster. If the defendant, in good faith, desired to have the purchase carried out, and if the plaintiffs are in any way responsible for that—so that no purchase money was received or can be received by defendant—out of alleged sale by plaintiffs—the defendant is not called upon to pay.