

The plaintiffs procured an offer in writing from one John G. Foster, addressed to defendant, offering to purchase this property for \$60,000, which offer, the defendant accepted, but, subsequently, Foster refused to carry out the purchase, and he did not in fact purchase, and the defendant did not receive any purchase money from Foster.

The plaintiffs' contention was that immediately upon a contract of purchase and sale being made—through the intervention and agency of the plaintiffs, acting for defendant—they, the plaintiffs, became entitled to their commission no matter whether the actual purchase and sale was carried out or not.

There was an employment by defendant of plaintiffs as defendant's agents to make a sale of the property mentioned. The particulars and real nature of the agreement between plaintiffs and defendant were contained in the offer drawn up by the plaintiffs and signed by Foster—which offer the defendant accepted. In the offer it was stipulated as follows: "The agent's commission to be paid out of and from part of the purchase money at  $2\frac{1}{2}\%$ ." There was nothing in writing between plaintiffs and defendant, and defendant contended that the agreement between him and plaintiffs was evidenced in the offer written out as above mentioned.

G. H. Watson, K.C., for the plaintiffs.

C. A. Moss, for the defendants.

HON. MR. JUSTICE BRITTON:—It may be that this special clause was inserted in the offer to prevent any possibility of Foster being liable for commission and also to permit Foster's paying it out of the purchase money and so prevent the money, to the extent of the commission, going into the hands of the defendant. This offer permitted Foster to pay the commission and keep the amount so paid out of the purchase money. I find that the agreement between the plaintiffs and defendant was that in the event of a sale—not merely an agreement for sale—the commission was to be paid out of the purchase money.

This is what the plaintiffs said: If the commission was to form part of the purchase money—as between Foster and defendant—it can come only out of the purchase money as between plaintiffs and defendant. If Foster paid it he would be protected. If defendant got the purchase money; or if sale carried out so that he could be responsible for not getting