

SECOND DIVISIONAL COURT.

JULY 3RD, 1920.

## \*SMITH v. UPPER CANADA COLLEGE.

*Principal and Agent—Agent's Commission on Sale of Land—Commission Payable out of Purchase-money when Received—Large Portion of Purchase-money not Received by Reason of Subsequent Agreement Made between Vendor and Purchaser without Privity of Vendor's Agent—Action for Balance of Commission notwithstanding that Whole of Purchase-money not Received—Dismissal of Action upon Question of Law Raised in Pleadings—Effect of sec. 13 of Statute of Frauds (6 Geo. V. ch. 24, sec. 19)—Appeal—New Point Taken by Court—Implied Agreement of Vendor to Do Nothing to Prevent Payment of Purchase-money—Damages for Breach of Implied Contract—Judgment Dismissing Action Set aside, Leaving Case for Trial on New Basis—Necessity for Amendment of Pleadings.*

Appeal by the plaintiff from the judgment of MIDDLETON, J., 47 O.L.R. 37, 17 O.W.N. 405.

The appeal was heard by MULOCK, C.J. Ex., CLUTE, RIDDELL, SUTHERLAND, and MASTEN, JJ.

A. G. F. Lawrence, for the appellant.

Frank Arnoldi, K.C., for the defendants, respondents.

RIDDELL, J., in a written judgment, said that, in the view he took of the case, the statutes had no bearing; the case had not been placed on the right basis. The real action was not to recover commission at all. Admittedly, commission could not be recovered under the contract between the parties and on its terms, for the money had not been received by the defendants, and therefore was not payable to the plaintiff according to the terms of the contract: *Alder v. Boyle* (1847), 4 C.B. 635.

The real cause of action was for damages for breach of the implied agreement on the part of the defendants not to do anything to prevent the payment by the purchaser of the purchase-money out of which the plaintiff was to receive his commission.

Reference to *Ogdens Limited v. Nelson*, [1904] 2 K.B. 410, 418, [1905] A.C. 109; *Lazarus v. Cairn Line of Steamships Limited* (1912), 28 Times L.R. 244, fourth rule stated by Scrutton, J., at p. 246.

The defendants had broken this contract, and the plaintiff was entitled to a verdict. If he could prove no damage, he was entitled to a judgment for nominal damages and costs: *Village of Brighton v. Auston* (1892), 19 A.R. 305.