

APRIL 21ST, 1913.

*HITCHCOCK v. SYKES.

Principal and Agent—Sale of Land—Commission Received by Partner of Purchaser from Vendors—Failure to Disclose to Purchaser—Fraud—Action by Vendors for Specific Performance—Counterclaim by Purchaser for Rescission.

Appeal by the defendant Webster from the order of a Divisional Court, 3 O.W.N. 1118, affirming the judgment of FALCONBRIDGE, C.J.K.B., 3 O.W.N. 31.

The appeal was heard by GARROW, MACLAREN, MEREDITH, MAGEE, and HODGINS, J.J.A.

G. H. Kilmer, K.C., for the appellant.

C. H. Cline and Featherston Aylesworth, for the plaintiffs, the respondents.

HODGINS, J.A. (after referring to the opinions given in the Divisional Court and to certain portions of the evidence):—The question raised on the appeal is the right of the appellant to rescission, and repayment of the \$20,000 paid by him, or to the payment to him of the \$2,000 commission, or to all these remedies combined. . . . We have to decide whether these rights fail, because to insist upon the duty of disclosure is to set up an artificial standard of morals (as put by the Divisional Court), or whether the respondents were guilty of fraud in law, as asserted by Mr. Justice Middleton in his dissenting judgment, or of a breach of duty in not disclosing the fact that they were paying Sykes a commission.

I am unable to come to the conclusion that what took place on the 12th April, 1910, amounted to a disclosure of the latter fact, or that the appellant's want of suspicion or inability to realise that he was being deceived is equivalent to disclosure. See *Bartram v. Lloyd* (1904), 90 L.T.R. 357. Reference may be made to the examination for discovery of the respondent Wilbur Hitchcock, in which he admits that he cannot put his finger upon anything that was said or upon any act done on or before the 12th April, 1910, that would indicate that the appellant knew that Sykes was being paid a commission.

*To be reported in the Ontario Law Reports.