

JUNE 28TH, 1907.

C.A.

## PURE COLOUR CO. v. O'SULLIVAN.

*Promissory Note — Discount by Payees with Bank — Action Brought by Payees while Bank Still Holders of Note—Note Taken up by Payees Pending Action—Failure of Action—New Ground of Relief Urged in Court of Appeal—Right of Payees to Compel Maker to Indemnify them against Note—Leave to Amend Refused.*

Appeal by plaintiffs from order of a Divisional Court reversing judgment of MABEE, J., at the trial, and dismissing the action, which was brought upon a promissory note dated 13th March, 1905, for \$3,500, made by defendant, payable to the order of plaintiffs on demand, with interest at 6 per cent. The statement of claim alleged that the note was given in consideration of \$3,000 worth of capital stock in the plaintiff company subscribed for by and allotted to defendant, and the sum of \$500 lent and advanced by the company to defendant. Defendant pleaded that plaintiffs were not the lawful holders of the note at the time of action brought, and further that there was an agreement between himself and one Clarkson, plaintiffs' president and agent, of which plaintiffs had notice, that he should not be called upon for payment of the stock or of the loan for 5 years.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

J. Bicknell, K.C., and W. M. McClemon, Hamilton, for plaintiffs.

A. O'Heir, Hamilton, for defendant.

OSLER, J.A.:—. . . As regards the note, it appeared that plaintiffs had discounted it with the Bank of Hamilton, transferring to the bank at the same time, as collateral, the shares for which it was supposed to have been given, and that at the time the action was brought the bank were still the holders of the note and shares. Plaintiffs afterwards took up the note, and it was produced by them at the trial. The trial Judge ruled that possession of the note at that