

SECOND DIVISIONAL COURT.

APRIL 8TH, 1920.

VICTORIA ELECTRIC SUPPLY CO. LIMITED v.
PALTER AND NELSON.

Judgment—Agreement Made after Commencement of Action in County Court—Payment of Money—claim by Instalments—Default in Payment after Half of Amount Paid—Judgment Entered for Full Amount Claimed—Irregularity—Practice—Setting aside Judgment—Costs.

An appeal by the defendant Nelson from an order of DENTON, Junior Judge of the County Court of the County of York, in an action in that Court, commenced by a writ of summons specially endorsed with a claim for \$806.76 for the price of goods sold and delivered.

After the writ had been served, the parties agreed that the debt should be paid in instalments, represented by promissory notes given at the time of the agreement and maturing at different dates. The president of the plaintiff company asserted that he agreed to accept payment by instalments on the express understanding that in the event of default the plaintiffs should be at liberty to sign judgment and issue execution, and that he never agreed to withdraw the action. This was denied by the defendant. Upon default occurring after \$415 had been paid, the plaintiffs entered judgment for the whole original debt, \$806.76, and \$24 taxed costs, and issued execution for that sum, but directed the Sheriff to levy only \$415.76 and costs.

The defendant Nelson applied to the learned Junior Judge for an order setting aside the judgment; and the learned Judge ordered that upon payment into Court by the defendant within one week of \$415, the judgment should be set aside, and that the costs of the application and judgment should be costs in the cause; but, upon default of payment into Court, that the action should be dismissed with costs.

This was the order from which the defendant Nelson appealed.

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

W. D. M. Shorey, for the appellant, cited *F. J. Castle Co. Limited v. Kouri* (1909) 18 O.L.R. 462.

B. Luxenberg, for the plaintiffs, respondents.

THE COURT held:—

(1) That, on the plaintiffs' own shewing, they could enter judgment only for the proper amount.