

Upon the argument of the appeal, it was stated that the defendant desired a reference to take the account between the bank and his brother in order to shew that the brother owed nothing, and that there was, therefore, no liability on the notes if they were given as security for the brother's indebtedness. No such defence was set up in the defendant's affidavit; and, even if it were, it would not be proper, according to the practice of the Court, to direct a reference until the defendant had proved that the notes were given for that purpose; and the plaintiff was entitled to have that question first disposed of at a trial—if the defendant failed to establish that upon which the right to an accounting depended, the reference would involve a useless waste of money.

For that reason, and because it is not proper to direct a reference where the defence is payment, the order appealed from should be discharged; costs here and below to be costs in the action.

MACLAREN, HODGINS, and FERGUSON, JJ.A., agreed in the result without expressing any opinion upon the point that a reference was not proper in a case where the defence is payment.

*Appeal allowed.*

FIRST DIVISIONAL COURT.

FEBRUARY 7TH, 1917.

\*MITCHELL v. FIDELITY AND CASUALTY CO. OF  
NEW YORK.

*Appeal—Leave to Appeal to Privy Council Given by Judicial Committee—Power of Court below to Stay Execution—Privy Council Appeals Act, R.S.O. 1914 ch. 54, sec. 10—Inherent Jurisdiction of Court.*

Appeal by the defendants (by leave of HODGINS, J.A., ante 290) from an order of RIDDELL, J., in Chambers, in so far as it refused an application for a fiat to stay execution. The order allowed the security on an appeal to the Privy Council from the judgment of a Divisional Court, leave to appeal having been obtained from the Judicial Committee; but the learned Judge held that there was no power under the Privy Council Appeals Act, R.S.O. 1914 ch. 54, to stay execution in cases where the Judicial Committee has given leave to appeal, there being no right of appeal under the statute.