

FIRST DIVISIONAL COURT.

FEBRUARY 7TH, 1917.

FOX v. PATRICK.

*Reference—Action upon Promissory Note—Defence of Payment—Account—Note Alleged to have been Given as Security for Debt of Another—Preliminary Question for Trial—Order Directing Reference Discharged—Practice.*

Appeal by the plaintiff from an order of BOYD, C., in Chambers, upon a motion by the plaintiff to remove from the files of the Court an affidavit filed by the defendant with his appearance and for leave to sign judgment and upon a motion by the defendant to dismiss the action, referring the whole action to the Local Master at London.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, HODGINS, and FERGUSON, JJ.A.

H. S. White, for the appellant.

P. H. Bartlett, for the defendant, respondent.

MEREDITH, C.J.O., in a written judgment, said that the action was brought to recover a balance of the amount of a promissory note for \$1,500 made by the defendant on the 25th August, 1904, payable to the order of the Standard Bank of Canada, two months after date, and endorsed by the bank to the plaintiff, upon which \$100 was said to have been paid on the 20th June, 1911. The writ of summons was specially endorsed. The defendant appeared on the 9th September, 1916, and filed with his appearance his affidavit, in which he deposed that the note was given by him "as accommodation security to the Standard Bank of Canada" for his brother; and that certain moneys which he sent to the plaintiff, who was manager of a branch of the bank, were or ought to have been applied in payment of the note sued upon and other notes.

The Chancellor made the order appealed against of his own motion, and made no order upon the motions before him, except that the costs of them should be costs in the cause.

The learned Chief Justice said that he doubted whether it was proper to make the order in the circumstances; but the appeal might be disposed of on another ground.

The plaintiff became the holder of the note after its maturity, and therefore took it subject to all the equities with which it was affected in the hands of the bank; but that was immaterial in view of the defence set up—payment.