

# The Ontario Weekly Notes

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No. 11

[APPELLATE DIVISION.]

FIRST DIVISIONAL COURT.

MAY 15TH, 1916.

JONES & MOORE ELECTRIC CO. v. BATEMAN.

*Contract—Sale of Machine Manufactured by Plaintiffs—Action for Balance of Price—Performance of Contract—Evidence—Findings of Trial Judge—Appeal—Judgment Varied by Ordering Delivery of Machine.*

Appeal by the defendants from the judgment of the Senior Judge of the County Court of the County of York, in an action in that Court, brought to recover the balance of the price of a machine manufactured by the plaintiffs, upon the order of the defendants. The judgment was in favour of the plaintiffs for the recovery of \$351.84 and costs, and dismissing the defendants' counterclaim with costs.

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

W. H. Clipsham, for the appellants.

R. McKay, K.C., for the plaintiffs, respondents.

GARROW, J.A., reading the judgment of the Court, said that a careful perusal of the evidence left him quite unconvinced that the judgment was erroneous. There was in fact but one contract and one performance. It was possible that the plaintiffs might have maintained the action after the delivery of the first machine, which seemed to have been manufactured in accordance with the written order given by the defendants, although it afterwards, through no fault of the plaintiffs, proved to be too powerful for the service in which the defendants wished to use it. But, by the consent of all parties, the machine for the price of which this action was brought was afterwards manufactured and delivered in place of the first machine. And the latter, the learned County Court Judge found, upon what appeared to be sufficient evidence, was a full and satisfactory performance of their contract on the part of the plaintiffs, with the result that they had earned and were entitled to payment from the defendants.