

Per DAVIES, J., and ANGLIN, J.:—There was no evidence to warrant the jury's finding that the council was guilty of negligence, and exercised its discretion *malâ fide*.

Per FITZPATRICK, C.J. and DUFF, J.:—The circumstances disclosed were such as to warrant a finding of unfair discrimination against C.

Judgment appealed against (39 N.B. Rep. 573) affirmed, and appeal dismissed with costs.

*O. S. Crockett*, for appellant. *Teed*, K.C., for respondent.

## Province of Ontario.

### COURT OF APPEAL.

Moss, C.J.O., Garrow, Maclaren, Magee, J.J.A., and Sutherland, J.]

[July 13.]

MANUFACTURERS' LUMBER CO. v. PIGEON.

*Receiver—Equitable execution—Fund not presently payable—Contract.*

Appeal by the plaintiffs from the order of a Divisional Court, 22 O.L.R. 378, reversing the order of MIDDLETON, J., 22 O.L.R. 36, by which a receiver was appointed, by way of equitable execution of the plaintiffs' judgment, to reach a fund in the hands of the Corporation of the City of Stratford.

MACLAREN, J.A.:— . . . The defendant had entered into a contract with the City of Stratford to pave a certain street and maintain it for 10 years. On the completion of the paving, he was to be paid 90 per cent. of the contract price, and the remaining 10 per cent. was to be retained by the corporation until the expiration of the 10 years, with the right to pay out of the same for any repairs not made by the defendant, interest being allowed him meantime on the balance in the hands of the corporation. The contract provided that at the end of the 10 years a "final certificate for the balance due (if any) shall be issued and paid to the contractor."

The whole question is, whether the said 10 per cent. is such a sum as is subject to equitable execution, and whether a receiver should be appointed. No case precisely in point was cited to us, and I have not been able to find any. It cannot be said that the authorities in cases more or less analogous are consistent