

the plaintiff with reference to the costs up to the trial. He must seek an order to the contrary.

When once the order of the Divisional Court has issued, the defendant is too late. The Court is functus. The order issued accords with the judgment pronounced, and it is of no avail to suggest that the Court, if asked, might have otherwise ordered: *Port Elgin Public School Board v. Eby*, 17 P.R. 58.

While it may be unfair that a defendant should be made to pay more costs of an unsuccessful appeal because the action was improperly brought in the higher Court, it would be quite as unfair that he should have the right to appeal, and, no matter how hopeless and improvident the appeal, cast the greater part of the costs upon his opponent. The Court could well deal with the matter so as to avoid injustice, but any arbitrary rule would often be unfair.

Leave refused, with costs fixed at \$10.

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SUTHERLAND, J.

MARCH 18TH, 1911.

KLINE BROTHERS v. DOMINION FIRE INSURANCE CO.

*Fire Insurance—Goods on Described Premises—Transfer to other Premises—Re-transfer to Original Premises—Assent to—Want of Authority of Clerk of Former Agent—Ratification after Fire—Mistake of Fact.*

Action upon a policy of insurance against fire in respect of a stock of tobacco contained in a building in Quincy, Florida, destroyed by fire on the 19th March, 1909. The policy was issued in the city of New York, for the defendants, by Dickson & Co., insurance agents, who were acting under an oral arrangement with the defendants, and were in the habit of filling out and issuing the policies. They had been supplied with a rubber stamp facsimile of the signature of the president of the defendants, for use as required. The policy was dated the 1st September, 1908. In October the plaintiffs applied for permission to transfer the policy so as to cover similar property contained in another building (the Owl Commercial Company building) in Quincy, and a form of consent to a transfer, not attached to the policy, was issued to the plaintiffs by the New York agents, and the signature of the president was put on with the rubber stamp. This was intended to be put on the back of the policy by way of indorsement. This transfer did not come