Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Burland v. *Earle and others, from the Court of Appeal for Ontario; delivered the 26th July* 1905.

Present at the Hearing:
LORD DAVEY.
LORD JAMES OF HEREFORD.
SIR ANDREW SCOBLE.
SIR ARTHUR WILSON.

[*Delivered by Lord Davey.*]

In this case the sole question is, whether the Appellant should be charged with any or what interest on a sum which has been found due from the Appellant in respect of sums drawn by him for salary as President and Manager of the British American Bank Note Company, in excess of the sum of $12,000 per annum, to which he was admittedly entitled. The liability to repay this amount was declared by the Judgment of the Court of Appeal for Ontario dated the 13th November 1900, which was, as regards this matter, affirmed by the King in Council on the Report of this Board. But neither the Judgment of the Court of Appeal for Ontario nor the Order in Council contained any direction for payment of interest on the sums overdrawn, nor was interest thereon asked for by the amended Statement of Claim in the action.

Their Lordships do not doubt the power of the Court on further directions to order payment of

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interest on a sum found due from a Defendant, although the decree declaring the liability contains no direction for payment of interest or the Statement of Claim does not ask for it. In a case like the present one the Plaintiffs are not entitled as of right to interest, and the liability for payment of interest is a matter for the discretion of the Court, and depends largely on the view which the Court may take as to the conduct of the Defendant to be charged and the circumstances under which the liability for payment of the principal sum was incurred. In such a case the question of interest is much more conveniently dealt with at the time when the original liability is declared and when the tribunal has all the evidence bearing on the question before it, and to postpone the question for consideration to a later date before (it may be) a tribunal differently constituted, practically involves a reconsideration of the evidence in the cause, and is at least fraught with some inconvenience. Their Lordships feel this strongly in the present case. They have before them, however, the Judgment of this Board delivered on the former Appeal. They are unable to agree with the learned Judges in the Courts below that the construction of the resolution under which the Appellant claimed to draw the addition to his salary in question was so free from difficulty as has been represented, or to assume that Burland must have known that he was not intended to have the benefit of the resolution. And they are satisfied that this Board did not intend to charge the Appellant with fraudulent conduct in the matter, and that the decision of this Board affirming the disallowance was not based on any such ground. It is quite true that the Appellant was in a fiduciary position towards the Company, and their Lordships do not doubt that interest might

be ordered to be paid by him, but it is always a question of circumstances whether, and how far, the jurisdiction to do so should be exercised. Their Lordships observe that, in their former Judgment this Board pointed out that the Respondent Earle was a director of the Company with two short intervals until the year 1890, and another Respondent was the administratrix of another gentleman who was a director from 1887 until 1892, and a third Respondent was himself a director from the year 1892 to the commencement of the action in December 1897. These gentlemen must be credited with having done their duty to the Company, and must have been aware of the construction which the Appellant placed on the resolution of 1888 in his own favour. They must also be assumed to have had at least the means of making themselves acquainted with the items which made up the amount charged for salaries in the accounts which they submitted to the shareholders for their approval. Their Lordships also observe that it is stated that the Appellant's construction of the resolution had been acted on for ten years or more, and the action was not commenced until a diminution took place in the very large dividends which had previously been paid by the Company. Their Lordships are fully sensible of the obvious objection to their overruling the discretion of the Courts of the Colony on such a question as the present one, and if the case had now come before the Board for the first time, they probably would not do so. But being satisfied that if this Board had been asked to allow the full interest claimed on the hearing of the previous Appeal it would not have done so, they feel they ought to give effect to their opinion. It does not however follow that no interest should be allowed. The Chief Justice suggests that interest should at any rate be allowed from the

commencement of the action, when demand for payment was made, but no notice was then given that interest would also be claimed, although interest on other claims was asked by the Statement of Claim. Their Lordships think that justice will be done by allowing interest from the 13th November 1900, the date of the Judgment of the Court of Appeal for Ontario, and that such interest should be at the rate of 5 per cent. per annum, being the rate prescribed by the Act of Canada, 63 & 64 Vict. c. 29.

Their Lordships will therefore humbly advise His Majesty that the Order of the Court of Appeal of Ontario of the 14th September 1903 be discharged, and the Order of the High Court of Ontario dated the 8th October 1902 be varied as follows, viz., in paragraph 3 thereof by omitting the words "the sum of $22,540.87, "being interest," and inserting instead thereof the words "interest at the rate of 5 per cent. "per annum from the 13th November "1900," and by adding at the end of the paragraph the words "such interest to be "computed by the Master in case the parties "differ as to the same," and in paragraph 5 thereof by omitting the words and figures "$86,353.52," and inserting in lieu thereof the words and figures following (that is to say), "the said sum of $58,556.25, with such interest "thereon as aforesaid," and that each party bear their own costs of the Appeal to the Court of Appeal of Ontario. As the Appellant has substantially succeeded in this Appeal the Respondents will pay his costs of this Appeal.