

Held, that being a matter of procedure, it applied to pending actions.

Watton v. Watton, L.R. 1 P. & M. 227, followed.

2. That where at the time the amending statute was passed the judgment of the Court had been pronounced, but had not been entered up, the action was still pending.

Holland v. Fox, 3 E. & B. 977, and in *Re Clagett's Estate*, 20 Ch. D. 637, followed.

3. Leave granted to appeal to the Court of Appeal from an order of a Divisional Court affirming, but on different grounds, the judgment at the trial dismissing the action, where no lapse of time had occurred to prejudice the plaintiff's claim to the consideration of the Court, the injury for which he sued was a serious one, and there was no authority upon the question of law decided by the Divisional Court.

J. J. Maclaren, Q.C., for the plaintiff.

W. M. Douglas, for the defendants, the Grand Trunk Ry. Co.

W. Nesbitt, for the defendants, the Canadian Pacific Ry. Co.

FERGUSON, J.]

[Feb. 7.

LOCKE v. LOCKE.

Mortgage—Building loan—Prior mortgage—Mechanic's lien—Selling value—Priority—R.S.O., c. 126, s. 5, s-s. (3)—56 Vict., c. 24, sec. 6.

A mortgage dated 27th August, 1894, for \$2,700, to be advanced for building purposes, was made repayable in monthly instalments of \$35.95 each during ten years, but did not on its face disclose, nor by reference to any other document declare, that it was a mortgage under 56 Vict., c. 24, sec. 6. By a letter from the mortgagor to the mortgagees, delivered to them prior to the mortgage, it appeared that the mortgage money was to be advanced as follows: \$1,600 when the whole job was ready for plaster, \$500 when plastered, \$300 when trimmed, and \$300 when completed. At the time of the loan the property was encumbered by a mortgage amounting to \$1,134.55, which the mortgagees paid out of the first advance of \$1,600, and gave the balance to the mortgagor upon his making the declaration required by sec. 6, and without notice of any unpaid claims. Upon a reference in a mechanic's lien action, the Master in Ordinary found that the "land and property" was encumbered by a prior mortgage for \$1,134.55, within R.S.O., c. 126, sec. 5, s-s. 3, before the 27th August, 1894; that this mortgage was paid as above stated; that the selling value of property had been increased by work done to the extent of \$2,000, and that the plaintiff's lien was entitled to priority upon the selling value over the mortgage for \$2,700, to the extent of \$1,134.55.

Held, on appeal, affirming the Master's decision, that as to the sum of \$1,134.55 the mortgage for \$2,700 was not a mortgage within sec. 6 of the first mentioned Act.

E. F. B. Johnston, Q.C., for the appellants.

H. E. Caston, for the plaintiff.