

SECOND DIVISIONAL COURT.

FEBRUARY 6TH, 1919.

## MILLER v. TORONTO R.W. CO.

*Appeal—Notice of Appeal Given after Expiry of Time for Giving—Death of Plaintiff after Abortive Notice Given—No Steps Taken in Meantime—Revivor of Action in Name of Executrix—Motion to Extend Time—Refusal—Merits.*

Action to recover damages for injury to the plaintiff by being struck by a car of the defendants, owing to the negligence of the defendants' servants, as the plaintiff alleged.

The action was tried (28th November, 1918) before LENNOX, J., and a jury; there was a verdict for the plaintiff for \$12,500, and judgment was pronounced by the Judge for that sum less certain sums advanced by the defendants.

The defendants intended to appeal from the judgment; but, apparently by reason of a misunderstanding, they did not give notice of appeal within the time limited by the Rules. The notice was given on the 28th December, 1918; and, on the same day, the appeal was set down for hearing, upon leave given subject to the right of the plaintiff to object when the appeal should come on to be heard.

On the 4th January, 1919, the plaintiff died; letters probate of his will were granted to his executrix on the 29th January, 1919; and the action was revived in her name as plaintiff.

The defendants applied to extend the time for giving notice of appeal and for leave to appeal.

The appeal and motion came on for hearing before a Divisional Court composed of BRITTON, RIDDELL, LATCHFORD, and MIDDLETON, JJ.

D. L. McCarthy, K.C., for the defendants.

William Mulock, for the plaintiff by revivor.

THE COURT directed that the motion should be argued with the appeal on the merits.

After argument, the Court held that leave to appeal should not be granted, as the plaintiff had died after the time for appealing had expired, and no step had been taken in the meantime.

The Court were also against the defendants on the merits.

*Motion dismissed; the defendants to pay the costs of the motion and appeal.*