

FIRST DIVISIONAL COURT.

MARCH 19TH, 1920.

## BANK OF OTTAWA v. CARSON.

*Guaranty—Indebtedness of Company to Bank—Action against Guarantors—Defences—Innocent Misrepresentation by Bank-manager as to Security to be Transferred to Guarantors—Security not Actually Transferred—Election, after Discovery of Mistake as to Security, to Stand by Transaction—Further Evidence Adduced upon Appeal—Effect of—Election to Affirm Original Transaction—Costs.*

An appeal by the defendants Carson, Lafrenière, and Garneau from the judgment of LENNOX, J., at the trial at Ottawa, in favour of the plaintiff bank for the recovery of \$8,800 upon a guaranty.

The appeal was heard in 1918, and judgment (15 O.W.N. 375) was given on the 27th January, 1919, against the appellants (FERGUSON, J.A., dissenting), but subject to rehearing of the case upon further evidence.

Further evidence was adduced, and the case was reheard, on the 17th and 18th February, 1920, by MEREDITH, C.J.O., MACLAREN, MAGEE, and FERGUSON, J.J.A.

W. N. Tilley, K.C., for the appellants.

I. F. Hellmuth, K.C., and Wentworth Greene, for the plaintiff bank, respondent.

FERGUSON, J.A., in a written judgment, said that the re-argument of the appeal had not changed his opinion of the rights of the parties in so far as they were to be determined on the issues and evidence presented at the trial.

The new evidence was allowed for the purpose of establishing an affirmation of the contract of guaranty after the misstatement relied upon by the defendants had come to their knowledge.

The documents, i.e., the mortgage of the 4th January, 1916, the letter of the 13th January from the plaintiff bank to the defendant Carson, and the claims filed by the defendants against the insolvent estate of the principal debtor, all supported the plaintiff bank's contention—while the letter of the 13th January seemed to contradict the stories of Carson and Lewis and to support the story of the plaintiff bank's manager, Lough, as to the circumstances under which the mortgage was taken and the claims were filed.

In these circumstances, and in the absence of any expression of opinion by the trial Judge touching the credibility of the