

the names of persons entitled to incumbrances other than mechanics' liens, one of whom was the appellant company; and the judgment provided that, in default of payment of the amount of the liens, the lot was to be sold and the purchase-money applied in payment of the claims mentioned in the schedules—that is, the claims of lien-holders and incumbrancers other than lien-holders—as the Master should direct.

The learned Chief Justice was of opinion that the appellant company, if it ever became a party to the action, became a party only when the notice of trial was served upon it, and that the lien as against that company, if it ever existed, was then at an end.

Reference to *Juson v. Gardiner* (1864), 11 Gr. 23, and *Byron v. Cooper* (1844), 11 Cl. & F. 556.

*Larkin v. Larkin* (1900), 32 O.R. 80, is on all fours with the case at bar, and is decisive against the plaintiff company. That case was rightly decided.

The appeal should be allowed, and the judgment below, in so far as it purported to affect the rights of the appellant company, should be set aside. The reversal of the judgment and the allowance of the appeal should be without costs: had the appellant company availed itself of the opportunity it had of attending the trial and taking the objection to the proceedings upon which it had now succeeded, the Assistant Master in Ordinary would have given effect to the objection, as it was his duty to do, following *Larkin v. Larkin*.

The order now made would of course not affect the liability of the appellant company under the terms of the order of the Second Divisional Court extending the time for appealing, but those terms must be complied with.

*Appeal allowed.*

FIRST DIVISIONAL COURT.

DECEMBER 19TH, 1919.

REX v. THOROLD PULP CO. LIMITED.

*Contract—Water Taken from Government Canal—Excess—Payment for—Lease—Construction—Penalty.*

Appeal by the defendant company from the judgment of FALCONBRIDGE, C.J.K.B., ante 159.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, J.J.A.

H. H. Collier, K.C., for the appellant company.

T. F. Battle, for the plaintiff, respondent.