

HON. MR. JUSTICE LENNOX.

DECEMBER 6TH, 1913.

HARKER v. TOWN OF OAKVILLE AND BELL TELEPHONE CO., THIRD PARTY.

5 O. W. N. 441.

*Third Party Notice—Motion to Set Aside—Fatal Accident—Electric Shock—Alleged Crossing of Wires Due to Negligence of Defendants' Workmen—Action against Municipality Supplying Light and Power—Notice Sustained.*

LENNOX, J., refused to strike out a third party notice in an action against a municipality supplying light and power for a fatal accident caused by electrocution where the defendants alleged that the third party, a telephone company, had caused the accident by their negligence in crossing their wires with those of defendant.

Order of acting Master-in-Chambers affirmed.

Review of authorities.

Appeal by the third party from an order of the acting Master-in-Chambers dated October 21st, 1913, refusing to set aside the third party notice herein.

H. A. Burbidge, for third party, appellants.

D. I. Grant, for defendants, respondents.

HON. MR. JUSTICE LENNOX:—I think the judgment of the learned Master in Ordinary is right.

I cannot see that the very strenuous argument of counsel for the appellants that the Telephone Company cannot be brought in because there is no right of contribution between joint tort feasons has any application. The defendants and the company did not act in concert, there was no intentional wrongdoing by anybody, and the act complained of at worst resulted from involuntary negligence.

The defendants in effect say to the company: "If we are liable it is because you, by crossing your wires with ours, forced us to become your agents in carrying the high voltage current complained of into the premises of our customer; the act complained of, as between us, is your act, not ours, and we are entitled to relief over against you." This is a case of two or more persons alleged to be subject to a common liability other than for fraud or other wilful tort, *Johnston v. Wild*, 44 Ch. D. 146. Unlike the cases of *Wade v. Pakenham* (1903), 2 O. W. R. 1183; *Müller v. Sarnia Gas Co.* (1900), 2 O. L. R. 546; *Parent v. Cook*, 2 O. L. R. 709 and 3 O. L. R. 350; and *Wilson v. Boulter* (1898), 18 P. R. 107, where the claims were divergent, or the measure of damages or the principles governing the