

that Mr. Wood should make any amendment he desires for the company;" and the trial Judge observed that it was better to go into the whole matter. "I want to know what the company will say about it as a company, because all the shareholders are here, and the company, while it is a different entity, is well represented by Mr. Wood representing them, and the liquidator would have no other rights probably, so the outcome, if there has to be a winding-up order, would be that the winding-up order would be made and the liquidator brought into the action if judgment is pronounced."

It may be noted here that an application to wind up the company had been enlarged and was pending before the trial Judge. No order has yet been made on that application. The company's amended defence was then filed. All parties being before the Court, if it were necessary, an order for winding-up could be made and the liquidator brought into the action. Whether the plaintiff, representing lien creditors, among others, whose claims were filed prior to the commencement of the suit, has a right to bring action, assuming that the principle in *Evans v. Coventry* would apply, notwithstanding Lord Hath-erley's decision in the *Mills* case, it is not necessary to decide, inasmuch as the company seeks to join the plaintiff, and by their defence ask to have the mortgage declared void. All parties are before the Court, and there is no reason that I can see why that issue should not be determined.

The appeal should be allowed, in so far as the judgment below dismisses the plaintiff's action, declaring the mortgage for \$60,000 *ultra vires* to the extent that the same exceeds the liabilities of the company which were cancelled by the arrangement made at the time the mortgage was given. There is evidence that Kirkegaard paid on the mortgage directly \$15,000, and possibly more; but the amount paid, or what part of the payment was out of the funds of the company, does not sufficiently appear upon the evidence. This is a matter that can be cleared up in taking an account of the amount due upon the mortgage. As proceedings are now pending, in an action upon the mortgage, before the Master to take the accounts, a reference in this case would seem to be unnecessary. The account there can be proceeded with, having regard to the rights of the parties as decided in this action.

As to the question of costs: having regard to the position and rights of the parties when the action was brought, and the fact that the company for the first time at the trial sought to