

appearance, I think the obtaining of an order for conditional appearance and enlarging time for delivery of statement of defence effectually preclude him from making the present motion. No doubt there would have been no difficulty in having the time for appearance enlarged pending a motion to set aside the proceedings.

What has been done now gives the defendant all that could be obtained even if the present motion was successful. The conditional appearance will enable him to defeat the action (as to any part at least that does not come under clause (e) of C. R. 162, if such there be) on plaintiff failing to shew assets as alleged. Any irregularity was waived by the appearance and the motion will be dismissed with costs to plaintiff in the cause. Defendant to have 4 days further time to plead.

HON. MR. JUSTICE BRITTON.

APRIL 14TH, 1913.

LESLIE v. CANADIAN BIRKBECK CO.

4 O. W. N. 1102.

*Company—Loan Company—Action by Shareholder for Account — Prepaid Shares—Special By-laws of Company—Right of Prepaid Shares to Share in Gross Earnings—Discretion of Directors as to Dividends—Transfer of Assets to New Company—Reconstitution of Shares—Acquiescence by Plaintiff in—Estoppel.*

Action by a stockholder for an accounting of the profits of a company. Plaintiff was the holder of a certain class of stock called prepaid stock, upon which \$50 a share had been prepaid. This stock was to receive 6 per cent. per annum upon the amount paid in and any surplus profits were to be added to the prepayment until the same reached \$100 a share, when the stock was to rank as fully paid up stock and to receive dividends accordingly. Plaintiff claimed that under the by-laws this prepaid stock was to receive a certain amount of the gross profits of the company for division among the holders of such stock and asks for an accounting upon this basis.

BRITTON, J., *held*, that the prepaid stock could only share in net earnings and that the directors of the company could determine how much they should distribute each year in earnings, and that, therefore, the action must be dismissed.

Tried at Toronto without a jury.

Hon. Wallace Nesbitt, K.C., for the plaintiff.

Britton Osler and E. D. Wallace, for the defendants.

By consent of the parties, the services of a Court stenographer were dispensed with. Admissions signed by counsel will be found with the exhibits put in in book form, and