

given. It seems to me that even more of plaintiff's statement of claim could be struck out without prejudice to plaintiff's alleged cause of action. It is quite clear that the statement of claim even yet contains irrelevant matter, which of course can be dealt with by the trial Judge when evidence is offered.

The appeal will be dismissed. Costs to be costs in the cause to the defendant.

HON. MR. JUSTICE BRITTON.

OCTOBER 24TH, 1913.

WHITNEY v. SMALL.

5 O. W. N. 160.

*Partnership—Operation of Theatres—Pooling Agreement—Construction—Death of Partner—Continuance of Partnership—Right of Personal Representative — Declaratory Judgment — Account—Reference—Motion for Judgment where Defence Struck out—Rule 35½—Practice.*

A deceased partner entered into a partnership agreement with defendant to share the profits of theatrical enterprises.

BRITTON, J., *held*, that plaintiff was entitled to a declaration that the deceased partner had been in his lifetime, and his estate was, a partner with defendant.

Motion by plaintiff for judgment, the statement of defence having been struck out.

G. F. Shepley, K.C., and G. W. Mason, for plaintiff.

J. H. Moss, K.C., for defendant.

HON. MR. JUSTICE BRITTON:—The action is brought for a declaration that under and by virtue of a certain agreement between Clark J. Whitney and the defendant, the said C. J. Whitney in his lifetime was and his estate is a partner with the defendant in the operation and control of certain theatres and theatrical enterprises, and for an account.

The statement of claim sets out in full the agreement made on 30th March, A.D. 1901, between defendant and C. J. Whitney. It states that Whitney was the sole lessee of the Grand Opera House, Hamilton, and the defendant was the sole lessee of the Grand Opera House, London, and of the Russell Theatre, Ottawa. It appears from the operative part of the agreement that defendant may not have