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APPELLATE DIVISION.

OCTOBER 21ST, 1913.

GIBSON v. CARTER.

Contract—Principal and Agent—Agent's Commission—Breach of Contract—Damages—Report of Referee—Appeal—Judgment—Costs.

Appeal by the defendants from the order of KELLY, J., 4 O.W.N. 1565.

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

R. S. Robertson, for the defendants.

Glyn Osler, for the plaintiffs.

THE COURT varied the order by reducing the amount found due by $75; in all other respects affirming the order. No costs of appeal.

OCTOBER 22ND, 1913.

*RE MCLEOD AND ARMSTRONG.

Mines and Minerals—Recording of Mining Claim—Discovery of Minerals—Staking—Affidavit Stating Matters not Known to Deponent but afterwards Shewn to be True—Inadmissibility—Necessity for Personal Knowledge—Unsurveyed Lands—Mining Act of Ontario, 8 Edw. VII. ch. 21, secs. 22(2), 35, 49-56, 63—Licensee.

Appeal by F. A. Armstrong from the judgment of the Mining Commissioner of the 24th April, 1913, dismissing the appel-

*To be reported in the Ontario Law Reports.

lant's claim to discovery of minerals in place in a portion of land staked by the appellant in the Gillies limit, and directing that the claim of George Johnston be recorded upon his staking.

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

W. R. Smyth, K.C., for the appellant.

A. G. Slaght, for the respondent.

The judgment of the Court was delivered by HODGINS, J.A.:—It was gravely argued before this Court that an affidavit which the appellant did not know to be true, when sworn to, was unexceptionable, if afterwards it was found that the facts stated had been correctly guessed at. . . . This is a new departure in affidavit-making, and, if accepted, would simplify the acquisition of claims by allowing a prospector who finds valuable mineral in place to quit the ground, and, having left others to do the staking, make the necessary affidavit in the pious hope that their work will justify the oath upon which he secures his claim.

Apart from the morality or immorality of the suggestion, and leaving aside for the moment the words of the Mining Act, there are two reasons which plainly render any such method of dealing with the requisite oath impossible.

It would enable a prospector to blanket claims and permit him, if he were sufficiently active, to go back upon the ground and stake out claims to correspond—a reversal of the universal practice, as I understand it, of taking up mining claims.

Secondly, if the registration is attacked, and it is open to the deponent to substitute, for his original statement, proof by others that that of which he was ignorant was by a happy chance true, then he displaces his own affidavit as proof and relies on what the statute does not admit as primary evidence to secure the claim. He thus holds his position against others until he can get the proof, or, if there is no contest, then he shuts out others by a device not permitted by the Mining Act.

Best, in his work on evidence, 11th ed., p. 43, puts upon the same plane as perjury a statement which the witness knows to be false and one of which he know himself to be ignorant.

The Mining Act does not permit the affidavit to be made on information and belief—no doubt because the statements are intended to be made by one who can speak at first hand, and

probably having in view the undesirability of founding a property right on statements which are not really evidence, as pointed out by Lord Justice Cotton in Gilbert v. Endean (1878), 9 Ch.D. at pp. 268, 269. . . .

The real objection to the method pursued is, that the affidavit must state certain matters of fact required under the Mining Act to exist, or be done, in order to secure a claim: i.e., the discovery of valuable mineral in place, the situation of the discovery post, the length of the outlines, the staking done, the lines cut and blazed, the possession of a miner's license, and that there was nothing on the land to indicate that it was not open for staking.

There is nothing to require a licensee to do all these acts himself (see 8 Edw. VII. ch. 21, sec. 22, sub-sec. 2, and sec. 35); but, before he records his application, he must swear to the required affidavit; and, in view of the provisions of secs. 49 to 56, that affidavit necessarily includes a statement that the claim was staked out "upon the said discovery" and that "the distances given in the application and sketch or plan are as accurate as they could reasonably be ascertained, and that all the other statements and particulars set forth and shewn in the application and sketch or plan are true and correct."

The claimant can and must, therefore, satisfy himself, not by guess-work, but by personal knowledge, and before he makes his affidavit, that the Act has been complied with.

I agree with the conclusion reached that the lands are unsurveyed. Having regard to the provision in the instructions that claims must be twenty acres, sec. 51 can only apply to lands which have been surveyed into 640 and 320 acres (clauses (c) and (d)), and to lands unsurveyed.

In both of these cases claims limited to this area are to be staked. The instructions appended to the order in council opening the lands in question to prospecting and staking distinguish between the "claims or locations already surveyed" and "claims on the blocks which have not be subdivided;" and all three claims in question here are part of block 2.

The main appeal of the appellant Armstrong should be dismissed with costs. His appeal against Johnson's claim is brought by him as a licensee under sec. 63. I can see no ground for interfering with the learned Mining Commissioner's decision in favour of Johnson, who appears to have complied with all the requirements of the Mining Act; and I think this appeal should also be dismissed with costs.

OCTOBER 22ND, 1913.

RE WOODHOUSE.

Land Titles Act—Application for Registration—Objection—Discontinuance of Action—Order Allowing—Old Con. Rule 430(3), (4)—Bar to any Future "Action"—Proceeding under Land Titles Act—Res Judicata.

Appeal by John Woodhouse from the order of LATCHFORD, J., 4 O.W.N. 1265.

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

Edward Meek, K.C., for the appellant.

W. B. Milliken, for the respondents, Christie Brown & Co. Limited.

The judgment of the Court was delivered by HODGINS, J.A.:—The authority for the order of the Master in Chambers made on the 5th October, 1912, is found in old Con. Rule 430, clause 4. The order, paragraph 3, provides that "this order shall be a bar to the continuance of this action and to any future action which may be brought by the plaintiff for the same cause of action."

Obviously, I think, the word "action" in the order must be construed as it is defined by the Rules under which alone the order could be made; and, if so, it is equally clear that it does not include a proceeding under the Land Titles Act.

It is to this point that the judgment of my brother Latchford is directed, and it appears to be the only one argued before him.

The effect to be given in the proceedings before the Master of Titles to the order in question is, of course, a matter for him to decide, and I agree with his decision so far as it deals with the meaning of the order. It is provided in Rule 430, clause 3, that a discontinuance under clause 1, i.e., before receipt of the statement of defence or after the receipt thereof and before any other proceeding in the action is taken by the plaintiff, shall not be a defence to any subsequent action. This means that by that sort of discontinuance there is not established any foundation for a plea of res judicata. But, where the plaintiff has to apply for leave, the Court or a Judge has power to direct that

the order shall be a bar to any future action. This is exactly equivalent in effect to a judgment under such circumstances as entitle the defendant to allege that the matter in question has passed into judgment binding both parties. For if it is not a bar in that sense, it is no bar at all. The effect of the order is well illustrated by Lord Herschell's remark in Owners of Cargo of Kronprinz v. Owners of Kronprinz (1887), 12 App. Cas. at p. 262: "The Judge's order to discontinue—unless it were made a condition of the discontinuance that no other action should be brought—would not operate as a bar."

It is quite true that the bar is against a subsequent "action;" but I take it that the effect of the exercise of the Judge's power, thus expressed, is to enable the issue of res judicata to be effectively raised in other proceedings if they involve the same parties and the same issue.

I think that the Master of Titles has, notwithstanding some of the expressions in his judgment, intended to decide, and has decided, that the effect of the order in question is to determine, in the proceedings before him, that issue in favour of the appellant here. I am of opinion that he is right in so holding. He is dealing with the rights of the parties before him; and, if he finds that the claimant is estopped or barred of record in regard to the right he is setting up, the Master can dismiss the claim; and this he has done. He has in fact disposed of the matter on the merits, and no good purpose would be served by again remitting it to him.

The appeal should, therefore, be allowed with costs, and the formal order objected to vacated and set aside.

OCTOBER 22ND, 1913.

KETTLE v. DEMPSTER.

Negligence—Injury to Person Working on Highway—Negligence of Driver of Vehicle Owned by Defendant—Evidence—Finding of Trial Judge—Appeal.

Appeal by the defendant from the judgment of FALCONBRIDGE, C.J.K.B., who tried the action without a jury, in favour of the plaintiff.

The action was brought to recover damages for injury said to have been caused to the plaintiff by the negligence of the defendant's servant, in the circumstances set out below.

The appeal was heard by MEREDITH, C.J.O., GARROW, MAGEE, and HODGINS, JJ.A.

J. J. Gray, for the defendant.

T. N. Phelan, for the plaintiff.

The judgment of the Court was delivered by GARROW, J.A.:—The plaintiff was employed in assisting to place a heavy steel girder in a house in Dufferin street, in the city of Toronto. To enable this to be done, the girder was set up on edge (it was 28 ft. long and 21 to 24 in. by 6 in.), and was being moved from the street into the house upon iron rollers. The operation necessarily caused a temporary block of the highway. Just at that time, the defendant's servant, one Thomas Byrne, driving what is called a bread waggon, having a covered top, came along and proposed to drive through the narrow space in the highway which had been left open. This the plaintiff and others who were working with him objected to. Byrne thereupon pulled up his horse and so remained for a few seconds, but started up again. When partly through or past the obstruction, the front wheels having been got past by turning towards the boulevard, the driver stopped, at the request of the workmen engaged with the plaintiff, and again stood for a short time; but, before anything further was done, started forward again, with the result that the hind wheel of the waggon caught on the girder and pulled it over upon the plaintiff—who was holding the girder on its edge—breaking his leg.

The action has been twice tried. It first came on for trial before Latchford, J., and a jury, when a verdict in favour of the plaintiff was rendered. That verdict, however, was set aside, and a new trial directed by a Divisional Court, upon the ground that the learned Judge had stated to the jury as a conclusion of law that which was, in the opinion of the Court, properly a question of fact to be determined by the jury upon the evidence.

The second trial came on before Falconbridge, C.J., without a jury, and the plaintiff again obtained a judgment. That judgment is now moved against, upon the grounds: (1) that there was no reasonable evidence of negligence; (2) that it is against the weight of evidence; and (3) that, in the circumstances, the plaintiff was guilty of contributory negligence.

As to the first point, the defendant should probably have appealed against the order of the Divisional Court directing a new trial; for, if there was no evidence, there was nothing to try. But I prefer to deal with the case on the broader ground

of the merits, as disclosed in the evidence. The learned Chief Justice found that there was sufficient evidence of negligence. and that the plaintiff had not been guilty of contributory negligence. A perusal of the judgment shews that, at least to some extent, the learned Chief Justice was influenced by considerations of the credibility of certain of the witnesses. And a perusal of the evidence in the light of his criticism, while it does not disclose what could be called a strong case, seems to shew enough to justify the result.

The defendant's counsel, before us, contended that the girder was unlawfully upon the highway, and a by-law of the city council was put in. But even if I agreed with that contention—which at present I do not—I should still be unable to see how it affords any justification for the act complained of.

The appeal should be dismissed with costs.

OCTOBER 22ND, 1913.

RE COOPER.

Will—Construction—Residuary Bequest to Nephews and Nieces —Supplying Word to Render Language of Will Intelligible —Proof of Contents of Will—Probate Copy Certified by Surrogate Court—Conclusiveness—Original Will Produced to Aid Interpretation.

Appeal by Barry S. Cooper and his adult children from the order of KELLY, J., 4 O.W.N. 1360, upon an originating notice, determining questions of construction of the will of Francis Cooper, deceased.

The appeal was confined to the question of the proper construction of the residuary clause.

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

H. T. Beck, for the appellants.

J. R. Meredith, for the Official Guardian, representing the infant child of Barry S. Cooper.

J. R. Code, for the executors.

J. Tytler, K.C., for Margaret J. Fulton and others, the respondents.

The judgment of the Court was delivered by GARROW, J.A.: —The residuary clause is the only one now calling for attention.

The judgment is reported in 4 O.W.N. 1360, and at p. 1361 the residuary clause, as it appeared to the learned Judge, is set forth, but, as the appellants contend, improperly omitting the very material word "my" immediately before the words "three nieces and five nephews."

The will had been duly proved in common form in the proper Surrogate Court, and in the probate copy certified by that Court the word "my" appears, as part of the contents of the will. This conclusion, while it stands unrecalled by the Surrogate Court, is, I think, conclusive upon all parties to this proceeding as to the contents of the will. And the construction of the clause in question must, therefore, be as if this word "my" immediately preceded the words "three nieces and five nephews."

Upon a question of construction the original will may be looked at, not to vary or cut down the words of which probate has been granted, but simply to enable such words to be interpreted by the Court. See In re Harrison, 30 Ch. D. 390. And, looking at the original will, which was produced, apparently without objection, at the hearing and again before us, it is at least apparent, I think, how the learned Judge came to omit the word in question. There had, it appears, on the face of the will been an extensive erasure immediately preceding the word in question, and the erasing stroke extended to and in part upon the word "my" but did not actually pass through it, and the learned Judge apparently assumed, without referring to the probate copy, that the word was included in the erasure.

It is obvious that the introduction of the word "my" presents such a wholly different case from that which the learned Judge considered, that no good purpose would now be served by entering upon a full consideration of his reasons for the conclusions at which he arrived. I shall rather, as more to the purpose, deal with the question—not a difficult one, it seems to me—as if it was, as in fact it is, now presented for the first time.

The facts are very few and uncomplicated. The testator was unmarried. He left two brothers surviving, namely, Barry S. Cooper and William F. S. Cooper. Barry S. Cooper had eight children, of whom three were females and five males. William F. S. Cooper, so far as appears, was unmarried. The testator also left other nephews and nieces to the number of

more than eight, but the exact number is not stated—the children of deceased brothers and sisters. The testator was apparently well disposed towards his brother Barry S. Cooper, to whom he left in his will a substantial bequest.

The contention of the appellants is, that the Court should, under these circumstances, supply the word "children" after the word "nephews" to make the clause read "my three nieces and five nephews, children of Barry S. Cooper." And with that contention I entirely agree.

That the Court has power in a proper case to supply a missing word cannot be disputed. The rule is stated in many cases : among others by Knight Bruce, L.J., in Pride v. Fooks, 3 DeG. & J. 252, at p. 266, in these words: "Again, all lawyers know that if the contents of a will shew that a word has been undesignedly omitted or undesignedly inserted, and demonstrate what addition by construction or what rejection by construction will fulfil the intention with which the document was written, the addition or rejection will by construction be made."

Similar remarks by the same learned Judge occur in the earlier case of Key v. Key, 4 DeG. M. & G. 73, at p. 84. See also Mellor v. Daintree, 33 Ch.D. 198; Re Holden, 5 O.L.R. 156, at p. 162.

The Court must, of course, first be satisfied from the language of the will what was the real intention of the testator; for it is only to give effect to such intention that the implication can be made.

In the present instance, upon the facts, the matter does not, it appears to me, admit of a reasonable doubt. The testator had some eighteen or more nephews and nieces. Out of these he selected as the special subjects of his bounty in the clause in question, three nieces and five nephews—exactly the number and description of the children of his brother Barry S. Cooper; and he coupled with the gift—for some purpose, it must be assumed—the name, not of his other surviving brother, who had no children, but of his brother Barry S. Cooper; a conjunction absolutely meaningless unless the word "children" is to be supplied, as the appellants contend.

I would allow the appeal and declare accordingly. Costs of all parties out of the estate.

HIGH COURT DIVISION.

BRITTON, J. OCTOBER 21ST, 1913.

RE CAMPBELL.

Will—Construction—Bequest of Interest on Specific Sum for Lives of three Legatees—Interest after Death of two Falling into Residue—Period of Distribution of Estate.

Motion by Jane Campbell McBain, sole executrix of the will of Alexander Campbell, deceased, for an order determining questions arising upon the construction of the will as to the distribution of the estate.

The motion was heard by BRITTON, J., at the Cornwall sittings.

D. B. Maclennan, K.C., for the executrix.

R. Smith, K.C., for the beneficiaries.

BRITTON, J.:—Interpretation is asked of certain clauses of the will of the late Alexander Campbell. The will was made on the 15th May, 1894, and the testator died on the 15th September, 1895. The will is lengthy, and the estate was a large one; but the only questions requiring an answer arise out of clauses 4 and 6.

Clause 4: "I give and devise unto my sisters-in-law Christy McLennan Catherine McLennan and Annie McPherson wife of Donald Roy McPherson the bank interest of $1,000 each to be paid yearly so long as they live and I direct my executors to set apart $3,000 for this purpose. Upon the decease of any of my said sisters-in-law such interest as to her so deceasing shall cease and upon the death of all of them the said sum of $3,000 shall be divided amongst the son or sons of my said daughters Margaret and Jane who is or are living and in case of no sons then to the daughters of my said daughters Margaret and Jane and the daughters and sons of my said daughter Flora and in case of no such said sons or daughters then to my legal or lineal descendants."

Clause 6: "I give and bequeath the rest residue and remainder of my real and personal estate to the sons and daughters of my daughters Margaret and Flora and to my daughter Jane in the following proportions—one-third to be divided equally be-

tween the children of my daughter Margaret, one-third to my daughter Jane, and one-third to be equally divided between the children of my daugher Flora."

Christy McLennan and Catherine McLennan, two of the annuitants mentioned in clause 4, are now dead; Annie McPherson alone survives. All the pecuniary legacies have been paid.

The applicant is the sole executrix of the will. She has now on hand ready for distribution the sum of $22,995.37.

All of the persons at present interested in said estate are of the full age of twenty-one. Some of the persons so interested reside out of Ontario, but their interests are the same as those appearing on this motion.

The questions are:—

(1) Is the said Annie McPherson entitled to receive the bank interest upon the sum of $3,000 or only on the sum of $1,000?

(2) Has the period of distribution arrived to enable the executrix safely to distribute the money now available for distribution among those entitled to receive the same under clause 6 of the will, or must such distribution be deferred until after the decease of Annie McPherson, when the sum of $3,000 must be distributed under clause 4?

I am of opinion that Annie McPherson is not entitled to receive the interest on the $3,000, but only on the $1,000. It may be and very likely was the intention of the testator to give all the interest on the $3,000 to the sisters-in-law and the survivors and survivor of them; but, in a case like this, I cannot gather intention apart from the meaning of the words, "I give . . . unto my sisters-in-law" (naming them) "the bank interest of $1,000 each to be paid yearly as long as they live." The $3,000 are to be set apart for the purpose named. Upon the death of any one of these sisters-in-law the interest to that one is to cease, but the will is silent as to where it is to go, so it must belong to residue.

My answer to the second question is, that the period of distribution has arrived as to all except the $3,000 mentioned in clause 4, and the executrix can safely distribute the sum mentioned as now on hand for distribution.

Costs of all parties out of that part of the estate other than the interest payable to Annie McPherson—her interest on the $1,000 shall not be charged with any costs.

MIDDLETON, J. OCTOBER 21ST, 1913.

NORTHERN ELECTRIC AND MANUFACTURING CO. LIMITED v. CORDOVA MINES LIMITED.

Company—Mortgage Made by Mining Company to Promoters and Owners of Stock—Action by Creditor to Set aside—Advances Made by Promoters—Judgment in Separate Action for Enforcement of Mortgage—Absence of Fraud—Assent of all Shareholders—Intra Vires Transaction—Application for Winding-up of Company.

Action by the plaintiffs, on behalf of themselves and all other creditors of the defendant company, to recover $800, and to have it declared that a certain mortgage made by the defendant company to the defendants Hughes and Mackechnie, for $60,000, on the 30th April, 1912, was ultra vires of the defendant company and void and a fraud upon the plaintiffs and the other creditors of the company.

In this action on the 22nd September, 1913, the plaintiffs, in their separate right, recovered judgment against the defendant company, and placed an execution in the hands of the Sheriff. At the time the action was begun, there were no executions against the defendant company in the Sheriff's hands.

The remaining claim in the action was tried before MIDDLETON, J., without a jury, at Peterborough, on the 14th October, 1913.

G. Grant, for the plaintiffs.

R. E. Wood, for the defendant company.

G. F. Shepley, K.C., and W. Tilley, for the defendants Hughes and Mackechnie.

No one appeared for the defendant Kirkgaard.

MIDDLETON, J.:—The defendants Kirkgaard, Hughes, and Mackechnie, being the owners of the mining property in question, caused the defendant company to be incorporated with the view of transferring the property to it. On the incorporation of the company, the property was conveyed in consideration of the issue of all the capital stock as paid-up, save a few shares necessary to the due incorporation of the company. These shares were held by Mr. Wills, the company's solicitor, and Mr. C. A. Bleeker, employed in his office. These two gentlemen were the nominees of the other three.

As the whole capital stock of the company had thus been disposed of, it was necessary, if the property was to be mined, that money should be advanced by those interested. Operations were carried on upon a somewhat extensive scale, and the required funds were contributed by the three promoters equally. These moneys passed to the company's credit, and were from time to time disbursed for the company's purposes. No security was given to the promoters, and all liabilities were met. The three promoters realised that, although in form the undertaking was the undertaking of the company, in substance they alone were concerned; and everything that was done was done in perfect honesty and without any suspicion of impropriety.

After the amount already advanced, including a comparatively small sum necessary to discharge current obligations, had reached a total of about $43,000, a critical situation developed. The three gentlemen had been for some time drifting apart in their ideas as to the policy and management of the affairs of the mine. As the result, Hughes and Mackechnie found themselves on one side; Kirkgaard on the other. The merits of this dispute or difference are not in any way now material. It concerned matters of policy and administration upon which they honestly differed. None of them was willing to spend more money unless his policy was followed. A deadlock resulted. The upshot of negotiations, in which offers to buy or sell were made, was an arrangement by which Kirkgaard agreed to buy out his two co-adventurers; security for the purchase-price to be given upon the property. In all this, probably little regard had been paid to the company as a separate entity. The arrangement ultimately made had the sanction and approval of all the shareholders, for Wills and Bleeker were consulted and approved. They sided with Hughes and Mackechnie in the controversy, and in the result handed over their qualifying shares to nominees of Kirkgaard, so that the corporate entity might be maintained.

The form which the transaction took is indicated by the agreement of the 23rd April, to which Mackechnie, Hughes, and Kirkgaard were parties, and under which Montgomery, Kirkgaard's solicitor, acted as trustee. By this agreement the two-thirds of the stock held by Mackechnie and Hughes was sold to Montgomery for $60,000, this sum to be secured by a mortgage on the property of the mine, with power of sale, but with no personal covenant on the part of Montgomery. Upon this mortgage being given, the stock was to be transferred to Montgomery.

In pursuance of this agreement, the mortgage in question was executed. It bears date the 30th April, and was signed on behalf of the company by Montgomery, who had become vice-president, and by the secretary.

This $60,000 was taken to include the moneys that had been advanced by the three promoters; the intention being to wipe out this $43,000 and to leave the property owned by the company—of which Kirkgaard really held all the stock—free from all liability other than the $60,000.

Contemporaneously with the mortgage, a further agreement was executed by Hughes and Mackechnie, by which they transferred to Montgomery all the stock held by them, giving him power to transfer sufficient shares to form a duly qualified board of directors; and Montgomery, on his part, undertook to provide for the proper working of the mine and the continuous prosecution of development work, and for the payment by him and his associates of all moneys due in respect thereto.

Kirkgaard undertook to operate the mine according to his own ideas, and until recently paid all liabilities. His expectation was to get the mine in such a condition of prosperity that it would be readily sold. He has not yet found a satisfactory purchaser. The mortgage is long past due. Payments amounting in all to about $19,000 have been made by Kirkgaard and his associates on account of it, thus reducing it to $41,000 and interest. The mortgagees have from time to time granted delay to Kirkgaard and his associates to enable them to bring their schemes to fruition; but, the patience of the mortgagees becoming exhausted, they brought action upon the mortgage, and on the 30th April, 1913, a judgment was pronounced for its enforcement; the company, i.e., Kirkgaard and the officers, consenting thereto.

In the prosecution of the reference under this judgment, delay was again granted; but, when further delay was refused, this action was instituted, at the instance of a gentleman named Schlicht, who had become associated with Kirkgaard. On motion, an interim injunction was granted, on the terms that this action should be brought to trial at the Peterborough sittings. These terms were assented to by the company and by the plaintiffs. Notwithstanding this, on the eve of the trial a motion for winding-up was made by these plaintiffs, the patent object of which was to bring about delay by the statutory stay consequent upon a litigation order. This motion was enlarged to be heard before

me at the Peterborough sittings, and was there renewed. Upon it, judgment is yet reserved.

At the trial it was proved that, in addition to the debt due to the plaintiffs, about $5,000 is due for wages for the month of March last, for which liens have been filed, and upon the liens proceedings have been taken; and that there is further indebtedness to a bank for a considerable sum. It is also shewn that another creditor has now obtained execution.

None of these debts existed at the time of the mortgage; nor at the time of the giving of the mortgage was it contemplated by any of the parties that any indebtedness should be incurred which would not at once be met. The transaction, as already found, is absolutely devoid of the faintest trace of fraud. The suggestion is that the $60,000 was really a debt of Kirkgaard to his co-adventurers, and that the company had no power to mortgage its property to secure this debt.

There is no doubt that the company possesses an existence and individuality entirely distinct from the individuality of its shareholders; yet, where a transaction is not in its nature beyond the powers of the company, and is assented to by every individual shareholder, and no fraud upon creditors is intended, the transaction cannot be regarded as ultra vires. There is no statute prohibiting the giving of a mortgage by a company. There is no statute which restricts the mortgage to be given to a present advance. The defendant company was here indebted to those three promoters to the amount of $45,000. By the arrangements made, it became freed from this indebtedness, assuming a new liability of $60,000. Incidentally it was advantaged, as a situation which meant ruin and the loss of the corporate property, was solved; new advances were secured; and a new start was made. The wisdom of the bargain made was a matter for the directors and shareholders; and the argument against the security was really based upon confusion of thought and the assumption that the Court could review the wisdom of the transaction of the company entered into.

If the matter is to be looked at in any narrower way, the mortgage has now been reduced to $41,000 and interest, by payments made, not by the company, but by Kirkgaard and his associates. As this is less than the actual debt to the three promoters at the date of the mortgage, it may well be looked at as a security for the then existing debt: Kirkgaard having in effect transferred to his associates his share of the total.

I have dealt with the facts as presented; but the plaintiffs

have other difficulties to face. A simple contract creditor suing on behalf of himself and other creditors has no locus standi to attack a transaction by his debtor as ultra vires. I was urged to delay the decision of this action until a liquidator had been appointed; but the liquidator would stand in no better position than the company itself. He could attack, under the Winding-up Act, transactions which are declared to be fraudulent and preferential; he could probably attack transactions tainted with fraud of any kind; he may be able to assert the rights of creditors, but he can have no greater rights than the company and its creditors; so that no good purpose, from the plaintiffs' standpoint, would result.

Again, it is pointed out that judgment in the action upon the mortgage stands, and is not attacked. It is based upon the finding of the existence and validity of the mortgage, and it probably forms another insuperable difficulty in the way of the plaintiffs.

The action fails, and must be dismissed with costs.

It may be that the applicants will not consider it desirable to press the winding-up; and I am not sure that the facts proved at the trial are technically in evidence upon that motion. I shall withhold decision on the winding-up application until the matter is further spoken to.

BRITTON, J. OCTOBER 24TH, 1913.

WHITNEY v. SMALL.

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 354—Practice.

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

G. F. Shepley, K.C., and G. W. Mason, for the plaintiff.
J. H. Moss, K.C., for the defendant.

BRITTON, J.:—The action is brought for a declaration that, under and by virtue of a certain agreement between Clark J.

Whitney and the defendant, Clark 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 the 30th March, 1901, between the defendant and Clark 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 the defendant may not have had a lease of the Russell Theatre. The defendant got by the agreement an undivided half interest in the Grand Opera House, Hamilton, together with its "profits and emoluments," and Whitney got an undivided half interest in the lease of the Grand Opera House, London, together with its "profits and emoluments." Each party was to assume, and apparently did assume, an equal one-half of the risk under each of these leases. The defendant further agreed to divide equally with Whitney the defendant's share of the profits of the Russell Theatre, Ottawa. The defendant agreed to use his best efforts to acquire the lease of the then contemplated new Opera House at Kingston, and, if successful, to give to Whitney a one-half interest in the same. The agreement was to extend until the expiration of the then existing leases of the mentioned theatres and any and all renewals thereof. The agreement further provided that it should be binding upon the heirs, executors, or assigns of the parties. . .

I am of opinion that the agreement contains what is equivalent to an express stipulation that the partnership should not be dissolved by the death of either, if such death should occur before the termination of the leases, but that it should continue until such expiration or sooner determination of the leases existing at the date of the agreement. The defendant got the profits from the property of the deceased Whitney, and must account for these.

The defendant in this action is in the position of one who has failed to deliver a statement of defence. He must be deemed to admit all the statements of fact set forth in the statement of claim. See Rule 354.

This is a matter only between the parties. No question arises as to the authority of one to bind the other—no question of the authority of an administrator to deal with the property.

The defendant was in possession of what was the property

of his partner, and he is bound to account for it all on the basis of the agreement. It is simply a question of asking the defendant to fulfil his contract. The plaintiff is entitled, as representing the deceased partner, to ask for that.

There will be judgment for the plaintiff as follows:—

(1) A declaration that, under and by virtue of the said agreement, Clark J. Whitney in his lifetime was, and his estate is, a partner with the defendant in the operation and management of the opera houses, theatres, theatrical enterprises, and booking percentages in the agreement in the plaintiff's statement of claim mentioned, under any lease, agreement, or arrangement existing at the date of the said agreement or thereafter made in pursuance thereof, whether by renewal of any lease or new lease, within the terms of such agreement, and that the said Clark J. Whitney was, and the plaintiff is, entitled to one-half of all earnings and profits derived and to be derived therefrom.

(2) An order of reference to the Master in Ordinary to take an account of the profits and earnings of the said opera houses, theatres, theatrical enterprises, booking percentages and fees, from the commencement of the theatrical season of 1901-2.

(3) Payment by the defendant of the amount which may be found due upon the taking of the said account.

The Master shall report his findings. Costs and further directions reserved.

LENNOX, J. OCTOBER 24TH, 1913.

*PORTERFIELDS v. HODGINS.

Assignments and Preferences—Assignment for General Benefit of Creditors—Wages-claims—Sale and Assignment of, before General Assignment—Right of Assignee to Preferred Claim on Assets of Insolvent—Wages Act, 10 Edw. VII. ch. 72—35 Vict. ch. 13.

Action by the assignee of the wages-claims of nearly one hundred employees of the Goderich Wheels Rigs, an incorporated company, against the assignee for the general benefit of creditors of that company, for a declaration that, under the provisions of the Wages Act, 10 Edw. VII. ch. 72, the plaintiff was en-

*To be reported in the Ontario Law Reports.

titled to be paid the amount of the wages-claims assigned to him in priority to the ordinary or general creditors of the company.

The assignments to the plaintiff were executed on the 21st April, 1913; and the general assignment to the defendant was executed on the 17th May, 1913.

The defendant admitted the plaintiff's right to rank as an ordinary creditor upon the assets of the company; but disputed his right to a preference.

M. K. Cowan, K.C., and Charles Garrow, for the plaintiff.
W. Proudfoot, K.C., for the defendant.

LENNOX, J. (after setting out the facts) :—No direct authority has been referred to, and it is said that the question is a new one.

The objections urged by the defence are: (1) that the wages having been purchased and the assignment thereof obtained before the date of the assignment for the general benefit of creditors, the right to preferential treatment did not then exist, and cannot be taken to be vested in the plaintiff; and (2) that this right is not assignable.

It is admitted that the wages in question were earned within three months, and that the assignors of the plaintiff were all in the employment of the company within one month next before the assignment for creditors. It is also stated and admitted that, after the sale to the plaintiff, some of these wage-earners were again in the employment of the company, and that they also claim in priority to general creditors for these subsequent earnings. In no case, however, does the claim of the plaintiff and the subsequent claim of the employee together amount to as much as three months' wages.

I am unable to see why the plaintiff should not enjoy all the rights and advantages which his assignor would have enjoyed had he retained his wages-claim.

It is not a new right arising after the assignment for creditors, but a statutory security always existing during the service, which may or may not have to be enforced, and is always available in case of need; it is a statutory lien upon the assets of the employer, as a mortgage is a lien upon land of the mortgagor—a lien though the land may never have to be resorted to for payment. There is nothing personal about it. It is not that the wage-earner may rank upon the estate or collect from the as-

signee, but that "the assignee shall pay in priority . . . the wages of all persons in the employment of the assignor," etc.; and 5 Geo. I. ch. 25, sec. 45, embodying a policy which was adopted here in 1872 (35 Vict. ch. 13), expressly provides that an assignment shall "pass and transfer the legal right to such debt or chose in action . . . and all legal and other remedies for the same." . . .

[Reference to Am. & Eng. Encyc. of Law, 2nd ed., vol. 2, p. 1084; The Wasp, L.R. 1 Ad. & Ecc. 367.]

The statute is for the benefit and security of the workman. Why should he not be allowed to obtain the full value of his earnings? Why should he be compelled, in case of stress, to sell out for a tithe of what is coming to him?

[Reference to McLarty v. Todd, 4 O.W.N. 472; Am. & Eng. Encyc. of Law, 2nd ed., vol. 16, pp. 496, 497, 498; Heyd v. Millar, 29 O.R. 735; Beifield v. International Cement Co., 79 Ill. App. 318, at p. 323; In re Westland, 99 Fedr. Repr. 399, at p. 400; Wilson v. Doble, 13 W.L.R. 290; Arbuthnot Co. v. Winnipeg Manufacturing Co., 16 Man. L.R. 401; National Supply Co. v. Harrobin, 16 Man. L.R. 472; and In re Brown, 4 Benedict (N.Y.) 142.] The Beifield and other American cases generally turn upon provisions in their statutes which are not in ours.

There will be judgment for the plaintiff with costs, declaring that he is entitled to rank as a preferred creditor. I think that the defendant acted in good faith, and was quite justified in awaiting the judgment of the Court before adopting this construction.

SCULLY v. NELSON—BRITTON, J., IN CHAMBERS—OCT. 22.

Pleading—Statement of Claim—Order Striking out Portions and for Particulars of Other Portions—Appeal.]—Appeal by the plaintiff from an order of the Master in Ordinary, acting for the Master in Chambers, directing that certain words and passages in the statement of claim should be struck out, and ordering certain particulars to be given by the plaintiff to the defendant. Objection was taken by the plaintiff on the ground that the order appealed from was made ex parte; but, by consent, the appeal was argued upon its merits. The learned Judge said that he had looked at all the cases cited, and they did not, in his opinion, bear out the contention of the plaintiff against the striking out of certain parts of the statement of claim or re-

quiring particulars to be given. Even more of the statement of claim might be struck out without prejudice to the plaintiff's alleged cause of action. It was quite clear that the statement of claim even yet contained irrelevant matter, which, of course, could be dealt with by the trial Judge when evidence was offered. Appeal dismissed. Costs in the cause to the defendant. J. P. MacGregor, for the plaintiff. M. H. Ludwig, K.C., for the defendant.

AUBURN NURSERIES LIMITED v. MCGREDY—BRITTON, J., IN CHAMBERS—OCT. 22.

Writ of Summons—Service out of the Jurisdiction—Contract—Breaches—Assets in Jurisdiction—Conditional Appearance—Rule 48.]—Appeal by the defendant from the order of HOLMSTED, Senior Registrar, acting for the Master in Chambers, ante 104, dismissing an application of the defendant to set aside the order allowing service out of the jurisdiction of the writ of summons and the service of the writ. The learned Judge said that he had read the correspondence between the parties, and looked at all the cases cited; and, upon the facts disclosed, and upon the authorities, this case was one in which, pursuant to Rule 48, leave should be given to the defendant to enter a conditional appearance. Apart from any question of the contract or breach of it, or of a new contract, as the plaintiffs alleged that they should, at the cost of the defendant, care for the property, the plaintiffs contended that the defendant had property within Ontario to the amount of over $200. That property was the property in reference to which this action had been brought. To determine now that it belonged to the defendant was premature, and the learned Judge was not called upon so to determine on the material before him. Appeal allowed to the extent of permitting the defendant to enter a conditional appearance. Costs of the appeal and of the defendant's motion before Mr. Holmested to be costs in the cause. H. W. Mickle, for the defendant. A. C. McMaster, for the plaintiffs.

RE WEBER AND MORRIS—BRITTON, J., IN CHAMBERS—OCT. 25.

Payment out of Court—Money Paid in by Mortgagee—Surplus Proceeds of Mortgage Sale—Notice—Personal Service—Service by Publication.]—Application by Nisbet & Auld Limited, execution creditors of Nathan Morris, for payment out to them of $205 now in Court. This money was paid into Court by Samuel L. Weber, pursuant to an order made by the Master in Chambers on the 24th June, 1913, and was the surplus realised by sale of property belonging to Nathan Morris, mortgaged to Weber. The sale was under the mortgage. The order for payment into Court provided that notice of the payment into Court should be given "by registered post prepaid to Nisbet & Auld Limited, 34 Wellington street west, Toronto, and Fanny Morris, 76 Bridge street, Brantford, Ontario." The learned Judge said that no evidence was before him of these notices having been given. Nisbet & Auld Limited were the applicants, and, whether by such notice or otherwise, were aware of the payment in; but, before any order for payment out, Fanny Morris should have notice of the application, or reasonable efforts should be made to effect service. If personal service of the application to pay out cannot be made, notice of the application should be addressed to Fanny Morris and be advertised on each of three days in a newspaper published at Brantford. The notice to be of an application at least two weeks after the date of the last publication. Form of notice to be settled by the learned Judge. Adams (Johnston, McKay, Dods, & Grant), for the applicants.