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HON. MR. JUSTICE MIDDLETON. OCTOBER 16TH, 1913.

STOCKS v. BOULTER.

3 O. W. N. 129.

Damages—Fraud and Misrepresentation—Rescission of Sale of Farm —Damages Suffered by Purchaser—Shortage in Acreage and in Fruit Trees—Loss of Income from Investment—Remoteness of Damage—Improvements to Property — Loss in Operating—Expenses of Moving — Expenses of Searching Title—Occupation Rent—Quantum.

See reports of S. C. in 20 O. W. R. 421, 22 O. W. R. 464; 47 S. C. R. 440.

Reference was ordered to Local Master to assess damages suffered by reason of misrepresentations leading to the rescission of a contract to purchase land. Master reported damages at $9,041.38 and allowed for rent, use and occupation $1,425.

MIDDLETON, J., varied above report, reducing damages to $458.05 and allowing for rent, use and occupation $2,000. Plaintiff to have right to further reference as to any increased value of land by reason of matters included under the head of outlays.

Chaplin v. *Hicks*, [1911] 2 K. B. 786, and *Goodall* v. *Clarke*, 44 S. C. R. 284, discussed.

Appeal and cross-appeal from the report of the Master at Picton, argued on 29th September, 1913.

The action was brought to rescind an agreement by which the defendants sold a farm to the plaintiffs. By the judgment of Hon. Mr. Justice Clute, dated 24th November, (1911), 20 O. W. R. 421; 3 O. W. N. 277, the agreement, and deed and mortgage executed in pursuance thereof, were rescinded and the property, real and personal, was directed to be reconveyed and returned; and the vendor was directed to repay the sum paid on account of the purchase price together with interest. There was a reference to the Master to ascertain the value of any chattels which could not be returned or replaced. No question arises in respect to any of these matters. The judgment then declared that the plaintiff was entitled to recover from the defendant Welling-

ton Boulter the damages which he has suffered by reason of the misrepresentations leading to the rescission of the contract, and to ascertain what would be a reasonable allowance to be made to Wellington Boulter by reason of the use and occupation by the plaintiff of the property in question.

Appeals were taken from this judgment to the Court of Appeal for Ontario, 22 O. W. R. 464; 3 O. W. N. 1397, and the case was only finally determined in the Supreme Court on the 18th February, 1913. See 47 S. C. R. 440; pending these appeals the plaintiff remained in possession of the property.

By his report dated the 8th of August, 1913, the Master has allowed as damages $9,041.38, and has allowed for rent, use and occupation, $1,425.

It was in respect of these two allowances that the present appeals were heard by Hon. Mr. Justice Middleton, on 29th September, 1913, in Weekly Court at Toronto.

A. W. Anglin, K.C., and C. A. Moss, for the defendant.

D. Inglis Grant, for the plaintiff.

HON. MR. JUSTICE MIDDLETON:—At the hearing Mr. Justice Clute found that there had been misrepresentation with respect to three matters, sufficient to justify rescission; the quantity of the land, the number of apple trees in the orchard, and the condition of the farm. So as to avoid difficulty if it should be thought there should not be rescission and that damages alone could be allowed, Mr. Justice Clute assessed the damages with respect to these matters: for the shortage of acreage at $2,530, for the shortage of trees in the orchard at $3,100, for the foul condition of the land and shortage of the wheat crop $2,000, a total of $7,630, so that if there had been no rescission the plaintiff's damages would have been $7,630. There having been rescission, these items in great measure disappear, yet the Master has allowed $9,041 38, a result which immediately suggests that the Master must have fallen into some error.

For the shortage of acreage and the shortage in the orchard the plaintiff has sustained no damage save that he has had less land to crop and fewer trees to bear. These, it seems to me, are factors in fixing the occupation rent with which he is chargeable. He has received back the amount paid for purchase money, and the interest upon it,

and in fairness he is directed to pay occupation rent. This occupation rent will be based upon the real value of the thing occupied; and the foul condition of the land would also reduce the amount with which he was to be charged for rent; and if it be shewn that during his occupation he expended money resulting in the betterment of the condition of the land, an allowance might be made to him upon that head.

The Master has proceeded upon a totally different theory; he says the plaintiff was in prosperous circumstances in British Columbia, having investments of $30,000, yielding an income of 10 per cent. He gave up these and came here, realising upon his investments, and stayed upon the Ontario property, not only after he had discovered the misrepresentation within a few weeks after his arrival, but throughout the litigation, including the hearing of the appeals; and the Master has allowed $7,500 as representing this supposed loss of income, although claimed as "loss of time or salary for plaintiff for two and a half years at three thousand dollars, $7,500." The Master has, among other things, ignored the fact that the defendant has had to pay interest upon so much of this capital as was invested in the farm, also the fact that the balance of the capital was not shewn to have been idle in the meantime.

But quite apart from this, after the best consideration I can give to the case, I feel clear that this is not the kind of damage which can be recovered at all. *Chaplin* v. *Hicks*, [1911] 2 K. B. 786, does not at all determine that damages heretofore regarded as being too remote can now be recovered. All it determines is that damages may in proper cases be allowed notwithstanding that there may be difficulties in satisfactorily ascertaining the amount of damage. In this respect that decision is identical with the view given effect to in our own Courts in *Goodall* v. *Clarke*, 21 O. L. R. 614, 23 O. L. R. 57; 44 S. C. R. 284.

Among other items which have been allowed by the Master is $258.05 expenses moving from British Columbia to the property. I think this is properly allowable. The objection taken is that the plaintiff availed himself of the opportunity to go to Scotland and that he would have gone to Scotland at any rate. Notwithstanding this, I think the amount is properly allowable.

Then a series of items are allowed for some changes made in the operation of the factory. If these operations had been shewn to result in any permanent improvement to the property, I think the amount by which the value of the property was increased might be allowed as an allowance under clause 2 of the judgment. It is clearly not damages sustained by reason of the misrepresentation; and there is no evidence to shew that any permanent improvement has resulted. While I allow the appeal upon this ground, I would allow the plaintiff to have a reference back at his own expense to shew whether the value of the property has been increased by reason of any of the matters set forth in these particulars.

Then the plaintiff seeks to charge, and has been allowed, the sum of $400 as loss in operating the property. It is not shewn that this loss was caused by the misrepresentation alleged. Possibly part of it might be attributable to the foul condition of the land, but I think the proper place to deal with this is in the adjustment of the occupation rent.

Their then remains the question of the occupation rent. It seems to me that the Master has approached this from the wrong standpoint, and that the sum with which he has charged the plaintiff is altogether inadequate. Yet it would not be fair to charge him with the full rental payable under normal conditions. After the judgment at any rate, possibly after his repudiation of the contract, the retention of possession by the plaintiff was purely voluntary; but the precarious nature of the holding and the bad condition of the ground owing to the weeds are factors to be considered. Giving the best weight I can to the evidence, and giving the plaintiff the benefit of every doubt, and making the most generous allowance to him in respect of all matters which can be allowed, I have come to the conclusion that he ought to pay at least $2,000 net for the time during which he was in occupation of the property.

The result is that subject to the plaintiff's right to a further reference as to any increased value by reason of the matters included under the head of outlays, the appeal is allowed to the extent of reducing the damages to $458.05, and the occupation rent is increased to $2,000.

The defendant should have the costs of both appeals.

No claim was made in respect of an item of damages which one would have expected to have been put forward,

namely, the expense of searching the title. If this has been overlooked, I would allow the claim now to be made and would allow the result to be modified accordingly.

MR. HOLMESTED, SENIOR REGISTRAR. OCTOBER 10TH, 1913.

DOMINION BANK v. ARMSTRONG.

5 O. W. N. 105.

Parties—Third Parties—Service of Third Party Notice—Extension of Time for—Irregularity — Rules 165, 176—Proper Subject of Third Party Notice—Claim for Contribution.

MR. HOLMESTED dismissed motion by third party to set aside notice.

Featherston Aylesworth, for third party.

R. D. Moorhead, for defendant.

MR. HOLMESTED:—This is an action brought by the plaintiffs against the defendant on a bond of indemnity or guaranty given by the defendant to the plaintiffs to secure advances made by the bank to a firm of J. B. Armstrong Manufacturing Co. Ltd. The statement of defence was filed on 22nd May last. On the 29th September last an order was made *ex parte* allowing the defendant to file a third party notice against the applicant. This notice was filed and served before the order issued. The order was made *nunc pro tunc*, I presume, so as to antedate the filing of the notice, which was subsequently re-served after the issue of the notice.

The third party moves to set aside the notice for irregularity and because the order allowing its service was an improper exercise of the discretion of the Court. Several grounds of irregularity were mentioned. The notice of motion has not been left with me, and I am not able to say what irregularities are specified therein; but those mentioned on the argument were that the order was made after the time allowed for defence, that the order was not made till after the notice was served, that it was made to take effect *nunc pro tunc*, but all irregularities except that first mentioned were as I understand, abandoned at the argument.

Counsel for third party also claimed that the claim is not properly the subject of a third party notice.

In support of the first objection *Parent* v. *Cook*, 2 O. L. R. 709, affirmed 3 O. L. R. 350 was relied on as establishing that the time for delivering a third party notice cannot be extended under what is now Rule 176. Rule 165 requires a third party notice to be delivered "within the time limited for the delivery of the defence," and there are certainly expressions in the judgment of the learned Chief Justice which seem to indicate that in his view the time limited by the Rule cannot be extended. That, however, does not appear to have been necessary for the decision of the case because as appears by the judgment even if there were power to extend the time the learned Chief Justice was of opinion that in the circumstances of that case the enlargement was not properly granted as a matter of judicial discretion, and with this the Divisional Court agreed. The later case of *Swale* v. *Canadian Pacific Rw. Co.*, 25 O. L. R. 492, which was also before a Divisional Court decided affirmatively, notwithstanding what is said in *Parent* v *Cook*, that the time for delivering a third party notice may be, and it actually was, extended in that case. In this state of the authorities I do not think that *Parent* v. *Cook* can be said to be an authority for the proposition that there is no power to extend the time for filing a third party notice beyond that limited by Rule 165(2). I therefore hold that it was not irregular to make the order complained of. As I understand, the other irregularities, which were mentioned, were waived, and it is therefore unnecessary to consider them. It, however, remains to be determined whether the notice discloses a claim which is properly the subject of a third party notice.

For the purpose of this motion I think I must assume that the allegations in the third party notice are true in fact. The notice states the nature of the plaintiffs' action and it then proceeds: "The defendant Robert T. Armstrong, claims to be entitled to contribution from you to the extent of one-half of the sum which the plaintiff may recover against him on the ground that you are also surety for the said J. B. Armstrong Manufacturing Co. Ltd., in respect of the said matter, under another bond made by you in favour of the said plaintiff on or about the said date." The mere statement of the claim seems sufficient to shew

that it is clearly a case in which a third party notice should be allowed. The third party denies that he signed the bond which is referred to in the second paragraph of the statement of claim on which the defendant's liability is based, but, even if I could go into the merits of the third party notice, it seems almost needless to point out that the defendant does not pretend or claim that he did, his claim is based on the fact that the third party is surety for the same debt under another bond.

I think the motion must be refused with costs to the defendant as against the third party in any event.

HON. SIR JOHN BOYD, C. OCTOBER 16TH, 1913.

RE ONTARIO BANK (PENSION FUND)

5 O. W. N. 134.

Bank—Winding-up.— Pension Fund—Bank Act, R. S. C. (1906), c. 29, s. 18, (2)—Inchoate Scheme — Claim on Assets of Bank—Money Raised by Assessment of Shareholders for "Double Liability"—Charitable Trusts—Order of Referee Disallowing Claim —Appeal—Costs.

BOYD, C., *held*, that the officers' pension fund of the defendant Ontario Bank should go to the relief of the shareholders under double liability. That the officers' pension fund was an inchoate scheme, not a charitable trust.

Appeal by certain persons who were members of the staff of the bank from an order of KAPPELE, Official Referee, in the winding-up of the bank, disallowing the claim of the appellants to a share of the assets of the bank in respect of a pension fund.

J. A. Worrell, K.C., for the appellants.

J. A. Patterson, K.C., for the shareholders.

A. McLean Macdonell, K.C., for the liquidator.

HON. SIR JOHN BOYD, C.:—Passing over preliminary matters set forth in the judgment of the Referee, the substantial question remains as to the $30,000 pension fund of the Ontario Bank. This amount is now represented by that much money levied as under the double liability call made by the liquidator. Is that money impressed with a trust for the benefit of the officers of the bank, or is it to be re-

turned to the shareholders as being unnecessarily levied? The petitioners, former officers of the Ontario Bank, ask that it be impounded and administered under the direction of the Court, and the judgment of the Referee is against that contention. I see no good reason for disagreeing with his conclusion. Looking at all the evidence and having regard to the action and inaction of the bank, the proper inference seems to be that there was an intention on the part of the shareholders and directors of that bank to establish a pension fund under the statute R. S. C. 1906, ch. 29, sec. 18, sub-sec. 2, which was frustrated in its progress by the insolvency and liquidation of the bank. The scheme was cut short before its completion and never was made ready for operation. Everything as to the ascertainment of the beneficiaries is left at loose ends; whether the claim for pensions is to depend on the length of service, or sickness, or old age, or inability to work, or contribution to the fund by the officers; these and such like details are all left unconsidered because nothing had been determined as to the status of the possible beneficiaries. One cannot think that the fund was meant for the benefit of a person who had left the service of the bank, nor can it be supposed that when the term of service was cut short by an order to wind-up, the portion of the fund then existing should be made more efficacious for the extruded staff than it was in the hands of the body that had created it, for all the money set apart came from the shareholders. No claim now exists by any officer as to this fund, and I fail to see how any such claim can hereafter arise because no one can tell under what conditions the pension was to be paid, or was intended to be paid out of the $30,000. The Court cannot undertake such an indeterminate task and supplement all that is needed, and even that in an arbitrary way, before it can be said that the pension fund has been established. At most there is but the nucleus of a fund which was being established before the liquidation.

The appellants relied on the doctrine of charitable trusts and referred specially to a case of pensioning as decided by Byrnes, J., in *Re Gosling* (1900), 48 W. R. 300. But in that case the testator had left a clearly defined fund for a clearly defined purpose which was deemed to be charitable. The benefit intended was for a class of "old and worn out clerks" who were to be "pensioned off." These expressions

brought the donation within the statute in that behalf. Here is no ascertained fund—the creation of the fund was in progress with an ultimate view of having it increased by contribution from the officers of the bank, and there is no means of defining who of all the officers and their families are to be the recipients of the pension. In this regard, the decision of Cozens-Hardy, J., in *Re Gassiot* (1901), 70 L. J. Ch. 242, is pertinent. He held that the testamentary gift of income to be applied for the benefit of persons answering a certain description in the wine trade without any reference to age or poverty could not be supported as a charitable gift and therefore failed wholly as infringing the rule against perpetuities.

In brief, the whole scheme as projected is as yet inchoate, and it was interrupted in the making by the compulsory liquidation of the bank.

The judgment should be affirmed and the money returned to the shareholders. The Referee has awarded costs against the petitioners. But, as the point is a new one under the Bank Act and is one calling for judicial decision, I think the better course will be to relieve the petitioners from the payment of costs and to direct that the costs of the liquidator be paid out of the fund.

HON. MR. JUSTICE MIDDLETON. OCTOBER 16TH, 1913.

RE KLOEPFER.

5 O. W. N. 133.

Life Insurance—Beneficiary—Wife or Surviving Children—Mention of Wife by Name—Death of Wife — Remarriage of Insured—Rights of Second Wife Surviving Insured—Rights of Surviving Children—Ontario Insurance Act, 2 Geo. V. c. 33, ss. 178, 181—Trust—Executors.

Insured left an insurance policy payable B. K. wife of C. K. for her sole use if living, in conformity with the statute, and if not living to the surviving children of said C. K. The first wife B. K. died and C. K. married again. Second wife claimed the money.

MIDDLETON, J., *held*, that the second wife was entitled holding that the wife to be benefited was the wife at the time of death, even though the wife at the time of insurance was mentioned by name.

Motion by the executors and widow of the late Christian Kloepfer for payment out of Court of moneys arising from an insurance policy upon the life of the deceased.

W. J. Boland, for the executors and widow.

F. W. Harcourt, K.C., for the infant children.

A. J. Thomson, for Nellie K. Bongard, daughter.

HON. MR. JUSTICE MIDDLETON:—The insurance money is payable to "Bessie Kloepfer wife of Christian Kloepfer, for her sole use, if living, in conformity with the statute and if not living to the surviving children of said Christian Kloepfer." The policy was issued on 25th May, 1885, Bessie Kloepfer died and on 10th June, 1910, the insured directed the policy to be paid to his executors.

In the meantime the insured had, on 1st June, 1904, married again. He died 9th February, 1913, leaving his second wife and children surviving.

All admit that the executors cannot take; as the latter part of clause 4 cannot aid the executors—as the children are preferred beneficiaries.

The children claim as beneficiaries named in the policy. The widow claims on the theory that the policy must be read, under the statute, as though she and not the first wife was named in it, relying on what is said in *Re Lloyd* v. *A. O. U. W.*, 5 O. W. N. 5; O. L. R.

"The insurance contract must be read as creating a trust in favour of the wife of the assured only, such wife being, by force of the statutory definition, the wife living at the maturity of the contract, notwithstanding that the first wife was designated by name."

I read these words as applying to a case which had already been held to come within clauses 3 and 4, and not as determining that these clauses provide that in the construction of an insurance policy "wife" (or a named wife) means the widow of the insured.

In *Re Lloyd* v. *A. O. U. W.* the policy was for $2,000: $1,000 to be paid to the widow and $1,000 to be paid to the daughter. I thought this was not, within the words of the act, a policy payable to the wife or payable to the wife and children generally. The Appellate Division took the view that the $1,000 was a separate insurance payable to the wife; and, this being so, secs. 3 and 4 applied.

The real question in this case is whether this policy is for the "wife and children generally" within the meaning of the statute; for, if it is, the word "wife" means the wife

living at the maturity of the contract, even though the first "wife is designated by name."

The benefit of the policy is for the testator's wife and children and it makes no difference that the wife if she lives takes absolutely and if she is dead the children take absolutely, it is still a policy for the benefit of the wife and children. In such cases the Legislature has given to the policy a statutory construction. The wife to be benefited is the wife at the time of death, even though the wife at the time of insurance is mentioned by name. In no other way can effect be given to the awkward words of clause 141.

The money will therefore go to the wife. The Official Guardian's costs must be paid out of the fund. The executors can well look to the estate.

HON. SIR G. FALCONBRIDGE, C.J.K.B. OCTOBER 16TH, 1913.

RE STANDARD COBALT MINES LTD.

5 O. W. N. 144.

Company—Winding-up—Claim on Assets — Assignments—Evidence —Finding of Referee — Notice of Adjudication — Appeal Dismissed with Costs by Falconbridge, C.J.K.B.

Appeal by the Baily Cobalt Mines Ltd. from the report of the Official Referee, in a winding-up matter, allowing a claim.

G. H. Watson, K.C., and J. Grayson Smith, for Baily Cobalt Mines Ltd., appellants.

W. R. Smyth, K.C., for liquidator.

H. E. Rose, K.C., and J. A. McEvoy, for Security Transfer and Register Co.

HON. SIR. GLENHOLME FALCONBRIDGE, C.J.K.B.:—As to the complaint of want of notice of the adjudication by the learned Referee, it appears by the record that the matter was gone into and elaborately argued by one of the present counsel for appellants—no application being made by him for postponement of the hearing for the purpose of calling evidence.

The assignments are on file and are produced. I find that there was evidence sufficient to prove the claim adduced before the Referee. The appeal is dismissed with costs.

HON. MR. JUSTICE MIDDLETON. OCTOBER 17TH, 1913.

REX v. VINCENT & FAIR.

5 O. W. N. 141.

Criminal Law — Application for Bail before Committal for Trial— Jurisdiction of Judge of Supreme Court—Criminal Code, s. 698 Remedy of Accused on Vagrancy Charge — Writ of Habeas Corpus Granted and Accused Admitted to Bail on Return — Amount of Bail fixed at $500 by Middleton, J.

Motion for bail upon a vagrancy charge.

The accused were arrested and committed for trial upon a charge of fraud; and upon this charge they were admitted to bail. An information was then laid against them, charging them with vagrancy, and upon this charge they have been remanded some four or five times, no evidence being taken before the magistrate. The magistrate refuses to grant bail except for a prohibitive amount; $5,000 for each prisoner.

W. M. German, K.C., for accused.

J. R. Cartwright, K.C., for the Crown.

HON. MR. JUSTICE MIDDLETON:—I do not think that under the Criminal Code a Judge of the Supreme Court has jurisdiction to grant bail until the accused has been committed for trial. See Criminal Code, sec. 698. Nevertheless, the prisoner is not without a remedy. Under the Habeas Corpus Act, upon the return of a writ the Court may "Determine touching the discharge, bailing, or remanding the person."

In *Rex* v. *Hall*, 6 W. L. R. 842, Craig, J., in the Yukon Territorial Court held the contrary; but he evidently misread the case of *Regina* v. *Cox*, 16 O. R. 228. The section of the statute referred to there by MacMahon, J., has been eliminated and is not now found in the corresponding section of the Code as it now stands. Compare R. S. C. 1886, ch. 174, sec. 83, with the present sec. 699 of the Code.

I think the alternative course suggested by MacMahon, J., in that case is the proper one to follow, and I therefore grant the writ of *habeas corpus,* and upon its return will admit the prisoners to bail.

To save the further attendance of counsel on the return of the writ, the amount of bail was discussed, and I think cash bail $500 for each is adequate.

The facts surrounding this case suggest that the charge of vagrancy is laid, and the remand granted, because the magistrate and police officials disapproved of the bail granted upon the more serious charge. It is obvious that, if this is so, such conduct cannot be too strongly condemned.

HON. MR. JUSTICE MIDDLETON. OCTOBER 21ST, 1913.

NORTHERN ELECTRIC & MFG. CO. v. CORDOVA MINES LTD., PETER KIRKGAARD, WILLIAM HUGHES AND W. G. MACKECHNIE.

5 O. W. N. 156.

Company — Mortgage Made by Mining Company to Promoters and Owners of Stock—Action by Creditor to Set Aside Mortgage—Advances Made by Promoters — Judgment in Separate Action for Enforcement of Mortgage—Absence of Fraud—Assent of all Shareholders.

MIDDLETON, J., *held,* that the transaction was *intra vires* of the company and dismissed the action with costs.

Action tried at Peterborough on 14th October, 1913.

The plaintiff company sued on behalf of itself and all others creditors of the defendant company, to recover the sum of $800 due to it by that company, and to have it declared that a certain mortgage given by the company to the defendants Hughes and Mackechnie for $60,000, on 30th April, 1912, was *ultra vires* of the defendant company and void, and was a fraud upon the plaintiffs and the other creditors of the company.

G. Grant, for plaintiffs.

R. E. Wood, for the defendant company.

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

No one appears for the defendant Kirkgaard.

HON. MR. JUSTICE MIDDLETON:—In this action on the 22nd September, 1913, the company in its separate right recovered judgment against the defendant company, and has now an execution in the hands of the sheriff. At the time of the bringing of this section there were no executions in the sheriff's hands.

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 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 of 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 Sohlicht, 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 consequent upon a liquidation 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 only permits the mortgage to be given for a present advance. The 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 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 plaintiff has 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 plaintiff.

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.

HON. MR. JUSTICE BRITTON. OCTOBER 21ST, 1913.

RE CAMPBELL.

5 O. W. N. 154.

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 — Construction by Britton, J.

Motion by Jane Campbell McBain, sole executrix of the will of the late Alexander Campbell, for an order determining certain questions arising upon the construction of the will as to the distribution of the estate. Heard at Cornwall Single Court.

D. B. McLennan, K.C., for executrix.

Robert Smith, for beneficiaries.

HON. MR. JUSTICE BRITTON:—Interpretation is asked of certain clauses of the will of the late Alexander Campbell. The will was made on the 15th day of May, 1894, and the testator died on the 16th day of 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 between the children of my daughter Margaret, one-third to my daughter Jane, and one-third to be equally divided between the children of my daughter 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 21. 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 men-

tioned 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.

SUPREME COURT OF ONTARIO.

FIRST APPELLATE DIVISION. OCTOBER 22ND, 1913.

RE COOPER.

5 O. W. N. 151.

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.

KELLY, J., *held*, 24 O. W. R. 665; 4 O. W. N. 1360, that a gift by a testator to a legatee of "all my cash in bank" passed certain moneys on deposit in the Canada Permanent Mortgage Corporation as well as other moneys in deposit in two chartered banks.

That a gift to the three nieces and five nephews of B. S. C., the brother of the testator, where B. S. C. had three daughters and five sons and several nephews and nieces (but not eight precisely) was a gift to the latter class and not to the children of B. S. C., the wrongful enumeration being disregarded.

Re Stephenson, Donaldson v. *Bamber*, [1897] 1 Ch. 75, followed.

SUP. CT. ONT. (1st App. Div.) supplied the word "children" in the following clause in testator's will. "my three nieces and five nephews, *children* of Barry S. Cooper" and *held* that these eight took to the exclusion of the other nieces and nephews of testator.

Judgment of KELLY, J., reversed.

Appeal by Barry S. Cooper and his adult children against a judgment of HON. MR. JUSTICE KELLY, 24 O. W. R. 665, on an application by originating notice for the construction of the last will of the late Francis Cooper.

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

The appeal to the Supreme Court of Ontario (First Appellate Division) was heard by HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR JUSTICE MAGEE and HON. MR. JUSTICE HODGINS.

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.

Their Lordships' judgment was delivered by

HON. MR. JUSTICE GARROW:—The residuary clause is the only one now calling for attention.

The judgment is reported in 24 O. W. R. 665, and at p. 666 the residuary clause, as it appeared to the learned trial 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 *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 will 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 appellant 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. and 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 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.

HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE and HON. MR. JUSTICE HODGINS agreed.

SUPREME COURT OF ONTARIO.

FIRST APPELLATE DIVISION. OCTOBER 22ND, 1913.

KETTLE v. DEMPSTER.

5 O. W. N. 149.

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

SUP. CT. ONT. (1st App. Div.) *held*, that the evidence justified the finding of the trial Judge in favour of the plaintiff in an action for damages for the negligence of defendant's servant in causing a steel girder to fall upon the plaintiff.

Appeal by the defendant from a judgment of HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., in favour of the plaintiff pronounced at the trial, without a jury.

The action was brought to recover damages said to have ben caused to the plaintiff by the negligence of the defendant's servant under the following circumstances:

The plaintiff was employed in assisting to place a heavy steel girder in a house on Dufferin street, in the city of Toronto. To enable this to be done, the girder was set up on edge (it was 28 feet long and 21 to 24 inches by 6 inches) 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 wagon 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 wagon 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 Hon. Mr. Justice Latchford, and a jury, when a verdict in favour of the plaintiff was rendered. That verdict, however, was set aside, and a new trial directed, 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 Hon. Sir Glenholme Falconbridge, C.J.K.B., 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.

The appeal to the Supreme Court of Ontario (First Appellate Division) was heard by HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MAGEE and HON. MR. JUSTICE HODGINS.

J. J. Gray, for the defendant, appellant.

T. N. Phelan, for the plaintiff, respondent.

Their Lordships' judgment was delivered by

HON. MR. JUSTICE GARROW:—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 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 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 would still be unable to see how it affords any justification for the act complained of.

The appeal should be dismissed with costs.

HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MAGEE and HON. MR. JUSTICE HODGINS agreed.

SUPREME COURT OF ONTARIO.

FIRST APPELLATE DIVISION. OCTOBER 22ND, 1913.

RE WOODHOUSE & CHRISTIE BROWN & CO. LTD.

5 O. W. N. 148.

Land Titles Act—Appeal from Decision of Master—Sec. 140 of Act—Application to Register Objection to Issuance of Certificate of Title—Applicants Barred from Bringing Action for Possession "Action"—Meaning of.

LATCHFORD, J., *held*, 24 O. W. R. 619; 4 O. W. N. 1265, that an order debarring the holders of the paper title to certain lands from bringing an action against the occupant for possession (see 23 O. W. R. 55) did not prevent them from filing an objection in the Land Titles Office to the said occupant being registered as owner of such lands.

SUP. CT. ONT. (1st App. Div.) reversed above judgment with costs, formal order objected to vacated and set aside.

Appeal by John Woodhouse from an order of Hon. Mr. Justice Latchford, 24 O. W. R. 619; 4 O. W. N. 1265.

The appeal to the Supreme Court of Ontario (First Appellate Division) was heard by HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE and HON. MR. JUSTICE HODGINS.

Edward Meek, for appellant.

W. B. Milliken, for respondents.

Their Lordships' judgment was delivered by

HON. MR. JUSTICE HODGINS:—The authority for the order of the Master-in-Chambers made on the 5th day of October, 1912, is found in old rule 430, sub-sec. 4. The order, clause 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, sub-sec. 3, that a discontinuance under sub-sec. 1, i.e., before receipt of the statement of defence or after the receipt thereof but and before any other proceeding in the action is taken by the plaintiffs, 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 A. C. 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.

HON. SIR WM. MEREDITH, C.J.O., HON. MR. JUSTICE MACLAREN and HON. MR. JUSTICE MAGEE agreed.

HON. MR. JUSTICE BRITTON. OCTOBER 22ND, 1913.

AUBURN NURSERIES LTD. v. McREDY.

5 O. W. N. 165.

Process—Writ of Summons—Service out of the Jurisdiction—Contract—Breaches—Assets in Jurisdiction — Conditional Appearance—Rule 48.

BRITTON, J., varied order of Mr. Holmested, 25 O. W. R. 85, by permitting defendant to enter a conditional appearance.

Appeal by defendants from order of Geo. S. Holmested, Esq., K.C., acting for the Master-in-Chambers, dismissing an application of the defendants to set aside the order allowing service out of the jurisdiction, of the writ of summons and service of the same. See ante 85.

H. W. Mickle, for appeal.

A. C. MacMaster, for plaintiffs.

HON. MR. JUSTICE BRITTON:—I have read the correspondnce between the parties, and looked at all the cases cited. Upon the facts disclosed, and upon the authorities, this case is one in which, pursuant to rule 48, leave should be given to the defendants to enter a conditional appearance.

Apart from any question of the contract or breach of it, or of a new contract as plaintiffs allege that they should, at the cost of the defendants care for the property, the plaintiffs contend that the defendants have property within Ontario to the amount of over $200. The property is the property in reference to which this action has been brought. To determine now that it belongs to defendants is premature, and I am not called upon to so determine on the material before me.

The appeal will be allowed to the extent of permitting the defendants to enter a conditional appearance. Costs of appeal and of defendants' motion before Mr. Holmested will be costs in the cause.

HON. MR. JUSTICE BRITTON. OCTOBER 22ND, 1913.

SCULLY v. NELSON.

5 O. W. N. 164.

Pleading—Statement of Claim—Order Striking out Portions and for Particulars of Other Portions—Appeal.

BRITTON, J., in Chambers, sustained an order of the Master in Chambers directing that certain words and passages in a statement of claim should be struck out, and ordering certain particulars to be given by plaintiff to defendant.

Motion by way of appeal from the order of the Master in Ordinary, acting for Master in Chambers, whereby it was ordered 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 plaintiff on the ground that the order as to which complaint is made was made *ex parte*.

By consent the appeal was argued upon its merits.

J. P. McGregor, for plaintiff.

M. H. Ludwig, for defendant.

HON MR. JUSTICE BRITTON:—I have looked at all the cases cited and they do not, in my opinion, bear out the contention of plaintiff against the amendment allowed, or against the striking out of certain parts of the statement of claim, or against the order requiring particulars to be

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 354—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

had a lease of the Russell Theatre. The defendant got by the agreement an undivided one-half interest in the Opera House, Hamilton, together with its "profits and emoluments," and Whitney got an undivided one-half interest in the lease of the Opera House, London, together with its "profits and emoluments." Each party was to assume and apparently did assume an equal one-half of risk under each of these leases.

The defendant further agreed to equally divide with said 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 said Whitney one-half interest in 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 as if they had been specially mentioned.

I am of opinion that the agreement contains what is equivalent to an express stipulation that the partnership shall not be dissolved by the death of either, if such death should occur before the termination of the leases, but that it shall continue until such expiration or sooner determination of the leases existing at date of 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 authority of 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: (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 date of 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 C. 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 and 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.

HON. MR. JUSTICE BRITTON. OCTOBER 25TH, 1913.

WEBER & MORRIS.

5 O. W. N. 166.

Payment out of Court—Money Paid in by Mortgagee—Surplus Proceeds of Mortgage Sale—Notice—Personal Service — Service by Publication.

BRITTON, J., *held*, that where money had been paid into Court under an order of the Master, directing that notice be given to the execution creditors such money would not be paid out upon the application of one of said creditors until the other had been notified.

An 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 day of June, 1913, and was the surplus realised by sale of property belonging to Nathan Morris, mortgage 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."

Adams (Johnston, McKay, Dods & Grant) for the applicants.

HON. MR. JUSTICE BRITTON:—No evidence is before me of these notices having been given. Nisbet & Auld Limited are the applicants, and whether by such notice or otherwise are aware of the payment in, but before any order is made for payment out Fanny Morris should have notice of the application, or reasonable efforts should be made to effect service. If personal service of application to pay out cannot be made, I direct that notice of application be addressed to Fanny Morris and be published on each of three days in a newspaper published at Brantford. The notice shall be of an application at least two weeks after date of last publication of such notice. Form of notice will be settled by me.