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VOLUME XXIII.

TORONTO :
THE CARSWELL COMPANY, LIMITED
1913.

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REPORTED IN

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THE

ONTARIO WEEKLY REPORTER

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HON. MR. JUSTICE MIDDLETON. SEPTEMBER 17TH, 1912.

RE BOULTON & GARFUNKEL.

4 O. W. N. 25.

Vendor and Purchaser—Title—Objection to—Right of Way—Compensation in Respect Thereof—Motion Dismissed.

Petition by purchaser to have it declared that certain rights of way over a private lane constituted an objection to vendor's title and for compensation in respect thereof. The lanes in question were laid out by a lessee from the vendor, who had an option to purchase and under whom purchaser claimed.

MIDDLETON, J., *held*, that purchaser had no higher rights than his predecessor in title and that the parties had reference to the existing conditions when they contracted.

Petition dismissed, purchaser to pay costs.

Petition by the purchaser under the Vendor and Purchaser's Act to have it declared that certain rights of way existing over what is referred to as a private lane constitute an objection to the vendor's title and for a reference to determine the amount of compensation to which he was entitled if these rights were not released.

R. S. Cassels, for Boulton, the vendor

W. C. Chisholm, for Garfunkel, the purchaser.

HON. MR. JUSTICE MIDDLETON:—John B. Boulton in his lifetime owned a block of land extending from Henry street to McCaul street. By his will he devised this to his wife, with power to sell.

During his lifetime Boulton and others whose concurrence was necessary had on the 1st of January, 1872, leased the entire parcel to R. B. Blake for a term of nineteen years and four months, with the right to purchase at the end of the term, at a valuation if the parties failed to agree upon the price.

Blake sub-divided the parcel and laid out certain private lanes thereon, including the one in question. He erected houses upon some of the sub-divided lots, and assigned the leasehold interest of these respective houses to different purchasers.

On the 13th June, 1891, Levi J. Clark, who had become the owner of one of these houses, obtained a conveyance of it from Mrs. Boulton. This conveyance recites the lease, the right to purchase thereunder, and the devolution of the right of both landlord and tenant, and Clark's desire to exercise the right to purchase with respect to the lands upon which his house is situated, and the agreement as to the price to be paid. Mrs. Boulton then conveyed this parcel, describing the land as running to the lane in question; this description following the description contained in the assignment of the leasehold interest made by Blake, through which Clark claimed. In November, 1892, a similar conveyance was made to Melfort Boulton, of a parcel to which he had acquired the leasehold interest; the land being similarly described as running to the lane.

It is conceded that these conveyances operate to give the respective grantees an easement over the lane in question.

Subsequently and on the 1st of May, 1893, the original lease having then expired, a new lease was made between Mrs. Boulton and Blake; reciting the original lease, the subdivision by Blake, his conveyance away of certain portions of the leasehold property as sub-divided—leaving him still entitled to the McCaul street frontage, including the private lanes—and an agreement to extend the rights under the original lease as therein provided. This lease then demises the McCaul street frontage, including the private lane, for a term of twenty-one years, and confers upon Blake the right at the expiry of the term to purchase the lands at a price to be ascertained by arbitration if the parties fail to agree.

Garfunkel having acquired Blake's title, an agreement was made on the 1st May, 1912, reciting the lease and that Garfunkel had agreed to purchase at the price of $116 per foot on McCaul street.

As pointed out on the argument, Garfunkel can have no greater or other right than Blake, and Blake was himself the author of the private lanes in question and party to the creation of the right of way over them, of which, as assignee, Garfunkel now seeks to complain. The term "private lane" is ambiguous; but here the parties must be taken to have

used that expression with reference to the actual condition of the premises.

The agreement executed by Garfunkel calls for the payment of $116 per foot for the entire McCaul street frontage, including the lane. In the absence of any attack upon that agreement I must assume that the parties fixed the price having regard to all the circumstances. I cannot reform that agreement, as I would be doing if I yielded to the purchaser's contention.

The order will, therefore, declare that the purchaser is not entitled to compensation by reason of the rights of way. The purchaser should also pay the costs.

MASTER IN CHAMBERS. SEPTEMBER 16TH, 1912.

CHAPMAN v. McWHINNEY.

4 O. W. N. 35.

Pleading—Statement of Claim—Double Amount Named in Writ—Motion to Strike Out Dismissed—Time to Plead.

MASTER-IN-CHAMBERS, where a statement of claim asked for double the amount named in the writ, dismissed defendant's motion to strike out, but gave him full time to plead and costs of the motion in the cause.

The endorsement on the writ claimed a commission on a sale of one property and exchange of another as part of the consideration of $22,000—giving the following particulars:—

To commission at 2½	$7,375 00
To commission on exchange 2½	550 00
	$7,925 00

In the statement of claim the transactions between the parties were set out, and it was said that 2½% was only half the usual rate, which plaintiff had agreed to accept in consideration of a promise by defendant to place the property in question with him for resale.

The plaintiff therefore asked (1) payment of $7,925; (2) damages for loss of sale as agreed by defendant; (3) or in the alternative for $15,750 being commission at the usual rate of 5 per cent.

The defendant moved to strike out these two latter claims and the corresponding parts of the statement of claim as being inconsistent with the endorsement on the writ.

J. R. Roaf, for the defendant's motion.

J. P. Crawford, for the plaintiff, contra.

CARTWRIGHT, K.C., MASTER:—The cases under C. R. 244 are few; and the inclination of the Court is not to give it a very wide application. See judgment of Mabee, J., in *Muir* v. *Guinane*, 7 O. W. R. 54, 158—also *Nicholson* v. *Mahaffey*, 8 O. W. R. 685. The only substantial question here is one of the costs, as if necessary the plaintiff would have leave to amend.

It is perhaps going a little beyond the scope of C. R. 244 to ask in the statement of claim for double the amount claimed in the writ; though as defendant is resisting the smaller amount he is not likely to submit to the larger. Had the writ asked for damages for breach of contract in addition to the sum of $7,925 there would have been no ground for this motion—nor if no sum had been named.

As it is the best disposition of the case seems to be to dismiss the motion and let defendant have full time to plead—validating the statement of claim as of this date. The costs should be to defendant in the cause as the motion was not uncalled for.

HON. MR. JUSTICE MIDDLETON. SEPTEMBER 17TH, 1912.

BOECKH v. GOWGANDA QUEEN MINES.

4 O. W. N. 27.

Action—Failure to Set up Defences—Leave to Amend Refused—Cannot bring New Action of Issues which could have been Tried.

MIDDLETON, J., *held*, that where a defendant in an action has failed to set up certain defences and leave to amend has been refused at the trial, he cannot bring another substantive action seeking a trial of the issues which he could have raised in the earlier action had he pleaded adequately, a judgment being conclusive not only upon all matters which are actually brought forward, but as to all matters which might have been brought forward as part of the subject of the contest.

Cooke v. *Rickman*, [1911] 2 K. B. 1125, and *Re Ontario Sugar Co.*, 22 O. L. R. 621; 24 O. L. R. 332, referred to.

A motion to continue the trial on *ex parte* injunction granted by HON SIR GLENHOLME FALCONBRIDGE, C.J.K.B., restraining the defendants from enforcing a judgment obtained by the defendants against the plaintiff in this Court on the 29th September, 1910.

McCullough, for the plaintiff.

M. Lockhart Gordon, for the defendants.

HON. MR. JUSTICE RIDDELL:—In the original action the present defendants sued the plaintiff for $2,000 alleged

to be due in respect of a subscription for stock. The defendant resisted payment, setting up several grounds of defence. At the trial he endeavoured to rely upon certain other defences, but objection was taken that these defences had not been pleaded; and effect was given to this objection. Appeal was had from this decision; and the exercise of discretion by the trial Judge in refusing leave to amend was approved both in the Court of Appeal and in the Supreme Court; and the Privy Council has refused leave to appeal.

The plaintiff now conceives the idea of himself bringing an action for the purpose of rescinding his subscription for the stock in question, relying upon the very grounds which he unsuccessfully sought to set up at the trial; and he seeks in this way to secure a trial of the issues which he might have raised in the earlier action had he pleaded adequately therein.

This experiment is, I think, entirely unsuccessful. From the earliest times the Court has consistently held that a judgment is conclusive, not only upon all matters which are actually brought forward, but as to all matters which might have been brought forward as part of the subject of the contest; and this view has been recently confirmed both here and in England. See *Henderson* v. *Henderson,* 3 Hare 100; *Humphries* v. *Humphries* (1910), 1 K. B. 796, (1910), 2 K. B. 531; *Cooke* v. *Rickman* (1911), 2 K. B. 1125; *Re Ontario Sugar Co.,* 22 O. L. R. 621, and 24 O. L. R. 332.

Quite apart from this fundamental aspect of the case, it is obvious that this action is entirely misconceived. Section 57, sub-sec. 9 of the Judicature Act provides: "No case or proceeding at any time pending in the High Court of Justice or before the Court of Appeal shall be restrained by a prohibition or injunction;" the proviso at the end of this section indicating, in accordance with the general policy of the Judicature Act, that the remedy, if any, must be an application for a stay in the original action.

I determine the matter upon the broad general ground that it is not competent for a defendant who has failed to plead any defence open to him in the original action to obtain any relief by any substantive proceeding. His only remedy would have been by application for indulgence in the original action; and that application was here made and refused.

The motion will be dismissed with costs; and, as the view I take is fatal to the whole action, I think it proper to

direct that this motion be turned into a motion for judgment and that the action be also dismissed with costs.

The amount of the judgment was, I understand, paid into Court as a term of the granting of the *ex parte* injunction. This may be directed to be paid to the defendants.

HON. SIR JOHN BOYD, C. SEPTEMBER 19TH, 1912.

CAMPBELL v. TAXICABS VERRALS LIMITED.

4 O. W. N. 28.

Company — Action Against — Organization not Completed — Legal Entity — Unused Powers — Authority of Solicitor to Defend Action—Costs.

Application by plaintiff's solicitor for payment by defendant's solicitors of his costs of the action on the ground that they warranted their authority to act for their client, an incorporated company which had never been organized and which had no assets.

BOYD, C., *held*, that defendant company was a legal entity, with unused powers, and that there was nothing to shew that defendant's solicitors had knowledge of any defects in its organization and that therefore the motion must fail.

Simmons v. *Liberal Opinion; Re Dunn*, [1911] 1 K. B. 966, distinguished.

Motion dismissed, with costs to be set off against the general costs of the action.

Action was brought to recover damages for injuries sustained by plaintiff on or about 9th November, 1910, by reason of the negligence of the driver of a taxicab engaged by plaintiff from defendant's garage. Plaintiff recovered judgment against defendant; but found no assets to realize upon.

Plaintiff now moved for an order setting aside the appearance entered in above action in the name of the defendant as a company, and all subsequent proceedings, and directing the solicitors who entered the appearance and defended the action to pay the plaintiff's costs, upon the grounds that the defendant never authorised the defence, and had never been organized as a company, and had never appointed officers, and had never appointed any person to accept service, and had given no instructions to the solicitors to defend.

J. MacGregor, for the plaintiff.

J. M. Godfrey, for the defendant, and the solicitors who defended the action.

HON. SIR JOHN BOYD, C.:—This motion was launched on the authority of *Simmons* v. *Liberal Opinion Limited, In re Dunn*, [1911] 1 K. B. 966, the head-note of which

suffices to shew its scope: "A solicitor assuming to act for one of the parties to an action warrants his authority and is personally liable to the opposing party for costs, if it turns out that the client for whom he assumed to act is non-existing or has revoked the authority." The defendant in that case was sued as a company; it turned out that though some preliminary steps had been taken to form, the matter had not been consummated by registration, so that in fact there was no company—it was non-existent. That is the radical difference as compared with this case, where the defendant, sued as a company, had been legally constituted a company by letters patent of Ontario, dated the 27th October, 1910. No steps appear to have been taken to organize the company in the usual way, and after the charter issued so matters remained till lately, when a meeting was held and the directors ratified what had been done in defending this action. The charter had not become forfeited under any of the provisions of the Companies Act by reason of its inaction.

So far as appears, the vehicles which are sent out in response to calls made by telephone on the "Taxicabs Verrals" are owned by George Verral. The writ was served upon him, and he forwarded it to an indemnity company in the United States, and that company undertook the defence and instructed the solicitors, who are now called upon by this motion to pay all the costs of litigation. There is nothing to shew that these solicitors had any knowledge of the defects or omissions in the organization of the defendants which are now relied on as nullifying the conduct and the results of this action: a very different position from that occupied by the solicitor in the English case. At most, or at least, in this instance there is a defendant which has a legal entity, with unused powers it may be, but still other than a non-existent body. By the statute under which the defendants were incorporated, sec. 16 declares that notice of incorporation shall be given by the Provincial Treasurer in the Ontario Gazette, and the corporation shall be deemed to be existing from the date of the letters patent incorporating the same (7 Edw. VII., ch. 34 Ont.). Upon incorporation the corporation is in possession of the powers specified in the Act (see secs. 17, 18, etc.). Section 21 declares that if a corporation does not go into actual operation within two years after incorporation or for two consecutive years, does not use its corporate powers, the powers except so far as is

necessary for the winding-up of the company shall be forfeited—but that forfeiture shall not prejudicially affect the rights of creditors. This company, being incorporated on the 27th October, 1910, had not defaulted under this lapse of time when the action was begun or when this application was made. It was an existing body in possession of unused powers, and with its original directorate holding office (see secs. 79 and 85). The directors, of whom George Verral was one, had power to defend this action in the name of the company (Lindley on Companies, 6th ed., vol. 1, p. 378), and the solicitors had no knowledge or intimation that this was not a *bona fide* defence. That the company had no property is nothing to the purpose of this application. Many an action against a company is frustrated for want of assets after judgment has been obtained.

The solicitors having appeared for the company and the suit having been contested down to judgment, it does not appear relevant to inquire in what manner the solicitors were appointed; the company cannot raise any objection to their authority, nor can the plaintiff; *Faviell* v. *Eastern Counties Rw. Co.*, 2 Ex. 344, and *Thames Haven Dock & Rw. Co.* v. *Hall*, 5 M. & G. 274.

I do not further pursue this inquiry; I see no ground to interfere with the record or to order payment of costs of the action by the solicitors.

Application is dismissed with costs to be set off against costs taxed to plaintiff in the action.

The same result and order in *Gibson* v. *Taxicabs Verrals Limited.*

HON. SIR JOHN BOYD, C. SEPTEMBER 20TH, 1912.

RE HOBBS & TORONTO.

4 O. W. N. 31.

Municipal Corporations — Buildings on "Residential Streets" of Cities—Municipal Act (1903), s. 541 (a)—By-law—Permit for Erection of Building for "Purpose of Storage"—"Stores"—"Shops."

BOYD, C., granted a mandamus compelling the defendant city to issue a building permit to the applicant for a building to be used for storage purposes only, and provided in the order that such building was not to be used as a place to repair nor refurnish old articles. Statute 4 Edw. VII. c. 22, s. 19, and *Toronto* v. *Foss*, 22 O. W. R. 328; 3 O. W. N. 1426, considered.

Motion by one Hobbs for a peremptory order in the nature of a mandamus requiring the city corporation and the

city architect to issue to the applicant a permit for the erection of a building.

W. C. Chisholm, K.C., for the applicant.

C. M. Colquhoun, for the respondents.

HON. SIR JOHN BOYD, C.:—In the application for permit to build it is stated that the building to be erected is for the "purpose of storage." It is proposed to store therein such things as (second-hand) machinery, furniture, or printing presses, for safe-keeping until removed. If the use of the building is thus defined and limited as a mere place of deposit, I do not think it falls within the classes of buildings prohibited by the by-law. The by-law is based on the Municipal Act, as amended in 1904, 4 Edw. VII., ch. 22, sec. 19, relating to the regulation and control in cities of the location, erection, and use of buildings for "laundries, butcher-shops, stores, and manufactories." The one pertinent word in this connection is "stores." In *Toronto* v. *Foss*, 22 O. W. R. 328; 3 O. W. N. 1426, it was conceded by counsel that the word "stores" in this context meant "shops." I think that is so. Probably, for the sake of euphony, after saying "butcher-shops," the further idea as to "shops" generally was carried out by using its equivalent, "stores." The dictionaries tell us that in the United States and the British colonies adjoining "store" is used to denote a place where goods are kept for sale, and quote Captain Basil Hall, writing about his travels in North America, where he says, "Stores as the shops are called." See Century Dictionary and English Imperial Dictionary, *sub voce* "store."

The legislation gives power to forbid the residential districts in cities being disturbed by the near locality of places where business is actively carried on, places to which the public is invited to come for purposes of traffic (buying and selling) or where anything like manufacturing work is being done. The broad meaning of "shop" is (1) a building appropriated to the selling of wares at retail, and (2) a building in which making or repairing of an article is carried on or in which any industry is pursued; *e.g.*, machine-shop, repair-shop, barber's shop; see Century Dictionary *sub voce* "shop." I think the permit may properly issue in this case to erect this building as a place of storage only, so that whatever engines or machines may be deposited there for safe-keeping are not to be repaired, refurnished, painted, or

otherwise dealt with as might be in a repair-shop or place of manufacture.

With these restrictions, I grant the application, but it is not a case for costs; the city authorities have not acted capriciously, and have had cause to fear that the building might be improperly used, were a broad permit given.

HON. SIR JOHN BOYD, C. SEPTEMBER 20TH, 1912.

RE BAYNES CARRIAGE CO.

4 O. W. N. 30; O. L. R.

Company — Winding-up — Petition for — Evidence in Support — Examination of Directors — Winding-up Act, ss. 2 (e), 13, 107, 135.

BOYD, C., *held*, that under s. 135 of the Dominion Winding-up Act, R. S. C. (1906), c. 144, the procedure provided for by the Consolidated Rules of Practice, is applicable to petitions for winding-up a company, and, therefore, witnesses could be examined in support of such a petition.

Re Belding, 18 O. W. R. 670, followed.

See *Re McLean, Stinson & Brodie*, 18 O. W. R. 163, 2 O. W. N. 435..

Motion on behalf of the company and directors to set aside an appointment to examine directors of a company and the subpœna to testify, therewith served by the petitioners, on the ground that it was not competent for the petitioner to use such evidence on an application for a winding-up order under the Dominion Act.

H. A. Burbidge, for the company and directors.

J. Grayson Smith, for the petitioners.

HON. SIR JOHN BOYD, C.:—The petitioners are shareholders to the extent of $50,000 paid up shares, the total capital being $375,000. The broad position taken is that the procedure under the Consolidated Rules is not available under the Act. It is also urged that directors as officers cannot be so examined. As I read the Act, it makes no express provision as to this preliminary procedure except what is found in sec. 13, *i.e.*, the application is to be by petition, of which four days' notice is to be given to the company before the application is made. No provision appears as to how the petition is to be supported or verified. It seems to be that it is only by reference to secs. 134 and 135, that the *modus operandi* can be ascertained.

Sections 107 to 133 are headed "Procedure," but they apply generally to proceedings under a winding-up order, that is, after it has been made, and not to this preliminary application for such an order. Section 116 is the only one which relates in terms to a step before the winding-up order is made, and that is of a conservatory character. Sections 134 and 135 relate to "Rules, Regulations, and Forms." Section 134 provides for the Judges making "forms, rules, and regulations," to be followed and observed in proceedings under the Act, but no action has been taken in this direction; so that sec. 135 now controls the situation applicable to the present motion. It reads: "Until such forms, rules, and regulations are made the various forms and procedures . . . shall unless otherwise specially provided be the same as nearly as may be as those of the Court in other cases." No other special provision has been pointed out to me, nor do I know of any which derogates from this sweeping direction as to the method of procedure. I read the word used "procedure" as including rules, and regulations, and methods of practice current in the High Court of Justice (sec. 2e), which are to be adapted as nearly as may be to the uses of the profession under the Winding-up Act. The marginal gloss is not of authority, but it is correct as found opposite sec. 135, to wit: "Until rules are made procedure of Court to apply." The practice of the Court is to support petitions by affidavits or by *viva voce* evidence of witnesses under the Consolidated Rules in that behalf, 489, 491, 492. Substantially the very matter now in dispute was decided as I now decide in earlier cases: see *Re Belding*, 18 O. W. R. 670.

I see no reason why the directors should not be examined as witnesses. They know more about the internal affairs of the concern than any other, or should have such knowledge, and the shareholders should not be deprived of this source of information when no imputation of *mala fides* exists. The policy of our legal methods is to facilitate and to simplify proceedings, and English cases in other conditions cannot control what is the manifest intention of the law-makers as set forth in this Winding-up Act.

All I now decide, is that, it is competent for the petitioners to examine the directors and the procedure taken is right.

The application must be dismissed with costs.

DIVISIONAL COURT.

SEPTEMBER 21ST, 1912.

RE ST. DAVID'S MOUNTAIN SPRING WATER CO. (LANDLORD) & LAHEY (TENANT).

4 O. W. N. 32.

Landlord and Tenant—Summary Proceeding to Eject Overholding Tenant — Dispute as to Tenancy—Evidence — Inference from Silence—New Trial—Costs.

The company, claiming to be the owners of certain property in the possession of Lahey, whom they alleged to be their tenant, served him with a notice to deliver up possession. Upon his refusal so to do, they took proceedings under the Overholding Tenants Act, before the Judge of the County Court of the county of Welland. The Judge made an order for possession; and Lahey appealed therefrom, upon the grounds that the Judge's decision was wrong in law and in fact and that evidence was wrongly excluded.

DIVISIONAL COURT remitted to County Court Judge for new trial the question of tenancy on the ground of improper rejection of evidence. Costs of appeal to be in discretion of Judge on new trial.

The appeal to Divisional Court was heard by HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., HON. MR. JUSTICE BRITTON. and HON. MR. JUSTICE RIDDELL.

O. H. King, for Lahey.

W. M. Douglas, K.C., for the company.

HON. MR. JUSTICE RIDDELL:—The company claiming to be owners of certain property in the possession of Lahey, whom they claimed to be their tenant, served him with a notice to deliver up possession; upon his refusal so to do, they took proceedings under the Overholding Tenants' Act, before the Judge of the County Court of the county of Welland. The learned County Court Judge made an order for possession, and Lahey now appeals upon the grounds that the judgment is wrong in law and in fact, and that evidence was wrongly excluded.

The evidence so far as admitted, shews that Lahey being in possession of the property, at a meeting of the company the secretary called attention to the unsatisfactory condition of affairs owing to there being no definite agreement with Lahey, whereupon a resolution was passed in the following terms: "Resolved to give the house and farm to Mr. Lahey rent free, in consideration of his keeping the front trees cultivated and looked after; such arrangement, however, to be terminated at any time at the will of the directors."

Lahey was present when the resolution was passed, and it was read over to him. Lahey swears that he said nothing, but was not allowed to explain why he said nothing. The president of the company on the contrary says: "He thanked the directors for appointing him, and told them that he would get out at any minute they asked him"—this Lahey specifically denies.

It is rather indicated than proved that the property had been purchased by the company from Mrs. H-D. acting for herself, and as Lahey claimed (at least) in part for him, he claiming a one-third interest. Counsel for Lahey stated to the County Court Judge—upon the Judge saying: "He can't dispute the landlord's title"—"He has no title over us, we are as much owner as he is." Whereupon the learned Judge said: "That doesn't make any difference. I suppose the law goes this far, that if Mr. Hill is the owner of property and he "accepts a lease from you although he may have an interest in the property, he can't dispute your title." And it is quite manifest that the County Court Judge proceeded on the assumption that there was an acceptance by Lahey of the provisions of the resolution already spoken of. If the learned Judge so found after hearing all the evidence properly admissible, no one could quarrel with his determination—but he seems to have reached his conclusions with the fact before him that Lahey swore that he stood silent when the resolution was read, and without an explanation being permitted of his silence.

No doubt "silence gives consent" in many cases—and no doubt in many other cases silence implies assent. But silence is not conclusive; it may be explained. I can conceive of more than one explanation which would nullify every adverse inference to be drawn from this silence—I do not mention any in view of a continuation of the trial being the proper course in my opinion.

The Court was called upon to pass upon the question whether Lahey accepted the terms of the resolution; that depended upon (1) the relative credibility of Murphy and Lahey, and (2) the construction to be placed upon the facts as found by the Court to be. Lahey should have been allowed to give his explanation in order to enable the Judge to determine the amount of credit to be given to his testimony. It is a matter of every day experience that a trial tribunal forms a low opinion of the credit of a witness for a time only to change it when his full story is told. The explanation, too,

would or might determine whether silence (if his story were accepted) was an assent.

It has been suggested that Lahey is in any case bound by another kind of estoppel—it is argued that his silence (if there was a silence), and his conduct led the company not to take proceedings—that the company acted upon this silence. It is sufficient to say that there is no tittle of evidence of any such result.

I think there should be a new trial—the evidence already taken to stand, but to be supplemented as may be thought best. No doubt the full facts of the title will be gone into unless the County Judge finds an estoppel.

As it may turn out that all the evidence adduced will not advance matters, I think the costs of this appeal and of the new trial as well as the proceedings heretofore had should be in the discretion of the County Judge.

The Divisional Courts have more than once said that County Court Judges should give reasons for the conclusions they arrive at; it seems necessary to repeat this once more.

HON. MR. JUSTICE BRITTON:—It is to be regretted that the evidence tendered by Lahey in explanation of his alleged silence, when the resolution mentioned was read and passed in his presence, was rejected—Lahey was entitled in law to tell his whole story in regard to the particular transaction relied upon by the landlord—to establish Lahey's tenancy. Simply because of the improper rejection of part of the evidence Lahey was prepared to give, I agree that there should be a new trial—and on the terms mentioned by my brother Riddell. I entirely agree with the contention of counsel for the landlord—that as the law now is—it is competent for, and the duty of the County Judge—to determine the question of tenancy—and the termination of it—and that the Judge may do this on conflicting evidence. *Fee* v. *Adams*, 16 O. W. R. 103, and *Moore* v. *Gillies*, 28 O. R. 358, are in point.

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—I think that Lahey should have had the opportunity to develop his case in evidence.

There must be a new trial. I thought Lahey ought to have his costs of this appeal, but will not dissent from the view of my learned brothers as to costs.

MASTER IN CHAMBERS. SEPTEMBER 21ST, 1912.

McVEITY v. OTTAWA CITIZEN.

4 O. W. N. 37.

Defamation — Libel — Security for Costs — Insolvent Plaintiff — Alleged Libel Involving Criminal Charge—Report of Proceedings before Magistrate—Animus.

MASTER-IN-CHAMBERS, *held*, that where an alleged libel is in the form of a report of the acquittal of plaintiff on a criminal charge, and the report impugns the correctness of the verdict, a jury might fairly say that the alleged libel involved a criminal charge.

Duval v. *O'Beirne*, 20 O. W. R. 884; 3 O. W. N. 513, referred to.

Motion for security for costs dismissed, costs in cause.

Motion for security for costs in a libel action.

H. M. Mowat, K.C., for motion.

J. T. White, for plaintiff, contra.

CARTWRIGHT, K.C., MASTER:—The motion is supported by an affidavit that there is an unpaid execution in the hands of the sheriff of county of Carleton against plaintiff for over $1,000. This is not in any way controverted. The motion is, however, resisted on the ground that the alleged libel involves a criminal charge. This is based on the fact that the opening words of the report in defendants' newspaper are as follows:

"City Solicitor was exonerated.

"Was alleged to have entered the premises.

"Despite the fact that sec. 61 of the Criminal Code of Canada allows (sic) that any trespasser resisting an attempt to prevent his entry into or on to property that is not his own is guilty of an act of assault, Deputy Magistrate Askwith dismissed an alleged case of assault Saturday against City Solicitor McVeity, when there was evidence produced to shew that he had used force in an attempt to gain admittance to property other than his own."

Thereafter sec. 61 is set out in full, and the evidence taken before the magistrate, the whole report covering three typewritten pages. It was argued that as it appeared from the report itself that the charge had been dismissed, the words "Despite the fact, etc.," could not be said to involve a criminal charge.

Whatever may be finally decided on this point, I think that in view of the late case of *Duval* v. *O'Beirne*, 20 O. W. R. 884; 3 O. W. N. 513, and the authorities there cited, that

question must be left to the jury. It may be thought that the animus of the whole report implies that in the opinion of the writer the magistrate should have convicted—and this may be held to imply a criminal offence—"despite the fact that the charge was dismissed." It seems to be at least arguable that if after an acquittal, e.g., for murder, a newspaper was to state that this was a gross miscarriage of justice, the accused could support an allegation that this involved a criminal charge against him—unless the fact of acquittal was conclusive because there could not be any further proceedings in the matter. In *Routley* v. *Harris*, 18 O. R. 405, it was held that the allegation of an offence punishable by imprisonment and not merely by a fine involved a criminal charge. An assault is punishable by imprisonment in the discretion of the Court or magistrate. In some cases it might be the only appropriate and adequate punishment. See Odgers, Broom's C. L. 307, and Criminal Code, sec. 291, which allows imprisonment for two months with or without hard labour even on a summary conviction for common assault.

The motion is dismissed with costs in the cause, as the point is new.

MASTER IN CHAMBERS. SEPTEMBER 21ST, 1912.

UNION BANK v. McKILLOP.

4 O. W. N. 36.

Judgment—Summary—Con. Rule 603—Action on Guaranty—Proof of Amount Due—Liability—Reference.

MASTER-IN-CHAMBERS on a motion for summary judgment on a guarantee, made an order as in *Sovereign Bank* v. *McPherson*, 14 O. W. R. 59.

Costs in cause.

Action on a guarantee in which plaintiffs moved for summary judgment under Con. Rule 603.

D. C. Ross, for the plaintiffs' motion.

Featherston Aylesworth, for the defendant, contra.

CARTWRIGHT, K.C., MASTER:—I have read the cross examination of defendant's officer on his affidavit in answer to the motion.

This does not seem to put the case any higher for the defendant than in the similar case of *Sovereign Bank* v. *McPherson*, 14 O. W. R. 59.

An order may go as in that case if the defendant really wishes to have the exact amount due on the guarantee ascertained and formally proved either on a reference or at a trial. If the latter course is adopted the defendant should plead in four days after delivery of statement of claim and the case should be set down on the peremptory list after being on the general list a week.

Costs as usual will be in the cause.

MASTER IN CHAMBERS. SEPTEMBER 23RD, 1912.

FARMERS' BANK v. SECURITY LIFE ASSCE. CO.

4 O. W. N.

Process—Writ of Summons—Service out of Jurisdiction—Motion to Set Aside—Conditional Appearance—Cause of Action.

Motion by defendants to set aside an order permitting service of a writ of summons herein on them in Montreal, on ground that payment of the guarantee on which action was brought was to be made in Montreal and there only.

MASTER-IN-CHAMBERS permitted defendants to enter a conditional appearance, leaving plaintiff to prove a cause of action within the province at the trial at his own peril.

Farmers Bank v. *Heath*, 21 O. W. R. 283, 403; 22 O. W. R. 614; 3 O. W. N. 682-805-879, followed.

Costs in cause.

This was an action on a guarantee given by defendants who are all resident at Montreal, where the document in question was given on 29th December, 1909. The usual order for service was made under Con. Rule 162 (2). The defendants moved to set this aside.

H. E. Rose, K.C., for motion.

M. Lockhart Gordon, contra.

CARTWRIGHT, K.C., MASTER:—The guarantee was admittedly signed at Montreal and it was argued that prima facie this would not import payment outside the province of Quebec.

It was further contended that in any case even if the guarantors had to seek out their creditor, that this would be done in Montreal itself, because sec. 70 of the Banking Act,

R. S. C. ch. 29, provides that "the bank shall establish agencies for the redemption and payment of its notes at the cities of Toronto, Montreal," and others; and that, therefore, payment of the obligation in question could be properly made at Montreal unless there was an express agreement to the contrary.

It was contended in addition, that a bank being incorporated to do business throughout the Dominion, could not be said to be resident in the province in which its head office was situated, more than in any other. And the provisions of sec. 76 (a) of the Banking Act were also emphasized.

The questions are new in my experience, and are, no doubt, worthy of consideration. Copies of the whole correspondence on the matter have been put in by the plaintiffs. This comprises a good many letters passing between the defendants and the head office of the plaintiffs or their Toronto solicitors, and pressing for payment. If this was to be made to the head office or the solicitors then the order was right. But this is nowhere exactly stated—though the whole of the negotiations were with them only. The matter is left in such doubt that the best course seems to be to allow the defendants to enter a conditional appearance and leave the plaintiff to prove a cause of action within the province on peril of having their action dismissed with costs.

This was approved in the recent case of *Farmers Bank* v. *Heath*, 21 O. W. R. 283-403; 22 O. W. R. 614; 3 O. W. N. 682-805-879.

A similar order will go in this case—defendants to have a week to appear—costs in the cause. The writ should be amended by changing name of first defendant to "Security Life Assurance" instead of "Insurance."

JUDGE'S CHAMBERS.

HON. SIR JOHN BOYD, C. SEPTEMBER 24TH, 1912.

DICK v. STANDARD UNDERGROUND CABLE COMPANY.

4 O. W. N.

Action—Stay of Proceedings—Mechanic's Lien—Independent Action.

BOYD, C., *held*, that where a contractor has a claim against an owner of land larger than the value of the land and wishes to prove his claim in an action, independently of Mechanics' Lien proceedings, s. 37 of the Mechanics' Lien Act, 10 Edw. VII. c. 69, does not give the officer charged with the trial of the lien proceedings power to stay his independent action.

Judgment of MONCK, Co.J., reversed, and stay vacated.

An appeal by plaintiffs from an order of HIS HONOUR J. F. MONCK, local Judge for county of Wentworth, in chambers, on September 12th, 1912, perpetually staying this action on the ground that the matters in controversy in this action are at present being tried in another action.

E. C. Cattanach, for the plaintiff.

G. H. Levy, for the defendants.

HON. SIR JOHN BOYD, C.:—The plaintiff Dick claims a large amount of damages, $100,000, against the defendants for breach of contract in not supplying materials to carry on a construction contract made by the plaintiff with the owners of the land, the defendants. This action was begun after mechanics' lien proceedings were begun by an alleged lien-holder on behalf of himself and all others against the contractor and the owner. To determine what should be paid for liens it may be necessary to consider the rights of the contractor, and owner *inter se*, but the contractor does not propose to claim any lien on the property, and refuses to bring in any such claim in the mechanics' lien proceedings. He is claiming a much larger sum than the value of the land by way of damages against the owners, and his claim, if successful, will not interfere with the right of those having liens to be paid under the Act. Dick does not propose to make any claim under the Act, and I do not think the statute is of sufficient stringency to enable the judicial officer charged with the mech-

anics' lien contest to bar Dick in his independent action and stay all proceedings therein perpetually. All things necessary to work out the liens *quoad* the land are within his jurisdiction, but I do not think a wider scope should be given to the provisions of the Act 10 Edw. VII. ch. 69, sec. 37. I vacate the order to stay proceedings with all costs of motion and appeal to be in the cause to the plaintiff.

MASTER IN CHAMBERS. SEPTEMBER 25TH, 1912.

BLACK v. CANADIAN COPPER CO.

4 O. W. N.

Particulars—Negligence—Statement of Claim—Damage to Stock of Florist by Noxious Gases — Particulars Unnecessary — Motion Premature.

Motion for particulars of negligence and damage alleged in statement of claim. Action was for damage to the business and stock of plaintiff, a florist, by noxious gases, vapors, acids and smoke alleged to have been wrongfully and negligently permitted to escape from defendant's works.

MASTER-IN-CHAMBERS, held, that as the allegation of negligence was unnecessary to plaintiff's case, he need not give particulars of it. *Tipping* v. *St. Helen's Smelting Co.*, 4 B. & S. 608, 616; 11 H. L. C. 642, referred to.

That particulars of damage were premature. Motion dismissed, costs in cause, without prejudice to plaintiff's right to renew application after discovery.

Action brought by a florist residing at Sudbury against defendant company to restrain it "from continuing to allow the escape of noxious vapors, gases, acids, smokes, etc., from its roastbeds and smelter on to the lands of plaintiff, and the vegetation thereon." Plaintiff also claimed $5,000 as compensation for damages already suffered.

In the 4th paragraph of the statement of claim it was said that defendant company "wrongfully and negligently permitted and allowed the said noxious vapors, gases, acids and smoke to escape," and thereby caused plaintiff great damage in respect of his plants, flowers, trees, etc. In 5th paragraph it was said that plaintiff in consequence of the continued damage had been obliged at great sacrifice to sell his property and to move some miles from Sudbury if he was successfully to carry on his business in case defendant company were permitted to continue its present methods of smelting.

Defendant before pleading asked for particulars under the 4th paragraph of the negligence therein charged as well as of the plants, etc., said to have been destroyed or injured. As to paragraph 5 particulars were asked as to what was meant by the sale of the lands at a great sacrifice.

The plaintiff's solicitors in reply sent a telegram saying "defendant has all particulars referred to."

The defendant thereupon moved to set aside the statement of claim as not complying with Rule 268 and in particular paragraphs 4 and 5 as being embarrassing because indefinite; or for particulars. The only material in support was the statement of claim itself and the letter and telegram in reply already referred to.

H. E. Rose, K.C., for motion.

C. M. Garvey, for plaintiff contra.

CARTWRIGHT, K.C., MASTER:—This case is similar in its facts to those of the leading case of *Tipping* v. *St. Helen's Smelting Co.*, 4 B. & S. 608 and 616, and affirmed in the House of Lords, 11 H. L. C. 642. There the declaration used the words "wrongfully and injuriously," and it would seem that in the present case negligence need not have been alleged as the liability of the defendant company must depend on the facts and "locality and all other circumstances must be taken into consideration," in determining the right of the plaintiff to the relief asked.

The whole question of the right to particulars was fully discussed in *Smith* v. *Reid*, 17 O. L. R. 265. Here too, as in that case, the plaintiff may rely on the doctrine of *res ipsa loquitur*, leaving the defendants to escape liability if they can shew any grounds such as are indicated in the judgments in the *Tipping Case*.

This disposes of the motion so far as the 4th paragraph is concerned. The one material fact on which the plaintiff must rely is that damage has been caused to his property by the defendant's works. This is sufficiently and plainly alleged and no particulars are necessary at this stage. As to the 5th paragraph if the defendant company is held liable the damages payable to plaintiff would most probably be a matter of reference and would not be gone into at the trial, which no doubt will be taken by a Judge without a jury.

I also draw attention to the absence of any affidavit by the defendant company that the particulars asked for are necessary for pleading.

This omission is suggestive in face of the telegram of the plaintiff's solicitors. Following my previous decision in *Spalding* v. *Canadian Pacific Rw. Co.*, 9 O. W. R. 870, I think the motion should be dismissed with costs in the cause, and the statement of defence should be delivered in ten days.

This is without prejudice to a similar motion after discovery has been had if defendants think it necessary.

HON. MR. JUSTICE LATCHFORD. SEPTEMBER 25TH, 1912.

WILLIAM PEACE CO. v. WILLIAM PEACE.

4 O. W. N.

Injunction — Restraining Breach of Covenant — Not to Engage in Trade.

An action for infringement of patent for metal weather strips, for an injunction restraining manufacture by the defendant of such weather strips in Hamilton, and for damages.

LATCHFORD, J., found defendant guilty of infringing his covenants with plaintiff company that he would not engage in business within five miles of Hamilton for 10 years, nor allow his name to be used in any similar business, and granted an injunction as prayed. with costs.

T. Hobson, K.C., for the plaintiffs.

A. O'Heir, for the defendant.

HON. MR. JUSTICE LATCHFORD:—I intend to reserve my decision as to whether the defendant has been guilty of any infringement of either of the patents which he transferred to the plaintiff company. Other phases of the case may, however, now be disposed of. The covenant on the part of the defendant contained in the agreement made in April, 1908, has to be construed strictly. So much is in favour of the defendant. He undertook for good consideration not to engage in any business for the manufacture of weather-strips within the city of Hamilton or within five miles of the limits of the said city during the period of ten years from the date of the agreement. He further covenanted that he would not allow his name to be used in connection

with any such business within the same limits for the same period. I find as a fact that the defendant has been guilty of a breach of both the provisions of this covenant—that he has in fact engaged in a business for the manufacture of metal weather strips within the city of Hamilton within the last two years, and therefore within the period in which he undertook he would not engage in that business. The defendant bought a machine for the purpose of manufacturing weather strips. He bought it in his own name. It was invoiced to him. He received it and paid for it. It was installed in a building belonging to the defendant's wife. It has been seen there, not in operation, but with pieces of weather-strip lying around it, indicating that it had been in operation. The defendant has stated in the witness-box that his son and not he has been engaged in the manufacture of weather-strips in the city of Hamilton. This, I find, is a mere pretence. There is nothing but the evidence of the defendant to support his statement, and the facts admitted by him make it clear to my mind that not his son but he himself is and has been engaged in this business. He also broke the second provision of the covenant in allowing his name to be used in connection with the business of manufacture by advertising in a Hamilton newspaper stating that "the original William Peace" would instal "new 1910 weather-strips." These were weather-strips manufactured by himself. The defendant purchased weather-strips manufactured under a patent of invention granted to him in the United States and transferred to a Peace Company in the United States. The material which he so purchased he used in or within five miles of the city of Hamilton. This was in breach of his agreement. The only party having the right to manufacture and sell the invention of the defendant in Canada was the plaintiff company. Not deciding for the present whether there was an actual infringement of the plaintiff's rights in the weather-strip and rail which have been latterly in use by the defendant, I think the plaintiffs are entitled to a declaration that the defendant has engaged in business in breach of his covenant as I have stated, and that the plaintiffs are entitled to an injunction restraining him in the terms of his agreement for the balance of the period of ten years from engaging in any business for the manufacture of metal weather-strips within the said city of Hamilton or within five miles of the limits of said city,

and that he should be also restrained from allowing his name to be used in connection with any such business for the balance of the said term within the said limits. The plaintiffs will also be entitled to their costs of the action. I will grant a stay of thirty days after I find on the other question.

The principal issues in this case were disposed of at the hearing. The only question reserved was whether the metallic strip used by the defendant after the plaintiffs had threatened to take action against him was an infringement upon either of the patents assigned to the plaintiffs by Peace. This strip is I am satisfied identical with that which Peace sought unsuccessfully to have patented in 1902. It may infringe upon Dominion of Canada Patent No. 99076—a point which it is not necessary for me to determine as in that patent the plaintiffs have no interest. But it does not in my opinion infringe upon the patents acquired by the plaintiffs and the defendant at their instance cannot be prohibited from using it. Otherwise judgment as at trial—stay of 30 days.