The
Ontario Weekly Notes

Vol. IV. TORONTO, SEPTEMBER 27, 1912. No. 2

HIGH COURT OF JUSTICE.

MIDDLETON, J. SEPTEMBER 17TH, 1912.

RE BOULTON AND GARFUNKEL.

Vendor and Purchaser—Contract for Sale of Land—Objection to Title—Rights of Way over Private Lane—Compensation.

Petition by Garfunkel, the purchaser, under the Vendors and Purchasers Act, to have it declared that certain rights of way, existing over what was referred to as a private lane, constituted an objection to the vendor's title, and for a reference to determine the amount of compensation to which the purchaser would be entitled if these rights were not released.

W. C. Chisholm, K.C., for the petitioner.
R. S. Cassels, K.C., for Boulton, the vendor.

MIDDLETON, J.:—John B. Boulton in his lifetime owned a block of land extending from Henry street to McCaul street, in the city of Toronto. 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 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 subdivided the parcel, and laid out certain private lanes thereon, including the one in question. He erected houses upon some of the subdivided 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 in 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 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 subdivided—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.

MIDDLETON, J. SEPTEMBER 17TH, 1912.

BOECKH v. GOWGANDA-QUEEN MINES LIMITED.

Res Judicata—Action for Money Due on Subscription for Shares —Judgment in—Issues—Refusal of Leave to Amend by Setting up New Defences—Attempt to Raise in Action to Rescind Subscription—Injunction to Restrain Enforcement of Judgment—Judicature Act, sec. 57, *sub-sec.* 9.

Motion by the plaintiff to continue until the trial an ex parte injunction granted by FALCONBRIDGE, C.J.K.B., restraining the defendants from enforcing a judgment obtained by the defendants against the plaintiff in the High Court of Justice for Ontario, on the 29th September, 1910.

J. W. McCullough, for the plaintiff.
M. L. Gordon, for the defendants.

MIDDLETON, J.:—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 in that action 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. An 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 (24 O.L.R. 293, 2 O.W.N. 1307), and in the Supreme Court; and the Privy Council has refused leave to appeal.

The defendant in that action 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, 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 cause 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.

BOYD, C. SEPTEMBER 19TH, 1912.

*CAMPBELL v. TAXICABS VERRALS LIMITED.

Company—Action against—Absence of Organisation—Legal Existence by Virtue of Letters Patent—Companies Act—Authority of Solicitors to Defend Action — Judgment against Company—Absence of Assets—Costs.

Motion by the plaintiff for an order setting aside an appearance entered in the name of the defendant as a company, and

*To be reported in the Ontario Law Reports.

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 organised 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.

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

J. MacGregor, for the plaintiff.

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

Boyd, C., referred to Simmons v. Liberal Opinion Limited, In re Dunn, [1911] 1 K.B. 966, and distinguished it from the present case. The defendant in that case was sued as a company; it turned out that, though some preliminary steps had been taken to form a company, the matter had not been consummated by registration, so that in fact there was no company—it was non-existent. In the present case, the defendant, sued as a company, had been legally constituted a company by letters patent of Ontario dated the 27th October, 1910. No steps appeared to have been taken to organise the company in the usual way; and, after the charter issued, nothing was done until lately, when a meeting was held, and the directors ratified what had been done in defending the action. The charter had not become forfeited under any of the provisions of the Companies Act, by reason of the inaction. . . .

[Reference to 7 Edw. VII. ch. 34, secs. 16, 17, 18, 21, 79, 85 (O.); Lindley on Companies, 6th ed., vol. 1, p. 378; Farrell v. Eastern Counties R.W. Co., 2 Ex. 344; Thames Haven Dock and R.W. Co. v. Hall, 5 M. & Gr. 274.]

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

BOYD, C., IN CHAMBERS. SEPTEMBER 20TH, 1912.

*RE BAYNES CARRIAGE CO.

Company—Winding-up—Petition for—Evidence in Support—Examination of Directors—Winding-up Act, secs. 2(*e*), 13, 107-133, 134, 135—*Practice of High Court.*

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

H. A. Burbidge, for the company and directors.
Grayson Smith, for the petitioners.

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 argued that directors as officers cannot be so examined. . . .

[Reference to secs. 13, 107-133, 134, 135, of the Winding-up Act, R.S.C. 1906 ch. 144.]

I read the word used in sec. 135, "procedures," as including rules and regulations and methods of practice current in the High Court of Justice (sec. 2(e)), which are to be adapted as nearly as may be to the uses of the profession under the Winding-up Act. . . . The practice of the Court is to support petitions by affidavits or by viva voce evidence of witnesses under the Con. 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 Lumber Co. Limited, 23 O.L.R. 255, 2 O.W.N. 739, 775.

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

*To be reported in the Ontario Law Reports.

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.

[See Re McLean Stinson and Brodie Limited, 2 O.W.N. 294, 435.]

BOYD, C., IN CHAMBERS. SEPTEMBER 20TH, 1912.

RE HOBBS AND CITY OF TORONTO.

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

Motion by 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.

BOYD, C.:—In the application for a 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 bulding 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, 1903, sec. 541a, as added in 1904 by 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 manufacturies." The one pertinent word in this connection is "stores." In City of Toronto v. Foss, 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, refurbished, 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.

DIVISIONAL COURT. SEPTEMBER 21ST, 1912.

RE ST. DAVID'S MOUNTAIN SPRING WATER CO. AND LAHEY.

Landlord and Tenant—Summary Proceeding to Eject Overholding Tenant—Dispute as to Tenancy—Evidence—Inference of Assent from Silence—Credibility of Witness—Rejection of Testimony—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 to do so, 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.

The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

O. H. King, for Lahey.

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

RIDDELL, J.:—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 asserted (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 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 Court 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 Court 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.

Britton, J.:—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 landlords 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 landlords that, as the law now is, it is competent for and the duty of the County Court Judge to determine the question of tenancy, and the termination of it, and that the Judge may do this on conflicting evidence. Re Fee and Adams, 1 O.W.N. 812, and Moore v. Gillies, 28 O.R. 358, are in point.

FALCONBRIDGE, C.J.:—I think that Lahey should have had the opportunity to develope 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.

New trial directed.

CHAPMAN v. McWHINNEY—MASTER IN CHAMBERS—SEPT. 16.

Pleading—Statement of Claim—Inconsistency with Endorsement on Writ of Summons—Amendment—Validation of Pleading—Costs.]—The endorsement on the writ of summons was for 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; to commission on exchange 2½% $550: total $7,925. In the statement of claim the transactions between the parties were set out, and it was said that 2½ per cent. was only half the usual rate, which the plaintiff had agreed to accept in consideration of a promise by the 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 the 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. The Master said that the cases under Con. Rule 244 were few; and the inclination of the Court was not to give it a very wide application: Muir v. Guinane, 7 O.W.R. 54, 158; Nicholson v. Mahaffy, 8 O.W.R. 685. The only substantial question here was one of the costs, as, if necessary, the plaintiff would have leave to amend. It was, perhaps, going a little

beyond the scope of Con. Rule 244 to ask in the statement of claim for double the amount claimed in the writ; though, as the defendant was resisting the smaller amount, he was 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 was, the best disposition of the case was to dismiss the motion, and let the defendant have full time to plead—validating the statement of claim as of this date. The costs should be to the defendant in the cause, as the motion was not uncalled for. J. R. Roaf, for the defendant. J. P. Crawford, for the plaintiff.

DAVIDSON V. PETERS COAL CO.—DIVISIONAL COURT—SEPT. 16.

Master and Servant—Injury to Servant—Negligence—Use of Explosives—Unguarded Receptacle—Cause of Injury—Negligence of Servant—Findings of Fact of Trial Judge—Appeal.]—Appeal by the plaintiff from the judgment of MULOCK, C.J.Ex.D., 3 O.W.N. 1160. The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ. The Court dismissed the appeal with costs. T. J. Blain, for the plaintiff. A. J. Anderson, for the defendants.

BROWN V. ORDE—BOYD, C., IN CHAMBERS—SEPT. 20.

Slander—Pleading—Statement of Defence—Justification—Fair Comment—Particulars.]—Appeal by the plaintiff from the order of the Master in Chambers, ante 18. The Chancellor dismissed the appeal; costs in the cause. J. King, K.C., for the plaintiff. H. M. Mowat, K.C., for the defendant.

UNION BANK OF CANADA V. MCKILLOP—MASTER IN CHAMBERS—SEPT. 21.

Summary Judgment—Con. Rule 603—Action on Guaranty—Proof of Amount Due—Liability—Reference.]—Motion by the plaintiffs for summary judgment under Con. Rule 603 in an

action on a guaranty. The Master said that the cross-examination of the defendant's officer on his affidavit in answer to the motion, did 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 should go as in that case, if the defendant really wished to have the exact amount due on the guaranty ascertained and formally proved, either on a reference or at a trial. Costs in the cause. D. C. Ross, for the plaintiffs. Featherston Aylesworth, for the defendant.

McVeity v. Ottawa Citizen Co.—Master in Chambers—Sept. 21.

Libel—Security for Costs—Insolvent Plaintiff—Allegel Libel Involving Criminal Charge—Report of Proceeding before Magistrate—Animus—Implication.]—Motion by the defendants for security for costs in an action for libel. The motion was supported by an affidavit that there was an unpaid execution in the hands of the Sheriff of Carleton against the plaintiff for over $1,000. This was not in any way controverted. The motion was, however, resisted on the ground that the alleged libel involved a criminal charge. This was based on the fact that the opening words of the report in the defendants' newspaper were 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 was 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. The Master said that, whatever might be finally decided on this point, in view of the late case of Duval v. O'Beirne, 3 O.W.N. 513, and the authorities there cited, that question must be left to the jury. It might be thought that the animus of the whole report implied that, in the opinion of the writer, the magistrate should have con-

victed—and this might be held to imply a criminal offence—"despite the fact that the charge was dismissed." It seemed 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., p. 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. Motion dismissed; costs to be costs in the cause, the point being new. H. M. Mowat, K.C., for the defendants. J. T. White, for the plaintiff.