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CARTWRIGHT, MASTER. MARCH 8TH, 1909.

CHAMBERS.

GORMAN v. HOPE LUMBER CO.

Venue—Change — Convenience — Witnesses — Postponement of Trial — Payment of Additional Expense.

Motion by defendants to change the venue from Perth to Sault Ste. Marie.

Gideon Grant, for defendants.

Featherston Aylesworth, for plaintiff.

THE MASTER:—The facts of this case are very similar to those in Scaman v. Perry, 9 O. W. R. 537, 761. Here the plaintiff swears only to 4 witnesses besides himself, which seems free from exaggeration. The defendants' manager swears to 16, though this number will probably "shrink before the test of the witness box:" per Boyd, C., in McDonald v. Dawson, 3 O. W. R. 773, 8 O. L. R. 73. He also shews why it would not be possible for defendants' witnesses to get out from the lumber camps and be at Perth on 29th instant, owing to the breaking up of the winter just about that time.

In these circumstances, if the venue remained at Perth, the trial would have to be postponed. It would, therefore, be better for plaintiff to have the trial at Sault Ste. Marie on 15th May, in which case the defendants must furnish to him $100, or whatever lesser sum is reasonable to take his witnesses to the trial. At that time the boats will be running again, and the journey will be less expensive than by rail.

Such an arrangement overcomes the difficulty that pressed the Chancellor in McDonald v. Dawson, 8 O. L. R. 72, 3 O. W. R. 773, and at the same time conforms to the

principle of McDonald v. Park, 3 O. W. R. 812, 972, and Hamilton v. Hodge, 8 O. W. R. 351, 421.

The costs of the motion will be in the cause.

CARTWRIGHT, MASTER. MARCH 8TH, 1909.

CHAMBERS.

GRAY v. CROWN LIFE INSURANCE CO.

Discovery — Production of Documents — Action on Life Insurance Policies — Application of Law of Quebec — Agreements between Insurance Company and Agent and Agent and Sub-agent — Materiality — Relevancy — Authority of Agents — Order for Better Affidavit on Production.

Motion by plaintiff for a better affidavit on production of documents from the defendants.

M. Lockhart Gordon, for plaintiff.

C. W. Kerr, for defendants.

THE MASTER:—The action is on two policies of insurance on the life of the husband of plaintiff. The statement of defence alleges that they are void by reason of his having died by his own hand, inasmuch as said policies were governed by the laws of Quebec. There are, therefore, two issues, both of which must be proved before defendants can succeed in refusing payment.

The plaintiff wishes to see the terms of the agreement made by the defendant company with Henderson, the general agent of the company for the province of Quebec, which is admitted to be in existence and to define his "duties and powers" (QQ. 172-174 of depositions of defendants' secretary). The same is true as regards Henderson's contract with Pratt as his city manager. It is no doubt most relevant to determine if the contracts are to be interpreted by Quebec or Ontario law.

In Cutten v. Mitchell, 10 O. W. R. 734, a similar question was raised, and on the document being examined by Anglin, J., "by consent of Mr. McKay, without which I would not have done so," as the learned Judge said at p. 736, he was satisfied that the plaintiffs in that case were not bound to produce it. Here in the same way the contracts are not mentioned in the defendants' affidavit on production, but Mr.

Kerr brought them on this argument, and was willing that I should examine them, as was done in the Cutten case. They were left with me for that purpose, and, after consideration, I have thought it right so to do. It would clearly be unfair at this stage to give any information of the contents of these documents, and I will only say that I again refer to Rule 312 as stating the guiding principle in all litigation under our present system to be this: so to act as "to secure the giving of judgment according to the very right and justice of the case." Here it is necessary to determine where the contracts sued on were made. That must depend on the authority of Messrs. Henderson and Pratt, as was conceded on the argument; and that will be evidenced by the two agreements in question, or may be so. They should, therefore be produced. But they both contain a clause making them strictly confidential. This, no doubt, refers to the terms of commission, which are not material. It will, therefore, be sufficient if copies of the printed part are produced, omitting the schedule in clause 9 of each of the agreements, which were both made on 1st February, 1905, and before the issue of either of the policies sued on.

The costs of the motion will be in the cause, as the point is not self-evident.

The deceased admittedly resided at Montreal, and the policies were applied for and received by him there, though they were signed by the company at Toronto, where the head office is situated.

TEETZEL, J. MARCH 8TH, 1909.

WEEKLY COURT.

RE DICKS.

Life Insurance — Policy Payable to Assured's "Surviving Children, Share and Share alike" — Variation by Will — Provision for Division when Youngest Child Attains Majority — Substituting Grandchildren in event of Death of Children — Variation of Terms of Policy — Substitution of Absolute for Contingent Interest — Provisions of Statutes in Force in 1895 — Right of Children to be Paid as each Attains Majority.

Application by Frederick Dicks, a son of Mary Dicks, deceased, for an order directing that $1,160 in the hands of

trustees, being his share of moneys derived from an insurance on the life of his mother, be paid over to him by the trustees, notwithstanding that all the children of Mary Dicks had not attained the age of 21, her will having provided for distribution when the youngest child should attain that age.

A. J. Russell Snow, K.C., for the applicant and adult children.

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

E. A. Forster and R. L. Defries, for the trustees.

TEETZEL, J.:—Under the two policies of insurance upon the life of Mary Dicks, for $5,000 each, dated respectively 30th January and 27th February, 1894, the insurance money upon her death was payable to the assured's "surviving children, share and share alike."

She died on 2nd March, 1895, and by her will, dated 10th December, 1894, she appointed her husband trustee to receive all the moneys payable under the two policies and others, describing them, and, after declaring them to be for the benefit of her children, directed that her husband should hold the insurance moneys and the other proceeds of her estate upon the following trusts:—

1. "To pay my just debts and funeral and testamentary expenses."

2. "To invest the proceeds thereof in securities of the Dominion of Canada or province of Ontario, or in mortgages on real estate, or stocks of chartered banks or building societies or loan companies, and to apply the annual income arising therefrom in the support of our children, and, should my said husband deem it necessary and advisable, he shall be at liberty to apply the corpus of my estate in the education, maintenance, and advancement of the said children or any of them, and, as soon as the youngest of my children shall have attained the age of 21 years, my said husband shall divide the said sum or so much thereof as may then remain, in equal shares, per stirpes et non per capita, among my children then surviving or the issue of any child or children deceased."

Then follows a provision that if all the children die before attaining 21 without issue, what may remain of the moneys shall go to the husband absolutely, but, in case any of them leave issue, the issue shall inherit in equal shares.

The application is made by Frederick Dicks, a son, for an order directing that the sum of $1,160, now in the hands

of the trust company, being his share of the balance on hand, should be paid out to him, notwithstanding that all the children of Mary Dicks have not yet attained 21 years of age.

The contention of the applicant is that under the terms of the policy he and the other children on the death of the mother had a vested interest in the insurance moneys, and that the provisions of the will postponing his absolute interest until the youngest child should attain 21 years of age, when the money should be divided per stirpes, were beyond the power of the testatrix under the law in force at her death.

In the first place, I think the provisions of the will are not a mere apportionment or an alteration of the apportionment of the insurance moneys, but are a variation of the terms of the policy. Under the policy the applicant upon the death of his mother was entitled to a vested interest in the insurance money; while under the will his interest other than the provision for his maintenance, &c., is made contingent upon his surviving the time when the youngest child should attain the age of 21 years, and thereby deprives him of the right of disposing of his interest, and gives the same to his child or children, should he leave any, otherwise to his surviving brothers and sisters.

Under the law as it stood at the death of the testatrix, there was no provision for an assured taking insurance moneys that had been apportioned to children and giving it to grandchildren.

The statute in force at that date was R. S. O. 1887 ch. 136, sec. 6, as amended by 51 Vict. ch. 22, sec. 3, and as again amended by 53 Vict. ch. 39, sec. 6.

As held in Re Grant, 26 O. R. 120, there is in the section as amended a clear distinction drawn between an "instrument in writing" and a will, and between what the insured may do by an instrument in writing and what he may do by his will. By his will he is only empowered "to make or alter the apportionment of the insurance money," and it does not empower him to declare that others than those for whose benefit he has effected the insurance, or for whose benefit he has declared the policy to be, shall be entitled to the insurance money, or to apportion it among others than those for whose benefit he has effected the policy, or for whose benefit he has declared it to be.

See also McIntyre v. Silcox, 30 O. R. 488; Scott v. Scott, 20 O. R. 313; Cartwright v. Cartwright, 12 O. L. R. 72, 8 O. W. R. 109.

I think these authorities clearly establish that, at the date of the will in this case, the law did not permit the testatrix by will to do other than apportion or alter the apportionment of the insurance money, among those for whose benefit it was effected, while in this case it seems to me she has gone further and sought to vary the apportionment by converting an absolute into a contingent interest, and by apportioning the share of any child who should die before the period fixed for distribution among her grandchildren.

The order will therefore be that the applicant is now entitled to be paid the balance of his share. Costs of all parties out of the trust fund.

MARCH 8TH, 1909.

DIVISIONAL COURT.

RE O'NEILL AND DUNCAN LITHOGRAPHING CO.

Master and Servant Act — Order of Police Magistrate for Payment of Wages — Right of Appeal to County Court Judge — Jurisdiction of Magistrate to Consider Defence of Failure of Consideration for Wages by Reason of Negligence of Servant — Jurisdiction of Judge on Appeal to Consider Same Defence — Prohibition.

Appeal by O'Neill from order of TEETZEL, J., ante 511, dismissing with costs a motion for prohibition.

A. M. Lewis, Hamilton, for appellant.

E. F. Appelbe, Hamilton, for the company.

THE COURT (MULOCK, C.J., MAGEE, J., CLUTE, J.), dismissed the appeal without costs.

MARCH 8TH, 1909.

DIVISIONAL COURT.

GOODYEAR v. TORONTO AND YORK RADIAL R. W. CO.

Street Railways — Injury to Person Crossing Track — Collision with Car — Negligence—Contributory Negligence —Findings of Jury.

Appeal by defendants from judgment of MAGEE, J., in favour of plaintiff, upon the findings of a jury, for the re-

covery of $375 in an action for damages for personal injuries sustained by plaintiff and for loss of a horse by reason of a collision between the horses and waggon driven by plaintiff and a car of defendants, upon the Kingston road, at the Woodbine avenue crossing, on 19th June, 1908, about 7.45 in the evening. The negligence charged against defendants was threefold: (1) excessive speed of car; (2) car not under proper control; (3) no warning to plaintiff of approach of car by sounding of gong or by a proper head-light. The jury found that the defendants "did not use proper care in approaching the crossing at too high a rate of speed;" they also negatived contributory negligence.

C. A. Moss, for defendants, contended that there should have been a nonsuit.

J. M. Godfrey, for plaintiff, contra.

The judgment of the Court (FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.), was delivered by

FALCONBRIDGE, C.J.:—I have re-perused this evidence in the light of the very earnest and capable presentation of the case made by counsel. The learned trial Judge could not have withdrawn the case from the jury. The damages were small, and this, it is contended, is significant. But we cannot say that 12 reasonable men could not have answered the questions as they did.

Appeal dismissed with costs.

MARCH 8TH, 1909.

DIVISIONAL COURT.

GORDON v. MATTHEWS.

Bankruptcy and Insolvency — Assignment for Benefit of Creditors — Right of Creditor of Partnership to Rank on Estate of Partner with Individual Creditors — R. S. O. 1897 ch. 147, sec. 7.

Apeal by plaintiff from judgment of MULOCK, C.J., 12 O. W. R. 1274.

The appeal was heard by FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.

R. S. Robertson, Stratford, for plaintiff.

G. C. Gibbons, K.C., for defendant.

RIDDELL, J.:—The position of a partner in respect of liability for the debts of a partnership in quite clear. "Every partner is liable jointly with the other partners . . for all debts and obligations of the firm incurred while he is partner:" Partnership Act, 1890, sec. 9 (Imp.) He owes these debts quite as much as he owes debts incurred by him.

When our statute R. S. O. 1897 ch. 147, sec. 7, says, "If any assignor or assignors . . owes or owe debts individually and as a member of a co-partnership," the case is contemplated of a person who is a member of a partnership incurring individual debts while the partnership incurs other debts which he owes as a member of the partnership under the rule above set out. The statute is introduced to make a statutory provision that the assets of the partnership are not to be used to pay the individual debts unless and until the partnership debts are provided for, and vice versa. This is the rule which has prevailed in England, and is laid down clearly by Lord Chancellor King in Ex p. Cook, 2 P. Wms. 500, who states the law as settled. It had been so decided by Lord Chancellor Harcourt in Ex p. Crowder, 2 Kemb. 706; and has not ever been varied in cases of bankruptcy.

And the estate to which recourse may be had without valid objection is, under the statute, the estate "by which the debt was contracted," i.e., determine whether the debt was contracted by partnership or by partner individually; and the debt of the partnership is entitled to share ratably in the partnership estate; the debt of the partner individually in the estate of the individual partner. The expression is, "the estates by which the debts . . . were contracted," not "the estates for the benefit or advantage of which the debts . . . were contracted." It makes no difference who may benefit by the transaction resulting in the debt—the whole question is, "who incurred the debt?"

For example, if a partner wished to furnish a house, and the tradesman made the agreement with the firm that the firm should pay, and the individual should not, the debt would not be one contracted "by" the individual, though for him and for his sole benefit; if a dealer were to sell to the firm, but with the stipulation that he was to be paid by an individual member of the firm, and this were agreed to, the debt would not be a debt of the firm but that of the individual partner. And if both firm and individual agreed to pay, it would make no difference for whose advantage the

debt was contracted, the debt would be incurred by both firm and individual.

In that case I am unable to see why a claim might not be made against both estates. If the firm A. & Co. have creditors B., C., and D., and the partner A. have creditors D., E., and F., D. can claim against both estates if the claims against the firm and the individual are not the same. Why should he not claim if the amount be the same? He has required and obtained the security of two debtors instead of one; why should he not have the advantage of his precaution?

The rule laid down by the judgment of the Chief Justice appealed from would operate to prevent a creditor who knows that a firm is shaky, but one of its members in fairly good standing, and insists on getting the security of the man who is worth something, from being in any better position than the creditor who was content with the firm's paper.

Whether it be necessary to elect under our statute should be left open for further consideration: the question does not arise here; the plaintiff has elected within the time which the authorities lay down, i.e., before accepting a dividend: Ex p. Bentley, 2 Cox C. C. 218.

The foregoing is, I think, the result upon principle. But authority is not wanting.

In re Chaffey, 30 U. C. R. 64, is a decision upon (1864) 27 & 28 Vict. (Can.) ch. 17, sec. 5 (7), of which the wording is not dissimilar to the present sec. 7. It was there decided that where a member of a partnership indorsed a note of the partnership payable to himself, the indorsee could treat the individual partner as having incurred a separate liability by his indorsement distinct from his joint liability as maker, and might claim upon either estate. It was held that he must elect: but, as I have said, that question does not arise in this case.

With the present opinion accords the opinion of the Divisional Court in Frost and Wood Co. v. Stoddart, 12 O. W. R. 688, when directing a new trial. The judgment upon the new trial (12 O. W. R. 1133) indicates that the real defect in the admissions, namely, that it did not appear whether the notes, &c., in the hands of the creditors had been accepted as in satisfaction of the former so as to annul the effect of the former, was not brought to the attention of the learned trial Judge. If and so far as the judgment

of my learned brother MacMahon is opposed to the present judgment, it should be overruled.

The appeal should be allowed, with costs here and below, and the plaintiff declared entitled to claim for a debt of $893.26 against the the estate of Myers.

BRITTON, J., concurred, for reasons stated in writing.

FALCONBRIDGE, C.J., agreed that the appeal should be allowed with costs here and below.

TEETZEL, J. MARCH 9TH, 1909.

WEEKLY COURT.

CURRAH v. RAY.

Vendor and Purchaser — Contract for Sale of Land — Action for Specific Performance — Reference as to Title — Possessory Title of Vendor to Strip of Land Laid out as Lane upon Plan — Knowledge of Purchaser — Conveyances of Lands Adjoining Lane by Reference to Plan — Easement — Extinguishment — Statute of Limitations — Intention to Renounce Right — Evidence as to Notice — Effect of Notice.

Appeal by plaintiff from report of local Master at Windsor upon a reference as to title in a purchaser's action for specific performance; and motion by defendant for judgment on the report.

A. H. Clarke, K.C., for plaintiff.

J. H. Rodd, Windsor, for defendant.

TEETZEL, J.:—The appeal was specially directed against two findings: (1) that the defendant (vendor) had acquired a good possessory title to a strip 20 feet wide laid out as a road or lane on an original plan of subdivision of part of the city of Windsor; (2) that plaintiff was, in the course of the negotiations leading up to the agreement, informed concerning the question of the road, and that he had such knowledge of it as to preclude him from objecting to carry out the purchase, on the ground of any defect in defendant's title to that portion.

After the registration of the plan, many conveyances were made by reference to it of lands adjoining the road or lane in question, so that there became vested in the purchasers an easement over the same as an appurtenance to their lands.

With great respect, I think that, in considering the evidence as to the occupation of the land in question by the vendor and his predecessors, the learned Master erred in assuming that the Statute of Limitations was applicable to the question of the extinguishment of the easement which had, under the plan and their conveyances, become vested in purchasers both east and west of the defendant's property.

In Gale on Easements, 8th ed., p. 520, it is stated: "The Prescription Act is silent as to the mode by which easements may be lost. Its enactments as to interruption and disability apply in terms to the acquisition only." These observations are applicable to our Real Property Limitation Act, R. S. O. 1897 ch. 133. After discussing a number of cases on the subject of extinguishment of easements by cessation of enjoyment, Mr. Gale, at p. 526, says: "It appears from these cases that the law has fixed no precise time during which this cessation of enjoyment must continue; the material inquiry in every case of this kind must be, whether there was the intention to renounce the right." Now, applying that conclusion of law to this case, I am of the opinion that the evidence falls far short of establishing an intention at any time, by all the parties who had an easement over the strip in question, to renounce their rights. In fact, the evidence does not seem to have been specially directed to this question, but rather to the question of the acts and intentions of the defendant and his predecessors. I am, therefore, of the opinion that the vendor has failed to establish that the rights of owners of the dominant tenements to the east and west of his property have been extinguished.

I also think the learned Master erred in the legal effect to be given to the evidence on the question of notice.

The contract as signed would entitle the plaintiff to a good title to all the property described in it, and, assuming that he had actual notice that there was some question of the right of the defendant to make title to the 20 ft. strip, which, it seems to me, is the most favourable assumption for the defendant warranted by the evidence, that would not debar the plaintiff from insisting on a good title. "It is

necessary," said Cotton, L.J., in Ellis v. Rogers, 29 Ch. D. at p. 571, "in order to bring a case within the exception, that there should be knowledge on the part of the purchaser that he cannot get a good title." See also Armour, 3rd ed., p. 7.

The evidence here falls far short of shewing that plaintiff knew, when the contract was signed, that it was impossible to get a good title to the strip in question. He is, therefore, entitled to require the defendant to shew a good title, which, in my opinion, the defendant has failed to do, so far as the strip in question is concerned, and it is a material part.

The appeal must be allowed with costs to be paid by the defendant.

A motion for judgment was also made by the defendant on the basis of the Master's report. With the report amended in accordance with the result of this appeal, there should be judgment for the plaintiff for the amount paid on account of purchase, together with costs of the trial and so much of the reference as pertained to the inquiry as to the title of the 20 ft. strip, and as to plaintiff's knowledge of the defect; with no costs to either party in respect to the remainder of the reference.

If the parties cannot agree upon the amount, I will hear them at the opening of Sandwich assizes on 23rd instant.

Moss, C.J.O. MARCH 9TH, 1909.

C.A.—CHAMBERS.

FISHER v. INTERNATIONAL HARVESTER CO. OF CANADA.

Appeal to Court of Appeal — Leave to Appeal from Order of Divisional Court — Judicature Act, sec. 76 (g) — Difference of Opinion between Trial Judge and Divisional Court— Master and Servant — Injury to Servant — Workmen's Compensation Act — Agreement — Acceptance of Benefits — Bar to Action — Absence of Special Circumstances — Leave Refused.

Motion by defendants for leave to appeal to the Court of Appeal from the order of a Divisional Court, ante 381, reversing the judgment of RIDDELL, J., at the trial, 12 O. W.

R. 1126, and directing judgment to be entered for plaintiff for $1,000 and costs.

J. W. Nesbitt, K.C., for defendants.

G. Lynch-Staunton, K.C., for plaintiff.

Moss, C.J.O..—Upon consideration I think this is not a case in which it would be proper to exercise the discretion given by sub-section (g) of sec. 76 of the Judicature Act, as enacted by 4 Edw. VII. ch. 11, sec. 2.

Any questions there might have been as to whether the injury to the plaintiff in respect of which the action was brought was or was not due to the negligence of the defendants and as to the amount of damages to which the plaintiff was entitled, if entitled to anything, were set at rest by the verdict of the jury.

There remained the question whether the agreement signed by the plaintiff at the time of entering the defendants' employment, and his acceptance of benefits under it, formed a bar to the maintenance of the action. Upon this there was a difference of opinion between the trial Judge and the Divisional Court. It has been held more than once that a difference of opinion between the tribunals is not of itself a sufficient ground for allowing a further appeal, and obviously the legislature must have so intended. It never could have been intended that that alone should be considered as furnishing sufficient special reasons for treating the case as exceptional. The sole question here was whether the agreement was such as, on its terms alone or coupled with the act of the plaintiff in accepting certain payments in accordance with them, excepted it from the operation of sec. 10 of the Workmen's Compensation Act. The learned trial Judge was of the opinion that it was. The Divisional Court was unanimous in holding the contrary.

The question was largely one of the construction of the instrument.

The learned trial Judge did not overlook the fact that the onus was on the defendants to shew that there was other consideration to the plaintiff than that of his being taken into the defendants' employment, that the other consideration was ample and adequate, and that the agreement, in view of such other consideration, was not on the plaintiff's part improvident, but was just and reasonable. But he construed the agreement as giving an option to the plain-

tiff, after the happening of an injury to him, of electing to accept the payments provided for or to repudiate and rely upon his legal rights, and that he, having accepted some payments, was bound by the agreement.

It was suggested on this application that in determining upon the effect of the agreement the learned trial Judge had given greater weight than he should to the fact of acceptance of the payments made to the plaintiff. But I am not on this application required to express an opinion as to that. I need only say that, as at present advised, having regard to the protection intended to be thrown about workmen by the provisions of sec. 10, I do not see anything unreasonable in the construction the Divisional Court has placed upon the agreement as a whole. And the case seems to me to present no other features rendering it exceptional or affording reasons for taking it out of the general rule.

The application is refused with costs.

CARTWRIGHT, MASTER. MARCH 11TH, 1909.

CHAMBERS.

COPELAND-CHATTERSON CO. v. BUSINESS SYSTEMS LIMITED.

Order in Chambers—Power of Master to Amend after Appeal and Affirmation—Making Order Issued Conform to Minutes as Settled—Costs.

Motion by defendants for an amendment of a previous order.

W. H. Irving, for defendants.

W. E. Raney, K.C., for plaintiffs.

THE MASTER.:—On 29th May, 1906, I made an order of which the minutes were settled by me and in my writing. From that order an appeal was taken by both parties, and those appeals were dismissed on 6th June, by Falconbridge, C.J.

It was not until 12th June that my order was taken out and entered. Then the concluding words in the settled minutes "on the final taxations therein" were given as "on the final taxation," but it was the order as settled that was

affirmed. If the omission had been noticed, it would have necessarily been supplied at the time and perhaps ex parte.

The defendants who took out the order now move to amend the order as issued so as to conform to the minutes.

Mr. Raney objected that I had no power in the first instance to make the order, so far as it assumed to dispose of certain costs; and, secondly, that, in any case, I could not amend it without consent.

I think the fact that the appeals were dismissed shews that I had power to make the order, even if this objection is now open to the plaintiffs. I also think that under Rule 640 I still have power to make the order issued conform to what was actually made, and affirmed on appeals by both parties.

The motion will, therefore, be allowed, but the costs will be to the plaintiffs in any event on the final taxation in whatever action it belongs to.

MEREDITH, C. J. MARCH 11TH, 1909.

ELECTION COURT.

RE NORTH PERTH DOMINION ELECTION.

Parliamentary Elections—Controverted Election Petition—Presentation after Office Hours on Last Day—Dominion Controverted Elections Act—Extension of Time for Presentation—Powers of Court—Preliminary Objections.

Summary trial of the preliminary objections filed by the respondent to the petition against his return, and motion by the petitioner for an order extending nunc pro tunc the time for presenting the petition until 7th December 1908, and for an order confirming and declaring presented within the time so extended the petition, and confirming nunc pro tunc the service of the petition and all subsequent proceedings thereon.

G. F. Shepley, K.C., and R. T. Harding, Stratford, for the respondent.

J. Bicknell, K.C., and J. W. Bain, K.C., for the petitioner.

MEREDITH, C. J.:—The petition was delivered to the registrar on the last day upon which, according to the provisions of sec. 12 of the Controverted Elections Act, a peti-

tion against the return of the respondent could be filed. The petition was not delivered at the office of the registrar but at his residence and after office hours, 3 hours and 12 minutes after his office had been closed (on a Saturday); and upon receiving it and the prescribed deposit, the registrar indorsed on the petition the following memorandum: "Received at 4.12 p.m. on 5th December, 1908 (after office closed), at my house;" and the petition was treated and was marked by him as filed on 7th December, 1908.

The respondent objects that the petition was not presented within the time limited by sec. 12, and it is conceded by the petitioner that if it is to be treated as presented on 7th December it was presented too late, and that the objection is entitled to prevail unless the Court has power now to enlarge the time for presenting it, and the time is extended by the Court.

Dealing first with the preliminary objection, it is, in my opinion, quite clear that the petition was not presented in time, the last day for presenting it being, as I have said, the 5th December, 1908.

By sec. 5, the petition is to be presented to the Court, and sec. 13 deals with the manner of presenting it. Section 13 provides as follows. "13. Presentation of a petition shall be made by delivering it at the office of the clerk of the Court during office hours or in any other prescribed manner." "Prescribed manner" means prescribed by the Act or by Rules of Court made under it (sec. 2 (g)), and there is no other provision in the Act, and no Rule of Court dealing with the matter.

Reading secs. 5, 12, and 13 together, it is, I think, quite clear that a person desiring to question an election must present to the Court his petition within the time prescribed by sec. 12, and that he must do so by delivering it within the time at the office of the registrar during office hours.

I do not agree with the argument of the petitioner's counsel that the purpose of sec. 13 is to allow to the petitioner an alternative mode of presenting the petition, that is to say, to enable him to file it at any time during the last day by delivering it to the registrar, whether at his office or elsewhere, as it was argued he might do in the case of a pleading in an action, or, as allowed by sec. 13, by delivering it at his office during office hours, whether or not he or any one else is in attendance there.

The language of the section is imperative—"shall be made," not "may be made;" and, in my opinion, no Court has the right to say that it may be made in any other manner than that mentioned in the section or that prescribed by a Rule of Court made under the authority of the Act.

The jurisdiction of the Court is purely statutory, and the provision of sec. 12 as to time is, besides, as Mr. Shepley argued, in the nature of a statute of limitation.

The North Bruce Case (1891), 27 C. L. J. 538, is quite distinguishable. In that case the petition was delivered to the registrar at his office, but not, if standard time governed, during office hours; and Mr. Justice Maclennan held that solar time governed, and that, according to it, the petition was delivered during office hours, and he also expressed the opinion that the Rule which provided that the office of the Court should be kept open from 10 a.m. to 3 p.m. was directory only, and that, had standard time governed, as the petition was delivered to the registrar at his office, though after office hours, while it was still open, it was in time.

It is unnecessary to say whether or not I agree with this latter view, for it is enough to point out that the petition in this case was not delivered at the office of the registrar, and that when it was delivered to him at his residence, his office was not open but had been closed for more than three hours.

The objection must be allowed with costs.

Now as to the petitioner's application.

The fact that no case can be found either in England or in Canada in which the time for presenting a petition has been extended or in which an application for that purpose has ever been made, is almost if not quite conclusive against there being any power in the Court to extend the time which the statute prescribes.

When the House itself dealt with election petitions, the practice as to requiring the petition to be presented within the time limited by the Orders of the House was strict: Rogers on the Law of Elections, 9th ed., p. 429 et seq.

The cases on applications for leave to amend a petition after the time for presenting a petition has expired are conclusive against the petitioner.

Section 2 of the English Parliamentary Elections Act, 1868, is similar in its terms to sub-sec. 2 of sec. 2 of the

Dominion Controverted Elections Act, which gives, subject to the provisions of the Act, to the High Court the same powers, jurisdiction, and authority with reference to an election petition and the proceedings thereon as if the petition were in an ordinary cause.

Notwithstanding this provision, it has been held in England that the Court cannot amend a petition by introducing a substantially new charge after the time for presenting a petition has elapsed, as that would make it in effect a new petition and thus defeat the provisions of the Act requiring a petition to be presented within the prescribed time: Rogers on Elections, 18th ed., p. 212, and cases there cited; and the same conclusion has been reached by our Courts, though I have not been able to find any reported case on the point.

Section 87, of which there is no counterpart in the English Act, was relied on by Mr. Bicknell, but it has, in my opinion, no application. Whatever may be its scope, it clearly applies only where a petition has been presented in due time and is on the files of the Court. It formed sec. 37 of the Act 35 Vict. ch. 10, and is there found under the heading "Procedure." It is found in the Revised Statutes of 1886, as sec. 64, under the heading "General Provisions," and appears in the present revision under the heading "General."

These changes in its position have effected no change in the meaning of the section as it appeared in 37 Vict.: Farquharson v. Imperial Oil Co. (1899), 30 S. C. R. 188; and, reading it as it appears there, it is applicable only to procedure, and, in my opinion, to procedure after a petition has been duly presented.

The same reasoning which led to the decision in the Glengarry case (1888), 14 S. C. R. 453, is, I think, applicable here. There the Court held that after the expiration of the 6 months allowed for bringing a petition to trial, there was no petition in respect of which the power to extend the time could be exercised. Here there never has been a petition in Court, and therefore there is nothing in respect of which the power conferred by sec. 87 can be exercised.

The motion must be refused with costs.

BRITTON, J. MARCH 12TH, 1909.

WEEKLY COURT.

RE HAMILTON POWDER CO. AND TOWNSHIP OF GLOUCESTER.

Municipal Corporations—Township By-law Licensing Erection of Magazine for Storing Gunpowder—Contract with Powder Company—Repeal of By-law—Mala Fides—Repudiation of Contract Acted upon by the Other Contracting Party—Expenditure of Money—Danger to Inhabitants of Township—Repealing By-law Quashed.

Application by the company to quash a by-law of the township.

D. H. McLean, Ottawa, for the applicants.

G. McLaurin, Ottawa, for the township corporation.

BRITTON, J.:—The by-law attacked is one passed by the township on 12th August, 1908, called by-law No. 11 of 1908, simply repealing by-law No. 8 of the same year.

On 5th June, 1899, the council of Gloucester passed a by-law called No. 8 of 1899, intituled a by-law relating to the manufacture, storage, and transportation of gunpowder, or any other explosive substance, also "licensing" the same. In passing this by-law, the council were exercising powers conferred by R. S. O. 1897 ch. 223, sec. 542, sub-sec. 17, and by 62 Vict. ch. 26, sec. 34, amending the former sec. 542 by adding thereto sub-secs. 17a, 17b, 17c, and 17d.

In the early part of 1908 the Hamilton Powder Company entered into negotiations with the township for a license or permission to erect within the municipality a magazine or storehouse for the storage of gunpowder and other explosives in quantities of more than 25 pounds, and for the transportation to and from that storehouse of the gunpowder and other explosives stored or to be stored. The parties came to terms, and the contract was regularly entered into. Any such contract on the part of the township would require authorisation by by-law, so by-law No. 8 of 1908 was on 6th July of that year duly passed. That by-law was the township's contract. The terms of it were accepted by the Hamilton Powder Company, and acted upon

The recitals in the by-law are substantially correct, and the enacting part is as follows:—

(1) "License and permission is hereby granted to the Hamilton Powder Company, whose head office is in the city of Montreal, in the province of Quebec, for the erection of a magazine for the storage of gunpowder," etc.

(2) "This license and permission shall be in force for 5 years, and a renewal of the same shall be wholly in the discretion of this council."

(3) "The annual fee for this license shall be $2."

This by-law is not for the public generally, except so far as the electors and residents are always interested in every contract of their council. It is not general legislation, prescribing terms on which any person may store or transport explosives. It is special legislation, in the form of a contract with the applicants, by reason of which the applicants, in their endeavour to carry out their part of the bargain, have been put to large expense, and have so changed their position as to make the cancellation of the contract a matter of great importance. It is not only a matter of importance financially, but to have such a by-law repealed would weaken the confidence which business men have and ought to have in the contracts of municipal bodies.

Speaking generally, the power of any municipal body to repeal its own by-laws is expressly given by sec. 326 of the Consolidated Municipal Act of 1903, save as by that Act restricted, the restriction being in the case of by-laws under which debts have been created—see sec. 392.

A repealing by-law would be intra vires, save only (apart from matter of form) that it should be passed in good faith and in the supposed interest of the public at large, and not for any private purpose. The general rule is, that it must not impair vested rights—that is, what are really vested rights. The rule as it appears in the Am. & Eng. Encyc. of Law, 2nd ed., vol. 5, p. 96, is: "A corporation has not the power, by laws of its own enactment, to disturb or divest rights which it has created, or to impair the obligation of its contracts, or to change its responsibilities to its members, or to draw them into new and distinct relations."

There was no motion to quash by-law No. 8. It was not attacked in law. The council simply undertook to repeal it. The recitals in the repealing by-law, No. 11, as reasons for the passing of it, are: (1) that by-law No. 8 was passed

upon representations that have not proved to be true; and (2) upon the condition that the powder company would give a bond of indemnity. No. 1 is somewhat vague. I have read all the affidavits and papers filed, and come to the conclusion that the negotiations for obtaining the license were fair and open, and that there was no misrepresentation by the Hamilton Powder Co. or any one acting on their behalf of any material fact. No. 2, as to giving the bond of indemnity: there was no conditional passing of the by-law; there could not be; it was not held over or open for the giving of any bond. There was discussion about a bond, and the applicants now do not object, but aver a readiness to give a bond of indemnity as against anything which the company or the township would be liable for, by reason of any act of the company. The precise terms of such a bond have never been agreed upon, and may well be the subject of further negotiations. The powder company are liable without any bond for any damages that may result from their breach of any law, or from their negligence. The township would not be liable for acting within their powers in granting a license to the powder company, and certainly would not be liable for the negligence of the powder company. Practically, there seems little to be gained by a bond, unless for the sake of getting one with satisfactory sureties, and it is not pretended that sureties were asked. Apparently the powder company are considered strong financially. As the company are willing to give a bond of indemnity, one should be prepared and executed and delivered to the township.

Early in the negotiations and as soon as there was a reasonable prospect of their resulting in a contract, the Hamilton Powder Company sought to acquire for their business a lease, from the Laurentian Stone Company Limited, of valuable property. As soon as by-law No. 8 was passed, this lease was delivered to and accepted by the powder company. It is not disputed that the powder company have expended in the erection of their magazine over $1,000, that they have paid one year's rent in advance to their lessors for the premises mentioned, and that they have expended other sums amounting in all to at least $1,300. It appears that the building has been erected in accordance with the provisions of "standard specifications" for such a building for storing explosives, and that these specifications

have been approved by the authorities of Manitoba and Quebec. It did not appear before me that there were specifications for such buildings approved of by the province of Ontario.

This case is, therefore, brought within the supposed case put by Hagarty, C.J., in Great Western R. W. Co. v. North Cayuga, 33 C. P. at p. 31: "If it had been proved that, on the special faith and consideration of this action of the municipality, the applicants had in fact altered their position, or done something which otherwise they would not have done for the benefit of the township, we should then have had to consider whether our statutable powers are sufficient to enable us to prevent the great injustice that would be thus perpetrated by a repeal of the by-law, or left it for a court of equity to have interfered."

If argued here that the company have done nothing for the benefit of the township, the answer is that they have spent money in the erection of a building and improving property in the township. The license granted is to do a business authorised by law, and under certain restrictions for the benefit of the public, as well as those carrying it on, and the township is directly interested and benefited in having legitimate business properly carried on within its limits. I take it that upon the facts this is a proper case for the application of the principle laid down in the case just cited. If so, then my duty is made plain by Alexander v. Village of Huntsville, 24 O. R. 665. That case seems to me expressly in point, and I am bound to follow it, unless it can be distinguished. There the municipality had passed a by-law exempting a manufacturing establishment from taxes for 10 years. The council subsequently, within the period of exemption, on the alleged ground that it was expedient and necessary to promote the interest of the ratepayers, passed another by-law repealing the exempting by-law. Upon the facts in that case, it was held that the repealing by-law was passed in bad faith, and so not within the powers of the council. Bad faith does not mean some particular advantage to one or more members of the council. It is not necessary to establish enmity or ill-will on the part of one or more members against a person interested in a by-law or contract. It may be bad faith without corrupt motives, and it may not be bad faith, although local feelings and prejudices influence members of a council in their action. It is, in my

opinion, bad faith if the sole purpose of a by-law is the repudiation and cancellation of a contract solemnly entered into by the municipality with a person, where that person has changed his own position and acted upon the contract so made. It is bad faith on the part of a municipal corporation if it attempts to do what no individual or trading corporation could do in reference to a contract.

This is not an interference with the very wide discretion allowed, and properly allowed, to members of a council. They need not have granted any license to the powder company or any other company, or they could have imposed very different terms, but, having granted the license, it was an unfair thing on the part of the council to attempt to cancel it and to allege misrepresentation on the part of the licensee to the council.

No doubt, the people in the immediate vicinity of the magazine had their fears aroused of danger. That does not apply, cannot apply, to many persons who signed the petition, and the opinions expressed as to danger are not of as much value as those of persons who are to a certain extent experts in storing or handling explosives. It is common knowledge that it is not difficult for any one canvassing for signers to a petition to achieve great success as to numbers. Many people are easily persuaded upon an ex parte request to sign a petition. The council should have accepted the situation and stood by the position taken in granting the license. From all that appears, I have no doubt that the applicants would and will do all in their power to secure safety and to allay fears that have unnecessarily been aroused.

The by-law must be quashed and with costs.

MACMAHON, J. MARCH 13TH, 1909.

TRIAL.

PITT v. WARREN.

Contract—Sale and Delivery of Mining Stock—Evidence to Establish Contract — Statute of Frauds — Conflict of Testimony—Findings of Trial Judge.

Action to compel the defendants to deliver to the plaintiff 100,000 shares of the stock of the Otisse-Currie Mining Com-

pany or for damages for breach of a contract to sell and deliver the stock.

G. F. Henderson, K.C., and W. N. Ferguson, K.C., for plaintiff.

F. Arnoldi, K.C., for defendants.

MacMahon, J.:—The defendant E. D. Warren was in Montreal from 14th to 17th September inclusive. On the 16th or 17th he informed the plaintiff that he was interested in a mining proposition on the Montreal River that he thought was going to be a good mine, and stated that Mr. Loring, a mining engineer, had gone up for the purpose of making a report as to the property.

The plaintiff says that Warren called him up. Warren says that Pitt said to him, "When you have heard from Loring, call me up." It does not matter which is correct as to that. Pitt went to the Windsor Hotel, where Warren was staying, and an offer was made by Pitt to put up $10,000 for a one-sixth interest in the mine. Warren says that he replied at once that such an offer would not be entertained. Pitt then made an offer to pay $10,000 for 100,000 shares of stock. He knew at that time that a company would be formed, stocked at $2,000,000, which would be put on the market. The plaintiff says that he wanted some writing from Warren to evidence the transaction, which Warren refused to give, saying he could not make a bargain for a sale of any shares until he returned to Toronto and communicated the offer to those who were interested with him in the property. Mr. Warren left that night for Toronto and arrived here on the morning of the 18th. He saw Loring on that day and instructed him to send a telegram to Pitt stating what was his opinion of the mine. The telegram is in evidence.

The evidence of the plaintiff and Russell A. Popham as to the communication made by Warren to Pitt on the afternoon of the 18th was absolutely contradicted by the defendants Warren and Gzowski and by Loring.

The result of this litigation hinges on the question on which side the truth exists.

I consider it is a great pity that the 17th section of the Statute of Frauds has not been amended in order that transactions of this kind (unless sales on the Stock Exchange) should come under it and be evidenced in writing. I may say this, that if Loring and Gzowski were cognisant of Pitt's

offer and said that they would not accept it, it would influence my mind a good deal in reaching a conclusion as to what took place over the telephone. It may be that something that was said when the parties reached the King Edward Hotel at Smyth may help me.

I have gone over my notes of the evidence again and find as follows. From what took place between Warren and Gzowski and Loring (who were interested with him in the mine) on the morning of the 18th, they had arranged, if they got the property, to put $100,000 worth of shares on the market, at 15 cents a share. The plaintiff's statement is that on the afternoon of the 18th he called up Warren and Gzowski's office, and Warren came to the telephone, and, after speaking about some Muggley Concentrator stock, and advising Pitt of his intention to leave for Montreal River on Monday night, Pitt asked Warren what about the deal he had at the Windsor Hotel the night before, and that Warren replied, "You can have 100,000 shares for $10,000 and an additional one-sixth for $40,000."

Russell A. Topham, also a broker in Montreal, came to Pitt's office (where there were two telephones) at Pitt's request, for the purpose of hearing the conversation between Pitt and Warren. He said that Pitt spoke about some proposition he had made, and Warren said 100,000 shares for 10 cents, or one-sixth for $40,000. He did not hear Pitt say "What about 100,000 shares at 10 cents." Warren offered the 100,000 shares at 10 cents. He did not hear anything said about the Windsor Hotel.

The defendants Gzowski and Frank C. Loring said that they were present when Warren had the telephonic communication with Pitt, which took place, I find, on Friday 18th September, although Loring was under the impression it was on the 19th.

The defendant Warren's evidence was, after speaking of the Muggley Concentrators and telling Pitt he was leaving on Sunday night for Montreal River, that Pitt asked him what about that 100,000 shares at 10 cents, and he told him it was impossible to let him have 100,000 at 10 cents, as a syndicate or pool had been formed to put the first stock on the market at 15 cents; that he agreed to keep $2,000 worth of that stock for Pitt at 15 cents. He says that there was nothing said about the $40,000 for the one-sixth interest over the telephone at all; that it was not mentioned.

The defendant Gzowski says he was in and out of Mr. Segsworth's office 6 or 7 times during the 18th, but that he left it to go to his own office after banking hours, which would be after 3 o'clock, to make a deposit in order to get the cheque marked by the bank for $1,000, which was to be paid to Currie, the owner of the mine, on the closing of the transaction that afternoon. Gzowski said that he was standing by Warren when the conversation with Pitt took place over the telephone, and that during the conversation Warren put his hand over the receiver and said that he (meaning Pitt) wanted 100,000 shares at 10 cents a share, and, after conversing with him (Gzowski), he heard Warren tell Pitt that he could not have them at that, that a syndicate had been formed by which 100,000 shares would be put on the market at 15 cents, but that he would reserve $2,000 worth of shares in that syndicate for him. He says that there was nothing said about a sixth interest at $40,000: it was not mentioned at all.

Mr. Segsworth was, I think, in error in supposing that Gzowski was present all the time, from about 3 o'clock until the contract was signed, which was about 6 o'clock. Gzowski gives the reason for his absence from Segsworth's office for some time after banking hours, which I fully credit. His absence from Mr. Segsworth's office was not noticed by the latter.

Loring says that he was present when Warren was conversing over the telephone with the plaintiff. He said that Warren told him that Pitt wanted 100,000 shares at 10 cents, and that his (Loring's) reply was that it was "out of the question" or "we cannot consider it." Loring stated that nothing was said about the one-sixth interest in the mine for $40,000. He says that the price had been fixed for 100,000 by a syndicate before that at 15 cents, and that the pool had been practically closed before then.

When Pitt says that Warren was to consult his partners before any offer could be accepted, and Warren, Gzowski, and Loring say that after consulting them they refused to accept, and told Warren so, I cannot believe that Warren, who refused to enter into any contract without first receiving the sanction of his partners, deliberately and in their presence told the plaintiff he could have the 100,000 shares for $10,000.

It may be that Pitt and Popham did not hear the word "not" used by Warren in replying to the inquiry that Pitt made, and that is the reason that there was a misunderstanding.

There were some slight discrepancies in the evidence of Loring as taken on his examination for discovery and that given at the trial, and there is also a slight discrepancy between Warren's evidence and that of Gzowski given at the trial, shewing that each was giving his independent recollection of what took place. For instance, Gzowski said that when Warren told them (Gzowski and Loring) that Pitt wanted 100,000 shares at 10 cents, there was a pause in the conversation, and Warren put his hand over the mouth of the receiver. Warren said he had not done so. That is an act he might have forgotten. I was impressed with the manner in which Gzowski gave his evidence and think he was correct in the statement that Warren did put his hand over the receiver at the time stated.

Loring's evidence was to the effect that Warren, while at the telephone, told Gzowski and him that Pitt wanted 100,000 shares at 10 cents, but he did not fully understand the telephoning until it was explained to him. But he said, in answer to question 24 on his examination for discovery, that he immediately vetoed the proposition and gave his reasons therefor.

Mr. Henderson put in questions 23, 24, and 26 of Loring's examination for discovery, and Mr. Arnoldi put in question 22, which explained that he heard of Pitt's proposition at the time of the telephoning; and he says in answer to question 50 that he did not then understand the exact nature of the proposition.

Counsel for the plaintiff urged that the plaintiff and his friends were going to the Montreal River because of the plaintiff's supposed interest by having 100,000 shares in the Otisse mine, when Warren and Loring were going there on 21st September. But the plaintiff during his evidence said he had contemplated going to the Montreal River, and there was therefore an incentive to his going there immediately when informed of the intention of Warren and Loring to visit the Otisse mine in that vicinity.

There was unquestionably an effort made by Pitt while on the boat going to the village of Smyth to induce Warren to give him the 100,000 shares at 10 cents, for on his exam-

ination for discovery, in answer to question 246, he said that Warren and Loring were going away, and he said to Warren in Loring's presence, "I said you said I could have an additional 333,000 shares for $40,000," and he said "Yes."

Warren denied making any such statement, and is corroborated by Loring.

That Pitt was not relying, when he visited the Otisse mine, on any promise made by Warren as to the 100,000 shares at 10 cents, or the 333,000 shares for $40,000, is apparent from what he said at the trial. Warren and Loring left on the boat—"I remained and got some of the adjoining property (to the Otisse) for myself. I made an investment for my friends as a substitute for the Otisse. If they (Warren and Gzowski) refused to let me in, I would have a mine of my own."

The plaintiff has failed to make out that the defendants or any of them entered into a contract to sell him 100,000 shares of the stock of the Otisse-Currie mine, and the action must be dismissed with costs.