the piles and counted in 1911—while their then total is added to the sales shewn up to 26th January, 1912. It is possible that from the earlier figures should be deducted some of the sales, but no evidence was given of a definite enough nature to enable any one to say to what extent this is true as a fact.

The appellant argued that the learned trial Judge had promised to give a reference and instead of so doing he had disposed of the whole case.

It is true that during the trial this point was mentioned but subsequent events indicate that both the Judge and counsel recognised before the trial closed that the former was intending to decide the question of damages himself. The voluminous written argument, put in after the trial are some indication of the view of counsel at that period of time. On another point argued I am not able to agree with the judgment in appeal in so far as it allows the respondent the $1 per thousand feet, promised as a bonus. The contract was made on the 11th day of May, 1910. After that, on 14th May, 1910, the respondent offered or agreed to give 25 cents a thousand extra and afterwards raised this to 50 cents and then to $1. But this is expressed as a voluntary promise and only on condition that the agreement of May 11th, 1910, is carried out, "and it is in no way to prejudice the said agreement nor have anything to do with it except as herein stated."

Two objections are made to its allowance in this action. One is that the promise is *nudum pactum*, and the other that the promise was conditional upon performance of the contract up to 1,000,000 feet in the first year.

As to the first objection, it is clear that the contract had been entered into and that the extra $1 was not to be paid for anything other than the performance of that identical contract. The learned trial Judge treats it as part of the contract price, but the letter of the respondent dated 29th August, 1910, seems a complete answer to this position while the reference to a change manifestly relates to the increase to $1 from 50 cents as previously arranged and not to a change in the contract. In that letter he says: "This is entirely voluntary on your part and I do appreciate it very much." There is no consideration to support this as a contract to pay. See *Harris* v. *Carter* (1854), 3 E. & B. 559 and *Fraser* v. *Halton* (1857), 2 C. B. N. S. 512, and compare *Wigan* v.