THE

Eastern Law Reporter.

VOL. IX. TORONTO, DECEMBER 15, 1910. No. 3

NOVA SCOTIA.

SUPREME COURT.

TRIAL.

NOVEMBER 3RD, 1910.

THE ATTORNEY-GENERAL EX REL. MORRISON v. LANDRY ET AL.

Trusts and Trustees — Moneys Raised for Charitable Purposes—Application of Part of it for Purchase of School Property—Resolution of Ratepayers — Meeting not Convened According to Requirements of School Law — Declaration of Trust—Conveyance.

Action to have defendants declared trustees and to compel a conveyance of land.

J. A. Wall, for plaintiff.

W. B. A. Ritchie, K.C., and T. R. Robertson, for defendant.

LONGLEY, J.:—Some facts in this case are clear and scarcely open to question and others are the subject of conflicting testimony. I shall endeavour to state the facts as they clearly appear and make the best findings I am able in respect of those points which are in conflict.

It is common ground that in 1906 or thereabouts a movement was made in the parish of D'Escouse, Isle Madame. to raise a large sum of money for specific benevolent purposes.

The parish of D'Escouse is a larger area than any of the school sections contained in the boundaries of that parish of which there are three. But one of these school sections, No. 8, is within said parish and everything which directly and properly belongs to the issue in this case concerns this school section.

The movement to raise money was supported and promoted by the parish priest and was announced from the pulpit to be for two purposes. 1st. The improvement of the church, especially the instalment of a furnace; 2nd, the procuring of a home for a religious order, the "Daughters of Jesus."

A sum of $1,252 was ultimately raised by various agencies —dinner, bazaar, lottery, private subscriptions, &c., and it was clearly raised throughout the entire parish and from outside contributions that could be obtained. All moneys so collected were deposited with the priest.

At last came the distribution of the money so raised. The priest announced the amount of $1,252 from the pulpit and declared that one-half, $626, would be devoted to the furnace, and no interest in this half attaches to the present suit, but the disposal of the other half is the subject-matter of this action.

It must be mentioned that School District No. 8, which is in the centre of the parish of D'Escouse, had prior to the movement for raising money been enjoying the services of the Daughters of Jesus, a teaching body. They had been employed as teachers in the public school. Whether they were licensed and entitled to draw the government grant was not shewn before me, but it is clear that they were employed and paid by the trustees of the school. They had no special building for a residence, but a house was rented for them—not a suitable or desirable one—and it appears that the trustees of the school were paying for the use and keep of this house. The object of the benevolent movement was to raise money to purchase a suitable dwelling for these Sisters which would afford them a comfortable home and at the same time relieve the section of the cost of maintaining a temporary and unsuitable home.

This part of the money raising, therefore, was a matter which chiefly concerned School District No. 8, and while it is clear that the whole parish contributed to the general

fund of $1,252 it is also reasonably clear that the chief efforts in raising a large portion of the fund—about $900—by a bazaar which lasted a week, was made by the residents of this school section and carried out largely under their auspices.

On Sunday, January 20th, 1907, the priest announced from the altar that $1,252 had been raised, that $652 would be devoted to the furnace, while the other half was to furnish the Sisters with a home, and to dispose of this sum he called a meeting of the ratepayers of School Section No. 8, to be held in the school house that same Sunday afternoon.

Up to this point the facts are tolerably clear, but as to the determination of the meeting and what took place at it there are grave contradictions. Of course it is scarcely necessary to say that as a legal proceeding this school meeting, if it can be so called, has no validity whatever. The school law of this province provides the only means and circumstances under which a school meeting shall be held, and this meeting fulfils in no particular these conditions, and therefore as a meeting having any power to transact sectional business legally it may be dismissed and must be regarded as a mere assembling together of some or most of the ratepayers to talk over matters, but with no power to do anything having any legal force under the Act. This meeting is only important as a step in a chain of events leading up to something which may come within the purview of the Court. One or two incidents of this meeting are common ground. The priest, Father Trenett, presided, and the first proposition submitted to the meeting was whether the people really wanted the Sisters or not, there having apparently been some difference of opinion on this point. He was assured that without taking any vote all wanted the Sisters.

Now comes the difference as to further proceedings. The plaintiff's witnesses declare that it was decided that the money be devoted to the purchase of a home for the Sisters, but on the condition that it should be the home of the Sisters as long as they remained in the parish, but when they should leave it should revert to and become the property of the school section. That a resolution to this effect was drawn up and adopted, which it was determined the priest should have typewritten, and it was typewritten the same day and

signed by the trustees appointed for the purpose of administering the fund and forwarded to the Bishop of the Diocese at Antigonish—the decision of the meeting being in effect that the property purchased with this money should be held by the Episcopal Corporation of Antigonish, which means the Bishop, so that while the Sisters should remain they would have a home, and if they left sooner or later the property would be available for the use of the section. The three trustees of School Section No. 8 were Andrew Landry, the defendant, Kenneth Dunn and Albert A. Martell. It was proposed that these three men be appointed to administer the trust, that is, to dispose of this $656 for the purchase of a home for the Sisters, which should be their's as long as they remained and occupied it, but to revert to the section in the event of their leaving. It is clear that Mr. Martell distinctly said that while he would be willing to act as one of the administrators of the trust he would not so act as a trustee of the school section, in which he was entirely right, for the school trustees, as such, could only take upon themselves responsibilities which were imposed or approved by a legal school meeting. It was, therefore, clearly understood that while the men chosen to administer this fund were de facto trustees of the section their functions in this regard were to be absolutely free from any functions as trustees of the school section. That after the determination had been reached that the money should be used to purchase a home for the Sisters, to be their's only so long as they occupied it and then revert to the section, Landry, Dunn and Martell were appointed a committee to co-operate with the priest in carrying out the resolution of the meeting The priest actually had the resolution typewritten and thrown into the form of a memorial to the Bishop, and at 7 or 8 o'clock that evening the three appointed men, Landry, Dunn and Martell, went to the priest's house and signed the document which was duly forwarded by mail to the Bishop of Antigonish.

The document is in French, but I will give a literal translation of it, and the whole action turns on the effect of this document, (M. 5.)

"D'Escouse, C.B., January 20th, 1907.

To His Lordship, Bishop Cameron, of Antigonish:

Section 8 of D'Escouse represented at a general meeting of the ratepayers submits humbly to Your Lordship the following resolutions:

We the ratepayers of section 8, D'Escouse, are agreed to purchase a house of residence for the Daughters of Jesus teaching in the section, in the name of the Episcopal Corporation of Antigonish, under these conditions:—

That the Daughters of Jesus will have charge of the maintenance, repairs and upkeep of the house, and that this house if the Religeuses should leave D'Escouse, shall become the property of the section and that the trustees then holding office shall dispose of the house or sell it for the purpose of the school or for the benefit of the said section.

Signed by three ratepayers named by the meeting.

(Sgd.) ANDREW LANDRY,
KENNETH DUNN,
ALBERT A. MARTELL."

The defendant's witnesses in effect deny that any resolution to this effect was adopted by the meeting, but, on the contrary, the determination of the meeting was that the house should be given outright and unconditionally to the Sisters, and that the document cited above was never signed by them, and is in effect a forgery. This version is supported by several witnesses, and Andrew Landry and Kenneth Dunn deny on oath their signatures to M. 5.

It is extremely unfortunate that Father Trenett, who could give very important evidence upon this point, is now located in Washington State on the Pacific, and his testimony is not before me. It is an unpleasant and delicate duty to decide upon conflicting evidence of this kind. But having regard to the fact that this document M. 5 came from the possession of Bishop Cameron in whose custody it properly was, and having regard to the reasonableness of the respective stories, the demeanour and character of the witnesses, I am compelled to find that the plaintiff's version of the facts is the true one. In spite of Landry and Dunn's specific denial of their signatures to M. 5, I have not the slightest doubt in comparing their signatures to this document with admitted signatures to other documents that they both signed the document as drawn up and typewritten by the priest.

We have, therefore, the $626 handed over by the priest to Andrew Landry, one of the committee, in the presence and by the consent of the others charged with a certain trust in

behalf of School Section No. 8. It remains to be seen how he and his associates of whom he seems to have been the chief and leader carried out their trust. No evidence was offered before me that the Bishop refused to have the deed in his name as requested by the committee. It is in evidence that the priest predicted that he would decline, but I have no means of knowing whether he did or not. What did happen is this: On the 28th day of January a deed was obtained from Philip Grouchy of a property in D'Escouse to Andrew Landry and his two associates, the consideration named being one dollar, and the deed itself conveying the land unconditionally to these men with no limitation or reservation whatever. The next day, January 29th, 1907, Andrew Landry and his colleagues conveyed the same property to the Mother Provincial of the Order of the Daughters of Jesus at Three Rivers. This deed is given for the consideration of one dollar, and conveys an absolute title in fee simple.

As early as August, 1907, only seven or eight months after this deed was given, the Sisters left D'Escouse and retired to Quebec. The majority of the people were quite in the dark as to the mode or form of conveyance, and the thing which most had been attempting to provide for, namely, the possible early departure of the Sisters, had come to pass, and it was expected that this property would revert to the section. When the matter began to be looked into it was found that on August 26th, 1907, Andrew Landry had obtained from the Order an absolute deed in fee simple of this property to himself, and on November 15th, 1907, he had given a mortgage to his brother Felix of this property for a consideration of $700.

Thereupon the school trustees took action in this Court against the two Landrys seeking a declaration that this property belonged to the school section according to the trust in M. 5. If I had been trying this action my difficulties would have been considerably lessened. But strange to say, at a school meeting held in 1909 a resolution was adopted instructing, in effect, the school trustees to abandon the action. How or by what means such a resolution should have been secured I have no means before me of knowing, but the effect of it was that the trustees gave notice of discontinuance. Application was then made by a resident ratepayer, Morrison, to carry on the suit on behalf of the rate-

payers, and the Supreme Court, while not agreeing to this proposal, gave leave to apply to the Attorney-General to pursue the action in the public interests, and the Attorney-General has allowed the use of his name on the relation of Thomas D. Morrison, and in that position the trial took place before me.

I must add, before leaving the facts, that Andrew Landry shewed some indebtedness to him from the Sisters, but it was, I am led to believe, made up in part of charges which would not have been made if they had remained. The benevolently inclined were giving the Sisters work and materials in connection with their residence, Andrew Landry among the number. As soon as they left, many of them were converted into charges or claims. But I do not think consideration or no consideration matters in this case, since it is clear from any point of view that he knew all about the trust and had signed his name to the paper to the Bishop. In the same way it was proved before me, without any attempt at contradiction, that Felix Landry took his mortgage as security for debts which Andrew actually owed him, subject, of course, to the natural suspicion one has of transactions of this kind between brothers having close relations and fighting for a common purpose. But as Felix Landry was present at the school meeting of January 20th, 1907, and was fully advised of the determination reached, I think he must be treated as having taken the mortgage with full notice of all that transpired, and that his valuable consideration will not avail to secure his mortgage if there are any legal grounds upon which it can be successfully challenged.

Having disposed of the facts as they appear to me, I come now to deal with the legal aspects.

Notwithstanding that the learned counsel for defendants, Mr. Ritchie, K.C., strenuously urged that this assemblage of ratepayers on January 20th had no power to create any such trust as that embodied in the memorial to the Bishop: 1st, because the section had no right to take real estate except under the special provision of the Act, and 2nd, because a handful of the contributories to the fund had no power to lessen the scope of the benevolence of the whole contributory body, yet I would have little difficulty in determining that if this action had been brought in the name and on behalf of the trustees that Andrew Landry could be made

to carry out the terms upon which he received this money. My real difficulty in this case arises as to the actual legal authority of the Attorney-General, acting on behalf of the public or any section of the public, to compel a school section to take over a property which a majority of them have declared at a legal meeting of the section they do not want.

In Attorney-General v. City of Halifax, 36 N. S. R. 177, two of the learned Judges (Townshend and Meagher, JJ.), laid down the principle that the Attorney-General may intervene only "when any corporation is doing acts detrimental to the public welfare or hostile to public policy." The question seems to be in all cases whether the corporation is acting within its corporate powers. If it is, then the Attorney-General may not interfere. This proposition, I think, is sound, but the question I have to determine is whether the majority of the ratepayers at the school meeting of 1909 were acting within their rights, or in accordance with their legal obligations. Assuming that the house so purchased for the Sisters became the property of the school section, on the departure of the Sisters, I am not quite able to see by what right a majority of the ratepayers could by resolution give it away. Certain clearly defined things they can do. They can vote any sum they think fit for school purposes. They can choose their trustees and, perhaps, vote to rescind a contract if it appears more advantageous to do this than to carry it out. They might even vote to refuse to accept an offer to donate property to the section with or without conditions. But this does not appear to me to be the present case. If this money was given upon trust to buy a building for a large sum of money for the use of A. while A. should continue to occupy it, and when A. left it should belong to the school section, then I know of no power vested in a mere majority of the ratepayers to ignore the trust and instruct the trustees, who are the corporation, to cease proceedings to enforce it. I think the trustees would have been entirely within their rights to have ignored the action of the majority and gone on with their action. If this be so, how can the interests of a minority of the ratepayers be affected or destroyed by the illegal action of the majority. It will be conceded that a majority of the ratepayers of a school section, a majority of the council of a municipal corporation, or a majority of the shareholders of

a private corporation cannot do anything. They must act within their powers under the law. It was decided in Hart v. McIlreith that a city council cannot pay money not authorized by law, and that any ratepayer injured can interfere to prevent this. A majority of ratepayers at a school meeting could not vote to impose an assessment on all the ratepayers and then dispose of the funds so raised for any purpose not sanctioned by the law. Any ratepayer would have a remedy in such a case.

In my view this house purchased by benevolent funds for the Sisters was held in trust—that is, a trust was attached to it. It was to become the property of the section if the Sisters left. It thus inured for the benefit of the ratepayers; it belonged to them. It was an asset to which every ratepayer was entitled to the benefit of, and the majority of the ratepayers, in my judgment, had no legal authority to dispose of it. There has been a breach of a public trust and, as I understand the law, the Attorney-General is precisely the functionary who has a right to intervene and ask for the performance of the trust. If it is a trust which cannot be carried out in precise terms, as I think in this case it can, he has a right to ask that a scheme of disposal be affirmed by the Court under the cy pres doctrine.

It was urged by the learned counsel for defendants that the trust itself is illegal and void inasmuch as the money was given by a benevolent public for a house for the Sisters, and no section of the givers had any right to attach conditions to the gift. I cannot quite accept this principle as applicable to existing conditions. The larger part of the entire funds —$900—was raised by a bazaar held in the school section, managed by the people of the school section and for the purposes inuring solely and entirely for the benefit of the school section. It was in School Section No. 8 only that these Sisters were teaching, and a house for them would be a relief to the ratepayers of that section. The priest recognized the exceptional interests of the section by calling a meeting of the ratepayers of that section to arrange the terms of disposing of the money to be devoted to the Sisters' home. These ratepayers who attended in force recognized that these Sisters were not a permanent institution—they might leave at any moment. It would be pure folly to present them absolutely with a house which

they might vacate (as they actually did), a few months after it was placed at their disposal, and thus enable them to sell for their own benefit this house bought with the benevolent contributions of the people. Would it not, therefore, be natural, wise and proper to annex the condition? At all events, it was annexed and Andrew Landry subscribed to it. By what principle can he therefore, a few months later, take advantage of his own wrong and procure an absolute deed of it to himself?

It was also contended by the learned counsel that the trustees have no power under the Act to accept property. I do not so read section 55 of chapter 52. "Public Instruction," sub-section "a," seems to me to give them ample authority to take possession of and hold any property "purchased" or "given to" it for school purposes. Even in the absence of any such express provision I should suppose that under the common law any corporation could receive property unless expressly forbidden to do so.

Holding the view I have already expressed as to this trust I think an order should pass in accordance with the prayer of the plaintiff declaring that defendants, Andrew and Felix Landry, hold the said land in trust for the trustees of School Section No. 8, and that said defendants, Andrew and Felix Landry, be required to convey said land to the trustees of School Section No. 8 free from any mortgage or incumbrance. Plaintiffs to have costs of action against defendants Andrew and Felix Landry.

NOVA SCOTIA.

SUPREME COURT.

TRIAL AT ANNAPOLIS.

NOVEMBER 4TH, 1910.

MESSENGER v. STEVENS.

Vicious Animal—Damage — Liability — Naas v. Eisenhaur (41 N. S. R. 424), distinguished.

Action claiming damages caused by defendant's cow breaking into plaintiff's pasture and injuring plaintiff's cow in such a way as to cause its death.

W. E. Roscoe, K.C. and O. S. Miller, for plaintiff.

J. J. Ritchie, K.C., for defendant.

GRAHAM, E.J.:—This is an action for damages caused by the defendant's cow breaking into premises in possession of the plaintiff, the title being in the plaintiff's wife, and there fatally wounding the plaintiff's cow so that it had to be killed. The evidence is circumstantial evidence and the hours are important as well as the locality. The plaintiff's cow was in the inside pasture, and a lane of one of his sons leads from that to a back pasture, which he uses for his horses at that time of the year. There was no other animal in the front pasture when he turned his cow out in the morning. One Norman, a school boy, at the noon hour, between twelve and one o'clock, on his way to his dinner, saw the defendant's cow in a field of oats of Major Messenger into which it had broken. He turned it out of the oat field into this lane which adjoined it, through a gate into the lane. He knew the cow. The tracks left by the cow shew that it followed the lane and at the end of the lane it broke through the entrance rails and into the plaintiff's front pasture where, as I have said, the cow of the plaintiff had been left. Then near to the entrance to the lane there were the tracks of two cows which had been engaged in an encounter. The ground was torn up by the pushing of two animals. The

plaintiff found his cow stretched out on the site of this encounter. He found the blood oozing from its head. When he found her in this position it was nearer to one o'clock than half past twelve o'clock. The plaintiff called in the neighbours and this defendant among them. The boy was summoned from the school. The defendant was the first to see him at the school and the boy convinced him that it was his cow he had turned out. The tracks were followed from the defendant's pasture across the lane through an adjoining field and into the oats field, thence back where the boy had turned it into the lane, thence as I have already indicated and to the defendant's pasture.

Now it is not denied that it was the defendant's cow which was turned into the lane. But the defendant suggests that it must have been something else which wounded the plaintiff's cow.

The plaintiff or his wife thought at first when the cow was found stretched out and the blood oozing from its head that some one had thrown a stone which caused the injury. But in the presence of the defendant they looked for a stone and there was none. The defendant called some witnesses who were or had been country butchers, and they looked at the skull, which was in Court, and gave their opinions that the aperture could not have been caused by the horn of the defendant's cow. And they gave as a reason that the blow, to cause such an aperture, would have knocked off the shell of the horn of the defendant's cow, and the shell had not been knocked off.

That reason, to my mind, is not a very good one. Perhaps the aperture was larger at the time of the trial from the fractured pieces of bone having fallen away. I think that a sharp horn might in such an encounter puncture the skull of another cow without removing its shell. Their experience seemed to be connected almost wholly with the blow of a dull instrument imparted by the butcher when he wishes to fell the animal in order to bleed it. And in cross-examination they did not appear to know much of the actual thickness and defensive power of the skull of such an animal against the sharpness or penetrating power of the horn of another animal.

There was testimony as to the shape of this animal's horns, but they appear to have had effective points and this

cow appears to have known how to use them effectively with fences.

Now if these witnesses, or other witnesses as plausible, could only have suggested another cause—a reasonable one—almost any cause—for the fractured skull this expert testimony would have been seriously considered. But when there is no reasonable cause suggested, and no other animal was present, and no person present with a weapon, and the circumstantial evidence shews these two cows in an encounter, the defendant's large and the plaintiff's small, and a few moments afterwards the plaintiff's cow is found stretched out on the spot her skull fractured and blood oozing from the fracture, I cannot help finding that it was possible for that wound to have been inflicted by the horn of the defendant's cow, and that it was so inflicted, and that it was a wound from which the cow could not recover. Circumstantial evidence is often used in the case of animals: Williams v. Woodworth, 32 N. S. R. 271, and the English case cited therein.

The defendant's cow was in the habit of breaking through fences and doing it with apparent ease. She was breachy and the defendant knew of it. I refer to the testimony of a witness Henshaw called by the defendant as well as to the testimony of other witnesses called by the plaintiff.

But it is not necessary that the plaintiff should shew in this action of trespass that the defendant's cow was vicious to other cattle, and that the defendant knew it. The distinction between this case and that of Naas v. Eisenhaur, 41 N. S. R. 424, is that the offending oxen were in that case on the highway, not on the plaintiff's land. This case comes within the doctrine of Lee v. Riley, 18 C. B. N. S. 722, distinguished in that case and followed in the case of Ellis v. Loftus, L. R. 10 C. P. 10. And from that case of Lee v. Riley it appears that the damages from the injury to the cow are not too remote.

I find that the cow was the plaintiff's and that he was in possession of the pasture.

I find a judgment for the plaintiff for the sum of thirty-five dollars and costs.

NOVA SCOTIA.

SUPREME COURT.

TRIAL AT ANNAPOLIS.

NOVEMBER 3RD, 1910.

PARKER v. BLIGH.

Tort—Action for Conversion of Goods—Warehouse Charges —Sale for Same and Advances — Pledge — Demand — Tender.

Action for conversion of goods.

J. J. Ritchie, K.C. and O. S. Miller, for plaintiff.

W. E. Roscoe, K.C., for defendants.

GRAHAM, E.J.:—This is an action for the conversion of 512 barrels of apples. The defendants, in the autumn of 1909 agreed to store at their warehouse at Wilmot the apples in question at the rate of five cents per barrel for the season but, if the plaintiff in the event sold the apples to them or shipped to their friends in England, the storage would be free. Later, December 22nd, the defendants advanced on the apples the sum of $600. In January the defendants urged the plaintiff to dispose of the apples, which he appeared reluctant to do, and they demanded payment of the charges against the apples for advances, storage, &c.

The plaintiff thereupon authorised Mr. Charles H. Shaffner to pay the defendants all the charges, and to repack and handle the apples for him.

I accept the testimony given by Charles H. Shaffner as correct. Sometime before the 28th of January, 1910, he went to the defendants' manager at Wilmot, Mr. Arthur D. Shaffner, who undoubtedly had authority in this behalf, namely to receive the money and hand over the apples, and offered to pay the charges. The manager (his brother) in his presence, telephoned a member of the defendants' firm at Halifax, Mr. Harris H. Bligh, relating the offer, and the manager told Charles H. Shaffner that Mr. Bligh refused to give up the apples.

This is the evidence of Mr. Charles H. Shaffner:—

"Q. What did he (the plaintiff) tell you? A. He wanted me to go and pay Mr. Bligh all the charges and take charge of them and repack and handle them.

Q. Handle them for whom? A. For him.

Q. Were you informed of the amount against them? A. I was. I knew the amount of the advance and the amount due for storage. Mr. Parker directed me to pay all charges against them.

Q. What did you say to A. D. Shaffner? A. I said that Mr. Parker wanted me to pay Mr. Bligh's charges and take delivery and repack them.

Q. What charges did you offer to pay. A. The advances and storage. Anything that Mr. Bligh had against them.

Q. What did your brother say? A. He thought it would be satisfactory but he would have to call up Mr. Bligh and get his consent.

Q. Did he call up Mr. Bligh? A. He did.

Q. What did he say over the telephone? A. He repeated the proposition and when he got through he said that Mr. Bligh refused to deliver the apples.

Q. I want to know whether on any other occasion than this you have got delivery from your brother of other lots of apples by saying that you would pay all the expenses? A. I have.

Q. More than once? A. Yes, several different lots.

Q. What would you say—the same thing that you said in this instance? A. Yes."

In cross-examination:—

"Q. What do you say it was that A. D. Shaffner said over the telephone? A. He told Mr. Bligh the proposal I made.

Q. What did he say? A. He said that his brother was there on behalf of Mr. Parker and offered to pay any charges against the fruit and to take delivery of it.

Q. Did you write the words down? A. No, that is as near as I can remember.

Q. That is the proposal you made to him? A. Yes, as their agent.

Q. What did he tell you they said? A. He said Mr. Bligh refuses to give them up, or words to that effect."

Subsequently, on the 28th of January, the defendants formally notified the plaintiff that unless the $600 with

interest and storage charges were paid by February 4th, they would sell the apples. The plaintiff stood on his rights. On the 5th a sale by auction took place.

This transaction, it is conceded, amounted to a pledge of the apples. It is also conceded that a sale in case of default would be a proper course: Ex parte Hubbard, 17 Q. B. D. 698; Ex parte Official Receiver, 18 Q. B. D. 232.

The defendant's counsel, however, contends that the second demand and refusal to pay put the parties in the same place as if there had been no previous tender and refusal to deliver.

Apparently the common law is to the effect that in such a case a tender need not be kept good; that an action for conversion may be brought at once on the ground that the lien is extinguished thenceforth.

Ratcliffe v. Davies, Croke, Jac. 244; Coggs v. Bernard, 1 Sm. L. C. 184, Holt, C.J.: "But indeed if the money, &c."

Some of the American cases follow this doctrine. Cass v. Higinbotham, 100 N. Y. 247; Ball v. Stanley, 26 Am. Dec. 263; Mitchell v. Roberts, 17 Fed. Reporter, 780, where the Judge states the law as follows: "The rule is settled that a tender of the debt for which the property is pledged as security extinguishes the lien, and the pledgor may recover the pledge or its value in any proper form of action without keeping the tender good or bringing the money into Court, because like a tender of the mortgage debt on the law day the tender once having operated to discharge the lien it is gone forever."

The effect of others of the American cases is thus stated in 31 Cyc. 853: "It is not necessary that the tender be kept good to enable the pledgor to avail himself of it as a defence to an action by the pledgee to enforce the collateral, but if the pledgor seek affirmative relief he must keep his tender good or at least offer to pay the amount into Court."

In the case of Yungmann v. Briesemann, 67 L. T. N. S. 642, Lord Esher said: "In my opinion a mere tender and refusal are not sufficient and I think that the plaintiff must always be ready and willing to pay."

And Kay, L.J., referring to the case of a mortgage, citing Gyles v. Hall, 2 Peere Wms. 378, that the only effect of a tender is to stop the interest running, the mortgagee not losing the property, says: "In my opinion that is a more

equitable rule than the rule that a pledgee refusing a tender should lose his special property."

But they did not decide the question because the sufficiency of the tender was not made out.

It is not necessary for me to decide the question here, for there is, I think, an insuperable difficulty about the tender.

All the cases agree that to constitute a valid tender there must either be an actual production of the money, or the persons must be ready and able to produce it, and its production is expressly or impliedly dispensed with.

The money was not produced as far as the evidence shews. And I can find no English authority that the bare refusal, without more, to deliver up the article held for payment constitutes a dispensing with the production of the money.

In Ex parte Danks, 2 DeG. M. & G. 936, the most favourable case for plaintiff, the person offering to pay had the amount there with him to tender it and he said he had it there and offered to pay it. The creditor said it was of no use as it was too late and that the debtor must see the creditor's attorney.

I refer to Coote on Mortgages, page 736, and 1484.

I think the action must be dismissed, and with costs.

PRINCE EDWARD ISLAND.

IN THE COURT OF THE STIPENDIARY MAGISTRATE FOR THE CITY OF CHARLOTTETOWN.

OCTOBER 1ST, 1910.

REX, ON THE PROSECUTION OF ROBERT JENKINS, v. PETER J. DOYLE.

Prohibition Act, 1900 — Social Club — Prosecution against Steward — Bona Fides of Club — What Constitutes a Sale in Violation of the Act.

J. J. Johnston, K.C., for prosecutor.

D. C. McLeod, K.C., and W. E. Bentley, for defendant.

The following judgment was delivered by

J. A. MacDonald, Esquire, Stipendiary Magistrate:—This is a prosecution brought by Robert Jenkins, inspector, against Peter J. Doyle, for selling intoxicating liquor contrary to the provisions of the Prohibition Act, 1900. By the evidence taken in this case it appears that Doyle is a steward of what is known as the Charlottetown Club whose rooms are situate on Great George street in the city of Charlottetown. He is a regularly engaged servant of the club, has a fixed salary and receives no other remuneration for his services. He has no interest in any part of the club property. As such steward, Doyle supplied members and their guests with intoxicating liquor for consumption on and off the premises of the club and received in payment therefor what is known as members' checks or wine cards, which may be taken as the equivalent of money. The liquor furnished to guests was paid for by members. It was a common practice for members to obtain from the steward liquor for consumption at home or elsewhere off the club premises. The money received for liquor delivered to members was paid into the general fund of the club. Much evidence was given in relation to the management, constitution, by-laws and general character of the club. The club was organized in 1893. Its object as stated by witnesses, was to promote social intercourse and mutual improvement and provide a place where gentlemen could meet together for friendly discussion and rational recreation. Also a place where strangers or visitors to the city could be introduced and entertained. A copy of the by-laws was put in evidence by which it appears that members are elected by ballot, pay an admission fee of forty dollars and an annual subscription thereafter of twenty dollars. The officers consist of a president, vice-president and secretary-treasurer elected annually. There is also an executive or managing committee of six members who purchase all supplies (including intoxicating liquors) for the use of the club and fix the price which members pay for any refreshments they may order. The club building is vested in trustees, who are members of the club and rented by the club from these trustees. The furnishings and equipment of the club are of the best quality. There is a large reading room, supplied with most of the leading papers and magazines, a billiard room, card room and café. A list of members was produced shewing the names of Lieutenant-

Governors, Premiers of the province, senators, members of Parliament, bankers and professional and business men of standing and repute in the community. It was also shewn that a number of members are total abstainers.

The first question to decide is, is the Charlottetown Club a bona fide institution, or has it been formed for the purpose of evading the liquor laws? This is a question of fact. It is impossible not to recognize the Charlottetown Club as performing an important function in the social life of the city. Its accommodations, furnishings and equipment, observance of club rules and general management and conduct would appear to be of a high standard. There is, however, one feature that in my opinion somewhat mars the otherwise excellent character of this institution. That is the practice of supplying members with liquor for consumption off the club premises. This practice was very severely questioned in the case of Davies v. Burnett, 1 K. B. (1902), p. 666. In that case the Judges following Graff v. Evans reversed with reluctance the decision of the magistrates who had convicted the waiter of what they had found to be a bona fide club and expressed the opinion that the practice of delivering intoxicating liquor to members for consumption off the premises would be an important element in the determination of the bona fides of a club. Apart from this practice the evidence is very strongly in favour of the bona fides of the club. It does not necessarily follow that because liquor is supplied in this manner for consumption off the club premises that the club becomes ipso facto not bona fide. I must find as a fact whether this club is bona fide or not. In other words has it maintained and put into daily practice its avowed objects or is it a body of men associated together to evade the liquor laws of this province. In determining the character of a club the whole history, management and outstanding features must be looked at. Not one feature alone but all taken together stamp the character of an institution.

I have considered very carefully the matter of supplying members with liquor for consumption off the club premises as affecting the bona fides of the club. If this were a main feature or object of the club there would be little difficulty in saying the club was not bona fide. But I must weigh as against this doubtful practice the overwhelming weight of evidence that goes to prove the bona fides of the club. It is impossible to say that the gentlemen who compose the club,

having regard to its history and daily practice, have associated themselves together for the purpose of evading the liquor laws of the province. I must hold, therefore, that the Charlottetown Club is a bona fide institution. The next question is one of law. Was the supplying of liquor by Doyle to members of the club a violation of the Prohibition Act? This matter was very ably and fully argued before me by Mr. Johnston, K.C., for prosecution, and Mr. McLeod, K.C., and Mr. Bentley, for defendant. Numerous English, Canadian and American cases were cited. The leading case is that of Graff v. Evans, 8 Q. B. D. 373. In that case Graff was manager of an institution carried on bona fide as a club, under rules by which members paid an entrance fee and subscription. Trustees were appointed in whom all the club property was vested, and there was a committee of management (for whom Graff acted) to conduct the general business. The club was not licensed for the sale of intoxicating liquor, but these were supplied at fixed prices to members for consumption on and off the premises, 33 per cent. above the cost price being charged for liquors to be consumed off the premises and the money produced thereby going to the general fund of the club. Graff having in the course of his employment as manager supplied intoxicating liquors to a member (who paid for them), held that Graff did not sell by retail intoxicating liquors within the meaning of section 3 of the Licensing Act, 1872, and therefore was not liable to conviction for an offence under this section.

Field, J., in his judgment, says: "In construing a statute like the present, by which a penalty is imposed, we must look strictly at the language in order to see whether the person against whom the penalty is sought to be enforced has committed an offence within the section. . . . The question here is—Did Graff, the manager, who supplied the liquors to Foster, effect a sale by retail? I think not. I think Foster was an owner of the property together with all the other members of the club. Any member was entitled to obtain the goods on payment of the price. A sale involves the element of a bargain. There was no bargain here, nor any contract with Graff with respect to the goods. Foster was acting upon his rights as a member of the club, not by reason of any new contract, but under his old contract of association by which he subscribed a sum to the funds of the club and became entitled to have ale and whiskey supplied

to him as a member at a certain price. There was no contract between two persons because Foster was vendor as well as buyer. Taking the transaction to be a purchase by Foster of all the other members' shares in the goods, Foster was as much a co-owner as the vendor. I think it was a transfer of a special property in the goods to Foster which was not a sale within the meaning of the section."

Huddleston, B., in the same case says: "There was no transfer of the general or absolute property in the goods to Foster, but a transfer of a special interest. I cannot think it was a sale of intoxicating liquors by retail."

In National Sporting Club v. Cope, 48 W. R., page 448, Channell, J., says: "The law with reference to purely members' clubs may be taken to be settled, namely, that in the case of purely members' clubs a license is not required; that the form that is gone through in the coffee room or in other places in the club where refreshments are sold in one sense is not a selling of liquors so as to make the licensing laws applicable, but is merely a form of distributing common property. It is treated as being analogous to the simple case in which people living in the same house might order a cask of beer from the brewers—order it all together on their joint account—and arrange between themselves that the proportions in which they should pay for it should be the proportions in which they used it, and that an account should be kept of the quantity they each had out of it. In that case there would clearly be only one purchase of the cask of beer, the beer would become—not their joint property, because they might not all have equal interests—but property in which they all had a common interest, and the arrangement would be a mere distribution of common property. Members' clubs are treated as being similar to that."

In Newell v. Hemingway, 60 L. T., page 544, the case of Graff v. Evans was quoted with approval and the principle laid down there upheld.

Lord Coleridge, C.J., at page 546, says: "It seems to me to be clear that what the appellant (the manager of the club) did in handing over the beer to the members was not a sale or anything like it. To call that a sale would be going far beyond the real purpose of the Act of Parliament, and would be putting down what was not intended to be suppressed. In the case of Graff v. Evans, Field, J., in an elaborate judgment points out that the handing over of liquors by the man-

ager of a bona fide club to the general body of members is not a sale. This case of Graff v. Evans is much in point and it would be straining the Act to bring such a case within its scope."

Manisty, J., at page 546, says: "Whether members of a club ought to be taxed or not is a question for the legislature but not for us. As the law at present stands bona fide clubs are not sellers of intoxicating liquor within the meaning of the statute. The directors in this case provided liquors which were handed over to the members of the club by the manager and consumed by them at a price sufficient to assist in keeping up the club. I do not think there was any sale within the meaning of the statute."

In a later case Davies v. Burnett, 1 K. B., p. 666, decided in 1902 the principles of law laid down in the foregoing cases were expressly upheld. In the matter of the findings of fact by the magistrates as to the bona fides of the club in question the Court expressed a strong opinion that the practice of supplying members with liquors to be consumed off the club premises ought to be an important element in determining the bona fides of the club.

This latter is an opinion on a matter of fact and does not in any way effect the principle of law laid down in Graff v. Evans. It seems to me the principles of law laid down in these cases are clear and unmistakable. The facts in these cases I have cited, are almost identical with this case of the Charlottetown Club. It cannot be doubted that if this case was tried in England under the Licensing Act (admitting the bona fides of the club) the Court would hold there was no sale within the meaning of the statute. It now remains to be decided whether the supplying of liquor under the circumstances mentioned in the cases quoted, held in the English Courts not to be "sales" within the meaning of the Licensing Act, should receive a similar interpretation under the Prohibition Act of this province. This is where the real difficulty of the case lies.

Section 3 of the Licensing Act, 1872 (English), is as follows: "No person shall sell or expose for sale by retail any intoxicating liquor without being duly licensed to sell the same, &c."

Section 3 of the Prohibition Act, 1900, enacts as follows: "No person shall by himself, his clerk, servant or agents, directly or indirectly on any pretence or upon any device

keep for sale, sell or barter, or in consideration of the purchase of any other property or for any other consideration give to any other person intoxicating liquor."

Is there that difference in the meaning of the word "sell" in the English statute and the word "sell" in the Provincial statute that a transaction in liquor could be regarded as "no sale" under the English Act, and a similar transaction be regarded as a "sale" under the Provincial Act? I cannot think so. The word "sell" or "sale" must bear its ordinary common law definition in whatever statute it is used unless the statute specially defines or limits or enlarges its meaning. In neither statute is this done. The word then when used in either statute should receive its common law definition. That it received this definition in Graff v. Evans is clear from the ratio decidendi of that case.

In some Canadian cases, particularly that of Ex parte Coulson, 33 N. S. R. 341, it is held that Graff v. Evans does not apply to statutes prohibiting the sale of intoxicating liquor, and the principle of this decision is criticised on other grounds. Attempts to explain the decision on the ground that the Licensing Act by its preamble was never intended to apply to clubs are unsatisfactory: because if that were the ground of the decision it would have been so stated, and if the club was outside of the operation of the statute by intendment than it would have been immaterial whether the transactions in liquor were sales or not. In the United States it is generally held that the supplying of liquor by the steward of a bona fide club to its members is a sale within the meaning of the statutes prohibiting the sale of intoxicating liquor, but the principle of these cases is certainly in conflict with the cases in the English Court of Queen's Bench and I consider myself bound by the latter. Reference was made to certain sections of the Prohibition Act which were intended to prevent evasions of the law, but I do not think the defendant comes within these sections.

There was no attempt at evasion. Whatever transactions in liquor took place were done openly and under the bona fide belief that no law was broken. The club was organized in 1893 and established a certain practice as detailed in the evidence of supplying those members who desired it with intoxicating liquor. This practice has been continued ever since. The Prohibition Act was passed in 1900. It could hardly be said that a practice established in 1893 was in-

tended as an evasion of a law not then in existence. In addition, the matters involved in the issue have already been adjudicated on in the Court by my predecessor in office, the Hon. F. L. Haszard, then stipendiary magistrate and now Premier and Attorney-General of this province. Mr. Haszard delivered a very elaborate and exhaustive judgment which I have had the privilege of reading, and which I follow in the present case. It was held that the club was a bona fide institution, and on the authority of Graff v. Evans that the supplying by the then steward of the club of intoxicating liquor to members was not a sale within the meaning of the Canada Temperance Act then in force in the city of Charlottetown. This case was decided in 1894. It must be remembered that the Prohibition Act does not prohibit the use of intoxicating liquors as a beverage. The theory of the English cases as applied to clubs is this—that the sale takes place when the committee acting for the club purchases the stock of liquors for use of the members of the club. What follows is a form of distribution of property in common among its owners according to certain rules made by the owners.

The function of the steward in supplying the liquor may be said to be purely mechanical. When the Legislature passed the Prohibition Act in 1900, the Charlottetown Club had been in existence for a number of years. It was well known that members were supplied with intoxicating liquor on the club premises in the manner already detailed. There was a judgment in its favour holding that the club had the right under the then existing law to do this. It seems to me that if the Legislature intended to bring this institution within the operation of the statute clear and express language should have been employed.

For the reasons given and under the authorities quoted I must hold that there was not in this case a sale of intoxicating liquor and consequently no violation of the Prohibition Act.*

*Reporter's Note.—This judgment is not subject to review or appeal.

NOVA SCOTIA.

SUPREME COURT.

TRIAL AT HALIFAX.

NOVEMBER 10TH, 1910.

FENERTY ET AL. v. THE CITY OF HALIFAX.

Watercourse--Diversion—Damages—Deed—Construction.

Action claiming damages for the diversion of water from plaintiff's mills.

L. A. Fenerty, for plaintiffs.

F. H. Bell, K.C., for defendant.

DRYSDALE, J.:—After the argument of this case I did not get all the exhibits until I had to take up my fall circuit. Since returning I have again gone over the extended notes.

At one stage of the argument both sides seemed to agree that the plaintiffs' rights were based on the natural flow of water coming from the Chain Lake valley or watershed as conditions existed in 1846, but later plaintiffs' counsel seemed to argue that he is entitled to a greater flow by reason of the city increasing such flow from bringing into the Chain Lakes other streams, and by reason of their extensive storage dams, relying upon dicta cited to the effect that if water is added to a natural stream by artificial means it becomes a part of the natural stream and subject to the same natural rights as the rest of the water. This latter contention is, I think, however, concluded as against the plaintiffs by reason of the deed or agreement of 1846 made between the predecessors in title of the plaintiffs on the one part and the predecessors in title of the city on the other part. In and by that deed the right to bring the Long Lake waters into the Chain Lakes for storage purposes, and for supply to the city from the latter lakes by means of pipes, is expressly given, and the right of Hosterman, plaintiffs' predecessor in title, to water expressly limited to the quantity naturally flowing from the Chain Lakes theretofore. Since the said deed the city has connected said lakes, constructed large dams and made one large watershed, and it seems to me quite clear that the plaintiffs' rights must be based on the natural flow from the Chain Lake valley based on condi-

tions as they existed before the date of said deed and quite apart from any increased flow that may have been caused by the city's works.

This brings me to a consideration of the plaintiffs' evidence in support of his allegation that the city in the summer months of 1909 deprived him of water that he was entitled to for his mills; in other words, that they did not let down to his mills the natural flow of the Chain Lake valley to which he was entitled. Outside of a few personal visits by himself to Byers brook, and very casual inspections of such brook which I do not think I can consider under the evidence as reasonable proof of plaintiffs' claim, his whole case is based on the theory that he is entitled to one-fifth of the entire waters collected from the large watershed and the whole city works. No evidence was given as to the volume of water that would come from the Chain Lake valley as it existed prior to 1846, but plaintiff contents himself with an estimate based on the fact that the Chain Lakes watershed forms about one-fifth of the whole watersheds that now feed the city's storage, takes the total amount fed to the city through the pipes and claims one-fifth of the waters so used plus an allowance for evaporation. And taking this estimate as proof of the plaintiffs' claim he can afford to abandon the item of evaporation. After giving the plaintiffs' theory—for it is only a theory —full consideration, I am forced to conclude that it is not reliable and it does not satisfy me that it makes out the case that he can only succeed upon, viz., that he has been deprived of any water that he is entitled to, based on Chain Lake conditions of 1846. Mr. Doane, the city engineer, makes cogent criticism in respect to Mr. Fenerty's data. The latter's statements are obviously mere guesses in many respects and the proof to my view falls far short of satisfactory evidence that the plaintiffs' have been deprived of any rights to which they are entitled.

The plaintiffs have the burthen of establishing that they have been deprived of water to which they were entitled and in this I think they fail. From the system adopted by the city for ascertaining the natural flow of Chain Lake valley I am satisfied the plaintiffs have been getting quite all the water to which they were entitled.

By the use of the measuring board at Byers brook a satisfactory basis for the calculations of the Chain Lake waters

is, it seems to me, established. It is true this board was out for a time in 1909, but the attendant who had worked the outlet and watched the inlet satisfied me that during the season of 1909 the plaintiffs had not suffered.

I am of opinion the plaintiffs' action fails and must be dismissed.

NOVA SCOTIA.

SUPREME COURT.

TRIAL.

NOVEMBER 8TH, 1910.

O'BRIEN v. CROWE.

Contract—Breach—Failure to Properly Perform—Damages.

Action claiming damages for breach of a contract to saw logs.

B. T. Graham, for plaintiff.

J. P. Bell, for defendant.

RUSSELL, J.:—This is an action for damages sustained by the plaintiff by reason of the defendant's misperformance of and failure to perform a contract for the sawing into lumber of the plaintiff's logs.

The agreement was as follows:—

"Agreement made this date between W. O'Brien and A. L. Crowe, of Truro, for sawing. First, W. O'Brien agrees to log to Mr. Crowe's mill timber enough to make 10,000 feet of lumber per day every day the mill works except stormy weather that is not fit to work.

The mill has to be kept running six days per week, barring accidents; if any break should occur it has got to be repaired as quickly as possible.

W. O'Brien agrees to pay Mr. Crowe for sawing $2 per M. for live sawing, and $2.50 for square edge to be sawed 1 inch, 1¼, 1½, 2 inches, 3 inches, 4 inches thick. W. O'Brien agrees to furnish for Mr. Crowe timber enough to set the mill on; also logs enough to make logs to build camps. Lumber is to be piled away from the mill by Mr. Crowe within a reasonable distance, and each kind to be kept separate. Lumber is to be well sawed and no logs are to be cut up and wasted.

Mr. Crowe is to have his money every month for sawing. A small portion of the money to be kept back until re-surveyed; that is to be within six months from time lumber is sawed, then he is to have whatever balance is due him.

Sgd., &c."

I think that under the terms of this agreement the defendant was bound to saw 10,000 feet of lumber per day, except as specially provided in the document. The nature of the business was such and was known to both parties to be such, that if the logs hauled to the mill were not sawn as they arrived, but allowed to accumulate at the mill, there would be additional and unnecessary labour in handling them. But I doubt if it is necessary to pass any judgment on the construction of the agreement. The defendant did not perform his contract satisfactorily. His machinery seems to have been imperfect, or if not, his workmen did not understand their business. He was running a farm in Truro and was only at the mill two days in the week for a good part of the time over which the work extended. The logs were sawed into lumber, much of which was unmerchantable, and the plaintiff was fully justified in putting an end to the engagement, and employing another sawyer, as he did. He now claims damages for the lumber badly sawn as well as damages caused by defendant's failure to saw the balance of the logs. The defendant sets up as a defence that the logs were muddy and in some instances covered with frozen mud which dulled the saws and made them work irregularly so that it was impossible to saw the lumber to a uniform thickness. I do not think that this furnishes any excuse for the failure to carry out the contract. It was one of the accidents with which the defendant had to reckon when he undertook to do the work.

The damages for the lumber badly sawn are not difficult to assess. There were 73,000 feet sent to the ——— Lumber Co., of which 7,000 feet were rejected and I think properly so. On the 66,000 feet accepted the plaintiff lost a dollar a thousand, making a loss of $66. The 7,000 rejected, I think the evidence shews to have been worth six dollars a thousand less than if properly sawed, making a loss of $42. Of 98,000 sold to Knott, Samoson & Co. 88,000 only were accepted. For these the plaintiff received only $12 a thousand because of their defective quality when he should have received $14, making a loss of $2 a thousand or $176. Of

the 10,000 rejected 7,000 sold at a loss of $6 a thousand, making a loss of $42. The 3,000 remaining were worth about $7 or $8 a thousand instead of $14. The loss on these would be about $18. Of the lot of 36,000 sold to Rhodes, Currie & Co. 31,000 realized $9.30 a thousand instead of $14, making a loss of $145.70. 800 feet were left on hand, of which 15 per cent. were spoiled, say 2,000, on which the loss was about $6.50 a thousand, making a loss of $78. The unspoiled lot not perfectly well sawed, 68,000 of this lot, are estimated to be worth less than they should be by $2 a thousand, making a loss of $136.

The computation of the damages for failure to complete the contract must be largely a guess. The evidence is not clear, but I think I am justified in estimating them at a minimum about of $50.

For these sums, amounting to $753.70, the plaintiff will have judgment and the counterclaim is dismissed.

Since the foregoing memorandum was written I have been favoured with memoranda from both parties, from which I observe that I have in some few instances allowed larger amounts than the plaintiff claims, and have disallowed some important items of his claim. As to the latter I think the evidence is too indefinite to warrant a larger finding. As to the former I think my notes taken at the trial warrant the amounts I have assessed.

NOVA SCOTIA.

SUPREME COURT.

CHAMBERS.

NOVEMBER 8TH, 1910.

GIRROIR v. McFARLAND ET AL.

Ejectment — Application to be put in Possession after Adverse Judgment at Trial—Refusal—Practice.

W. Chisholm, in support of application.

E. F. Gregory, K.C., contra.

Motion on behalf of Margaret A. Gallant to restore her to the possession of land from which she was removed by the sheriff under a writ of possession issued by order of the Court in an action of ejectment in which plaintiff recovered judgment against defendants, alleged to be in possession of land to which plaintiff was entitled.

The applicant claimed that at the time of the recovery of the judgment in ejectment she was in sole possession of the land in question as owner thereof, subject to a deed made to plaintiff by way of mortgage, and that she was not a party to the proceedings in which the judgment was recovered.

LONGLEY, J.:—After giving this application to put Margaret Gallant into possession of the premises from which she has been ejected by the sheriff in this suit careful consideration in all its aspects, I have come to the conclusion that under the circumstances of the case it would not be possible for me to make any such order consistently with the law apart from the fact that the learned Chief Justice, who tried this case, in a sense, decided the very question upon which Mrs. Gallant is seeking repossession. I do not think in any case it would be proper to determine the question of the validity of a deed, or to vary its character, on mere affidavit. This, I think, could only follow a regular trial. I do not say that Mrs. Gallant is excluded from bringing any action to test this point. I do say that I do not think I have any authority to restore her to possession upon affidavit and summary motion in face of the judgment already given and executed in this cause. Ex parte Reynolds, 1 James Reps. 499, deals with a state of facts so different in my view from this case that it has no bearing.

I have to refuse the application, and I am afraid I have no alternative but to add, with costs.

NOVA SCOTIA.

SUPREME COURT.

TRIAL AT HALIFAX.

NOVEMBER 10TH, 1910.

FULLER & CO. v. HOLLAND.

Contract — Sale of Goods — Delivery of Part—Promissory Note for Price of Whole—Balance of Goods Undelivered —Demand—Action on Note—Consideration.

Action on a promissory note given in payment for goods ordered by defendant through plaintiffs and destroyed in part by fire before delivery.

H. Mellish, K.C., for plaintiffs.

W. B. H. Ritchie, K.C., for defendant.

MEAGHER, J.:—A quantity of glass of the value of $128.23, ordered by the defendant from the plaintiff arrived at Halifax in the spring of 1909, with other goods ordered by the plaintiffs from Belgium. All were consigned to the plaintiffs and there was nothing in the packages to distinguish those for the defendant from the plaintiffs' other orders. The defendant was informed of the arrival, and late in April an invoice of his order was sent to him. The terms of payment were thirty days after arrival of the goods, though strictly speaking, that meant thirty days after he was supplied with the invoice.

The defendant failed to direct delivery of the goods to him from Deep Water where they were landed, consequently they were all removed to the plaintiffs' warehouse. Soon after the defendant ordered nineteen boxes of the forty-five to be sent to him, which was done. The balance remained on the plaintiffs' premises awaiting his further orders, and were destroyed by fire on the 5th of May, 1909.

After the nineteen boxes were delivered the defendant was applied to to sign a note at thirty days for the amount of the order. He sought and obtained the plaintiffs' consent to a note for sixty days, urging as a reason that he had other bills coming due at the end of thirty days, and did not want to have to meet all together. The defendant agreed to pay and did pay the interest on the extra thirty days.

The note then made is the one sued on. It was not made for the plaintiffs' convenience or accommodation. Neither party so understood or regarded it. The giving of the note meant the assumption by him of liability for the amount of the order. He had already received part of the goods and the balance was, I am persuaded, held by the plaintiffs for his convenience and subject to his order and to be delivered as he required or had accommodation for them.

I have said that he signed the note after he received part of the goods; his letter of the 9th of July is to that effect, but I should have so found independently of the letter.

A demand and refusal of the balance of the order was pleaded but not proved. The defendant admitted he never sought delivery of them at any time. It seems to me that

was essential in order to shew failure of consideration: Anderson v. Jennings (1846), 2 U. C. Q. B. 422. For aught that appears the plaintiffs may have been and may still be perfectly ready and willing to deliver him glass of exactly the same quality, sizes and character as that ordered, and probably would have done so long ago if requested, in which case the defendant would have nothing to complain of. It may well be that the plaintiffs (defendant) would not have that right if the title to the goods imported to fill the defendant's order passed. But if the title passed and the plaintiffs were merely holding the goods for him as his agent or bailee they were at his risk and there was no failure of consideration. His conversation with Sterns after the fire shews that he thought the goods and the risk were his.

If the defendant paid the note I do not see why he could not after demand for delivery of the remainder have successfully sued for breach of the contract to deliver which sprang from the circumstances; equally so, upon the mere giving of the note, without payment. A demand would in either case be necessary because I am persuaded there was at least a when and as he ordered and required their delivery, and meantime they were to hold them for him.

The only question calling for determination is, was there a consideration for the note? As to that I find there was. The plaintiffs changed their position and gave him a longer credit and in the transaction a promise was involved to give him the balance of the goods and a liability to pay damages for failure to do so. It cannot be assumed that the plaintiffs accepted his note intending to do neither of these things: Tradesmens National Bank v. Curtis (1901), 167 N. Y. 194; Anderson v. Jennings, above cited; see also the observations of Parke, B., in Jones v. Jones (1840), 6 M. & W. near the foot of page 86. The present case seems to me a much stronger case than that of Sowerby v. Butcher (1834), 2 C. & M. 368.

The plaintiffs are entitled to judgment for the amount of the note with interest and costs.