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NOVA SCOTIA.

SUPREME COURT. JUNE 14TH, 1909.

CHAPPEL BROS. & CO. LTD. v. THE CITY OF SYDNEY.

Municipal Corporation — Public Library — Committee — Plans and Specifications—Approval by City Council — Liability for Cost of.

W. H. Covert, for plaintiff.

F. McDonald, for defendant.

LAURENCE, J.:—A library committee was appointed from time to time by the town of Sydney, which had charge of a public library maintained by the town. Mr. Carnegie in the year 1903 offered the town $15,000 for the erection of a library building on conditions which are mentioned in an Act of the Legislature, c. 169, of 1903.

In the same year by c. 174 of the Acts of the Province, the Town of Sydney was constituted a city, and by the same Act the liabilities of the town were transferred to and imposed on the city.

The library committee referred to, without special authority from the city, proceeded to call for plans and specifications for the building contemplated by the donations of Mr. Carnegie and c. 169 of 1903 Acts referred to. The plaintiffs submitted plans and specifications to the committee—which I find were, after certain alterations made at the request of the committee—accepted, and on these plans and specifications tenders for the library building were asked for, and one, that of the plaintiffs, who are also building contractors, was received, but not accepted or at least acted on as the building has not been erected. The committee after this reported in full all they had done in the matter

to the city council, and their report was adopted and approved of.

I am of opinion that the defendant corporation is liable for a reasonable amount for the plans and specifications so furnished on the implied and executed contract with the committee—so ratified by the city council of the defendant corporation—on the authority of Lawford v. Billericay Rural Council, (1903) 1 K. B. 772.

The amount sued for is $426.63, or 3 per cent. of cost of building. This I assume included a charge for inspection of building during construction. I think $250 a reasonable amount for plans and specifications, for which plaintiff should have judgment.

NOVA SCOTIA.

FULL COURT. DECEMBER 11TH, 1909.

CHAPPELL BROS. & CO. LTD. v. THE CITY OF SYDNEY.

Municipal Corporation — Contract for Erection of Library Building—Donor — Principal and Agent—Conditional Gift in Aid of Library—Approval of Gift by Ratepayers —Power of City Council to Enter into Contract.

Appeal from the judgment of LAURENCE, J., in favour of plaintiff in an action to recover an amount claimed to be due plaintiffs, a firm of architects, for work and labour in connection with the preparation of plans and specifications for a library building for the defendant city. (Reported ante p. 485).

F. McDonald and W. F. O'Connor, in support of appeal.

W. H. Covert, contra.

TOWNSHEND, C.J.:—The single question, it seems to me, necessary to deal with in this appeal is the power of the city council to make a contract binding on the city for the construction of the library building.

By c. 169, Acts 1903, it is recited that Andrew Carnegie had donated to the town $15,000 to be expended in the erection of a building to be used as a free public library on condition that the town contributed annually to the support of the library $1,500. Further, that the ratepayers of the town, at a meeting called for the purpose, had approved of the acceptance of the gift. Further, that the ratepayers had

also approved of the expenditure of $7,500 for the purchase of a site for said building. Then follows s. 1, which authorizes the town to include in the estimates of the amount required for the general purposes of the town, the amount required for the site, and in the annual estimates $1,500 for the support and maintenance of the library, but no power is conferred to assess or include in the general assessment any amount for the construction of the buildings, for the obvious reason that the funds for this purpose were to be donated by Mr. Carnegie.

In this case the library committee of the town called for tenders to construct the building according to plans and estimates furnished by the plaintiff, which were adopted and accepted, but it was afterwards decided not to proceed with the building, and plaintiff now seeks to recover the value of his plans, estimated at three per cent. on cost of building. The learned trial Judge reduced the amount of the claim from $426.32 to $250, for which he gave judgment. It would seem to be very clear that if the city is liable for this claim, it would also have been liable for the whole cost of the building had it been proceeded with, and yet there is not a word in the statute enabling the city to include in its assessment any such item.

The powers of a municipal corporation are, as I understand it, limited to the purposes for which taxes may be levied under the law creating them, or to those objects when there is special statutory authority for the imposition of taxes.

It is said in Vol. 20 Eng. & Am. Encyc., p. 1171:—

"The power of a municipal corporation to contract an indebtedness, when there is no special fund for the payment of the obligation, is impliedly limited by the purposes for which taxes may be levied."

Again, at p. 1158:—

"It may probably be stated as a general rule in the present connection that the law will never imply a contract where none could have been expressly entered into."

It is said that reading the special Act, c. 169, Acts 1903, with chapter 71 R. S. s. 132, s.-s. (p), there is power to include the amount sued for in the general assessment. Subsection (p) is as follows: "All other expenditures incurred in the due execution of the powers and duties by law vested in, or imposed on the town, its mayor, council and officers."

I am of opinion there can be no implication, under c. 169, to impose on the ratepayers any liability not expressly authorized by statute, and that the fact of two other items of expenditure for the libraray being expressly authorized while this is omitted, strengthens the argument that it was not intended, and the facts also shew that there was no intention on the part of the ratepayers nor the legislature to impose any liability on the town for the building.

I think the defendant's argument was sound when it was contended that in asking for plans and specifications and tenders the committee were doing so in the capacity of agents for Mr. Carnegie, and not for the town. Necessarily the committee and the town council had to be the active parties in arranging for the building, which Mr. Carnegie had promised to pay for, but they had no authority to bind the town in any way in respect to the construction of the building.

Dillon's Municipal Corporations, Vol. 2, s. 763, says:—

"It is a principle universally declared and admitted that municipal corporations can levy no taxes, general or special, upon the inhabitants or their property, unless the power be plainly and unmistakably conferred. It has indeed often been said that it must be specifically granted in terms, but all Courts agree that it must be given either in express words or by necessary or unmistakable implication, and that it cannot be collected by doubtful inferences from other powers, or powers relating to other subjects, nor can it be deduced from any considerations of convenience or advantage."

It will be observed that the charges sued for in this action were included in the amount of plaintiff's tender, but whether so or not, makes no difference in the legal result. If power to make such a contract was not specifically conferred on the council, there would be no power to bind the ratepayers. The plaintiffs appear to have been well aware that payment for the building was to be got from the Carnegie fund, and must be taken to have made their tender accordingly, and to have known that only from that source could they receive payment. I agree that if the council had entered into the contract to put up the building in the only capacity it could have done so, acting for Mr. Carnegie, and plaintiff had constructed the building, payment could have been enforced against Mr. Carnegie, but that

is a different matter from making the city liable in the first instance or at all.

It may be that the committee or the members of the council have made themselves personally liable to the plaintiffs, as to which I give no opinion, but in the absence of statutory authority I do not think the city can be made responsible for indebtedness in no way so authorized. In this connection reference may be made to the case of Waterous Engine Works v. The Town of Palmerston, 21 S. C. R. 556, which generally supports the views I have expressed.

In my opinion the appeal should be dismissed with costs.

DRYSDALE, J.:—This appeal is from the judgment of Mr. Justice Laurence allowing plaintiffs $250 as a reasonable amount for plans and specifications prepared by plaintiffs, architects, for the defendants, intended for the erection of a public library in Sydney. If the plaintiff is entitled to recover it was admitted on the argument before us that under the evidence the plaintiff is entitled to $426.63 or 3 per cent. of the cost of the building.

The real question argued on this appeal was as to the power of the defendant corporation to enter into any such contract as the one sued upon. If the defendants were authorized by the legislature to erect a public library the power to enter into a contract for plans follows, and in my opinion, the defendant's powers in this respect rest wholly upon a proper construction of c. 169 of the local Acts of 1903. The preamble of this Act recites a gift to the defendant town of $15,000 to be expended in the erection of a building to be used as a public library on condition that the town contributed annually toward the support of said library the sum of $1,500. It further recites the acceptance of said gift by the ratepayers, as also the ratepayers' approval of an expenditure of $5,700 for the purchase of a site for said library building. The enacting clause following then declares or provides that the defendant is authorized to include in the estimates extending over a period of three years the said sum of $5,700 for the site as well as $1,500 annually for all time to be expended towards the support and maintenance of the said library. There is no specific declaration in the enacting part of the statute that the defendant is empowered or authorized to erect the said building, but on looking at the whole Act the power must be considered as impliedly

given. I think the Act must be considered and construed to mean as expressly conferring upon the defendant corporation legislative authority to erect a public library, purchase a site therefor, and assess to the limit mentioned for its annual maintenance. In my view the defendants' position must be considered as if in the enacting clause we had an express declaration following the recitals to the effect that the town is authorized to proceed and erect the library building referred to in the recitals. When we conclude that the defendant corporation had been given the power to erect such a building it seems to me their liability to plaintiffs is concluded. It matters not whether they resort to the gift money for payment or to taxation. By the express powers conferred on towns by c. 71, s. 132, the corporation can rate and collect for all expenditures incurred in the due execution of the powers and duties by law vested in or imposed upon the town by the special Act above referred to, and I see no answer to the plaintiff's contention here that he has a right to recover as against the defendant corporation for his work and labour in and about the plans and specifications ordered.

The order for judgment should be varied to provide for a recovery of $426,63, and the appeal dismissed with costs.

GRAHAM, E.J., concurred with DRYSDALE, J.

Appeal dismissed.

NOVA SCOTIA.

FULL COURT. DECEMBER 22ND, 1909.

REX v. LANDRY.

School—Trustee—Election — Irregularity—Voters' Qualification—Unpaid Taxes—Quo Warranto.

Motion for an information in the nature of a quo warranto to test the validity of the election of a school trustee.

J. A. Wall, in support of application.

W. B. A. Ritchie, K.C., contra.

DRYSDALE, J.:—This is an application for leave to file an information in the nature of a quo warranto against defendant.

The application is based on the allegation that he was improperly elected a school trustee for District No. 8 in the county of Richmond, in that two ratepayers voted for his election who are charged with being in arrears for school rates at the time of so voting, and in that one Lewis Landry desired to vote against him but was not permitted to vote by the chairman of the meeting at which the election took place. The vote as recorded stood 38 for and 37 against the defendant's election.

The first question that presents itself is as to the right of Edward Bond and Simon Sampson to vote at the meeting referred to.

The relator, in support of the allegation that these men were in arrears, read the affidavit of Simon Joyce, who was secretary to the trustees from March, 1908, to March, 1909. The question of arrears related solely to the taxes for the school year ending July 31st, 1908 (being for the assessment authorized at the annual meeting held in March, 1907). As to these taxes Joyce, in his affidavit, states that the tax roll and records show and he verily believes that the said Bond and Sampson were rated at $2.40 and $4.73 respectively, and that the said roll and records shew and he verily believes that neither the said Bond nor the said Sampson had paid the same at the time the books and records were handed over to him (in March, 1908); that he had demanded the same and that they had not been paid to him; and that they were unpaid at the time of the vote in question in 1909. It will be noted the contest is over the year previous to Joyce's term of office. It is admitted the taxes rated upon these men during the term of his incumbency were paid. On the strength of Joyce's allegation as to what the tax roll and records shew, his belief and demand, rests the relator's case as to the disqualification of these two ratepayers. Any prima facie case so made as to the alleged non-payment by Bond and Sampson has been so fully and satisfactorily met as in my view not to leave the question in dispute.

The secretary, during the year in question (Andrew Landry) distinctly states in his affidavit the fact of payment and adjustment of the rates in question. Felix Landry

produces a copy of the original collector's tax roll shewing on its face such payment and adjustment, as well as a copy of the official account book of the secretary for trustees in which is duly entered in that year the payment. The fact of payment is also sworn to specifically by Bond and by Virginia Sampson, the wife of Simon Sampson. And again, the auditor's report for 1907 and 1908, and up to February 26th, 1909, presented at the very meeting in question, shews no arrears against these men as claimed. It gives in detail the delinquents and Bond and Sampson are not found in the list of ratepayers that the auditor's report as those in arrears. An effort was made to shew that the former secretary, Andrew Landry, had not reported Bond and Sampson in arrears in 1908, when he went out of office, but I think the paper produced for that purpose has been explained in the affidavit of Andrew Landry in which he deals with it. An examination of the previous year's auditors' reports shews they were not in arrears and that this paper could not have been used. I think that the records of payment are reliable and must be taken to be correct. In the face of all this testimony as to payment I cannot see that there is any question for trial so far as the case rests upon the votes of Bond and Sampson.

The votes of these two men being properly taken, the next question is how is the case affected by the chairman's refusal to accept the vote of Louis Landry against the election of defendant. If Louis Landry were entitled to vote, had been permitted and had carried out his intention of voting against defendant, the position would have been 38 to 38, and the election would then have been decided by the vote of the chairman, who only votes in case of a tie, and the result would, without doubt, have been the same, as he was elected chairman by the followers of defendant. But, apart from speculation as to what would have happened, I am of opinion that the vote of Louis Landry was properly rejected. His claim was based on s. 25 of c. 52 solely, as a person who had deposited $1 with the secretary. He was not a ratepayer and had never paid taxes of any kind—not even a poll tax. It is contended that because he resided in the section at the time of the meeting, although he had never paid a poll tax, yet by depositing $1 with the secretary at the meeting, he acquired a right under the section to vote in the election of trustees. Does s. 25 confer any such right? In my opinion it does not. I think the

section ought to be construed strictly as it is creating a class of voters who are not ratepayers within the definition of ratepayer as used in the Act or within the meaning of the term ratepayer as generally understood. And it seems to me he must literally fill all the requirements of this section before he can assert a right thereunder. These annual school meetings are held before the expiration of the current school year, and I think the section contemplates a person who has been paying poll taxes—at least one who has paid that of the then current year. It reads, in effect, "On depositing $1 any person who is liable to pay poll tax, and has paid all poll taxes previously imposed, including that of the current year, shall be qualified to vote." This does not give any person liable to poll tax a vote on depositing $1, but only those liable and who have paid a poll tax previously. It seems to me clear a person who had never paid a poll tax previously cannot qualify under the plain terms of the section, and I do not think it was ever intended by the Legislature, as disclosed by the terms of this section, to open the door simply to all those who may happen to reside in the section at the time of a meeting who are not ratepayers and who had never before contributed. Had this been the intention it would have been easy to say so, and then the section would have stopped with the simple declaration that on depositing $1 any person residing in the school section at the time of the meeting should have a vote. I cannot so read the section and I think the vote of Louis Landry properly rejected.

I think the motion of the relator fails and should be dismissed with costs.

GRAHAM, E.J.:—I agree with the opinion of Mr. Justice Drysdale that Bond and Sampson were entitled to vote for the election of trustees. The vote would thus have stood 38 for and 37 against the defendant's election.

But I am sorry not to be able to concur as to the right of Louis Landry to vote and his vote being rejected.

These are the conclusions in respect to the right to vote of Louis Landry. The following is shown in the affidavits: Joyce says:—

"One Louis Landry who is a resident of the said school section and who had previously deposited with me as such secretary at said meeting the sum of one dollar, and who then was a person liable to pay a poll tax, and against

whom no unpaid poll taxes or school taxes of any kind in said school section were outstanding, demanded the right to vote and have his vote counted against the said Andrew Landry, but the chairman refused to allow him to vote unless he took the declaration provided for by section 24. Thereupon the said Thomas D. Morrison objected to this ruling on the ground that this declaration was not required of a poll-taxpayer offering to vote under section 25, but the chairman adhered to his ruling and refused to receive the vote without said declaration and the said Louis Landry did not vote."

He says in another affidavit:—

"Louis Landry referred to in another affidavit sworn by me in this matter was not on the tax roll of the said school section as ratepayer or poll-taxpayer, but was assessed for real and person property on the then assessment roll (having purchased property in and removed to the said section since the tax roll then in force was made out) and would have to pay both poll tax and rates in respect of the moneys assessed at said annual school meeting, and is now on the school tax roll for both poll tax and rates."

Under s. 78 of the Education Act it is provided as follows:—

"Any amount" (of expenditure) "so determined shall be a charge on the section and shall be collected as follows:—

(a) Every male person . . . residing in such section at the time of the holding of such school meeting (voting the expenditure) shall pay the sum of one dollar as a poll tax, but no person shall be liable to pay more than one tax in any one school year."

Section 25 is as follows:—

"On depositing with the secretary of trustees previous to or at any school meeting the sum of $1 any person who is liable to pay the poll tax, and has paid all poll taxes previously imposed, including that of the current year, though not rated in respect to real or personal property, shall be qualified to vote in the election of a trustee or trustees at such meeting, and at any other meeting held for the election of trustees within a year from such deposit unless the deposit has been refunded.

"(2) Money so deposited shall be refunded on demand in every case where no assessment is authorized by such meet-

ing; otherwise it shall be retained as payment of the poll tax of the depositor."

The expression "including that of the current year" is inserted merely to shew that the person desirous of voting for a trustee, if a poll tax has been imposed on him for the current year, has paid that as well as all previous arrears, whereas, as to sectional rates, a ratepayer votes on the strength of having paid those of the previous year. See the declaration of qualification in s. 24.

The time for paying a poll tax is when the vote of expenditure for the year is made and the roll made out, but it being a good time for collecting in advance at the annual meeting from those wishing to vote for a trustee, s. 25 enables it to be deposited or paid a little in advance, and it is good for voting purposes for a year from the date of deposit. It is to be refunded if there is no vote of expenditure. That lasts till the next annual meeting, when he must pay again if he wishes to vote.

Now Louis Landry having come into the section recently there had been no poll tax for the current year "imposed" upon him and therefore there was none in arrear. But he could make the deposit and vote for a trustee under s. 25. If there had been one imposed before and unpaid he would have been obliged to pay that as well as make the deposit. But there are not to be two poll taxes paid in respect to one vote of expenditure.

I think that he was entitled to vote, and as this would have made the vote result in a tie, and the chairman then having a casting vote, might have cast it against the defendant, we cannot say that the result was not affected by the irregularity.

I think there should be judgment for the Crown, granting the application, costs to be costs in the cause.

RUSSELL, J.:—I cannot agree that the vote of Louis Landry was properly rejected. I think that any person coming within the class of persons liable to pay a poll tax, should one be imposed in consequence of the action of the annual meeting, is entitled to vote at the meeting on depositing the sum of one dollar, if he is not in arrear for rates or poll tax, and has paid the rate and tax, if any, for the current year. The rejected voter, I think, came within this class.

If the case were that of an election scrutiny I think it would have to be held that the rejection of the vote invalidated the election, because it would be impossible to shew that the rejection of the vote might not have affected the result, the Court not being allowed in such a case to speculate on the effect of the vote to be given, and being bound to assume the possibility of the vote producing a tie and the tie being determined by the casting vote of the chairman with the result opposite to that which has occurred. But I think we are not to deal with the case as we would with an election petition. The allowance of the writ is discretionary. The writ may be denied on the ground of public policy and in consideration of general justice, all circumstances being considered and the question determined from the standpoint of public interest, and thus the Court may deny the application for leave to file an information although the facts are such that if the proceeding was entertained judgment would be given against the respondent. I think it is not in the interest of the public that an election should be disturbed which it is morally certain embodies the determination of a majority of the duly qualified voters.

MEAGHER, J.:—I do not say anything because one of the parties wrote me a letter in connection with the matter, and I merely wish to say that if such a thing occurs again I shall hand such letter to the Court and ask them to take such proceedings against the party as will put a stop to this iniquitous habit.

Motion refused.

NOVA SCOTIA.

THE FULL COURT. DECEMBER 22ND, 1909.

IN RE JONES' TRUSTS.

Trustees—Sale of Real Estate—Action by Cestui que trust for Account—Expectancy.

Appeal from the judgment of DRYSDALE, J., passing trustees' accounts.

H. Mellish, K.C. and F. L. Davidson, in support of appeal.

W. B. A. Ritchie, contra.

TOWNSHEND, C.J.:—This is an appeal from the decision of DRYSDALE, J., passing the accounts of the trustees, and discharging one of them from the trust. The appellant, Kathrine Alice Jones, contended that in the accounts so taken and approved the trustees have not been charged with the value of her expectancy in certain real estate in the city of Toronto, in the sale of which the trustees concurred. There is no question that the sale was greatly for the benefit of all concerned, including the appellant. The appellant's claim arises out of the will of the late John Bell of Toronto. Her mother, Mrs. Nagle, is his daughter, and, among other things the will provides: "All the remainder of said property enumerated in schedule number one shall be disposed of by my said daughter amongst her legitimate children in such manner as she by her last will shall direct and appoint, and, failing such will, then equally among her children share and share alike."

A deed of separation was entered into between the appellant and her husband Alfred Ernest Jones 10th January, 1900, in which the trustees now seeking to pass their accounts were appointed. Under that deed, among other things, the appellant conveyed and transferred to the trustees all real and personal estate (except Bloor street property, so called, situate in the said city of Toronto) of every nature and kind and description, wheresoever situated to which the said party of the second part (the appellant) now is or at any time hereafter shall or may be or become entitled in possession, expectancy, reversion or remainder under the said will of her said grandfather, the said John Bell, and particularly all lands and premises and real estate (except the said Bloor street property, so called), situate in the city of Toronto aforesaid, mentioned in or described by the said will of the said John Bell. . . . In trust to sell, convey and dispose of the same, or any part thereof at public auction or by private contract or otherwise, and to collect, call in and realize, and convert the same into money whenever the said trustees in their discretion shall deem it expedient to do so, &c., &c."

The trustees on the 7th day of June, 1905, concurred in the sale of certain of the Toronto real estate, including a lot of land on King street, in respect to which Mrs. Nagle held a life interest with a power of disposing thereof at her death among her legitimate children in such manner as she

shall by will devise, &c., and in default to be divided equally amongst her children.

It is contended by the appellant that, in agreeing to such sale, the trustees have neglected to obtain any consideration for her expectancy in this King street property, and she now seeks to have them charged in taking the accounts, with the fair value of such expectancy.

The appellant, in express terms, conveyed her expectancy in this property to the trustees to be held in trust for the objects set forth in the deed, with power to sell and invest the proceeds, and the sale of any interest she held was to be entirely in their discretion when they thought it expedient to do so. The land in question, with her expectant interest, has been converted into money, and the amount realised is now a fund in the hands of The General Trust Co. Toronto, which represents the land, and in my opinion the appellant's expectancy in the moneys realized from such sale remains as it did before in the land. It is held under the terms of the will in the same way, and subject to the same conditions as the land, and the appellant has in terms expressly authorized this conversion of her right of expectancy into money. If Mrs. Nagle died without exercising her power of disposition by will, there cannot be any doubt that appellant, as one of her children, would be entitled to her equal share in this fund, and unless she has parted with her power under the will of John Bell, she still retains the right to distribute the fund among her children. The only necessary point for us to consider is whether her power of appointment ceased with her concurrence in the sale of the property in question.

Now, it will be noticed that the sale of this property was made by the executors of the will of John Bell in connection with certain necessary arrangements or rearrangements of the assets of the deceased. There were mortgages on some of the lands and properties connected with the estate including the King street property. These sales and rearrangements were made with the consent of all parties interested in John Bell's estate, and as already stated, for the benefit of all concerned, and certainly for the benefit of the appellant. In the agreement or deed concurred in by the trustees the following provision is made respecting the moneys realized by this sale: "The Toronto General Trust Corporation shall, subject to the provisions of the will of the late John Bell, and the order of Mr. Justice Teetzel, receive all moneys

payable to the executors of the said John Bell, and shall, after obtaining the consent of the said Susan Maria Nagle, invest the same and pay over the interest to Susan Maria Nagle quarterly . . . during the lifetime of Susan Maria Nagle, and at her death distribute the moneys to the parties entitled &c., &c."

If then these moneys are held in the hands of the Toronto General Trust Co., subject to the provisions of the will of the late John Bell, it seems clear that appellant's expectancy just remains as it did before the sale, except that it is money instead of land, and as to this change appellant had expressly authorised the trustees to sell such expectancy and turn it into money. The Trust Co. having contracted to hold the whole fund subject to the terms of the will, necessarily the appellant must get either her expectancy in case Mrs. Nagle exercises her power, or in default as her heir at law. The result of the whole transaction in regard to this property, therefore, is that the appellant's right of expectancy stands exactly as it stood before, and the trustees have not sold or disposed of it—on the contrary have in the most explicit terms provided that the General Trust Co. shall hold the whole fund realized for the benefit of those entitled under the will of the late John Bell. Counsel for appellant did not, as indeed he could not say there was any breach of trust so far as concurring in the sale was concerned, but confined his argument to the contention that appellant's right of expectancy had not been preserved, or that nothing had been obtained for this by the trustees. I have already shewn that he is in error on this question and his whole argument fails.

Then, looking at the will of John Bell it appears that this power was coupled with a duty, and if so no act on the part of Mrs. Nagle could destroy the trust imposed upon the land, and on the fund realised by the sale. The will provides:

"And in the next place to pay over to my said daughter the balance of the said rents and profits after payment of taxes and other incidentals, for the maintenance and education of herself and family during her life, her children to be entitled to such maintenance until of full age if they do not contract habits of immorality or mischief."

And he then goes on: "All the remainder of said property enumerated in schedule number one shall be disposed of by my said daughter amongst her legitimate children in such

manner as she by her last will shall direct and appoint, and failing such will, then equally among her children share and share alike."

Authority for this will be found In re Eyre, 49 L. T. N. S. 259, where Kay, J., says: "A trustee who has a power which is coupled with a duty is, I conceive, bound so long as he remains trustee, to preserve that power and to exercise his discretion as circumstances arise from time to time, whether the power should be used or not, and he could no more, by his own voluntary act destroy a power of that kind than he can voluntarily put an end to or destroy any other trust that may be committed to him."

Again in Saul v. Pattinson, 34 Weekly Reporter, 561, Pearson, J., says: "This is a power no doubt given to the trustees, but is a power in the nature of a trust, and no more capable of being released than any other trust, &c."

The power here is in like manner in the nature of a trust for the maintenance and education of Mrs. Nagle and her children during her life, and she is incapable of parting with or releasing it during her life. The power remains even if she has been guilty of a breach of trust in joining in the sale. The trust imposed on the land must follow the fund so realised from the sale in the hands of the Trust Co.

It is, in my view, a sufficient answer to all that has been urged on behalf of the appellant that what has been done has been with the common consent of all parties interested, including the appellant, and that her rights have in no way been prejudicially affected by the action of her trustees. That any apportionment of the fund, even if in other respects her case was good would be impossible in this proceeding for want of proper parties before the Court.

I am of opinion that this appeal should be dismissed with costs, and the judgment of Drysdale J., affirmed.

GRAHAM, E.J.:—It has become necessary, owing to ill health affecting the mind, to change one of the trustees, and this has been done on an originating summons. The accounts were referred to a referee. A new trustee has been appointed.

Under the settlement (which we were told at the argument was confirmed by her after the dissolution of the marriage), Mrs. Jones authorised the trustees to sell, among other properties a property in Toronto in which, under her grandfather's will, she had an expectancy. The property

was vested in trustees. There was a life estate to her mother with a power of appointment by will to her children (Mrs. Jones being one of the children), and in default of appointment by the mother to the children of whom there are now three. The trustees of this settlement sold it in the only feasible way of selling such a limited interest, namely, they concurred in a sale with the trustees of the will.

Apparently, an advantageous sale was made although it should be mentioned there was no power of sale in the will. Now she is asking for an apportionment of the purchase money and Clark v. Seymour, 7 Sim. 67, and In re Cooper and Allen, 4 Ch. D. 802, are cited, and she asks to have the matter referred back for that purpose. The learned Judge thought that it was better to wait until the life estate had determined before attempting an apportionment, and from that judgment there is an appeal.

Mrs. Jones is no doubt entitled to have an apportionment of the purchase money made but she is asking for it on the basis that Mrs. Nagle, who has a power of apportionment under the will by concurring in the sale released or extinguished that power, and that the beneficiaries of this settlement were now entitled to one-third interest subject to the life estate. An apportionment is only of practical importance in that view.

I think such a direction ought not to be made in this proceeding even if that was the case. There are persons who ought to be parties when that subject comes up for decision.

Mrs. Jones has a fixed allowance under the settlement and I cannot see that whether there has been a release of the power or not she will be affected, and as to the other beneficiaries her children, two of whom are minors, they may get more by waiting for the exercise of the power and are not asking for it.

It cannot be very material that a portion of the fund representing the expectancy of Mrs. Jones or rather her interest in it under this settlement, should be transferred by the trustees of the will who hold it at Toronto to the trustees of this settlement.

The appeal should be dismissed.

Other members of the Court concurred in dismissing the appeal for the reasons stated.

NEW BRUNSWICK.

SUPREME COURT. VICTORIA CIRCUIT, 1909.

REX v. HATCH, MURRAY & HATCH.

Criminal Law—Indictment for Murder—Evidence of Convicted Felon.

H. F. McLeod, S.G. and T. J. Carter, for Crown.

H. A. McKeown, K.C., W. P. Jones and F. B. Carvell, K.C., for defence.

On an indictment for murder against the defendants the evidence of Tony Arosha, convicted of murder, and under sentence of death, was tendered by the Crown. Counsel for defence objected on the ground that Arosha was not a competent witness because under sentence of death, citing: Roscoe's Criminal Evidence 103; Regina v. Webb, 11 Cox C. C. 133.

Counsel for Crown, contra.

At Common Law, upon judgment of death, the attainder of a criminal commenced, one result of attainder was to destroy his competency as a witness; it was not the death sentence but the attainder following the death sentence which destroyed his competency: Lewis' Blackstone, p. 1759, Tomlin's Law Dictionary 'Attainder.'

Section 1033 of Cr. Code of Canada abolishes attainder. Regina v. Webb was decided by a single judge before the abolition of attainder in England. Attainder is the ground of disqualification stated in the judgment in that case.

MCLEOD, J.:—I have no doubt the witness is competent to give evidence, and will admit the testimony subject to objection.

As the point is arising for the first time I will, if counsel for defence wish, reserve a case on that ground.

NOVA SCOTIA.

SUPREME COURT. MAY 10TH, 1909.

SPAIN v. McKAY.

Landlord and Tenant—Lease—Hotels—Rent — Distress — Sale of Furniture—Lessor's Right to Bid at Auction.

F. MacDonald, for plaintiff.

R. H. Butts, for defendant.

LONGLEY, J.:—On the 23rd June, 1906, the defendant McKay leased to the plaintiff a certain hotel premises at Sydney Mines for a term of five years, to begin June 22nd, the rent to be payable monthly, not in advance. The character of this transaction did not seem to me to be affected in any sense by the fact that one Ballard advanced the money to Spain to pay for the furniture and mortgaged his own premises to defendant to get the money. Nor by the fact that the bar license fell off because of the rigid enforcement of the C. T. Act and later the Nova Scotia License Act. When the lease was given both parties knew that liquor was illegal in Cape Breton county and these extraneous matters which were elaborated in the evidence may be altogther eliminated.

The fact is that on the 29th of July, 1908, there was due to the defendant seven hundred and eleven dollars ($711.00) unpaid rent, and plaintiff's affairs in connection with the hotel had become desperate. He was unable to pay the rent, and defendant conceived that the only course opened to him was to sell out the furniture under distress and resume the charge of the hotel. Some suggestion had been made by plaintiff of the settlement on the basis of giving up the premises to the defendant on condition that he would abandon his claim for rent and release Ballard from the balance due on his mortgage to defendant, about six hundred dollars ($600.00), but defendant did not agree to this and told plaintiff he must distrain unless he gave up the premises. Plaintiff said he had other creditors and did not think he could do this as a voluntary act, and therefore it was understood that defendant should distrain.

He issued a warrant to defendant McCaffery and his bailiff, on the 6th day of August for eight hundred and thirty-six dollars and ninety-five cents. This was unquestionably more than was due for rent at that date, the next month was not due until August 29th, and therefore the defendant had been technically guilty of an excessive distraint for which he is liable to plaintiff for any damage which this caused him, which in reality is no damage at all since it is clear that a distress for seven hundred and eleven dollars and ninety-five cents would have as effectually driven the plaintiff out of business as the distress for eight hundred and thirty-six dollars and ninety-five cents did.

The distress was duly executed, the goods appraised and after due public notice of the sale they were sold at auction by the licensed auctioneer in the town, and the sale was regular enough as far as I can see except that nearly all the goods were bid on by the defendant, and paid for by his wife out of her money as it was alleged by defendant. The point is taken that under the law the landlord cannot buy at public auction goods upon which he has made distress. King v. England, 4 B & S. 782, is quoted as an authority on the point, but the conditions were totally different in that case, for a sale of goods distrained was not then part of the remedy of distress, and the Court held that the landlord having distrained the goods cannot take them himself, and that his taking them did not amount to a valid transfer or sale. But the situation has completely changed since then. A distress is usually made by a bailiff, there is a statutory right to sell, and the sale is now generally done by an auctioneer after five days' public notice. There does not therefore seem to me any sound reason why a landlord may not go to the auction and see that the goods upon which he had made distress and which were his sole security for rent should not be sacrificed. At the sale a large crowd was present and many sales were made to outsiders, but the defendant, forced by the plaintiff's failure to resume management of the hotel, naturally would buy the furniture himself or appear at the sale for that purpose and bought it after fair competition. Woodfall in his latest edition referring to King v. England makes a note that the principle (of landlord not able to buy) would scarcely apply now to a sale at auction.

I am therefore going to hold that the defendant had a right to bid at the sale at public auction conducted entirely

independently of him, and in any case plaintiff was not in a position to raise the issue as to the ownership of the property, which might if capable of being raised at all seems to me could only be raised by a bona-fide third party whose goods had been sold. Plaintiff was at all the sale, made no protest bid on some of the articles, and was well aware that defendant was doing so.

I give judgment for plaintiff for one dollar for excessive distress and leave the question of costs open for further consideration.

NOVA SCOTIA.

SUPREME COURT. MAY 14, 1909.

WINGFIELD v. STEWART.

Parol Agreement for Sale of Motor Boat—Statute of Frauds —Change of Possession—Receipt and Acceptance — Evidence.

J. J. Rowen, K.C., for plaintiff.

T. F. Tobin, for defendant.

DRYSDALE, J.:—The question here I think is one of fact. The plaintiff says that on the 17th of August, 1909, he agreed to sell to defendant and defendant agreed to purchase the motor boat "Bessie" for $425.00. Such boat was then moored at plaintiff's float off the Yacht Squadron, that is to say a float for which plaintiff as a member paid the Yacht Club a fee for the right to use. At the time of the sale plaintiff says it was arranged between himself and defendant that defendant should use the said float and that thereafter defendant took charge of and used said boat, that he repeatedly promised to pay the money but failed to keep his promise, and on October 15th, 1908, wrote plaintiff the letter G/1, after which plaintiff brought this action. Defendant denies that he ever purchased the boat and sets up the Statute of Frauds. I am of opinion that there was a sale concluded on the 17th of August as testified to by the plaintiff, that thereafter there was a receipt and acceptance of the boat by the defendant and that plaintiff is

entitled to recover herein. The plaintiff impressed me as a witness entitled to have his version of the facts accepted, and I was not impressed by the manner in which defendant attempted to meet or deal with the facts as detailed by plaintiff. I give credit to the plaintiff where there is a conflict here, and I think his case has not been met.

I direct judgment for plaintiff for $425.00 with costs.

NOVA SCOTIA.

SUPREME COURT. DECEMBER 30TH, 1908.

ROYAL BANK v. SCHAFFNER.

Contract—Price—Sale of Goods—Debtor and Creditor—Security—Evidence.

H. Mackenzie, for plaintiff.
H. Mellish, K.C., for defendant.

RUSSELL, J.:—The plaintiff is claiming as assignee of T. R. Prince who had an account against the defendant for lumber sold to him and supplies and services in connection with a lumbering venture. There were two lumbering properties concerned in the case, one may be known as the Meander River lot and the other the Northover lot. As to the former the plaintiff claims that there was a sale made to the defendant of the logs in question, while defendant contends that although the form was gone through of a sale of the logs it must be considered between the parties as a mere security taken on the logs by the defendant for advances and for a debt due defendant by Prince at the time of the assignment. The importance of these contentions is in part dependent on the fact that before the logs could be sawed the dam broke and a number of the logs were carried away. It is impossible to say how many. The plaintiff claims that these were lost to the defendant, and the defendant that they were the plaintiff's. But there is still another dispute. Assuming the logs, that is these Meander logs, to have been sold, the plaintiff contends that they were sold as a specific lot for an agreed price, namely, as 500 M. feet at $5 a thousand, making $2,500 for the lot, while

defendant says this was only an estimate and that the logs were bought not as a lot for $2,500, let the same be more or less, but at the rate of $5 a thousand so that the defendant should be accountable only for so many thousand feet as were actually there. In view of the documentary evidence I accept the plaintiff's version of the agreement that there was a sale of the logs, but I do not think it was the intention that defendant should pay for 500 M. feet of lumber if there were not that quantity there. He was to pay for what he got at $5 a thousand.

I incline to the view that the burden of proof would be upon the plaintiff to show that this quantity was delivered, but even if this be not the case, I think it is clear that there was no such quantity delivered. The uncertainty on this point is caused by the fact of the dam having been broken and a quantity of the logs having gone adrift. The evidence seems to show that the logs could not have gone very far. The river is a small one, so small that above the dam there was not water enough during the first season after the transaction took place to get the logs down to the mill. Below the dam there were parts that are described by some of the witnesses as very crooked. I do not think it possible that any of the logs could have gone out to sea, and that being the case it would have been very easy for the plaintiff to show the fact if any very considerable number had gone below the dam that had not been recovered. There were some. A witness called by consent after the trial, pursuant to leave reserved at the trial, speaks of 75 or 100 logs as having been seen by him below the dam. There may have been and probably were some others, but it is not necessary to determine how many and could only be necessary if the number were much greater than I think it can possibly have been. The defendant gives the whole product of the logs sawed as 570,000 feet. Of this quantity 175 M. were produced from the logs on the Northover land, leaving only 395,000 feet to be attributed to the Meander lot, being 105,000 feet short of the estimate on which the defendant paid Prince, or accounted to him for $2,500. There is a shortage here of $525. The hundred logs of which the witness Crowell speaks would reduce that shortage by about $100 at the outside, leaving a balance of $425 to be accounted for.

The plaintiff has a claim in connection with the Northover logs which would be more than sufficient to make good this deficit if I could accept his version of the transaction, but I think I cannot do so. Both Schaffner and Adams say that it was in the nature of a joint speculation to which all three, Prince, Adams and Schnaffner were giving their time and the latter advancing the money. It resulted in a loss of several hundred dollars, defendant says from $1000 to $1,200, but I cannot tell whether he is speaking of the Northover lot or of the two lots considered together. There is a claim for supplies on account of the Northover venture which defendant says he is willing to set against his claim upon Prince. It amounts to only $258.47 and is therefore insufficient to cancel the deficit of $425 already referred to on the Meander transaction.

This case was tried without any stenographer and the argument by counsel was delayed until some months after the trial. It took place without any extended notes of the evidence, and both counsel have been placed at a great disadvantage in conducting the argument. It is quite possible that they have not been able to give the Court the assistance that would otherwise have been derived from their efforts, and there may in the result have been a miscarriage of justice because of the effort to get along without stenography, a reform with which the re-introduction of the hand loom and the substitution of the flail for the threshing machine would be in keeping.

NOVA SCOTIA.

LONGLEY, J. JANUARY 12TH, 1910.

CHAMBERS.

THE DOMINION COAL CO. v. McINNES.

Landlord and Tenant — Overholding — Writ of Possession — Notice to Quit — Certiorari — Practice — Waiver.

Application for an order directing the County Court Judge for District No. 7 to send up for review proceedings under the Overholding Tenants Act, R. S. (1900), c. 174, s. 6.

W. B. A. Ritchie, K.C., in support of application.

L. A. Lovett, contra.

LONGLEY, J.:—This is an application made to me under s. 6 of c. 174, R. S. (1900) "The Overholding Tenants Act." The plaintiffs have obtained from the County Judge for Cape Breton a writ of possession against the defendant who was holding as their tenant under a special contract which provided that his tenancy should cease when he left their employ. He left on strike July 6th, 1909, and these proceedings were begun in September following.

The counsel for plaintiffs raised the objection that the proceedings contemplated under this section was certiorari, and in support of this referred to the Ontario Revised Statutes where a clause exactly similar to this is margined as "certiorari," and also to certain Ontario cases having reference to the interpretation of this section in which the learned Judges, in dealing with it, speak of it as certiorari. The opinion of Meredith, C.J., in Re Snure and Davis et. ux., 4 O. L. R. 82 is quoted, where he says:

"It is only the proceedings and evidence before the judge sent up pursuant to the writ of certiorari at which we may look for the purpose of determining what is to be decided by the Court under s. 6 of the Overholding Act."

In this case it is not really necessary for me to formally decide this point in view of the conclusion I reach upon the grounds submitted for granting the order, but I may venture the general opinion that while the order under s. 6 of our Act is in the nature of a certiorari, I do not think it involves the necessity of the application of the Crown rules and recognizance. I am inclined to regard it as a special provision made for a specific purpose and that the granting of an order will fulfil its purposes without the special paraphernalia of certiorari.

I am therefore obliged to consider the grounds upon which I am asked to bring up the proceedings and evidence in the present case. At least I think I am. I do not believe it is the intention of the Act that an order is issued by either the Court or a Judge upon mere application. I do not conceive that the large and unusual powers conferred upon this Court to override the judgment of a County Judge should be exercised unless upon reasonable and substantial

grounds, and I therefore proceed to consider the chief grounds alleged as a reason why this order should be made.

1. I cannot agree that because the original lease refers to the house as at Dominion No. 4, and the notice to "a house held by you at Dominion No. 3 from said company under and by virtue of a written agreement dated October 28th, 1903," there is any irregularity which calls for review. This notice was served on defendant at the very house where he was then living, and he could have no difficulty in knowing the premises meant in the notice.

2. I do not know that I am at liberty, under Meredith, C.J.'s dictum, to consider the point of the right of the sheriff's deputy to serve the notice, since nothing appears in the "proceedings and evidence before the judge" to establish any disqualification on the part of the deputy. It is alleged by affidavits that such deputy is or was in the employ of the plaintiffs as a labourer. I do not think this constitutes a disqualification, nor approach the conditions which led to the decisions in Re William Kennedy, 3 E. L. R. 554; Ex. parte McCleave, 5 Can. C. C. 116; In re Dickey, 8 Can. C. C. 321; or Condell v. Price, 12 N. B. R. 332.

3. Nor do I think that the circumstances in this case even resemble those in Grant v. Robertson. There the notice was given when the defendant was lawfully holding and not overholding at all.

In my judgment the notice was given at a time when defendant had been overholding for some time, and therefore in accordance with the provisions of the statute.

4. It is claimed the Judge had no power to adjudicate on the merits ex parte and grant costs. The only authority in support of this somewhat extraordinary proposition is a dictum from Wetmore, J., in 17 N. B. R. 355. I find that Mr. Justice Wetmore's dictum was not the actual ground of the decision of the case, and even if it were, I should, while giving respectful weight to it, hesitate to accept it as an authority. It does not seem to me that the words of the Act call for any such interpretation as that. When a lawful notice is served on an overholding tenant, and he refuses to attend the adjudication which is afforded him, the Court can do nothing until it has bodily dragged him into Court, as he is willing to let the matter go by default. I respectfully decline to place any such interpretation upon the Act. (See Ex p. Bell, 17 N. B. R. 355).

Another point was raised, that because the plaintiffs had allowed defendant to remain in the premises for some months after he had quit work, they thereby lost their right to evict under the tenancy contract. This is a proposition which I scarcely think is worthy of serious consideration. When a strike occurs the plaintiffs would naturally look for a settlement at an early date, and to say that because they do not evict a tenant immediately after he quit work they thereby establish him as a tenant permanently does not seem to me a rational proposition.

These were the principal points submitted to me as reasons for issuing an order. I do not regard any of them as substantial or sufficient, and the order is refused with costs.

NOVA SCOTIA.

THE FULL COURT. DECEMBER 22ND, 1909.

WINGFIELD v. STEWART.

Contract—Sale—Motor Boat—Statute of Frauds — Acceptance and Receipt—Change of Possession.

Appeal from the judgment of Drysdale, J. (reported ante p. 505), in favour of plaintiff in an action for the price of a motor boat sold by plaintiff to defendant.

T. F. Tobin, K.C., in support of appeal.

J. J. Power, K.C., contra.

GRAHAM, E.J.:—This is an appeal from a judgment for the plaintiff in an action to recover the sum of $450, the price of a motor boat, and the section of the Statute of Frauds which requires an acceptance and actual receipt of the boat is involved.

The plaintiff was a member of the Royal Nova Scotia Yacht Squadron, and the boat was moored to one of the buoys assigned to him, lying off the club premises. The defendant was not a member.

After the Judge's finding it must be taken that there was a complete verbal contract between the parties on the 17th August, 1908. There had been negotiations and the

defendant had been out in the boat twice with the plaintiff before that. Then on that date the plaintiff says, and the defendant is unsatisfactory in his denial of it, that they closed the bargain, the plaintiff having told him that he had another offer, and that they "shook hands on the transaction." I think the defendant does not deny that incident. It tends to show that a bargain was made. Payment of the price was to be made later when the defendant realized on some shares. The learned Judge finds that when the payment was overdue there was a demand made and an excuse given. On the 20th of August and also on the 5th of September the defendant took out parties including ladies in the motor boat. He purchased gasoline on both occasions, once personally from the keeper of the locker-room of the squadron for the purposes of the boat. On each occasion, as he did not know much about the management of such a boat, he took with him a person who was to manage the boat —one George Mader—who had been recommended to him by the plaintiff. The mooring buoy continued to be used. The plaintiff testifies that when the bargain was closed "he said he had no place to moor the boat, and I gave him the privilege of using my mooring until the end of the season if the Squadron did not object." The defendant says that the question of using the mooring may have been discussed.

On the 15th of October the defendant addressed a letter to the plaintiff saying that he had decided to locate in Boston and would have no service for a boat and that "you will readily dispose of your boat, and trust you will very soon find a customer."

In respect to the use of the boat by the defendant on the two occasions after the 17th August, it is contended by him that it was part of the negotiations that he was to have the opinion of an expert before closing the bargain, and that these trips were trial trips in order to get that opinion. The plaintiff does admit that during the negotiations there was conversation as to the defendant having the opinion of an expert, but he contends that on the 17th the bargain was closed, presumably without any such opinion, and that these trial trips were not to be attributed to that phase of the negotiations.

This part of the case is not clear, owing to the conflicting testimony, but the learned Judge has found the facts in the plaintiff's favour. Taking out the boat with pleasure

parties on these occasions and using the mooring buoy by permission of the plaintiff, on defendant's request, would in my opinion show an acceptance and actual receipt of the boat. The case is not dependent upon the incident of the permission to use the buoy merely, nor is it the case I think of the club being in the position of a bailee for the plaintiff, the consent of which would be required as was contended by the learned counsel for the defendant.

On the main question I refer to the cases of Morton v. Tibbett, 15 Q. B. 428; Cusack v. Robinson, 1 B. & S. 299; Marvin v. Wallis, 6 E. & B. 726; and Braumont v. Brengeri, 5 C. B. 301.

The appeal should be dismissed and with costs.

TOWNSHEND, C.J., and LONGLEY, J. concurred.

MEAGHER, J., dissenting:—I have not been able to reach the same conclusion. I do not think that the evidence discloses an acceptance and receipt under the Statute of Frauds. If there was an acceptance, it was subject to tests to be made and upon which the completion of the bargain depended.

Appeal dismissed with costs.

NOVA SCOTIA.

THE FULL COURT. DECEMBER 22ND, 1909.

SILVER v. BURNS ET AL.

Contract—Fishing Vessel—Master and Owners—Construction—Evidence.

Appeal from the judgment of FORBES, Co.C.J., in favour of defendants in an action claiming damages for wrongful dismissal and breach of contract.

W. F. O'Connor, K.C., and D. F. Matheson, in support of appeal.

J. A. McLean, K.C., contra.

DRYSDALE, J.:—The plaintiff was formerly the master of the fishing schooner "Golden Rod," and with a crew of fishermen sailed her on shares, the master receiving the same share of the catch as the highest line of the crew. This continued until August 15th, 1907, when the owners determined not to send the vessel for any further fishing trip that season. The master (plaintiff) contends that by a special arrangement with the managing owner, Burns, effected in the spring of 1907, he acquired the right to sail said vessel for two fishing trips in that season and that he was improperly dismissed from the service, or prevented from making the second trip whilst engaged in making preparations therefor.

His rights in this respect depend upon proof of a contract definitely to employ him for the whole season of 1907, and on a perusal of the evidence I am of opinion that he has failed in making proof of such a contract.

The plaintiff, in speaking of the verbal arrangement under which he claims, says, "In discussion with the managing owner it was agreed that if the first trip was a saving trip I should make a second or Fall trip." And in his cross-examination he states, "Burns ordered me to go on second trip. We agreed on that in the spring. I mean we talked about two trips." And, again, "Burns asked me if I was going on second trip and I said if I had a saving trip early enough, and he said, 'Yes, try and do it."

The statements standing alone, and giving them full force do not indicate any binding engagement for a second trip. It was at least conditional, and in determining whether a saving trip was made on the first voyage the owners would surely have a voice. They determined against a second trip, evidently being dissatisfied with the first, and laid their vessel up, and they were, I think, quite within their rights.

The plaintiff must also fail, in my opinion, on another ground.

The suit is against Burns' representatives and his co-owners, Burns having died before trial, and the alleged contract rests solely on a verbal statement of or agreement with the deceased. No corroboration of the conversation with Burns is given. The plaintiff alleges that one Albert Wagner was present at the time of the conversation relied on took place, and when Wagner is called he states that he never heard any such conversation.

I think the learned County Court Judge was right in dismissing the action, and the appeal should be dismissed with costs.

TOWNSHEND, C.J., RUSSELL and LAURENCE, JJ., concurred.

Appeal dismissed.

NOVA SCOTIA.

THE FULL COURT. DECEMBER 22ND, 1909.

THE ROYAL BANK v. SCHAFFNER & CO.

Contract — Construction of — Sale of Logs — Offer and Acceptance—Account.

Appeal from the judgment of RUSSELL, J., in favour of defendants in an action to recover a balance claimed to be due in connection with a logging transaction. (Reported ante p. 506.)

H. D. McKenzie, K.C., and H. B. Stairs, in support of appeal.

H. Mellish, K.C., contra.

DRYSDALE, J.:—Dealing first with the Meander River logs, I think the true construction of the contract between Prince and the defendant relating to such logs was a sale of all such logs in the river at $5 per thousand as were then actually there. After conversation relating to such logs, Prince by a letter dated August 13th, says: "I enclose the bill for the logs and I can meet Mr. Adams by appointment to take delivery of them."

The bill is dated August 13th, 1904, and is as follows:—

"August 13th, 1904.

Messrs. I. B. Schaffner & Co.

500,000 feet of spruce and hemlock logs now lying in the Meander River, above Parker's Mills, at Upper Kennetcook, in the county of Hants, at $5.00. $2,500."

Prince, also, in the letter, offered to saw and haul the lumber from saw logs at $3.00 per M.

To this letter the defendants replied as follows, under date of August 18th, 1904:—

"Dear Sir,—Referring to our conversation of two or three days ago we hereby confirm the purchase from you of between five and six thousand feet of spruce and hemlock logs, now in Meander River, Upper Newport, in the county of Hants, at $5.00 per thousand, and the same has been placed to your credit as per your invoice of August 13th. These are the logs which our Mr. Adams examined on the 16th and took possession of.

We accept your offer of $3 per thousand for sawing the same, and we understand you will put them f.o.b. cars at not over 50 cents per thousand extra. The cost of the sawing and loading will be paid as soon as the logs are sawed and delivered, and we will instruct shipment as fast as the sales are made. We wish to have part of these manufactured as fast as possible in order that we may place them on the market. Will you please advise us how soon you can commence sawing.

Also please confirm this sale and the agreement by return mail. We will accept the draft on account of the purchase for the amount agreed upon, and when it is sawed and disposed of we will settle the balance.—Yours truly."

Then Prince, under date of August 20th, wrote defendants, referring to said letter of the 18th, saying:—

"I hereby confirm the sale and purchase of the logs in the Meander River and will begin sawing as soon as possible."

I think the 500,000 mentioned in the so-called bill or invoice of August 12th must be considered only as an estimate, and that Prince would be entitled to recover on such contract the actual quantity then in the river at $5 per M., and it imposed an obligation upon Prince to saw and haul the lumber for the price stipulated therefor in the contract.

On September 21st, 1904, Prince by an order on defendants directed them to pay plaintiff bank any balance due (after payment of his account) on account of saw logs so purchased under agreement of August 18th, 1904. On its face this order was accepted in terms as follows: "Accepted October 5th, 1904, as per our letter this date," and in the letter here referred to defendants say they return accepted order for any surplus proceeds over and above the amount of their account against Prince, expressed a hope there was as

much lumber as Prince claims, and state to the bank that in the meantime they have put up more money to saw and market the lumber.

At this date (the date of the acceptance) the defendants had advanced Prince $2,125.74, and the question before us is whether in the proof in this action more than this sum is due and payable by defendants to plaintiff under such contract. According to the finding of the learned trial Judge, the logs in the Meander fell short of the estimated 500,000 about 85,000, and according to this finding the state of Prince's account at that time with the defendants would entitle plaintiffs to recover $3.39, provided no deductions are entitled to be made by reason of Prince's breach of contract to saw and haul. There was an undoubted breach in this respect, and defendants being obliged to get such work done, and having suffered a loss as compared with Prince's $3 contract to saw and haul, a loss amounting to about $300, the question is, can such deduction be made? I think it can. It was an equity that ran with the contract. It was part of the contract that Prince should saw and haul, and in the equitable assignment to the bank they merely took the balance due as per contract of which express mention was made in the order.

I see no reason to disturb the learned Judge's finding as to quantity. In fact plaintiffs offered no evidence of quantity except such as is obtained through the medium of defendants, their books and sales. On this branch, in my opinion, the action fails.

As to the Northover logs, so called, the plaintiff sues under an assignment from Prince for supplies and work and labour furnished and performed by Prince. I think it very clear under the evidence that there can be no remedy in this form of action, and that Prince could not recover for such supplies and labour. The most that he would be entitled to is an accounting. This claim was not made either below or before us, and I think the action as framed fails. It seems clear that any rights that Prince may have in respect to such logs is based on an agreement under which he was to do a certain amount of work, the defendants furnish the moneys and other outlay, and if any margin were made after disposal of the timber he was to share in such margin. Counsel for plaintiffs insist he was not to furnish

supplies, and that he or his assignee ought to recover for some supplies furnished in connection with his work in respect of said logs. Any such supplied as he alleges were furnished were not supplied at defendant's request. They were used by him in the work of the joint venture, and in my view are only a proper matter of accounting in connection with the result of the venture.

No doubt an accounting was not asked for, because it was apparent there was a loss on the Northover venture, and the accounts as presented shew an adverse balance against Prince.

I am of opinion the action fails and that the appeal ought to be dismissed with costs.

The other members of the Court concurred.

MEAGHER, J.:—Was of opinion that there must of necessity be an accounting. Otherwise the balance due could not be arrived at, particularly as the assignment was under the statute and subject to all equities.

Appeal dismissed with costs.

NOVA SCOTIA.

THE FULL COURT. DECEMBER 22ND, 1909.

THE SYDNEY BOAT AND MOTOR CO. v. GILLIS.

Contract — Failure to Perform — Waiver of Adherence to Specifications—Defective Workmanship—Condition Precedent.

Appeal from the judgment of LONGLEY, J. (Reported ante p. 75), in favour of plaintiff in an action to recover the contract price of a motor boat constructed by plaintiff for defendant.

W. F. O'Connor, K.C., in support of appeal.

G. A. R. Rowlings, contra.

DRYSDALE, J.:—This case went to a second trial because the time the boat was tendered it did not appear very clearly whether or not the anchor stipulated for in the specifications

had been dispensed with, and by mutual agreement another and smaller one substituted and accepted in lieu thereof. On the new trial had before Mr. Justice Longley the question has, after contradictory evidence, been settled in favour of the plaintiff.

It is now contended however that the new trial discloses that the hull was not constructed in a workmanlike manner, and that it had a plank in it that was cross grained, and that the hull was so constructed as to cause leaks, and that the learned trial Judge had so found. I do not read the learned Judge's findings as embodying any such conclusions, and if his statements can be so read they are without support in the proof.

It appears that on the second trial, after the boat had been lying beached for something over a year, a witness who seems to have made a very superficial examination speaks of seams that leaked and of a plank that had cracked. Such a condition of affairs after such a length of weather exposure on a beach is not to be wondered at, and does not give much light upon the boat's condition as turned out and finished a year previously, and one cannot read the evidence of the new witnesses without coming to the conclusion that they were not testifying as to the condition of this boat as a boat built according to the specifications, but to a class of boat other and different from the one plaintiffs undertook to build. When the learned trial Judge speaks of it requiring $11 to make the seams and plank conform to the terms of the specifications an examination of Charles McDonald's evidence, where this estimate is given, plainly shows that such a sum was mentioned as an estimate to caulk and repair after the boat had been damaged by exposure for over a year, and cannot be said by any fair reading to have any reference to the boat's condition at the time she was finished and tendered. I can understand weather exposure for such a time quite accounting for the condition described, and I do not see anything in this evidence to justify us in holding that either as to her planks or seams she was not properly turned out when tendered. No such controversy arose at the former trial, apparently, and I do not think at this date much attention ought to be given to this alleged defect. A great number of alleged defects were urged, all of which were either not defects at all, when properly understood, or were matters expressly stipulated for in the specifications.

In my opinion there was completion of the contract according to the agreement between the parties and tender of the boat, and the plaintiffs can and ought to recover.

I think the appeal should be dismissed with costs.

TOWNSHEND, C.J., and GRAHAM, E.J., concurred.

LAURENCE, J., dissented on the ground that under the evidence and findings the boat had not been completed according to the specifications, and that such completion was a condition precedent to plaintiff's right to recover.

Appeal dismissed.

NOVA SCOTIA.

THE FULL COURT. DECEMBER 22ND, 1909.

REX v. SIMMONDS.

Liquor License Act — Social Club — Sale of Liquor by Steward to Members—Violation.

Case stated under the Nova Scotia Liquor License Act to determine the liability of an incorporated club for a sale of liquor made by the steward of the club to a member.

O'Connor, for prosecutor.

O'Hearn, for defendant.

DRYSDALE, J., delivered the judgment of the Court.

The stated case herein involves the question of a corporate body selling liquors to its members or shareholders.

The defendant is the steward of an incorporated social club and is charged with a violation of the Liquor License Act, in that he supplied liquors to a member on the club premises.

The Act expressly prohibits a sale of liquors by any person or corporation without first obtaining a license authorizing such sale (s. 86 of the Act read in connection with the amending Act of 1907), and the defendant being charged before the Stipendary Magistrate was convicted of an offence against the Act, from which conviction he appealed by way

of a case stated, and the case so stated by the Magistrate is in the words following:—

"The above-named defendant was summoned before me for that he did unlawfully sell liquor by retail without the license required by law within six months previous to the 13th day of April, A. D. 1909. Defendant appeared in obedience to a summons under the Nova Scotia Liquor License Act on the 17th day of April, 1909, and pleaded not guilty to the above charge. At the conclusion of the evidence, a copy of which is annexed hereto, I convicted the defendant and fined him for said offence the sum of $50 and costs. I find under the evidence, made a part of this case, that defendant was the steward of an incorporated club located in the city of Halifax known as the "Maritime Club," a social club, supplied liquors to its members at a fixed price. That the defendant was an employee of the club and that the liquor in question alleged to be sold was the property of the club, and also that the defendant in his capacity as steward sold liquor to the members only."

"Counsel for the defendant, at the trial contended that as the evidence established that the defendant was acting merely as the agent or employee of the club supplying its members with liquor for the usual monetary consideration, there was no evidence of a sale, and that, consequently, there could be no conviction. I expressed the view that the club being incorporated the supplying by the club of intoxicating liquors to its members for a monetary consideration was a sale and violation of the Nova Scotia Liquor License Act. At the request of counsel for the defendant, and after written notice received from the defendant by me, I do reserve the following question for the Supreme Court of Nova Scotia:—

Is the supplying of intoxicating liquor by this club to its members for a pecuniary consideration a sale and a violation of s. 86 of the Nova Scotia Liquor License Act."

The question is thus directly raised here whether an incorporated social club selling to or supplying its members only with liquors at a tariff rate is violating the Liquor License Act.

It is established by Graff v. Evans, 14 Q. B. D. 373, and other cases that a bona fide association of club members arranging for the supply of liquors to its members at a tariff rate is nothing more than a distribution of the common

property amongst the owners, and is not in law a sale of the goods so distributed. The decisions so holding are, I think, founded on sound reasoning, and the question here is whether a legal corporation acting by its directors is in the same position as a bona fide partnership or association formed for social purposes.

The legal entity in this case is distinct from the shareholders, and I am unable to come to the conclusion that the supply to members on a tariff rate of the corporation's goods can properly be said to be a mere distribution amongst the shareholders of their own property.

To so hold, one must either lose sight of the separate corporate existence, or hold that the shareholders are the real owners, notwithstanding the Act of the Legislature creating the entity, and vesting therein the shareholders' rights and interests, and I think this cannot be done.

If the corporation, under the circumstances detailed in the case stated, supplied liquors to persons other than shareholders it would, without question, be a sale and a violation of the Act, and the sole question here is whether, when the corporation supplies to its own shareholders, the effect is to change what would otherwise be a sale into a mere distribution of property.

Looking at the distinct legal entity created by the legislature, called the corporation, and considering the ordinary shareholders' limited rights in connection with the management and control of such a body, I cannot come to the conclusion that the supply as in the case stated can mean any transaction known to the law except that known as a sale.

In my opinion the conviction ought to be affirmed and the appeal dismissed.

The other members of the Court concurred.

NOVA SCOTIA.

THE FULL COURT. DECEMBER 22ND, 1909.

IN RE LESSER AND COHEN.

Arbitration—Submission by Consent of Parties—Award by Two Arbitrators—Irregularity — Notice to Third Arbitrator of Meeting—Insufficiency—Setting aside Award.

Motion to set aside an award.

A. G. Morrison, K.C., in support of motion.

W. B. McCoy, contra.

LAURENCE, J.:—This is a submission to two arbitrators by consent of parties, who appointed a third before entering upon the reference.

The three arbitrators, Webber, Ehman, and Sakato, held the first meeting on Sunday, September 19th last, and heard the evidence of the parties to the submission, and at a later meeting, two other witnesses. The arbitrators adjourned on the 19th to the 20th, and again adjourned until the 21st, all being present at this meeting. Cohen proposed to examine a material witness, Mr. A. G. Morrison, and the arbitrators decided to hear this witness, and again adjourned but to no named day. No other meeting, as far as the affidavits show, was held until the afternoon of the 29th, when the two arbitrators, Webber and Sakato, met and made the award in question. This was the final meeting held to adjudicate upon the evidence and make up the findings. The parties were not present, and their presence was not necessary. The only question as to the regularity of this meeting is: Was Ehman, the third arbitrator, duly notified of this meeting? Each party to the submission was entitled to have the three arbitrators present at this meeting and the judgment of them all upon the matters to be decided unless, after reasonable notice, one declined to attend. No written notice was given to Ehman by the parties or by the other two arbitrators. The only notice alleged to have been given was a verbal notice by messenger sent, it is stated, by one arbitrator, Webber. But there is some proof that Sakato and Webber agreed on the 29th as the date for

final meeting, and it may be assumed the notice was sent at the instance of these two arbitrators. There is a conflict of evidence in the affidavits as to notice of this meeting having been given to Cohen, one of the parties, but it is doubtful if any different or better notice was given to Cohen than to Ehman, the absent arbitrator. The alleged notice to Cohen was given by A. Lesser, the same person who says he gave the notice to Ehman. It is, however, of no consequence, as notice to a party in such a case would not dispense with notice to the arbitrator.

The presence of the parties was not required, but the presence of the arbitrator was unless, as already stated, he, after notice, refused to attend.

The proof, in regard to the notice, is simply this:—

Ehman says the messenger, A. Lesser, called at his place of business about 10.30 a.m. on the 29th, and said to him, "They want you over at Abram Webber's at 2 o'clock sharp." This, Ehman says, is the only message or notice given to him by A. Lesser. In answer to this, A. Lesser says he was sent by Webber to deliver the notice and did deliver it to Ehman about the time named in these words, "That Mr. Webber said for him (Ehman) to come up to his (Webber's) store at 2 o'clock p.m. as the Reverend Sakato and himself wanted to finish the arbitration matter of Lesser and Cohen." He further says he returned to Webber and reported to him what Ehman said when the notice was given, and that Webber then sent him to give a similar notice to one of the parties, Cohen. This latter is only important in this view, viz., that A. Lesser is contradicted by Cohen and Joseph Ball, who swears he was present, as to delivery of this message in the terms sworn to, and therefore as affecting his credit. Webber could have aided Lesser's statement by stating, if it be true, that he had sent this message to Ehman, that he reported to him what he (Ehman) said, and that he then sent him to Cohen. Webber says nothing about it. In later affidavits used by leave of the Court, Ehman and his wife and daughter state that Ehman at home on the 29th at noon informed his wife and daughter of the message received that forenoon from A Lesser, giving it in the words he alleged were used, and that he then did not know its meaning. There is a strong preponderance of proof against A. Lesser's version of the words used in the message given to

Ehman, and I am inclined to accept Ehman's statement on that.

Then, if the words used were merely, "They want you over at Abram Webber's at 2 o'clock, sharp," used by one who was in no way connected with the arbitration proceedings, and only two or three hours in advance, I am inclined to think this notice quite insufficient both in respect to its terms and the length of time given. In order to justify an arbitrator proceeding ex parte a very strong case must be shown of wilful delay by the party not attending; and therefore if a reasonale excuse for his not attending is shown, the Court will set aside an award made in such a proceeding: Gladwin v. Chilcote, 9 Down. 550. I would suppose the same justification would be required for two arbitrators proceeding in the absence of the third. As stated already, at the last meeting of the three arbitrators it was agreed that A. G. Morrison, a witness named by one of the parties as material to his case, would be called at a future meeting. He was not called, and the affidavits disclose that he was not called because Sakato, one of the arbitrators, "deemed it inadvisable and not material to the issue."

"Where arbitrators who had proceeded in a reference informed the defendant that they would suspend their proceedings till the books of account had been referred to, it was held that afterwards making an award in his absence, without examining the books of account, was ground for setting it aside": Redman on Awards 137; Pepper v. Gorham, 4 Moore 148.

"So where arbitrators promised to hear certain witnesses and made their award without doing so": Earl v. Stocker, 2 Vern. 251.

Russell on Arbitration (9th ed.) 145 states the same proposition and cites the above cases.

The agreement by the arbitrators to hear the witness Morrison is proved in the nature of admissions of the arbitrators, and it is scarcely permissible to use such admissions of arbitrators against an award unless the admissions appear by the record: In re Whitely and Robert's Arbitration (1891), 1 Chan. 565.

However, in my view, in this case, the award should be set aside.

DRYSDALE, J.:—In this application the point is as to reasonable notice to the parties and arbitrators of the final meeting at which the award was made. I think it quite impossible, on reading all the affidavits herein, to come to any other conclusion than that Cohen, one of the parties, not liking the prospect of a probable decision against him, deliberately attempted to prevent any award by staying away from the final meeting,of which he had due notice, and also preventing or conniving at the absence of the arbitrator named by him at such final meeting. Rev. Mr. Sakato, one of the arbitrators, states that on the evening before the final meeting he told Cohen explicitly that the question of award would be finally considered next day at 2 p.m. Distinct notice to said Cohen of the time and place of such meeting and the business to be transacted is also sworn to by one A. Lesser. To my mind this position is not met by anything said or produced before us by or on behalf of Cohen, and under all the circumstances I think the notice a reasonable one.

Then, as to the notice to the arbitrators, it is said that the arbitrator Ehman, who was absent from the final meeting, had not reasonable notice of such meeting. What was his position before and at the time he received the admitted notice to attend at Webber's at 2 o'clock sharp on the day of the final meeting when the matter was to be considered and the award made? A reading of the affidavits, especially his own, compels me to consider that from and after the meeting of 22nd September, he had been doing his best to prevent any further proceedings, and I have no doubt that upon ascertaining it was the intention of the other two arbitrators to proceed, his course of absenting himself was wilfully entered upon. For me, he destroys the effect of his attempted contradiction herein when he produces the affidavit of his wife and submits paragraph four thereof for consideration. Under the circumstances no reasonable mind, I think, could conclude that he did not know what he was wanted for in the matter of the notice therein admitted. I think he had reasonable opportunity to attend if he so desired, or obtain an adjournment, and as I am satisfied he was wilfully absenting himself, in obvious concert with Cohen, I do not think it is open to Cohen to complain of the award.

I would dismiss the application with costs.

GRAHAM, E.J.:—I concur in the opinion of my brother Drysdale. As there is a difference of opinion on the bench, I took the affidavits and read them over, and I am convinced the notice was sufficient.

RUSSELL, J..—I also concur with Drysdale, J.
Motion to set aside dismissed.

NOVA SCOTIA.

THE FULL COURT. DECEMBER 22ND, 1909.

HALLISEY v. MUSGRAVE.

Contract — Sale — Railway Ties —"Government Standard Ties"—Construction of Contract.

Appeal from the judgment of WALLACE, CO. C.J., in favour of plaintiff in an action for the price of railway ties supplied to defendant.

T. R. Robertson, in support of appeal.

E. D. King, K.C., contra.

DRYSDALE, J.:—The plaintiff contracted with defendant to supply 2,000 railway ties, and the question between the parties is as to the nature of the tie to be supplied as respects the size thereof. The learned County Court Judge has found on the material before him that it was not a term of the contract that the ties should be "Government standard size," and directed judgment for the plaintiff for the balance claimed, as if the contract were properly filled. From this finding and judgment the defendant has appealed, the contention on his behalf before us being that on the material so before the learned County Court Judge, the finding and direction above mentioned is wrong. The contract now in question was made in September, 1907, and it appears that, before September and during the year 1907 the plaintiff had been supplying ties to the defendant. On January 18th, 1907, the defendant wrote plaintiff enquiring whether he had any standard railway ties for sale, and as a result of this enquiry a contract in writing was made for the supply by

plaintiff to defendant of 1000 hemlock ties, and such additional ties as defendant should take during the season, said ties to be equal to customary government standard. This contract was apparently filled according to its terms. On September 4th, 1907, the defendant, in a letter to plaintiff, after referring to some shipment under previous supply, writes as follows: "Spruce ties. If you can give us 2-3rds spruce and 1-3rd hemlock we will accept the spruce at 29 cents and the hemlock at 30 cents loaded on cars and we will take practically any quantity that you can furnish, but it will be necessary for you to let us know with as little delay as possible just what quantity you are prepared to furnish." The plaintiff then waited upon the defendant and apparently verbally agreed upon a quantity, and closed for a supply of 2,000 ties. The defendant, after such oral arrangement, by letter under date of September 11th, 1907, addressed to plaintiff, reduced to writing his understanding of the contract in words as follows:—

"Dear Sir,—Referring to our recent conversation, we confirm contract for 2,000 ties, usual government standard size, one-third hemlock and two-thirds spruce at 30 cents and 29 cents respectively, 1,000 to be delivered by the 25th of this month and the balance the following month."

This letter was duly received by the plaintiff, and thereafter the plaintiff commenced supply. Two car loads were supplied and paid for in September, and as to these no question arises. In October and November two car loads, practically the balance of the 2,000, were supplied and payments made on account. As to these October and November shipments it is unquestioned that a portion of the ties were not in size up to standard. The plaintiff alleges that when he closed his contract with the defendant verbally he did not agree to government standard as to size, and his statements as to this are most unsatisfactory. In his direct examination he says: "I received letter B. (September 11th, 1907). I never agreed to government ties. They were to be the same as supplied previously. I never agreed to that standard. The letter (B) confirms the contract, but the government ties were not agreed to." Whilst in his cross-examination he undertakes to say he does not know what standard ties means, and then admits that he had previously contracted with defendant to supply standard ties, and then further says that when he discussed the letter of September

4th, 1907, with defendant, the latter told him a four-inch tie would do him; that defendant then also said the ties should be from four to ten inches. The defendant denies that any such conversation as to size took place, and if plaintiff is telling the truth in his direct examination when he says the ties were to be the same as supplied previously, it is obvious a four-inch tie was not contemplated. It is also very obvious that a four-inch stick would not be considered either a standard or a merchantable railway tie. Considering the previous dealings between the parties, the correspondence and the whole evidence, it seems to me that there should have been a finding that the contract was for the supply of government standard ties. I think the finding and judgment below ought to be set aside with costs. The plaintiff is entitled to recover on his claim $112.67 with costs. I think the defendant's damages on his counter claim ought to be fixed at $100, and he should recover this sum with costs of such counter claim, one to be set off against the other, and judgment entered for the balance.

TOWNSHEND, C.J. and GRAHAM, E.J. concurred.

MEAGHER, J.:—I heard the first part of the argument but left before it was concluded, and therefore take no part in the decision.

Appeal allowed.

NOVA SCOTIA.

THE FULL COURT. DECEMBER 22ND, 1909.

SPAIN v. McKAY.

Landlord and Tenant — Rent — Distress — Sole Purchase by Landlord—Legality.

Appeal from the judgment of LONGLEY, J. (Reported ante p. 503), in favour of plaintiff in an action claiming damages for an unlawful distress.

T. R. Robertson, in support of appeal.

J. B. Kenny, contra.

RUSSELL, J.:—This is an action for damages for the conversion of goods which the defendant McKay purchased at a sale under a distress for rent. Plaintiff was McKay's tenant and contended that the defendant being the landlord could not lawfully purchase the goods distrained. This has been the recognized law of the land ever since the case of King v. England, 4 B. & S. 782, and Matthew, J., in Moore Nettleford & Co. v. Singer (1904), 1 K. B. 820, referring to the suggestion that this principle is no older than the decision in King v. England, says that, turning to the Statute of William and Mary, it is clear that where a landlord, empowered to sell, himself buys the goods it is not a proper description of the transaction to call it a sale. In the case last referred to there was a sale by auction, but that was held to make no difference, the auctioneer being the agent of the landlord for all purposes save that of making a memorandum of the contract, as to which he is the agent of both parties. The learned trial Judge had the authority of King v. England cited to him but refused to follow it on the ground that the situation had been completely changed in this country since the decision in that case, the sale being now made after notice and generally by an auctioneer. But the statute under which this is done here is very much the same as that under which King v. England was decided, the only difference being that a notice of the sale is expressly provided for in our statute. The abuses that might occur under the statute of William and Mary in England would also be possible under our statute, if the landlord were allowed to purchase. The reason for not allowing him to purchase is stated by Wills, J., to be that "it would be contrary to all principles of justice to allow a man who ought to endeavour to make the best price possible for the goods which he is selling, to be in a position in which it is to his interest that they should be sold for as little as possible: (1903) 21 K. B. 170. It is plausible to argue that the permission to the landlord to bid would enhance the price received by providing an additional competitor, but if he is at liberty to buy he will be interested in discouraging competition, and there is an illustration afforded by this very case of the temptation to which the landlord would be subjected to endeavour to deter others from bidding in order to secure the goods for himself at as low a price as possible instead of "for the best price to be gotten therefor," as the

statute provides. On the whole, I think that the difference between our statute and the statute of 2 William and Mary is not sufficient to render the principle obsolete that the landlord cannot sell the goods to himself, or rather, as Lord Alverstone has said, that such a transaction "is really no sale at all": (1903) 2 K. B. at p. 169.

The irregularity cannot, in this particular case, have occasioned any very great damages, and it might even be plausibly contended that the damages were merely nominal, the distress in the first instance being regular and the common law effect of the subsequent irregularity being cured by 2 George II.. to which corresponds s. 10 of our Act (cap. 172 R. S.), there being a slight difference in the proviso which has no bearing upon the present enquiry. There is, however, I think, sufficient evidence to have warranted a finding that some actual damage occurred, and I think the amount might fairly have been estimated at $100.

The defendant counter claims for rent, and it appears that there was actually due at the date of the surrender of the lease $836.95. Plaintiff's counsel in opening claimed that the last month thus charged for should not be allowed because the surrender took place before the end of the then current month. But this contention was abandoned. At the date of the counter claim being put on the record there was really no rent due, the defendant having in his hands the proceeds of the sale to a greater amount than the amount of the rent due. There was really a balance due the plaintiff of $36.02, apart from the damages recoverable for the irregularity, the goods sold having realized $872.97 and the amount of rent being only $836.95 as stated.

No order for judgment has been taken, but the whole matter was meant to be disposed of by the learned trial Judge, and I think that the Court can now make the judgment that he should have made, dismissing the counter claim with costs and giving the plaintiff judgment for $136.02. But this, I think, might well have been without costs because of the extravagance of the plaintiff's claim and the untenable contentions set up with respect to the real nature of the plaintiff's claim and the measure of damages. The appeal should be, I think, allowed with costs.

There was a contention that the agreement for the lease was void and no rent was due thereunder because the object of the transaction was illegal, plaintiff having leased the

property with a view to the illicit sale of liquor, but counsel on both sides were a little afraid of the results to which this contention might logically lead, and it was not seriously pressed. There was nothing in the transaction so obviously illegal as to oblige the Court to take notice of it, and it is not necessary to enter upon the enquiry as to which of the parties would suffer most if the point were well taken.

TOWNSHEND, C.J.:—That is the judgment of the Court. Appeal allowed with costs.

PRINCE EDWARD ISLAND.

SUPREME COURT. JANUARY 11TH, 1910.

SADIE BUCHANAN v. THE PROVINCIAL GRAND ORANGE LODGE OF PRINCE EDWARD ISLAND.

Action of Negligence—Plaintiff Injured by Fall of Striking Machine—Cause of Injury—Implied Permission—"Res ipsa Loquitur" — Duty of Occupier of Land towards Person Invited—Unusual Danger—Contributory Negligence—"Volenti non fit Injuria"—Weight of Evidence —Rule Nisi to Set Aside Verdict Refused.

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

A. A. McLean, K.C., and D. McKinnon, for defendants.

The judgment of the Court was delivered by:—

FITZGERALD, J.:—This suit was tried at the last Trinity term of this Court.

The jury found a verdict for the plaintiff for $250 damages, at the same time answering certain questions put to them by the judge.

The rule nisi to show cause why that verdict should not be set aside, and a non-suit entered or new trial granted, was heard and argued last Michaelmas term.

The grounds in that rule are as follows:—

1. That the verdict was against the weight of evidence.

2. That the verdict was contrary to the evidence and to the direction of the Judge and perverse.

3. That the verdict was contrary to law.

4. That the accident happened through the acts of fellow-guests of the plaintiff, and the defendants are not liable.

5. That the owner of the machine was a trespasser and the defendants are not liable for his default or negligence.

6. That the plaintiff being cognisant of the danger and voluntarily running the risk the maxim "volenti non fit injuria" applies, and the defendants are not liable.

Without a knowledge of what the charge was, no argument on these grounds or decision thereon would be intelligible; and as it describes the pleadings, and its insertion here will greatly shorten the judgment of the Court, it is now read as part of that judgment, leavng out the introductory paragraph thereof.

"This is a suit brought by the plaintiff against the Provincial Grand Orange Lodge of Prince Edward Island that they permitted a striking machine to be erected without proper fastenings on ground used by them for a public tea, and to be used without taking reasonable precaution to prevent accident to those frequenting the tea, by reason whereof the plaintiff was injured. The defendants by their pleadings deny the permission, the insecure fastenings, and any negligence on their part, and in addition say that the injury which the plaintiff suffered was caused by her own negligence and improper conduct. That is the case stated shortly.

"Now, we will assume that the plaintiff was lawfully on the grounds, and the evidence shows that she was injured by the falling of this machine. I am not going into any lengthy definition of what is negligence or contributory negligence; but will, assuming these circumstances, state shortly the law applicable. It is this:—

"With respect to such a visitor the law requires that she, using reasonable care on her part for her own safety, is entitled to expect that those in charge of such a gathering shall on their part use reasonable care to prevent damage from any unusual danger which they know or ought to know is on the grounds. And the question whether such reasonable care was taken by the managers must be determined by a jury as a matter of fact.

"The first and initial question for you is therefore: Did the managers know this dangerous thing was on their

grounds, or ought they to have known it? For if they did not know this, nor is there sufficient proof that they ought to have known it, there can be no liability though the plaintiff is injured.

"The evidence does not disclose any permission formally given by those in authority. There remains the question, however, ought they to have known it? That is a question for you, gentlemen, and I leave it to you. You have heard the evidence.

"It was on the ground for a time. At any rate you could safely say it was there about an hour; and it made a certain noise, and many people congregated about it. It will be for you to say under all the circumstances given in evidence whether in your opinion the managers ought to have known of its presence, or that on a 17-acre field, with other amusements and entertainments, it might have reasonably escaped their attention for the time it was there.

"Should you find on both these points for the defendants there is legally an end to the plaintiff's case. Supposing, however, you find that it was there by the defendants' permission—that permission being given by their neglect to know of its presence when they should have known of it—you will then have to consider:—

1st. Was it secured with reasonable care for the use of such a machine at such a gathering?

2nd. Were reasonable precautions taken to prevent accidents in its use?

"You heard the evidence of the witnesses. I direct your attention to the two principal ones as to its erection and condition. I have got from the stenographer a copy of the notes of evidence given by Alexander Munro, and I will read it to you: (Judge here reads evidence of witness).

"On the other hand there was the evidence given by the witness Ford. You heard his evidence. He says: (Judge here reads evidence of witness).

"Now in relation to its use, you heard the evidence of the witnesses who used it, and as to where it was placed, and also of those who told you of the repeated warnings of the men in charge to those about, to keep off the guy ropes, which if interfered with would surely affect the stability of the machine.

"A great deal of evidence given, points to the fact that it was by reason of this crowding that the machine fell. You

well remember one of the witnesses (D. Campbell) hearing the cry that one of the stakes was up and that it was falling.

"But you, not I, have to find what was the cause of this falling. Did it fall by reason of the negligence of the defendants? You must find that before there is any liability. You should also bear in mind the evidence of the repeated warnings given in a voice that those about could hear, in determining the question of reasonable care in its use.

"Now supposing further that you find for the plaintiff on these issues also, you will have a further question to determine namely: Was the defendant herself guilty of what the lawyers call "contributory negligence," that is, as I before put it to you, was there a want of reasonable care on her part. The law says as to this: Even if the accident is attributable in the first instance to the defendants' negligence, if it would not have occurred but for the negligence of the plaintiff, she cannot recover.

"This again is a question of fact, and it is for you to say whether the plaintiff might by the exercise of ordinary care on her part have avoided the accident.

"The defendants' contention is: That it was not ordinary care on her part to stand as close as they claim the evidence shows she did, to such an erection; no place for a woman to remain unless she voluntarily runs the risk of accident, such as a flying hammer, splintered wood, or the rought jostling of a crowd and its attendant dangers to the stability of the machine and to the onlookers; and that in view of the crowding, crushing, and pressure on the guy ropes, to which the evidence shows repeated attention had been called by the person in charge, and its danger, no reasonable person should have stood within the danger zone; that it was not a hidden danger but an obvious one, against which, she as a reasonable person should and might easily have protected herself, or avoided. These are considerations which require your attention.

"You heard the many witnesses who gave evidence as to the length of time she remained there, and her position there, and you heard her own testimony.

"It is for you to say whether under the circumstances, had the plaintiff acted with ordinary care she might have avoided the accident.

"If you find she did not so act—it matters not that the accident is attributable in the first instance to defendants' negligence—your verdict should be for the defendant.

"I desire also to say to you that in gatherings such as this, the management offer no guarantee of indemnity against injury to those attending. There is always a certain amount of risk to those who mix with large crowds and join in their amusements, the avoidance of the danger necessarily attending which lies on the visitor, who is required to take reasonable care for his own safety; and that for accidents happening by reason of the conduct of visitors unconnected with any duty on the part of the management, the management are not liable; if, however, the management leave anything dangerous in a place where they know it to be extremely probable that some other person will unjustifiably disturb it—to the injury of a third person—and if there is no exercise of reasonable care on the part of the management to guard against this danger—there is a liability; the jury, however, have to find that there was this knowledge of probable interference by strangers, and that no reasonable care was taken to prevent it.

"I also desire to instruct you upon whom lies the burden of proof. The law is: The jury have to consider (upon the evidence given upon both sides) whether they are satisfied in favour of the plaintiff with respect to the question which she calls upon them to answer.

"Then comes this difficulty—suppose that you, after considering the evidence are left in real doubt as to which way you are to answer, in that case also the burden of proof lies upon the plaintiff, and if the defendant has been able by the facts which he has adduced to bring your minds to a real state of doubt, the plaintiff has failed to satisfy the burden of proof which lies upon her.

"As to the damages, in case you should find for the plaintiff, I need not say very much to you. They are entirely in your discretion, bearing in mind that they must be reasonable under all the circumstances, and that perhaps the best test of the amount is that stated by Mr. Bentley that such a recompense should be given to the woman as would put her, if possible, in the position in which she was before the accident. That of course is impossible in one sense, but in another sense money does cover an injury, and it is the only thing that can be given by a jury in recompense for an injury done.

"There are several issues raised by the pleadings in this case which you will be required to answer. I have put them in simple form, thus:—

"1st. Was the machine there by the implied permission of the defendants? (Answered "Yes.")

"2nd. Was there negligence on the part of the defendants in its erection or use? (Answered "Yes.")

"3rd. Might the plaintiff by the use of ordinary care have avoided the accident? (Answered "No.")

"4th. And then in case you find for the plaintiff, at what sum do you assess the Plaintiff's damages?" (Answered "$250.00.")

No objection to this charge was made by defendants' counsel, nor to the questions put by the Judge to the jury.

The first two grounds in the rule may be considered as one question, viz.: Was the verdict contrary to the evidence?

It is quite possible under that evidence, as will be apparent to any intelligent mind after a perusal of the stenographer's notes, for reasonable persons to arrive at quite different conclusions, and to make divers findngs of fact upon all of the three questions submitted by the Judge.

It is also quite possible that Judges, sitting in Courts of Appeal, might not agree with the conclusions reached by the jury, yet, as the latter are the tribunal entrusted by the law, with the determination of issues of fact, their findings will not be disturbed, they being fully and properly instructed, and following such instructions, unless their verdict is one which, viewing the whole of the evidence reasonably, they could not properly find: Metropolitan Ry. Co. v. Wright L. R., 11 A. C. 152; Toronto Railway Co. v. King L. R. (1908), A. C. 260; Windsor Hotel Co. v. Odell, 39 S. C. R. 336.

Before proceeding further to consider these two grounds, it is necessary to describe shortly some of the circumstances attending the injury complained of.

A public tea party had been announced and advertised by the defendants to take place on the 14th July, 1908, on grounds obtained by them. A large concourse of people was expected, and a great number of all ages and sexes attended. All were admitted free. The object of the gathering was to raise money for an orphanage, and this money was made on the sale of tickets for tea.

This machine was what is known as a striking machine, used by men for the trial of their strength. It consisted of

a perpendicular mast of wood (according to the evidence) between 20 and 25 feet high, set on a small platform. On this platform was a block which, when struck with sufficient force, rang a bell on the top of the mast. This mast was a piece of timber, 6 to 7 inches wide by 4 to 5 inches in thickness, with an iron rod running from the platform to its top. It was kept in place by guy ropes or wires attached to posts in the ground. On the strength and sufficiency of these guy ropes and posts depended the stability of a machine of this height and small base, and its safety during the violent blows dealt on it in its use.

The trial Judge treated this machine as a thing of unusual danger at such a gathering; and involving in its use a duty on the part of the management to use reasonable care to prevent danger to people there as invited guests—persons lawfully there at the special invitation of the Committee of Management for purposes of their own.

It is conceived that there cannot be any question that such a machine at such a gathering was necessarily a thing of danger, dangerous if by chance it should lose its stability, dangerous in its use by reason of the great physical force employed by those trying their strength upon it, and the effect of such force on the mechanism of the machine; and dangerous as was shown by the injury actually received therefrom.

Accepting therefore the unusual danger as a fact, and the duty of the management, knowing, or having opportunities of knowing thereof, to use reasonable care to safeguard their guests on premises under their full and absolute control, the first question for the jury would be, "Did the management know or ought they to have known of this danger to those invited by them there?" This the trial Judge left to the jury as an initial question.

We have considered the evidence on this branch of the case, and the relation by many witnesses of the time it was on the ground, and the noise made in its use, and the number of people using it, and the crowd surrounding it, and it is not in our judgment necessary to say further than that the jury, accepting the evidence of many of these witnesses as true, could not do otherwise than find that there was ample time and opportunity given the management for knowing that this danger was on their grounds, and that they ought to have known it was there; and that their finding was, in

our opinion, not inconsistent with all of the evidence given, and is consequently one that should not be disturbed.

We next consider the question of negligence on the part of the defendants, and of contributory negligence by the plaintiff. These were, we think, properly left to the jury, and their answers to the issues, put to them, so instructed, must be taken, if not unreasonable and perverse, as final between the parties.

Here the Court admits that the evidence is conflicting.

"This is the common case," as Mr. Justice Duff says in Windsor Hotel Co. v. Odell, 39 S. C. R. at p. 338, "of a conflict of evidence which the jury having the witnesses before them have resolved, by accepting the story of one side and rejecting that of the other."

The principle to be applied to such cases he further says—adopting the language of the Judicial Committee in the Commissioner for Railways v. Brown, 13 App. Cases 133—is: "Where the question is one of fact and there is evidence on both sides properly submitted to the jury, the verdict of the jury, once found, ought to stand; and the setting aside of such a verdict should be of rare and exceptional occurrence."

After a careful review of this evidence this language seems particularly applicable.

It is quite impossible to reconcile the testimony given by the different witnesses, but, unquestionably, the jury, believing some of them, could find as they did.

The question is not, is this verdict the best one that could have been arrived at, or even whether in our opinion it is a right or just one under the evidence, but as Mr. Justice Davies expresses it in the case last quoted, it is "simply whether it is one which a jury could under all the circumstances fairly find."

We are not prepared to say that the finding of the jury on these issues is one that they could not fairly find, accepting the testimony of some of the witnesses, and rejecting that of others. It certainly is not perverse.

The remaining grounds in the rule, though argued in great length, do not, we think, call for an extended judgment on our part.

If they mean anything, they mean that the trial Judge's summing up to the jury was contrary to law, though no objection was taken to it by the defendants on the trial.

Indeed, we are at a loss to see how any question, except that the verdict was contrary to the evidence, can now be before us: Royal Paper Mills Co. v. Cameron, 39 S. C. R. 369.

The Court, however, is of opinion that in this case, and under the circumstances disclosed by it, there was a duty thrown upon the management to see that their grounds, on this occasion, were free from unusual dangers—such as this striking machine presented—and knowing this particular danger to be there, or having an opportunity of such knowledge, that their further duty was, by reasonable care on their part, to protect from probable injury thereby those on the grounds on their invitation, and for their purposes; and that the trial Judge so charging the jury, charged them correctly, and that the jury having found implied permission for the erection and use of this dangerous machine, negligent performance of the defendant's duty in relation to it, and no contributory negligence on the part of the plaintiff, the grounds set forth in the rules numbered 2, 3, 4, 5, and 6 are not in accordance with the law and the findings of fact by the jury on a proper presentation of the case to them, and are not available to the defendants.

This simple legal proposition does not require the citation of particular authority. But from the multitude of cases cited no dictum appears to this Court more applicable here, or more concise, than that quoted and approved by the Appeal Court in Inlermaur v. Dames, L. R. 2 C. P. 311.

"With respect to such a visitor at least, we consider it settled law that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, when there is evidence of neglect, the question whether such reasonable care has been taken by notice, lighting, guarding or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as a matter of fact."

Or as Mr. Justice Bigham in the recent case of Marney v. Scott (1899), 1 Q. B., at p. 990, says:—

"A person who goes upon premises upon business which concerns the occupier, and upon his invitation, express or implied, is entitled to expect that the occupier shall use reasonable care to prevent damage from unusual danger, which he knows or ought to know."

The rule will be discharged with costs.

PRINCE EDWARD ISLAND.

SUPREME COURT. JANUARY 11TH, 1910.

IN RE APPLICATION OF ANNIE COOK.

Certiorari — Conviction of Magistrates — Killing Dog — Damages Awarded for Injury — Criminal Code Sec. 537 —Amending Irregularity—Rule for Certiorari Dismissed.

J. A. Mathieson, K.C., for applicant.

W. S. Stewart, K.C., and G. S. Inman, contra.

The judgment of the Court was delivered by:—

FITZGERALD, J.:—The applicant in this case was on the 9th day of September last, 1909, convicted before two justices for the unlawful and wilful killing of a dog, the property of Peter G. Ross, and the conviction adjudges "the said Annie Cook for her offence to forfeit and pay the sum of $1 fine and $20 damages for the loss of the dog, to be paid and applied according to law, and also to pay to the said Peter G. Ross the sum of $4 for his costs, &c."; and the minute of judgment made by the magistrates at the time shows that they fixed the fine at $1 and "awarded Peter G. Ross the sum of $20 for the loss of his dog."

It is contended that under s. 537 of the Criminal Code the Magistrate erred in making this conviction, as that section gives them no power to award damages to the complainant for the injury done.

There is no doubt that that section contains no such power. The injury done the complainant is expressly reserved to him as I read the section, not to be considered or adjudicated on by the Court trying the criminal offence.

The complainant's personal injury must be the subject of civil proceedings; what penalty is coming to the Crown by reason of a criminal offence is all that the Magistrates under that section have to determine.

If the offence could come under s. 539 the case would be entirely different, but it clearly cannot, as that section includes within its provisions only such injuries to property for which no punishment is otherwise provided by the code, punishment for killing a dog is explicitly provided for by s. 537.

This conviction is consequently bad so far as it contains any adjudication upon the "injury done."

The new conviction put in, in substitution of the one referred to, reads:—

"We adjudge the said Annie Cook for her said offence to forfeit and pay the sum of $21 to be paid" &c., with costs the same as in the original.

This conviction cannot stand for the simple reason that it is not the adjudication of the magistrates. They, by their first conviction and their minutes of it, show that they fixed the fine or penalty at $1, and $20 to the complainant for the loss of his dog. There was in fact no adjudication imposing a penalty to the Crown of $21, and no formal written conviction can make that a fact which never was one.

It was suggested on the argument that our local statute, 44 Vic. c. 1, was in some way a bar to this conviction, as it empowers the killing of dogs under certain circumstances.

That statute no doubt was available to the defendant on the trial of his case before the magistrates.

We know not whether he sought to excuse his act under its provisions—or deeming them not serviceable to him in his defence refrained from quoting them.

It is, however, quite plain that its provisions are in no sense a bar to punishment for an offence against the Criminal Code, though they may be pleaded in justification or excuse.

Under s. 1124 of the code full power of correcting any irregularity in a conviction of this character is given to this Court, even if the punishment imposed in it is in excess of that which might lawfully have been imposed.

Upon a perusal of the depositions before us, this is a case, in our opinion, in which the Court should rectify the error of the magistrates, and not quash the conviction wholly.

The order will therefore be for the rectification and amendment of this conviction by striking out thereof the following words—"and twenty dollars damages for the loss of the dog." Otherwise the conviction to stand, and be enforced by the magistrates.

There should be no costs given to any party before the Court on this certiorari, neither party having succeeded materially.

The rule for a certiorari will be dismissed without costs.

PRINCE EDWARD ISLAND.

SUPREME COURT. JANUARY 11TH, 1910.

IN RE APPLICATION OF ROBERT JENKINS FOR A WRIT OF CERTIORARI.

Certiorari—Prohibition Act, 1900—Witness—Principal and Agent—Answer Incriminating Employer—Order of Dismissal Final.

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

J. J. Johnston, K.C., for defendant.

The judgment of the Court was delivered by:—

SULLIVAN, C.J.:—This is an application by Robert Jenkins, an inspector appointed by the Provincial Government under the Prohibition Act, 1900. The motion is for a writ of certiorari, to quash an order made by the stipendiary magistrate for Charlottetown on the 12th August, 1909, dismissing an information laid by the applicant against Arthur W. Reddin, a druggist, for a third offence against the provisions of the said Act. The application was initiated upon three grounds, but two of these being obnoxious to other remedies were not relied upon at the argument, which was confined to the first ground mentioned in the conditional order, namely:—

"That the stipendiary magistrate improperly refused to compel a certain witness who was a clerk of the defendant to answer a question asking him if he sold intoxicating

liquors at the defendant's place of business between the dates mentioned in the said information, within which the said third offence was alleged to have been committed."

As I view this application, it makes no difference whether the magistrate decided rightly or wrongly respecting the proposed question. But in deference to a desire expressed by counsel at the argument, that in any event, it would be useful in the administration of the Prohibition Act to have the opinion of the Court on this point, I proceed at the outset to state the view which I entertain in regard to the question.

It does not appear that at the trial the privilege was claimed by the witness for his own protection, or because the answer to the question would tend to criminate him; and the question seems to have been disallowed by the magistrate on the ground that a person acting in the capacity of a clerk is not compelled to give evidence tending to criminate his employer. I am unable to accede to that view of the law. It is a well known, indeed, an elementary rule of law, of great antiquity, that, where there is no statute to the contrary, a witness is not compellable to answer a question tending to criminate himself. The privilege, however, is that of the witness, not that of the party, and must be claimed by the witness himself on the ground that the answer to the question would tend to criminate himself, not that it would tend to criminate some other person. But, even if the answer to the question submitted would tend to criminate the witness himself, still he was compellable to answer it under s. 34 of the Prohibition Act. That section enacts that: "In any prosecution or proceeding under this Act no witness shall be excused from answering any question upon the ground that the answer to such question may tend to subject him to a prosecution under the provisions of this Act;" and the same section provides for the witness this indemnity, that although he shall be compelled to answer, yet the answer so given shall not be receivable in evidence against him in any prosecution thereafter taking place against him under the Act. In my opinion it is abundantly clear that the witness referred to was compellable to answer the question submitted to him. It does not follow, however, that it is competent for this Court to grant on this application a writ of certiorari to quash the order of acquittal made by the magistrate. It does not appear that there was any want or

excess of jurisdiction in the tribunal that tried the complaint. The stipendiary magistrate had, from every point of view, ample jurisdiction to hear the case. He duly entered upon the inquiry, adjourned the hearing from time to time, examined many witnesses for the prosecution and finally dismissed the prosecutor's complaint, not on any preliminary or collateral point, but ostensibly upon the merits, because, as he alleges in his order, there was no evidence to sustain it. In all cases disposed of on the merits under the Prohibition Act the legislature has thought proper to make the adjudication of the magistrate final, and in such cases no mere error of the tribunal whether as to law or fact involved in the determination can suffice to render the adjudication open to review upon certiorari.

When the defendant was before the tribunal and the magistrate entered upon the hearing of his case by the examination of witnesses on behalf of the prosecution, the defendant's liberty was placed in jeopardy, that is, in the event of his conviction, his imprisonment would follow. The object of this application is, as was stated by the applicant's counsel in the course of the argument, that in the event of the order of acquittal being quashed, a motion might follow for a writ of mandamus to compel the magistrate to re-try the case, so that, concisely stated, the aim of this application is to bring about a new trial of the defendant for the same offence of which the magistrate acquitted him. It is a fundamental principle of British law that a person who has been regularly tried and acquitted by a competent tribunal having full cognizance of his case, cannot be again tried for the same offence. In the course of his judgment in the case of the Queen v. Duncan (7 Q. B. D. 198), Lord Coleridge enunciated this principle in these words:—

"The practice of the Courts has been settled for centuries, and is that in all cases of a criminal kind where a prisoner or defendant is in danger of imprisonment, no new trial will be granted if the prisoner or defendant, having stood in that danger, has been acquitted."

In The Queen v. Russell (3 El. & Bl. 942), which was an application for a new trial in a case of acquittal on a charge of misdemeanour, in his judgment Lord Campbell said:—

"The ground of my decision is that this is a criminal proceeding, and that the defendant ought not to be twice put in peril for the same cause. That rests upon a maxim

of English law which will, I hope, always be held sacred . . . "If there be an improper conviction it should be set aside, but I hope the same practice will never prevail in the case of an acquittal."

In Regina (Giants' Causeway, &c., Tramway Company) v. Justices of Co. Antrim, Ir. R. (1895), 2 Q. B. D. 603), which was an application for a writ of certiorari, to quash an order of acquittal made by the magistrates, the Court held the motion for a certiorari unsustainable. The Chief Justice of the Court, in the course of his judgment, says:—

"One fatal objection presents itself in limine. The offence with which the defendant in the summons was charged is one punishable by fine and imprisonment, and the order sought to be quashed is one of acquittal. In the whole range of our law there is no precedent for the granting, or even the making, of such an application in a case where there has been an acquittal by the magistrates. Not only is the application unwarranted by precedent, but principle cannot be referred to in support of it; on the contrary, to grant this application for a writ of certiorari to quash the order for acquittal, and for a writ of mandamus to compel the magistrates to rehear the complaint, would be to act in disregard of one of the most deep-rooted principles of the law. It would be a direct infringement of the principle that no one is to be tried twice for one and the same offence. Nemo debet bis vexari pro una et eadem causa is a maxim embodying one of the most cherished principles of our law." (p. 635).

The cases of Regina (Drohan) v. The Chairman and Justices of Co. Waterford (Ir. R. 1901, 2 K. B. D. 548), and The King (Hastings) v. The Chairman and Justices of Galway, (Ir. R. 1906, 2 Q. B. D. 499), are authorities to the same effect, namely, that an order of acquittal by magistrates having jurisdiction to hear and determine a case which in the event of conviction would entail imprisonment on the defendant and who in pursuance, and within the limits of such jurisdiction, hear and determine it, cannot be quashed by certiorari, so that the accused may again be subjected to trial for the same offence.

For the reasons which I have stated the conditional order for a writ of certiorari must be discharged, but without costs.

PRINCE EDWARD ISLAND.

SUPREME COURT. JANUARY 11TH, 1910.

FARQUHARSON v. WEEKS.

Attorney and Client—Negligence—Construction of Statute —Disagreement of Jury—Payment of Second Jury Fee —Practice.

J. J. Johnston, K.C., and Gilbert Gaudet, for plaintiff.

W. A. O. Morson, K.C., and G. S. Inman, for defendant.

The judgment of the Court was delivered by

SULLIVAN, C.J.:—This was an action for negligence against an attorney, in which the jury found a verdict for the plaintiff for $100 damages. The defendant now seeks to set that verdict aside, on the ground that it is contrary to evidence.

The action in which the alleged negligence took place was one brought against the plaintiff Farquharson by two persons named Williams and Baker, in which the defendant, Mr. Weeks, was the attorney for the plaintiff (Farquharson). The plaintiff desired to have that case tried by a jury, and he instructed the defendant to take the requisite steps to attain that object. The defendant gave the notice and paid the fee required by the statute to secure a jury. At the trial which ensued, the jury disagreed. Notice for a second trial having been given on behalf of Williams and Baker, the plaintiff again instructed the defendant to secure a jury. The defendant gave the usual notice, but did not pay any fee, he being of opinion that under the statute a second payment was not necessary. When the case was called on for trial, the Court held, after argument, that no jury fee having been paid for the second trial, the cause should be placed on the non-jury list. The result was that the plaintiff refused to go to trial, and the defendant signed, on his behalf, a confession of the action, and consented to a verdict for $400 passing in favour of Williams and Baker, for which sum judgment was entered against the plaintiff, whose goods were subsequently taken in execution thereunder.

The plaintiff's declaration contains a count charging the defendant with negligence in not securing a jury for the second trial; also a count charging that the defendant wrongfully and improperly, without the authority or consent, against the will, and contrary to the directions of the plaintiff, signed a confession of the action upon which judgment was entered against the plaintiff and his goods were taken in execution as already stated.

At the trial, it was admitted that the failure to have the plaintiff's case tried by a jury was due to the defendant's omission to pay the jury fee. But it was contended that as an attorney is only liable for gross negligence or gross carelessness, the defendant's failure to construe, as the Court, after argument, subsequently did, an Act of the Legislature, which had not previously received a judicial interpretation, did not warrant the maintenance of an action against him on that charge.

The section of the statute referred to reads as follows:—

"Provided, always, that either party to any action or suit shall have the right to have the issues in fact in any such suit or action tried before a jury in the manner heretofore practised, if he shall seven clear days before the first day of the term at which the case stands for trial give to the opposite party a notice in writing of his desire to have the case tried before a jury, and if he shall before the first day of said term pay to the prothonotary of the Court, the sum of three dollars, to be applied toward defraying the expenses of said jury, which said amount shall be costs in the cause."

The construction given by the Court to that enactment, so far as it relates to the question involved in this suit, is, that where a case has been submitted to a jury, even if they disagree and be discharged without finding a verdict, the party desiring a new trial before another jury at a subsequent term, must not only give notice of such desire, but must also pay the jury fee as in the first instance. It must be admitted, however, that the enactment is by no means clear, nor free from doubt. The defendant here did not infringe any plain rule of law or practice, and the utmost that can be said is that he misconstrued a doubtful enactment of the legislature.

In each of the cases of Kemp v. Burt (4 B. & Ad. 424), Bulmer v. Gilman (4 M. & G. 107), Elkington v. Holland (9 M. & W. 659), and Purves v. Landell (12 C. & F. 91), the

Court held that it did not constitute gross negligence in an attorney to misconstrue a doubtful Act of Parliament. In the latter case, Lord Campbell, C.J., said:—

"An action may be maintained against an attorney, but it is only if he has been guilty of gross negligence, because it would be monstrous to say that he is responsible for even falling into what must be considered a mistake. You can only expect from him that he will be honest and diligent; and if there is no fault to be found either with his integrity or diligence, that is all for which he is answerable."

On this branch of the case the evidence does not shew that the defendant was guilty of either gross negligence or gross carelessness.

With regard to the Court charging that the defendant signed a confession of the action without the authority or consent, and contrary to the instructions of the plaintiff, the overwhelming preponderance of the evidence supports the view put forward by the defendant, namely, that he had the plaintiff's authority and consent to terminate the suit of Williams and Baker against him by the settlement which he made.

A careful consideration has brought me to the conclusion that the jury erred in their determination, and that under the evidence, they could not reasonably find a verdict for the plaintiff.

The rule for a new trial must, therefore, be made absolute.

NOVA SCOTIA.

TRIAL.

LONGLEY, J. JANUARY 6TH, 1910.

SYDNEY LAND AND LOAN CO. v. A SOLICITOR.

Company—Solicitor and Client—Moneys of Company in Solicitor's Hands—Right to Apply them on Payment of Debentures of Company held by Solicitor—Action by Company—Set-off—Creditor Ranking pari passu—Preference—Solicitor as Trustee—Liquidation of Company—Winding-up Proceedings.

Action for money had and received.

W. B. A. Ritchie, K.C., for plaintiff.

W. F. O'Connor, for defendant.

LONGLEY, J.:—The plaintiff company recovered judgment, after trial, appeal to this Court and to the Supreme Court of Canada, against one Rountree for something over four thousand dollars. The directors, after judgment, on the representations of defendant, reduced the amount of the judgment to $3,097.65. This does not really bear on the case now before me, but it is a fact that needs to be stated in order to a clear understanding of the whole case.

On the 29th of February, 1909, the defendant Rountree paid over the $3,097.65 to plaintiff's solicitor, the now defendant.

The solicitor had not then taxed his costs, but they were taxed later at $501.19, which amount he was undoubtedly entitled to retain. He also paid to Messrs. Ritchie & Robertson $463.14, their bill for legal services in the case and this also is to be credited. He also paid plaintiffs $388.32 cash. These three credits amount to $1,372.65. About these there is no dispute. The balance, apart from possible interest charges, is $1,725. There is no dispute about this. The defendant admits that this balance has not been paid over, and he pleads a set-off which practically covers this balance. The real issue in this case and the only one I have to determine is how far defendant is entitled to his credits.

The first and most important set-off claimed by defendant is in respect to certain debentures and debenture interest which defendant claims against the company. It appears that on November 24th, 1902, the company by resolution authorised the directors, of whom defendant was one, to borrow an amount not exceeding $150,000 by the issue of 650 debentures, 60 of such debentures to be for the sum of $1,000 each; 100 to be for $500 each; and 500 for the sum of $100 each, all of such debentures to bear interest at the rate of 5% per annum, and none of the debentures were to mature later than the 1st day of December, 1912, or at any date prior thereto at the option of the company, and all such debentures shall be redeemed on the 1st day of December, 1912, or at any date prior thereto at the option of the company on the payment of the par value thereof and five per cent. premium.

The form of the debentures issued under this resolution was as follows:

"$100.

"The Sydney Land and Loan Company, Sydney, N.S., Dominion of Canada, Province of Nova Scotia.

"The Sydney Land and Loan Company, for value received, promise to pay to the registered holder hereof, or order, the sum of one hundred dollars in gold coin five years after the date hereof, with interest thereon until paid at the rate of five per cent. per annum, payable semi-annually on the first days of January and July in each year to the registered holder thereof, or order, and on presentation of the proper interest coupons hereunto attached, both interest and principal being payable at the Royal Bank of Canada in the Town of Sydney, N.S.

"Dated January 1st, 1903."

To this the necessary coupons were attached.

The defendant was on January 1st, 1908, the registered holder of $6,000 of such bonds upon which two years' interest coupons were unpaid, amounting to $660, and on the said 1st day of January six bonds of $100 held by defendant fell due, amounting to $600, making, as he alleges, $1,260 then due him by the company. This was due before he received the money. Soon after its receipt he went to the office of the company, and informed the secretary that he had received the money from Rountree and that he proposed to appropriate $1,260 of it to the payment of his overdue debentures and debenture interest, to which the secretary made no reply. Consequently, a few days after, Gillies and Hill gave a cheque for $1,260 to defendant. He seeks to set this off against plaintiff's claim. Can he do it?

If the bonds issued by the plaintiff company had been in the form and subject to the conditions of some issues of debenture stock, whereby the said bonds are secured by a deed to a trustee and bind all the property of the issuing company, and are enforceable only by foreclosure proceedings, I would think that such a set-off would be out of the question. But no such character is to be attached to the debentures, so called, in this case. The document has really the character of a promissory note payable with interest in five years from date. I have examined the numerous authorities submitted by the learned counsel in the case. I am not clear that any of those cited bear directly on the point, but in

my view the registered holder of one of these debentures was simply a creditor of the company for overdue interest and when the bond accrued due he was simply a creditor to the amount of the bond, and is as much entitled to set it off against their present claim as if he had held the promissory note of the company. I therefore allow this set-off.

The learned counsel for plaintiff has urged a number of objections to any such view and has cited authorities, and it is necessary that I should give these the fullest consideration.

1. He claims that it is "a general, almost invariable rule that debenture holders of the same series are made to rank pari passu inter se. Even if it is not so expressed the Court will, from slight indications, infer equality." Parsons on Company Law, p. 311.

I have no difficulty in accepting this as the general principle of law, but of course there are debentures and debentures. As these are usually intended to afford special security to the purchasers and designed to give them a priority over general creditors by making them a first charge, or, at all events, a charge on the real estate plant and property of the company issuing them, they are in their very nature pari passu. No one bondholder can foreclose and get a preference over other bondholders. Any foreclosure must be for the benefit of the whole issue and to guard against any attempt on the part of individual bondholders to seek personal remedies it is usual, at present, to have the securities of the company conveyed contemporaneously with the issue of the debentures to trustees for the bondholders who only can take measures to realize for the benefit of bondholders and for the benefit of each alike.

But I conceive the debentures issued in this case to be essentially different from any conception of debentures which are recognized in modern times. Palmer, in his Company Precedents, V. III., p. 9, remarks:—

"A few companies have issued debenture stock without giving to the stockholders any charge or security whatever on the undertaking. Of course, if the public are willing, with their eyes open, to take up such stock so much the better for the company. But it seems only fair in such cases to inform subscribers that no security is offered except the personal obligation of the company. For there can be no doubt that the general impression of investors is that debenture

stock (like railway debenture stock) is secured by first charge, whereas, in fact, an unsecured debenture stock holder (to adopt the language of James, L.J., in Florence Land Co., 10 Ch. D. 544), instead of being in a better position than an ordinary creditor—instead of getting any security whatever for his money—would be in a worse position than the commonest ordinary creditor of the company."

I presume he means in a worse position while the debenture stock was unmatured. After that, it would seem to me, he would be in exactly the same position as any other creditor, and so I regard defendant in this case when his totally unsecured debentures, having nothing but the personal obligation of the company behind them, became due. He seems to me to have been in the position of an ordinary creditor and as such as much entitled to set off their claim against him as if he had lent them the money and taken a note. In this case it must be clearly understood we are not dealing with an ordinary debenture issue nor an ordinary mortgage bond. We are dealing, in my view, with a debenture sui generis, and to which it is impossible to apply the usual principles of equality or pari passu which undoubtedly, as a general rule, attach to this class of securities.

But the learned counsel for plaintiff urges that in the present case the defendant held this money received from Rountree as a trustee, and therefore, under a well known, and, I think, universally recognized rule, could not claim an offset of a personal debt.

The chief authority cited in support of the application of this principle to the present case is In re Mid-Kent Fruit Factory (1896), 1 Ch. 567. At first reading this case seems to approach the incidents of the present case, except that in that case the money held by the solicitor was not ordinary funds of the company which had come into his hands in the general course of business, but the balance of a fund which the company had put in his hands for a certain specific purpose. It was held that he was trustee for the company for the disposition of this fund to the purpose designated and that he could not under the circumstances set off against it any personal claim against the company, unless with the consent of the company, or, I gather from the words of Vaughan Williams, after notice to the company.

I do not regard the money received by defendant from Rountree as being held in trust in the usual sense. Every

man, solicitor or otherwise, who receives money from one man to pay over to another is under obligation to pay it over—not as a trustee but as an ordinary obligation. I confess I cannot appreciate the principle that a solicitor who has collected $1,000 for me cannot deduct from this sum a debt which I owe him at the time. The fact that by special provision of the statute a solicitor is liable to special penalties at the instance of the council of the Bar Society, if he retains money wrongfully which he has collected, seems to me to have no bearing whatever upon the rights between his client and himself respecting mutual debts or claims. I may mention, though it does not seem to me of great importance, that if the doctrine of the Mid-Kent Fruit Co.'s Case (supra) is to be applied here, which I think cannot be, then this case differs somewhat inasmuch as defendant, before appropriating a portion of the money received to the payment of his debentures and overdue interest, went to the office of the secretary of the company and informed him of his intention to do this, and therefore it cannot be said that the company was without notice, and no objection appears to have been offered until after proceedings had been taken under the Winding-up Act.

Still another point raised by plaintiffs is that defendant was a shareholder and a director of the company when the debentures were issued, and was a director when default was first made in the payment of the interest coupons and knew quite well that the company was unable to meet its debenture obligations. Ordinarily I would not think that this matter would affect the legal rights of defendant. If any debenture holder who was also a debtor to the company could set off overdue interest and an overdue debenture, I fail to see why defendant, because he happened to be a director, should be debarred from doing likewise. It is just possible that the special knowledge of defendant as to the financial condition of the company in some equitable manner precludes him from availing himself of the remedies open to outsiders, but I have no authority for this proposition and cannot take the responsibility of so deciding.

There remains $465 unaccounted for, and defendant accounts for this by claiming a commission of ten per cent. on the whole amount of the original judgment, over $4,000.

During the trial the defendant's counsel offered to reduce the amount of the commission to five per cent. I regret to

say that in the absence of express contract I can find no authority for allowing any commission at all. The only evidence offered on this point was that of defendant himself, who said that he constantly charged a commission on all collections, even in cases where there had been contested litigation and large costs had accrued. He also said he had known other solicitors who did so, but he would not say that was the recognized practice in Nova Scotia, since he knew nothing about it. I cannot find any principle of law which justifies me in allowing any such commission, and I cannot allow it. I have therefore to give judgment for the plaintiffs for $465 and any interest thereon, if pressed, which counsel can show is legally due. I am not clear that any interest is payable until quite a late date.

Plaintiffs must have the general costs of the action.

Note.—At a later stage the plaintiff company has been put in liquidation, but authority has been obtained to bring this action, and I do not think the subsequent steps under the Winding-up Act in the slightest degree affect the legal principles upon which this judgment is based.

NOVA SCOTIA.

DEAN v. McLEAN.

SUPREME COURT. JULY 10TH, 1909.

Promissory Note—Part Payment—Consideration—Illegality —Sale of Shares on Margin—Criminal Code sec. 231.

V. H. Shaw, for plaintiff.

R. H. Graham, for defendant.

GRAHAM, E.J.:—This is an action on a promissory note, dated April 10th, 1906, payable one year after date for $812.40. It was a renewal of a former note made in 1904, payable two years after date.

The original note was given to the defendant as a result of a compromise of a claim which the plaintiff had placed in the hands of his solicitor for collection from the defendant. Some $1,300, claimed to have been loaned to the defendant by the plaintiff.

There have been small sums paid from time to time on the note in action, but that fact is not material.

The defence now raised to the action is that the money loaned was lent to the defendant with the knowledge that the defendant was about to use it for an illegal purpose. The illegal purpose was an alleged violation of a statutory provision now s. 231 of the Criminal Code. That is aimed at making a contract purporting to buy or sell shares without the bona fide intention of acquiring the shares, with intent to make gain by the rise or fall of shares.

The transaction was in respect to 40 shares of the Dominion Coal Company in respect to which the defendant had made a deposit by way of margin with one, Ross Cameron & Co., correspondents of Curtis & Sederquest, of New York, of the sum of $200.00, which the defendant had to his credit in connection with a transaction in Union Pacific shares.

The loans, consisting of three sums, were paid in as follows: August 5th, 1903, $500; August 7th, $300; August 22nd, $500; and were required by Ross Cameron & Co. as further deposits by way of margin to avoid being closed out. The plaintiff himself paid in the last sum of $500 to Ross Cameron & Co., but the transaction was afterwards closed as the shares continued to decline. It is quite clear upon the evidence that the defendant was engaging in an illegal transaction with Ross Cameron & Co., and that no receipt or delivery of the shares was intended. This is constituted a crime under the provisions of the code already mentioned. It was therefore an illegal transaction as distinguished from a void transaction as a betting transaction would be in England, under English statutes. That distinction has to do with this matter of lending money to be used for the purpose indicated. The only question is whether the plaintiff at the time knew of the purpose to which the money was to be applied when he made the loans. If he did he cannot recover, the consideration of the note is an illegal one. I have come to the conclusion from the evidence, and under the circumstances, that the plaintiff did know of the purpose to which the money was to be applied, and that there was no real transaction in shares or the contemplation of the receipt of shares. The plaintiff therefore cannot recover.

I refer to cases of Cannan v. Bryce, 3 B. & Ald. 179; McKinnell v. Robinson, 3 M. & W. 434; Pearson v. Car-

penter, 35 S. C. R. 380; B. C. Stock Exchange v. Irving, 8 B. C. 186.

It is contended by the plaintiff that this was a past matter, i.e., that the money was already lost, and the defendant was borrowing money to pay it back. I think that was not the transaction. It appears to me it was to be applied in the hope that the price of Dominion shares then falling would go up and enable the defendant to win.

Then it is contended that the compromise and the forbearance constitute a consideration for the note. My conclusion, as already stated, is that the plaintiff knew of the illegal purpose to which the money was to be applied, hence that his loan was illegal and not recoverable in law.

A person knowing that his claim is illegal cannot by compromising or giving time for its payment supply a valid consideration.

The action will be dismissed, but without costs, as the defendant is setting up his own criminal conduct.

NOVA SCOTIA.

FULL COURT. DECEMBER 22ND, 1909.

DEAN v. McLEAN.

Promissory Note—Consideration — Illegality — Gambling Transaction—Criminal Code, s. 231.

Appeal from the judgment of GRAHAM, E.J., (reported ante p. 555), in favour of defendant in an action on a promissory note. The defence was illegal consideration.

W. B. A. Ritchie, K.C., in support of appeal.

Rawlings, contra.

RUSSELL, J.:—This action was brought to recover the amount of a promissory note given by the defendant to the plaintiff for money alleged to have been loaned to the defendant to enable him to pay margins on stock transactions. The plaintiff's original claim was for a much larger amount and was compromised in an agreement to accept a smaller sum than that originally claimed. The details as to the com-

promise are of no importance whatever. The defence is that the money was advanced by the plaintiff with knowledge that it was to be used in an illegal stock jobbing transaction and the learned trial Judge has sustained this defence.

Under the section relating to stock transactions (s. 231 of the Criminal Code), the defendant could lawfully contract to buy forty shares of the Dominion Coal Company's stock, allowing the broker to retain the shares as security for the advance of the purchase money. There is no evidence that the broker did not purchase the stock and so retain it. If he failed to do so, and rendered accounts from time to time which were mere fictions, crediting the defendant with dividends and charging him with interest, there is no clear evidence that the defendant was aware of the fact.

If the defendant were aware of the fact, the plaintiff would not be disentitled to recover on his note unless at the time he loaned the money he was aware that the object of the loan was the pretended purchase of the shares, and that they were not to be really bought by the broker and held for the defendant, and as the property of the defendant subject to the lien.

The only thing that looks like evidence is a statement in answer to a question to the plaintiff as to what he knew after the account was rendered, that he then "knew that it was not legitimate." Even as to this, the most he seems to have known was that the purchaser did not intend to pay for the stock in full, but to sell it out again through his broker when it reached 120, which, as I understand the law, is perfectly legitimate.

This, also, is all that is meant by the statement of the defendant, that there was no arrangement at any time to cover the stock to the full value.

To a previous interrogatory combining two questions in one, the plaintiff made an answer which, at the most, implies that he did not think the defendant was buying the stock out and out, by which, I take it, he meant that he was not paying for it out and out. It is not even clear that the witness is not speaking of an impression acquired after the date of the loan. There is, on the other hand, affirmative evidence that the plaintiff believed that the stock was to be paid for out and out. The learned Judge asked the question: "When he came the second time for the money what was he to do with it?" The answer is: "He was to

apply it on the stock, to help buy the 40 shares of coal outright." A moment before this the learned Judge said to the plaintiff: "You knew he was not buying $4,000 worth of stock as an investment? A. I don't think the stock came to that. There was $1,700 paid on it and if he applied $100 a month it was not impossible for him to get the money to pay for the certificates."

Still earlier, the plaintiff had said that he had not put up his money "because he thought the defendant was trying to redeem the securities."

It is not necessary to conclude that these answers were perfectly candid. The defendant had already said, in answer to a question, whether he had explained all the circumstances to the plaintiff: "Certainly, he was familiar with them from the first." But there is no clear evidence that there were any circumstances to be explained except that the defendant was buying stock on margin to be held by the broker for advances pending a rise in the value, which is a perfectly lawful transaction.

The defendant has expressed the opinion that no broker who was not running a bucket shop would accept a five point margin.

There is no evidence, apart from the vague, general statement already referred to as to his knowledge of all the circumstances, that the plaintiff knew that the stock was bought on a five per cent. margin, and none whatever that, if he had known this, he would have known enough to accept it as the infallible indication of a bucket shop transaction, assuming in defendant's favor that he was well informed in expressing such an opinion.

In order to succeed in the unrighteous defence set up against the plaintiff's claim for the money advanced, it was necessary for the defendant to show that he was engaged in an illegal transaction, and that the plaintiff knew when he advanced the money that it was to be used for the furtherance of such illegal transaction. I can find no very clear evidence to support the first of these propositions, or even to show that the stock was not really purchased by the broker and held for advances, although it seems altogether probable that it was not. But there is certainly no evidence to show that the plaintiff was aware, when he advanced the money, that it was to be used for an illegal purpose.

The appeal should therefore, I think, be allowed with costs, and judgment entered for the plaintiff for the amount claimed with costs.

DRYSDALE, J., concurred.

MEAGHER, J.:—I think the judgment should be affirmed.

Appeal allowed.

NOVA SCOTIA.

RUSSELL, J. JANUARY 25TH, 1910.

SUPREME COURT.

TRIAL.

THE SILLIKER CAR CO. LTD. v. EVANS.

Company Law—Stock — Conditional Subscription — Allotment—Acceptance—Calls.

Action to recover calls on an allotment of stock alleged to have been subscribed for by defendant in the plaintiff company.

E. P. Allison, for plaintiff.

Jas. Terrell, for defendant.

RUSSELL, J.:—The defendant is sued for calls on an allotment of stock in the plaintiff company. Before the company was formed a committee was appointed, consisting of Mr. Dustan and Mr. Hill to solicit subscriptions in Dartmouth, and the latter, meeting the defendant, asked him to take shares in the proposed company. He had with him at the time a document requesting a number of gentlemen nominated as provisional directors to have allotted to the subscribers the number of shares set opposite their names. This document was not read to the defendant, and I doubt if it was shown to him at all.

Mr. Hill merely asked him if he would not take shares in the proposed company, and, after some conversation, de-

fendant told Mr. Hill to put him down for $200 (two shares). Defendant did not sign the document but his name was put down by Mr. Hill, not in the defendant's presence, or during the interview, but after they had separated, and probably when Mr. Hill was in Webber's shop, where he solicited and procured another subscription. The name was of course written by Mr. Hill in good faith and with the assumed authority of the defendant. Both the defendant and Mr. Hill are quite hard of hearing and it is entirely probable that things were said by each that were not fully understood by the other. Defendant says that he expressly stipulated that he would not take any shares except upon the condition that the engines and boilers should be made in Halifax or Dartmouth, and "that he would wait to see whether they would do this." Mr. Hill admits that something was said by the defendant about the making of the boilers, and states clearly what it was, according to his understanding of the interview, and he denies positively that any such condition was attached to the subscription as defendant alleges. I must assume that both witnesses are telling what they believe to be the truth, and it is not difficult to me to believe that there was a misunderstanding between them. If the defendant had signed the document there would be a serious question as to the attaching of any condition to the subscription that was not contained in the document. But the case is different where he merely authorized Mr. Hill to put him down for two shares, or two hundred dollars, subject to this condition. The authority to use his name was in that case limited to a conditional subscription for the shares, or, rather, to a conditional authorization to the provisional directors to subscribe for shares. The defendant could have repudiated any allotment if the condition were not complied with.

The question remains to be considered whether it was not incumbent upon him, when he received notice of the allotment, to notify the company promptly of his refusal to take the shares and to follow up his refusal with steps to have his name removed from the register. Under the admissions, I think I am bound to hold that notice of the allotment was given to the defendant. I incline to think, although I do not need to decide, that it was actually received, but, even if not actually received, it is admitted that it was posted and I think that the posting was a communica-

tion, the document being in the nature of the acceptance of an offer. The notice was thus given on the 9th of April, 1907, the company having been incorporated by letters patent on April 4th, 1907, and on May 6th, 1907, the defendant wrote to the secretary of the company a letter saying that he had recently received notice of the non-payment of his subscription and setting up precisely the contention on which he is now defending the action, that his offer to take shares was conditional on the engines and boilers being made in Halifax or Dartmouth. I do not think that the delay between the receipt of the letter of allotment, if it was received, and the repudiation of liability is fatal to the right of the defendant to have his name removed. He might well suppose that the company would comply with his condition, and, although claiming the right not to be registered as a member until such compliance, he might reasonably wait for a time to see whether the condition would be complied with or not. I do not profess to think that this was in his mind in delaying repudiation. I think it more likely that he was unaware of the necessity for doing anything about the matter, as he did not consider that he had ever given authority to anybody to make him a member of the proposed company. He has never done anything to estop himself from claiming that he is not a member, and I think that he repudiated the obligation within a reasonable time under the circumstances. In Baillie's Case, 5 Eq. 428, where the repudiation was on February 7th, 1867, and no steps were taken by the shareholder to get his name off the register until proceedings were threatened against him in December, 1867, the Vice-Chancellor said he had a doubt whether the shareholder had not lost his right by delay, but that Pellatt's Case and Hebb's Case had satisfied him that "so long as a person has rejected the shares it is not his business to get his name off the register."

I have discussed this case as if there had been a contract between the defendant and the company for a conditional subscription for shares. I doubt, however, if this is the correct view of the case. If Mr. Hill, acting for the promoters and provisional directors of the proposed company, thought the defendant was agreeing absolutely to take shares in the company when formed, and the defendant was offering to take shares only if and when the company should contract for their engines and boilers to be made in Halifax or Dart-

mouth, there was no consensus ad idem, and no contract at all, not even a voidable contract; and I am not clear that such a case would not be governed by Baillie's Case (1898), 1 Ch. 110, where the name of a party alleged to be a contributory was removed from the register notwithstanding winding up proceedings, and although no step had been taken before the winding up to have the name removed.

I think that the plaintiff company's claim must be dismissed and the defendant's name struck out of the register.

NOVA SCOTIA.

SUPREME COURT.

FULL COURT. JANUARY 19TH, 1910.

OVERSEERS OF THE POOR v. STEVENS ET AL.

Pauper — Support — R. S. N. S. (1909), c. 50, sec. 25 — Liability of Father and Grandfather.

Action by the overseers of the poor for the district of Tancook in the county of Lunenburg against defendants as father and grandfather respectively of Edith Mason, a pauper, to recover for moneys paid, laid out and expended by plaintiffs as such overseers for the relief and maintenance of said Edith Mason and for services rendered under the provisions of the Poor Relief Act, R. S. (1900), c. 50.

Defendants' liability was sought to be established under a report of the committee of poor made to and adopted by the municipal council of the county as follows:—

"We, your committee, have examined the petition from the overseers of the poor for District No. 10, regarding the support of Edith Mason would recommend that the husband or father of this woman, if able, be called upon for her maintenance."

This was an appeal from the judgment and order of FORBES, CO. C.J., in favour of plaintiffs.

S. A. Chesley, in support of appeal.

W. F. O'Connor, K.C., contra.

GRAHAM, E. J.:—This action is brought under sec. 25 of ch. 50 R. S. (1900) of the Relief of the Poor.

In order to recover there should be a direction as to the manner in which the pauper is to be relieved. There is no direction in regard to that and no refusal. The action, therefore, cannot be maintained. The action, also, is for past expenditures which this provision of the statute does not cover.

The appeal will be allowed and the action dismissed with costs.

NOVA SCOTIA.

SUPREME COURT.

FULL COURT JANUARY 17TH, 1910.

REX v. DAVID.

Public Health Act—Violation—Contagious Disease—Quarantine—Removal of Warning on House.

Appeal from judgment of the County Court Judge for District No. 6, affirming a conviction for a violation of the Public Health Act, R. S. (1900) ch. 102, sec. 48.

The evidence shewed that owing to the prevalence of diphtheria at Port Felix, in the county of Guysboro, the health officer directed the board of health of the place to quarantine suspected houses, and that under the authority of a resolution of the board the defendant's house, among others, was flagged, that the flag was removed by an inmate of defendant's house and that defendant and his wife refused to submit themselves to the health officer for examination after being requested so to do.

On the information of the health officer defendant was brought before one of the stipendiary magistrates for the county and was convicted of the offence alleged, and was directed for such offence to forfeit and pay the sum of five dollars and costs of suit, to be paid and applied according to law.

On appeal the learned County Court Judge affirmed the conviction and ordered that the costs of the appeal be taxed and allowed, and be paid to the clerk of the Court to be paid over to the informant.

J. A. Fulton in support of appeal.

J. L. McKinnon, contra.

TOWNSHEND, C.J.:—The Court is of the opinion that the appeal should be dismissed and the conviction sustained.

GRAHAM, E. J. (concurring):—In respect to the question of costs, the conviction should be amended by substituting the provision that the costs be paid to the informant (Summary Convictions Act, R. S. 1900, ch. 161, sec. 43), and the County Court Judge's order by the insertion of a provision that the costs be paid within 30 days.

Appeal dismissed.

DOMINION OF CANADA.

EXCHEQUER COURT. SEPTEMBER 13TH, 1909.

JOHN P. LEGER v. THE KING.

Negligence—Government Railway—Destruction of Premises by Fire—7 & 8 Edw. VII., c. 31—Amount Recoverable.

CASSELS, J.:—This is a petition of right, the trial of which took place before me at St. John on the 9th June, 1909.

The suppliant claims the sum of $17,500 as damages by reason of the destruction by fire of his hotel buildings, barns, etc. The buildings of the suppliant were situate at Bathurst near the station buildings of the Intercolonial Railway. A fire started on the roof of the freight shed in the early morning of the 25th of May, 1908, and spread to the buildings of the suppliant which were completely destroyed.

The suppliant alleges that the fire occurred through sparks or cinders emitted from an engine of the Intercolonial Railway, and that the engine in question was not provided with proper appliances. The suppliant also alleges that the roof of the freight shed was in an improper state of repair,

the shingles being loose allowing cinders to get under them and so making the probability of fire more likely than if it were in a good state of repair. His contention is that it was the duty of the railway authorities to keep the roof of the freight shed in a proper state of repair so as to minimize as far as possible the danger of fire. The contention of the suppliant is that even if the engine were furnished with all the necessary appliances to minimize the escape of sparks or cinders, nevertheless if the fire was caused by sparks or cinders emitted from an engine that the respondent is liable by reason of the negligence of the railway in allowing the roof of the freight shed to get into such a state of disrepair as to make a fire probable.

An alternative claim is based upon the provisions of the statute 7 & 8 Edward VII., ch. 31, s. 2, sub-sec. 2. This sub-section reads as follows:

"2. Whenever damage is caused to property by a fire started by a railway locomotive working on the railway, His Majesty, whether his officers or servants have been guilty of negligence or not, shall be liable for such damages: Provided that, if it is shewn that modern and efficient appliances have been used and that the officers or servants of His Majesty have not otherwise been guilty of any negligence, the total amount of compensation recoverable under this sub-section shall not exceed five thousand dollars, and it shall be apportioned among the parties who suffered the loss as the court or judge determines."

In the event of the suppliant being entitled to claim under the provisions of this statute a portion of the $5,000 and his right, if any, being limited to a claim under this statute, the suppliant by consent of counsel for suppliant and respondent is entitled to judgment for the sum of $3,284.67.

In the event of the suppliant being entitled to damages for the total loss occasioned to him by reason of the destruction of his premises the question of the amount of damages is to be referred to the Registrar.

Since the trial I have carefully perused the evidence as extended by the stenographer, and also the various exhibits, and I remain of the opinion I expressed at the trial as to the proper finding on the facts. I think on the evidence that the only conclusions that should be arrived at are as follows:

1. That the fire in question originated from sparks emitted from an engine on the railway. The fire could not have

been started in any other way so far as the evidence adduced before me discloses (see Canada Atlantic Ry. Co. v. Moxley, 15 S. C. R. 145).

2. The engine in question was equipped with all modern and efficient appliances, and the respondent has saved himself from liability so far as any claim is based upon negligence in operating an engine defectively equipped.

I am of opinion that the roof of the shed in which the fire originated was in a defective state of repair. The shingles were in such a state as to allow cinders to get under them and to make a fire more probable than if it were in good repair.

The first question is whether any duty exists on the part of the Crown towards the suppliant to keep its own buildings in repair so as to minimize the risk of fire to its own premises, and if so, and the fire spreads across the road to the suppliant's premises, is the Crown liable?

The second question is what is the meaning of the subsection of the statute 7 & 8 Edw. VII., if the previous question is decided in favour of the respondent, and is the suppliant entitled to recover portion of the $5,000?

In answer to the first question, I am of opinion that the Crown is not liable by reason of the non-repair of the roof of the shed in question. But for the provisions of the statute 7 & 8 Edw. VII., cap. 31, s. 2, ss. 2, there would, in my opinion, be no liability. This statute creates a liability on the part of the Crown to the extent of $5,000, notwithstanding that modern and efficient appliances have been used for the prevention of fire, leaving the liability in a case in which the officers and servants of His Majesty have been guilty of negligence as before the passing of the statute. But for statutory provisions the Crown would not be liable.

The Exchequer Court Act, section 20, sub-section (c), provides that the Exchequer Court shall also have exclusive original jurisdiction to hear and determine "every claim against the Crown arising out of any death or injury to the person or to property on any public work, resulting from the negligence of any officer or servant of the Crown, while acting within the scope of his duties or employment."

Does the case come within the purview of this section? Under the provisions of the statute respecting Government Railways, cap. 36 R. S. C. 1906, it is provided by section 5, sub-section (j) that the minister may from time to time repair

buildings. I know of no principle of law which compels the minister to do so. I am bound by decisions which decide that the minister is not an officer or servant of the Crown within the meaning of this section 20, sub-section (c) of The Exchequer Court Act. (See McHugh v. The Queen, 6 Ex. C. R. 374; Hamburg American Packet Co. v. The King, 7 Ex. C. R. 156, at p. 176).

There is no evidence before me of any instructions to any officer or servant of the Crown to repair, or of any funds appropriated for that purpose.

In the absence of liability therefor created by statute the Crown is not liable for mere non-feasance: Leprohon v. The Queen, 4 Ex. C. R. 100, at pp. 110, 112; Davies v. The Queen, 6 Ex. C. R. 344, at p. 350; Sanitary Commissioners of Gibraltar v. Orfila, L. R. 15 A. C. 400; McHugh v. The Queen, 6 Ex. C. R. 374, at p. 382; Hamburg American Packet Co. v. The King, 6 Ex. C. R. 150, at p. 176.

On the other branch of the case I think the suppliant is entitled to succeed. The fire was started by a locomotive working on the railway (see Jaffrey v. Toronto, Grey & Bruce Ry. Co., 23 U. C. Q. B. 553; Canada Southern Railway Co. v. Phelps, 14 S. C. R. 132).

The suppliant is entitled to judgment for $3,284.76, and the costs of the action.

DOMINION OF CANADA.

EXCHEQUER COURT. JANUARY 22ND, 1910.

EMIL ANDREW WALLBERG v. THE KING.

Works done under Instructions of Government Engineer — Quantum Meruit — Meaning of — Referee's Report — Appeal.

Wallace Nesbitt, K.C., and Harold Fisher, appeared for the plaintiff.

James Friel, appeared for the Crown.

CASSELS, J.:—This is an appeal from the report of the Referee dated the 30th October, 1909.

The appeal was argued before me on the 20th December, 1909.

The action was instituted by the plaintiff Wallberg claiming payment for certain works performed by him in connection with the property of the Intercolonial Railway at Moncton.

Wallberg had contracts for the erection of certain buildings for the Intercolonial Railway at Moncton. The cost of these erections was in the neighbourhood of $1,000,000.

The facts connected with these contracts are detailed in the very carefully prepared report of the Referee.

It appears that in the preparation of the plans for the buildings in question no provision had been made for drainage or water connection. The contracts are in writing.

Mr. W. B. McKenzie, who has been the chief engineer of the Intercolonial Railway since 1897, was entrusted by the Government with the supervision of these works. Mr. Mckenzie has been in the employ of the Government since 1872.

Throughout the whole of the prolonged enquiry no suggestion has been made that Mr. McKenzie was not thoroughly competent to perform the duties imposed upon him, nor is there the slightest slur cast upon his integrity or good faith.

With the view to procuring the buildings being erected by the contractor Wallberg and to obtain the necessary water supply and drainage, Mr. McKenzie directed Wallberg to proceed with the works in question. They comprise what are called:—1. The main sewer; 2. Branch sewers; 3. Water system.

He undertook with Wallberg that the Government would pay him the actual cost of the works and an additional sum of 15 per cent. contractor's profit. No written contract was entered into. The works in question were commenced in 1906 and completed about 1908. Wallberg was not paid for the works and applied to the Government after their completion for payment.

The Government, represented by the Minister of Railways, acting with fairness, agreed to pay him, but being dissatisfied with the amount claimed directed a reference to the Exchequer Court to ascertain the amount properly due. Thereupon a statement of claim was filed by Wallberg setting out his claim. The defendant filed a defence. The fifth paragraph of the defence is as follows:—

"5. The Minister of Railways has accepted and taken over the said works on behalf of His Majesty and is willing

to pay the fair value of the same, but not the amount claimed, which is considered excessive."

The defendant denied that the claim in question could be claimed as extras under the contracts referred to.

Counsel for the plaintiff and also for the defendant both agreed that the case was one for a reference under the provisions of the Exchequer Court Act and the Rules of Court, and thereupon an order was made as follows:—

"2. This Court doth order that it be referred to the Registrar of this Court for enquiry and report and to ascertain the value of the works executed by the plaintiff referred to in the statement of claim, and in respect of which this action is brought.

"3. And this Court doth further order that the amount to be ascertained shall be the fair value or price thereof allowed on a quantum meruit."

The trial was proceeded with before the Registrar and an enormous amount of evidence adduced, followed up by the report in question, by which the plaintiff was allowed the sum of $53,205.65, without interest.

The Registrar has expended a great deal of time on the consideration of the case and the preparation of his report.

The case on appeal was presented to me by Mr. Nesbitt, K.C., in an aspect, as I was informed by counsel on the appeal, not presented before the Registrar.

Since the argument I have perused and considered the mass of evidence and documents, and in my opinion the Registrar has not adopted a correct method of dealing with the case.

The Registrar has dealt with the case as if the market value of the work had to be ascertained, and adopting the views of Messrs. LeBlanc, Chipman and Kerr, has concluded that the works could have been executed at a much less cost than the actual cost had a different plan of construction been adopted than the plan adopted by Mr. McKenzie. Even on this view of the case, for reasons I will give later on, I would not be prepared to accept the conclusions of Messrs. LeBlanc, Chipman and Kerr as against the views of Messrs. Holgate, St. George and Archibald. All these gentlemen, Messrs. LeBlanc, Chipman and Kerr—Holgate, St. George and Archibald, are men of eminence in their profession. They are expert witnesses, no doubt intending honestly to put forth their different views, and I see no reason for any reflection

being made against any of them. Some of them, notably Mr. St. George, had personal knowledge of the locality in question, and was much better qualified to give evidence by reason of his intimate knowledge of the character of the locality and soil than the others accustomed to deal with sewerage works in other localities.

In the first place, to consider the question of how the case should be approached. The statement of claim sets out the cost of the works including the cost of excavation for what is called the false start.

It has to be borne in mind, as stated, that McKenzie was the trusted employee of the Government. Wallberg is a trusted contractor under the Government. No imputation of bad faith is made against him. He was under the strict orders of Mr. McKenzie, who directed the method of carrying on the work. How can any question of self-interest as against duty arise? It is proved conclusively that all sums claimed for wages have been paid. The vouchers are produced from which this fact is clear. Every precaution seems to have been taken to have the correct time of the men ascertained. The vouchers were satisfactory to those in charge representing the Government. The men received their pay as shewn by the time sheets. Is it to be assumed that for the paltry sum of 15 per cent. on the wages Wallberg would pay the men sums in excess of the amount to which they were entitled? I think such a presumption should not be entertained. Now we have the works proceeded with directed by Mr. McKenzie. The width of the ditch is marked. His evidence is clear that in his opinion it was not too wide. Torrens, acting under McKenzie, was superintending the work. Rhindress, also in charge of the cement, was seeing that the contractor did his work properly. All are agreed that the work as completed is well done. It is true that the plans shewing details were prepared after the work was completed, no doubt with the view to a record being kept. These plans shew the works as completed. Nevertheless the work was done under the direction and as ordered by the chief engineer. This being the case the consent judgment was pronounced.

The form of judgment is incorrect if it is open to be construed as a reference to the Registrar as an arbitrator or persona designata without appeal. (See Fraser v. Fraser (1904), 1 K. B. 56).

What really took place was an agreement that the case was one proper for a reference, the terms of reference being agreed upon, and then I made the order. It was intended the reference should be the ordinary one with right of appeal as usual. No question against the right to appeal has been raised before me.

Bearing in mind that the claim as presented by the statement of claim is for the work as executed under the directions of McKenzie, the judgment directs an inquiry "to ascertain the value of the works executed by the plaintiff referred to in the statement of claim and in respect of which this action is brought," and proceeds to direct "that the amount to be ascertained shall be the fair value or price thereof allowed on a quantum meruit."

There being no written contract making McKenzie the sole judge, the Crown is not bound by his report as to the amount due. But the Crown does admit his authority in ordering the works. To my mind it would be manifestly unfair to the contractor in the face of what has taken place and in the face of this judgment, to act on the evidence of other engineers who endeavour to shew that McKenzie might have adopted a different plan which would have cost less. It seems to me the case must be viewed from the standpoint of the works being executed on the plans of Mr. McKenzie and accepting his plans, then a quantum meruit.

If during the execution of these works extra expense was incurred through the negligence of the contractor, this amount of course would not be allowed, but what is fair and reasonable in carrying out the particular works should be allowed. If McKenzie is incompetent and might have adopted a better and cheaper method, why should the contractor suffer? I do not think the evidence shews that he was incompetent. I think a careful analysis of the evidence proves that he knew what he was about.

It is said the market value should be the test. I do not so view it. Quantum meruit is thus defined in the books:—

"Where a person employs another to do work for him, without any agreement as to compensation, the law implies a promise from the employer to the workman that he will pay him for his services as much as he may deserve or merit: Bouvier's Law Dictionary, p. 801.

"The value is the 'reasonable' value:" 12 Ency. of Laws of Eng. 153.

"Quantum meruit is the reasonable amount to be paid for services rendered or work done, where the price therefor is not fixed by contract:" Stroud's Judicial Dictionary, p. 1635, citing 3 Black. Com. 161; Cutter v. Powell, 6 T. R. 320; Sumpter v. Hedges, 1898, 1 Q. B. 673.

Now, suppose I instruct a contractor to build me a house of ordinary size, say rentable at about $400 per annum. A brick wall of the thickness of 1½ bricks would be sufficient for all practicable purposes. There is no written contract. I have a whim that I would like a wall about three feet thick, and I tell the contractor to so build the house. The contractor follows my instructions and gets paid on a "quantum meruit." The extra thickness of wall would have little or no effect on the market price, but is not the contractor to be paid for the work?

It appears from the evidence of Mr. McKenzie and of Mr. Torrens that peculiar difficulties were encountered in the performance of the work. McKenzie gave the directions as to the width of the cut. According to some of the evidence even this width was insufficient to allow the banks to stand. According to Holgate the slope should have been greater. The material is peculiar. It is a question of paying for a greater amount of excavation with a greater width, or a smaller amount for getting rid of the material falling in. I think the evidence shews that the width of the cutting was not too great. Greater reliance should be placed on the evidence of those who were present on the ground and saw the actual state of affairs than expert testimony given by witnesses testify after the completion of the work. See Gareau v. Montreal Street Ry. Co. (31 S. C. R. 463), where the headnote in part reads as follows:—

"Held, Taschereau, J. dissenting, that notwithstanding the concurrent findings of the Courts below, as the witnesses were equally credible the evidence of those who spoke from personal knowledge of the facts ought to have been preferred to that of persons giving opinions based merely upon scientific observations."

Moreover, Mr. St. George and Mr. Archibald have knowledge of the locality and the character of the soil and the difficulties to be encountered, and they are both in accord with the manner of doing the work adopted by Mr. McKenzie. If the soil is as described I do not think Mr. LeBlanc's idea of a proper slope very feasible.

Both Mr. Chipman and Mr. Kerr give in the main theoretical evidence. The Registrar in his report referring to branch sewers, states: "The quantities found by Messrs. Chipman and Kerr from the plans supplied will be accepted, but a different and higher price will be allowed for the excavation on account of the difficulties mentioned by the chief engineer Mr. McKenzie."

It would appear from this finding that in the opinion of the Referee neither Mr. Chipman nor Mr. Kerr was cognizant of the difficulties.

In dealing with the main sewer the Referee refers to the excavation. He states it is obvious that the "quantities charged in exhibit No. 5 are excessive, but that is due to the manner in which the works were proceeded with."

He allows for a length of 2,880 feet, the width to be 8 feet at the bottom and 9 feet at the top, with an average depth of 15 feet. I have endeavoured to point out that in my opinion this was not the proper method of arriving at what the contractor is entitled to. It is also obvious that a sewer 15 feet in depth and 8 feet wide at the bottom and 9 feet at the top must require a greater slope. The evidence as to shoring in streets of a city has but little application.

Then as to wages, neither Mr. Chipman nor Mr. Kerr seem to be cognizant of the peculiar difficulties surrounding this work and the difficulty of procuring labour..

I hesitate at overruling the Referee who has a great experience in cases of this nature and has given very full consideration to the case, but after the fullest consideration of the evidence, I have formed the opinion I have expressed.

I think the plaintiff is entitled to the amount expended for the work on the so-called false start. The sum found by the Referee is $708.76. I think it is covered by the reference and no reason exists why the contractor should not be paid.

I think on the evidence as a whole the plaintiff should be paid the amount found as due by Mr. McKenzie, but not any amount for accidents to workmen, loss of horses, or wear and tear of machinery. He is entitled to the fifteen per cent. profit. I do not think he can recover interest.

If there is any difficulty in arriving at the amount on the basis of this judgment the matter can be referred back to the Referee to settle the amount.

Costs of this appeal to the plaintiff.

NOVA SCOTIA.

SUPREME COURT.

JUNE 4TH, 1909.

EVA ALLEN v. PENIAH WENTZELL.

Insurance—Life Policy — Beneficiary — Change of—Requisites for—Payment of Premium by Insured on Understanding that Policy would Enure to Benefit of New Beneficiary—Trust—Costs.

D. F. Matheson, K.C., for plaintiff.

S. A. Chesley, K.C., for defendant.

RUSSELL, J.:—The Confederation Life Association issued a policy upon the life of Lloyd Crouse for the sum of $1,000, payable to his fiancee Eva Risser if living, otherwise to his personal representative or assigns. Eva Risser was then assumed by the assured to be his fiancee, but she says she had never promised to marry him, and she afterwards married Allen, her present husband. The policy was delivered to her and held by her for some time, but afterwards and probably after she had definitely made up her mind to marry another, she gave him back his ring, returned him the policy and told him to take her name off. He said he would never do it in this world, but he took the policy and at some date subsequent to this when the premium note for the first premium was overdue and unpaid the agent called upon him for payment of the note. He informed the agent that he had had a row with his girl and would not pay the note unless the policy was changed, so as to be payable to his mother. The agent told him that his mother would get it anyhow. At least he thinks he so told him and knows that he so told the mother. The assured, however, intended to call at the office of the company and have the alteration made in the policy. He was unable to carry this intention into effect, because he was about to go away in a fishing vessel. He had intended to do this earlier, but had for some reason put off doing so and was lost on the voyage. It is contended, on behalf of the claimant Eva Allen, that the policy having been made in her favour as a beneficiary it could not be made payable to any other beneficiary except by an instrument in writing under s. 11 of the Life Insurance Act, 1903, c. 15. No doubt the beneficiary could have been so changed, but I do not think it

follows that there was no other manner in which a change could be effected, although this seems to be the impression of Mr. Hodgins, who says that the alteration of a name or amount may be done by a writing or by a will, but unless the method stated in the statute is followed an intention to change would be ineffectual: Hodgins on Life Insurance, p. 54. The beneficiary in this case is not among those regarded by the statute as preferred and there was no trust for her. The statute does not create any trust. She had taken the proper and decent view of the matter when she renounced her interest in the policy at the same time that she returned the ring and dismissed the lover. In the fervor of passion he declined to accept the renunciation, but in a calmer and saner moment he accepted it and did what was wise and just in diverting the change in favour of his mother. The premium note, as already stated, was not then paid and would not have been paid if the company had not agreed to make the policy payable to the mother. This payment was not made for the benefit of Eva Allen. The company, in consideration of this payment, agreed to make the policy payable to the boy's mother, and I think that this is a contract that an equity court would enforce by reforming the policy if necessary. I doubt if such a reformation is necessary, because I think that the same consequence follows from the equitable principle of a resulting trust. If the company had paid the money to Mrs. Allen under the circumstances detailed, I think there would have been a resulting trust in favour of the person who furnished the consideration, that is, of his estate. The money will be payable under this view to the mother as administratrix. Under the principle first referred to it is payable to her in her own right. There is nothing in the evidence or the interpleader issue to shew whether it makes any difference which of these views is the correct one. I should incline to give the mother the benefit of the doubt and allow her to hold it for her own right. I think the costs may properly be made payable out of the fund. The insured, by his own procrastination, has created the difficulty that has occurred and left open a question on which opinions may well differ, the terms of the statute being comparatively new and none too clear in their construction. The case is similar to that of a will obscurely and ambiguously drafted and which gives rise to unnecessary litigation.

NOVA SCOTIA.

IN THE SUPREME COURT.

TRIAL.

RUSSELL, J. FEBRUARY 1ST, 1910.

BALCOM v. HISELER.

Mining Properties—Co-owners—Action for Account—Evidence.

Action for an account of moneys received by defendant from plaintiff and of transactions in connection with the acquisition, management and proceeds of gold mining areas and the sale of mining machinery.

J. J. Power, K.C., for plaintiff.

R. E. Harris, K.C., and J. B. Kenny, for defendant.

RUSSELL, J.:—This is an action for an accounting between the plaintiff and the defendant in respect to two mining properties in Lunenburg county, which may conveniently be spoken of as the Gold River property and the Forest King property. As to the former the principal question to be decided is whether the half interest which was sold by the defendant to the plaintiff was sold for $4,000, as plaintiff claims, or for $10,000 as claimed by the defendant. The instrument of transfer names $10,000 as the price and acknowledges payment of this sum, but the plaintiff says that this sum was inserted on the suggestion of the defendant, that it would look better than $4,000 in the event of a sale. I give the effect of the evidence in all cases and not necessarily the precise words. The plaintiff says he heard the defendant dictating to Miss Weiss, the book-keeper, an entry in the ledger, which is made in her handwriting, in which the transaction is entered at $4,000, and the book-keeper, when called, fully corroborated this statement, and was not in the least shaken in respect to it by a severe cross-examination. There is an entry made in defendant's handwriting in a day book in which the transaction is recorded at the

price of $10,000, but there is a suspicious appearance about this entry. It appears at the foot of a page, and is dated the 27th of the month, while the following item at the head of the next page is dated the 26th. It is true that there are instances in this book other than the one in question in which the same sort of thing occurs, the tendency of which is to break the force of the inference I was inclined to draw with reference to this entry; but inasmuch as the entry made by the defendant in his own book is not from any point of view evidence in his favour and could only be used at all, even if so, by way of qualifying the effect of the alleged entry in the ledger when used by the plaintiff, it is not necessary for me to say more than that I remain unconvinced that this is not an entry made after the event for the purpose of bolstering up the defendant's claim that the price was $10,000. It is also fair to say that I am not convinced to the contrary.

The evidence of the book-keeper was sought to be discredited by showing that there was a very friendly and affectionate intimacy between the plaintiff and her, and this was abundantly proved. I have no doubt that she gave her evidence with a very pronounced bias in favour of the plaintiff, and that she was hostile to the defendant. I should have been inclined to discredit her testimony for this reason if it had not been very clearly and intelligently given, and had not been subject to a very rigorous cross-examination without being severely shaken. But the evidence that satisfies my mind on the issue is that of Captain Pye, which amounts in effect to the proof of an admission by the defendant that plaintiff's interest in the mine stood him at less than $5,000 inclusive, as I understood, of expenditures that were after the purchase of the interest. I conclude that the price of the half interest in the Gold River property was $4,000, and that plaintiff paid the defendant on account or loaned to him subject to the set-off of the interest in the mine $3,500, to which must be added $1,000 for ten shares of Whaling Company stock sold by plaintiff to the defendant, leaving the balance in favour of the plaintiff in this transaction $500. There is, I understand, no dispute that these areas were worked as a joint venture, each contributing half, and interested equally in the profits should there be any. There were no profits, the venture resulting in a loss.

With respect to the Forest King property, I find that a verbal agreement was made for the transfer from the defendant to the plaintiff of a half interest, with a view to a joint working of the property on the same terms as those under which the Gold River property was being worked. When Captain Balcom was about to leave on a voyage in August 26th, 1908, he demanded a transfer, and one was tendered which was considered unsatisfactory. The plaintiff then had a form of transfer prepared, which the defendant would not agree to. The plaintiff's attorney, under a power of attorney, after the plaintiff had left on his voyage, put on file the unsatisfactory document, which is the form set out in the defence in paragraph 6. I cannot see very clearly why this document was not considered sufficient to effect the purposes of the parties. It certainly would have been if the proviso had been put in the form of an agreement to pay half the expenses of prospecting and renewing instead of a proviso which plaintiff's counsel seems to have considered an improper condition, suspending the effective operation of the transfer. I do not think that, after accepting this document and putting it on record, or filing it in the Mines Office, the plaintiff can say that he has no interest in these areas. I think he is the owner of a half interest and is entitled to an accounting from the date of the verbal agreement, say, from June 28th, 1908, when the work began on Forest King. The only question that arises is as to the date at which this part of the accounting should end, and that is not a very simple question. The difficulty of answering it is due to the indefiniteness of the intentions of the parties. Defendant evidently expected that Captain Balcom would leave some money with his attorney for the further working of the mine, and Croft, the man in charge, evidently expected the work to go on in the same manner after Captain Balcom left as before. But Donahue, who had been appointed under a power of attorney to represent Balcom, had an interview with the defendant on Monday morning, the day on which plaintiff left on this trip, and in the course of this interview, according to Donahue's evidence, which I accept with confidence, the defendant asked if Captain Balcom had left any money to work the property, to which Donahue replied in the negative, adding, after an intermediate question and answer, that any work that had to be done would have to be a future consideration. I do not think that after this inter-

view the defendant could go on making indefinite expenditures on the property, and charging them up to the plaintiff. I think that the accounting as to the Forest King property must close with the expenditures made and obligations incurred on the joint account down to the date of this interview on August 28th. Perhaps among the obligations I should include a limited expenditure by Croft, who was in charge of the property. There is no direct evidence about this that is satisfactory, but Donahue says that while plaintiff left no money with him he did say that he would not mind spending one or two hundred dollars on the property, and I should infer that he had empowered Croft to expend this amount. If it is shown that Croft did expend money to the amount of $200 on the property under instructions from plaintiff; that amount can properly be brought into the account. But otherwise, and apart from such expenditure, I think the account must stop at the point indicated.

As to the price at which the mill was sold, and whether it should be accounted for, and at what figure, I make no decision, because I do not understand that the evidence was exhausted. It was distinctly agreed that the only points on which my decision was desired were the price at which the Gold River property was sold, and the basis on which the Forest King property was to be dealt with, plaintiff contending, as to the latter, that a transfer had been refused, and that he had a right to have a refund of all the money he had laid out on that account, while defendant, as I understand, claims to charge up to the joint account a large amount of expenditure made on the Forest King property after the date when plaintiff left the province. I think I have sufficiently indicated the view I have taken as to this.

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2. Construction — Life Estate—Gift over "as Left Unused" by Life Tenant: In re Elliott (N.S.), 308.

3. Construction — Trusts — Administration — "Heirs at Law"—Statutory Next of Kin — General Scheme of Will: Smith et al. v. Robertson et al. N.B.), 312.

4. Residuary Clause — Construction — Gift Inter Vivos — Declaration of Trust—Testamentary Gift — Wills Act of New Brunswick: Clark v. Clark et al. (N. B.), 318.

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3. "Government Standard Ties": Hallisey v. Musgrave (N.S.), 527.

4. "Heirs at Law": Smith v. Robertson et al. (N.B.), 312.

5. "Inmate": Rex v. Franey (N.S.), 411.

6. "Navigate": Saint John Pilotage Commissioners et al. v. Cumberland Ry. and Coal Co. (Jud. Com. P. C.), 340.

7. "On a Public Work": Chamberlin v. The King (Sup. Ct. Can.), 349.

8. "Quantum Meruit": Wallberg v. The King (Exch. Ct. Can.), 568.

9. "Ship": Saint John Pilotage Commissioners et al. v. Cumberland Ry. and Coal Co. (Jud. Com. P. C.), 340.

10. "Substantial Performance": Sydney Boat and Motor Co. v. Gillis (N.S.), 75.

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ERRATA.

P. 150. For "Rex v. William Endler," read Rex v. William Findler.

For "N. A. McMillan, for plaintiff, and B. Archibald, for defendant," on p. 83, read D. A. Hearn, K.C., for plaintiff, and A. D. Gunn, for defendant.