THE

Eastern Law Reporter.

VOL. VII. TORONTO, JULY 15, 1909. No. 2

NOVA SCOTIA.

RUSSELL, J. JUNE 14TH, 1909.

IN CHAMBERS.

REX v. JORDAN.

Canada Temperance Act—Illegal Sale of Liquor—Conviction—Commitment—Imprisonment—Habeas Corpus—First and Second Offences.

Motion pursuant to special leave given for an order in the nature of a habeas corpus for the discharge of defendant from imprisonment under an order of commitment for the unlawful sale of liquor contrary to the provisions of the second part of the Canada Temperance Act.

J. J. Power, K.C., in support of application.

Stuart Jenks (Deputy Attorney-General), contra.

RUSSELL, J.:—The defendant was convicted on the 8th of May for an offence against the Canada Temperance Act, alleged to have been committed between the 27th of January and the 27th of April. On the 29th of May he was convicted for an offence committed between the 27th of April and the 10th of May, and was punished with the increased penalty as for a second offence. The second offence, it is argued, may have been committed according to this record at any time after the 27th of April before the 8th of May, and therefore before conviction for the prior offence, and it is contended that no offence punishable as a second offence

can be committed until after there has been a conviction for a first offence. Counsel for the Crown concedes that if a conviction for a first offence must precede the commission of the offence charged as a subsequent offence, the defendant must be released, but he contends that it is sufficient to warrant the increased penalty as for the second offence if it is committed after information laid for the first, and he lays his emphasis on sub-sec. 2 of sec. 143 (ch. 152 R. S.) which says that the increased penalty . . . shall only be recoverable . . . in the case of offences committed on different days and after information laid (not conviction adjudged) for a first offence. But it is to be observed that the section speaks of a previous conviction having been charged, which must mean charged in the information, and outlines the procedure for ascertaining whether he has been "so previously convicted." When we turn to the forms we find that in an information for a second or third offence we are to add the appropiate clauses from forms U and V, in which there are no appropriate clauses other than those which allege a previous conviction. I infer that it is meant that the informant who is proceeding as for a second offence must in his information allege a previous conviction and not merely a previous offence or a previous information for an offence. Section 128, which enacts the penalty for the subsequent offence, points the same way, although not with the same certainty.

This opinion is in accordance with the principle cited by Landry, J., from Crankshaw's Criminal Law, in the case of ex parte McCoy, 7 Can. C. C. 485, and with the views expressed by Landry, J., in that case concurred in by Hanington, J. Gregory and Barker, JJ., did not dissent from this view, but were not required to go so far as Landry, J., because there had not been even an information laid for the prior offences. McLeod, J., did dissent, but his views were not endorsed by Gregory, J., with whom Barker, J., agreed. The authority of Dorien, C.J., as cited in the passage already referred to in Crankshaw, is to the same effect. I therefore think that the conviction is bad and that the defendant must be released.

NOVA SCOTIA.

SUPREME COURT.

FULL COURT. APRIL 5TH, 1909.

RE VICTOR WOOD WORKS LIMITED, EX PARTE SAVAGE, ET AL.

Company Law—Amalgamation of Companies—Failure to Amalgamate — Winding-up — Basis — Contributories — Shares — Subscription — Payment — Surrender — Meeting of Shareholders—Allotment—Ratification by Payment of First Instalment—Recovery of Instalments Paid.

Case reserved by RUSSELL, J. (See 4 E. L. R. 142).

W. B. A. Ritchie, K.C., and J. L. Ralston, for contributories.

H. Mellish, K.C., for liquidator.

GRAHAM, E.J.:—It is sought to place on the list of contributories a number of persons in Amherst, 27 in all, who it is alleged became shareholders in the above company, and the question is whether they agreed to take shares or not.

It appears that about the 25th of May, 1907, a project was started in that town to form a company for house building and general wood working, making doors, sashes, &c.

The Siliker Company, a company of that sort, had just removed from that place to Halifax.

A subscription list was started, and I append the document in full:—

"PROPOSED WOOD WORKING FACTORY.

Authorised Capital	$100,000 00
Capital to be paid up	50,000 00
Bonds to be issued	30,000 00
Bonds in Treasury	20,000 00

The Manufacturers' Committee of the Board of Trade, having interviewed Mr. LeVeille and representatives of the Victor Wood Working Factory, are favourably impressed

with the opening which exists for a factory for house building and general wood-working, to be instituted at once in Amherst, and after having looked carefully into the proposed Financial Plan as outlined by Mr. LeVeille and associates, recommend the matter to the favourable consideration of the investing public, including all who are interested in any way in the progress of the town and the increase of its industrial life.

Mr. LeVeille's time for deciding as to his definite location makes it imperative that immediate action be taken if he is to locate in Amherst.

We, the undersigned, subscribe the sum set opposite our respective names, towards the capital of the proposed industry.

Shares $100 each.

Payments:—25 per cent. cash June 15
25 per cent. cash Aug. 1
25 per cent. cash Sept. 1
25 per cent. cash Oct 1."

Of the shareholders ofthis company Hewson and Murdock subscribed for 50 shares each and Blair and Hunter for 20 shares each, and in all some 431 shares were subscribed of the par value of $100, there being some 49 subscribers.

Then there was a notice of a meeting of the subscribers and this is the notice. It was dated the 21st of May and the meeting was to be held on the 22nd:—

"Amherst, N.S., May 21, 1907.

A meeting of the subscribers to the capital stock in the new Woodworking Company, to be established in Amherst, will be held in the Town Council Room at seven o'clock sharp on Wednesday evening the 22nd inst., for the purpose of electing provisional directors and the transaction of such other business as may properly come before the meeting.

This meeting has been called early owing to the entertainment advertised to be held in the Winter Fair. Building the same evening, and it is hoped that all will be present promptly at the hour stated.

F. L. Blair,
Chairman of the Manufacturers' Committee."

This is the minute of what was done at the meeting:—

"A meeting of the subscribers to the stock list of the new Woodworking Company proposed to be established in Amherst was held in the Town Council Room at 7 o'clock p.m., on the 22nd May, 1907.

Present—Messrs. C. S. McLeod, E. E. Hewson, Samuel Freeman, Henry Hunter, H. L. Hewson, D. A. Morrison, Walter Wood, Dr. W. T. M. McKinnon, H. G. Hagen, W. B. Murdock, James W. Pipes, G. I. LeVeille, T. N. Campbell, W. A. Allen, D. R. Pridham and F. L. Blair.

T. N. Campbell was appointed chairman and F. L. Blair secretary of the meeting.

The stock list was read by the chairman.

Moved by C. S. McLeod, seconded by Henry Hunter, and passed:

That Samuel Freeman, Walter Wood, D. A. Morrison, W. A. Allen and C. S. McLeod be a committee to represent the new stockholders in conference with the directors of the Victor Wood Works Ltd., and consummate arrangements with the said company.

Moved by Dr. McKinnon, seconded by J. W. Pipes, and passed:

That above named committee, in conjunction with the board of directors, have power to carry on such negotiations as will enable the company to carry out the wood working end of the business immediately.

On motion the meeting adjourned.

F. L. BLAIR, Secretary.

Attest.

T. N. CAMPBELL, Chairman.

Amherst, N.S., May 22nd, 1907."

Twelve of the subscribers were at that meeting, besides the directors of the Victor Wood Works, Limited. Not even a majority of these on the subscription list, whom they afterwards purported to represent, were present.

By way of explanation, it appears that the promoters of the new company contemplated acquiring the assets of the Siliker Company, but that project had proved unsatisfactory and it was abandoned.

But the promoters also contemplated the acquisition of the assets of the Victor Wood Works, Limited. It was a company manufacturing wooden handles and skewers, and consisted of the persons I have named, namely, Hewson, Blair and Murdoch, who had 100 shares each, Hunter, who had 28, and White who had 10, all of these people being directors except White.

The Victor Wood Works, Limited, was incorporated under the Company's Act of Canada, and had a capital stock of 1000 shares of $100 per share.

The shares, when the company applied for incorporation, were subscribed to the number of 338, by Hewson, Blair, Murdock, Hunter and White, and 550 shares were issued to White in addition to $15,000 cash for the property and assets, the company having been in existence for some time as a partnership. Of the 550, the 338 shares were taken as above.

This company, after incorporation, had been in existence since May, 1906.

On the 23rd of May was held the joint meeting of the committee and the directors of the Victor Wood Works, Limited.

These are the minutes of that joint meeting:—

"A joint meeting of the committee appointed by the new subscribers to the stock of the Victor Wood Works, Limited, and the directors of the company, was held in the Town Building on Thursday evening, the 23rd of May, 1907, at 7 o'clock.

Present—D. A. Morrison, W. A. Allen, Walter Wood, Samuel Freeman, C. S. McLeod, G. I. LeVeille, W. B. Murdock, H. L. Hewson, Henry Hunter, and F. L. Blair.

Mr. Murdock in the chair.

It was moved by Mr. Wood, seconded by Mr. Hewson, and passed unanimously:

"That the attached statement of assets and liabilities of the Victor Wood Works, Limited, be the basis on which the new subscribers (as per attached copy of subscription list) join the said company in its plans for extended operations."

Moved by Mr. Hewson, seconded by Mr. McLeod, and passed:

"That a syndicate be formed for the purpose of underwriting $40,000 of bonds of the company on a commission of 5 per cent. for underwriting; each member of such syndicate to participate equally in the underwriting and in the profits. Said commission to be paid when bonds above mentioned are all sold. Said syndicate to be open only to shareholders and subscribers to shares in the company."

Moved by Mr. McLeod, seconded by Mr. Wood, and passed:

"That the schedule of machinery presented to the meeting be accepted and that Mr. Le Veille be authorized to purchase the same on behalf of the company at the lowest possible prices, and report his action to the directors when

further instructions will be given for shipment. Cost of such machinery not to exceed the estimated amount."

Moved by Mr. Morrison, seconded by Mr. McLeod, and passed:

"That Mr. G. I. Le Veille be employed by the company as superintendent, at a salary of $1,500 per year, he to draw $100 per month, the balance to remain on account of stock subscribed for by him."

Moved by Mr. Hewson, seconded by Mr. Hunter, "that W. A. Allen be employed by the company as assistant superintendent at a salary of $1,200 per year."

On the motion the meeting adjourned.

The following papers referred to in the foregoing minutes are appended hereto.

Statement of assets and liabilities, subscription list (copy) and schedule of machinery.

F. L. BLAIR, Secretary.

Attest.

W. B. MURDOCK, Chairman.

Amherst, N.S., May 23rd, 1907."

STATEMENT OF ASSETS AND LIABILITIES,

As at May 17th, 1907.

Assets.

Land (10 acres), barns and sheds	$990 75
Buildings	17,504 95
Machinery and equipment	16,294 64
Sidings and I. C. R. deposit	1,317 82
Lumber (estimated)	2,253 76
Office furniture, supplies, etc.	973 27
Organization and preliminary expense account.	6,789 57
Accounts receivable	532 81
Manufactured stock	500 00
	$47,157 00

Liabilities.

Debentures	$1,000 00
Stock	2,600 00
Loans	39,424 12
Accounts payable	191 94
Bills	3,941 57
	$47,157 57

Estimated immediate expenditure required to place Victor Wood Works, Limited, in a position to conduct a building and contracting business.

Shed at end of present building, 75 by 75....	$1,200 00
Brick work shop, 50 by 100 (2 storey).....	5,900 00
Kiln, 36 by 100, building, piping and fixtures	4,475 00
Exhaust system	1,400 00
Alterations present building	200 00
Machinery, as per schedule	9,105 00
Shafting, pulleys and belting	2,000 00
	$23,480 00"

It will be noticed that the meeting is described as a "joint meeting of the committee appointed by the new subscribers to the stock of the Victor Wood Works, Limited, and the directors of the company." That is pure misdescription. The day before they had been called "subscribers to the stock list of the new woodworking company." The committee had not been appointed by subscribers to the stock of the Victor Wood Works, Limited.

Mr. Blair, who was secretary-treasurer of the Victor Wood Works, Limited, and who has been appointed secretary of the shareholders of the new concern, apparently became secretary of this joint meeting and wrote the minutes. And I suppose he used that description for the sake of brevity and because he had in mind the proposed scheme of union. Whether by virtue of what occurred later the persons became shareholders in the Victor Wood Works is one question, but that they or any other of these persons subscribed for shares in that company is not the case.

It is moderately clear that the subscribers to the subscription list were endeavouring to take over the Victor Wood Works, Limited, and enter into larger operations by reorganizing or reconstructing that company. An amalgamation of the two concerns was intended, although that expression is generally applied where both bodies are incorporated. They intended to join together. I do not know that it is important which one was to join the other, but in the result the Victor Wood Works, Limited, by the resolutions, was to be the acquiring company. That no doubt accounts for the name being used in some of the writings. The way in which it was intended to be done was this, I think. The old shareholders in the Victor Wood Works, Limited, were to surrender their shares with the

exception of 26 shares of the par value of $100. Apparently Murdock claimed that he had paid some such sum for his shares. The amount of the surrendered shares was to be turned into a liability of the company. And the subscribers to the subscription list were to take new shares in lieu of the surrendered shares. This would enable them to acquire the property subject to the liability. Hewson, Murdock and Blair thus would be reducing their holdings very much, and also their controlling interest. It appears that the amount of the loan, $39,424.12, mentioned in the basis, represented in part the amount of the paid up shares or what should have been paid on account of them. They must be treated as paid up, no doubt. The company apparently had been financed and carried on upon money borrowed from one of the banks. As security for this sum the debentures of the company issued to the extent of $50,000, were, on the 15th of June, 1907, given to the bank. And apparently the directors had personally indorsed the paper of the company for the money borrowed.

The new concern by the basis contemplated a loan of $40,000 to enable them to accomplish their purpose, and to have a working capital. Already the promoters had fallen short of getting the proposed amount of subscriptions, some $50,000.

Going back to the case of the subscribers, this notice of 5th of June, 1907, was sent to them by Blair.

"Amherst, N.S., Canada,
June 5th, 1907.

Dear Sir:—

It will doubtless be of interest to you to have a brief statement of affairs in connection with the proposed extension of the Wood Works to the stock list, of which you were good enough to subscribe.

As you are perhaps already aware, the subscribers held a meeting in the Town Hall on the 22nd of May, and appointed the following gentlemen a committee to work in conjunction with the board of directors of the Victor Wood Works, Limited, viz., Samuel Freeman, W. A. Allen, C. S. McLeod, W. Wood and D. A. Morrison.

It is proposed to hold a shareholders' meeting as soon as possible after June 15th, at which the number of the present board will be increased by the addition of several gentlemen from the new subscribers.

In the meantime, the committee above mentioned, in conjunction with the directors, have been authorized by the subscribers to proceed to purchase the necessary machinery and provide buildings to carry on the house-building business with the least possible delay.

Mr. Le Veille is now away buying the necessary machinery. The materials are arriving every day.

The company has been most fortunate in securing a supply of thoroughly seasoned lumber of good quality, so that first-class work may be turned out at the start. We are also fortunate in having Mr. Ainsley Allen join our company. His financial interest and well-known ability as a practical builder, greatly strengthens our position.

We are glad to report a lively interest being taken in the industry.

Your continued co-operation in every possible way will be greatly appreciated.

Yours truly,

F. L. BLAIR, Secy.-treas."

Then followed a notice of the 11th June, 1907:—

"Amherst, N.S., June 11th, 1907.

Dear Sir:—

Please take notice that the first payment of 25 per cent. on the stock in the Victor Wood Works, Limited, subscribed for by you, is due and payable on Saturday, the 15th inst.

The building operations have already commenced. The materials necessary for carrying on the wood-working end of the business are constantly arriving, and the required machinery is all bought and will soon be at hand.

It is, therefore, particularly requested that prompt payment of the amount due be made, so that the work may proceed economically, and the new plant placed on a producing basis as speedily as possible. This can be done to the best advantage by your prompt support and active co-operation, which we earnestly solicit and trust to receive.

Yours truly,

F. L. BLAIR, Secy.-treas.

Amount subscribed:

Amount due June 15th, 25 per cent."

Further joint meetings of the committee and the directors were held on the 29th May and the 18th and 19th of June, altogether in respect to purchasing and contracting for materials.

The committee purported to act only as a committee. The Victor Wood Works, Limited, had ceased to hold meetings on its own account, and nothing was done by the directors or the company, as such, in the way of carrying out the terms of the basis. None of Blair's notices were issued by the authority of the directors. There was a meeting of the directors, and of them only, held on the 18th of July, but it only dealt with the security for the loan already made, confirming the deposit of the bonds by a memorandum of 15th of June. It will be noticed that in the notice of June 5th, 1907, it was proposed to hold a meeting after June 15th, when the board of directors was to be increased by the addition of several gentlemen from the new subscribers, involving future action, as the number of directors had been limited.

Some of the subscribers to the subscription list, 27 in all, paid an instalment of their subscriptions. None of the directors did so, except Hunter, who had an account turned.

It will be remembered that the first instalments by the terms of the subscription list were due at the date fixed in the notice, i.e., June 15th, and it was no doubt thought of importance to get these in by that date, although payment could not have been then enforced.

The project collapsed in July, four persons who had paid repudiated and demanded their money back before the winding up, which commenced on the first of August. These instalments were mostly paid to Blair, who was secretary also of the joint committees. I think there is no evidence to show any receipt by the directors or any authority in Blair to receive them or of their reaching the directors. In my opinion this arrangement was but a preliminary or provisional arrangement between the committee of the subscribers and the persons forming the directorate of the company, and that they contemplated more formal documents to effect their purpose.

By the Company's Act (Canada) R. S. c. 79, ss. 51, 52, it is provided, in respect to increasing and reducing capital, that a by-law should be made by the directors, and it would have no force unless approved of by two-thirds in value of the shareholders.

Then by the Company's Act, R. S. c. 79, sec. 46, it is provided that stock shall be allotted at such times and in such manner as the directors, by by-law, shall prescribe The new shares would have to be allotted and without that

formality I do not see how these subscribers to the subscription list would be bound.

I think that at the date of the winding up the arrangement contemplated between the committees and those who were directors of the company, had not been completed. It would not have been enforced and it fell through. The basis had been settled, but it was only a basis. Can it be said, if this resolution constitutes the contract, that the committee agreed that all of those on the subscription list—(I mean other than directors)—would take that number of shares set opposite to their names, or that they were to have the option of taking them?

The surrender of the old shares (except 26) was agreed to by the other parties as a whole, that is there was not to be a pro rata surrender according as the new shares were taken up. Of course a surrender would require some formal document. White, who was not on the directorate, and was not present, is on the list for 10 shares, and he holds 212 shares issued to him. The directors could not bind him.

It is, I think, clear that the surrender of shares, even of paid up shares, which means handing back to the shareholders their money, could only be accomplished in pursuance of a statutory power. Even then it would have to be fair to creditors, and it only could be fair if others were bound to take shares in lieu of those surrendered.

Now, if the contract of the joint meeting was that the subscribers to the subscription list were to have the option of taking shares, there was no agreement at all. I shall refer to ratification later. It was left to the chance of their coming in. And it was possible as afterwards happened that many would not come forward at all to pay instalments. In that case there would be an illegal reduction of shares in case the surrender was made according to the resolution.

If, on the other hand, the committee are to be taken as having agreed that all of those subscribers (other than the Directors) agreed to take the number of shares in the Victor Wood Works, Limited, set opposite their names in the subscription list, I think that the taking of those shares substantially was a condition (as well as the surrender of the old shares), which the few who did pay instalments could avail themselves of as a condition precedent.

The liquidator seeks to hold these 27 subscribers as shareholders, because they each paid an instalment, and because the committee took part provisionally with the directors in

ordering some lumber and machinery for the new project and one of the notices purports to inform the other subscribers of that fact.

The only evidence of an agreement on the part of the directors of the company to give shares to these subscribers to the subscription list (and there must be an agreement) is the voting for the basis at the meeting of the 23rd of May. There is a condition involved in the basis.

I do not agree with the contention that the basis was only a representation, and we all know that a misrepresentation is no answer after a winding-up has commenced. Neither do I agree that it involved only a condition subsequent. That condition went to the root of the matter. There is a great difference between 49 persons becoming shareholders, and only 27 with a comparatively very small holding of shares, and finding the old shares still in existence. It does not affect the question that now the surrender of those shares is not very material. It would be, if by chance, there was a surplus. Then referring to the terms of the subscription list the "capital to be paid"—$50,000—was never all subscribed for.

The consideration having failed, I do not see what was to prevent these people from recovering back what they had paid.

The project having fallen through, is there anything which puts creditors in a better position than the directors would have been in about compelling these people to take the shares?

Here the liquidator acting for the creditors has elected to treat the basis as not completed, and the old shares as not surrendered. He has put them on the contributory list, and while they are put on as paid up, he no doubt holds these directors as liable personally for the indebtedness to the bank, which should have been applied to the payment of the old shares. And he has not placed the directors on the list as contributories in respect to the subscriptions on the subscription list, all except Hunter. And when we come to deal with his case, we will have to see whether he is to be held for the subscription and also treated on the basis of having surrendered the old shares. One test is whether the 27 subscribers who paid their instalments could have compelled the directors to have allotted them shares. I think there would have been a complete answer, namely, that the arrangement was not completed. Then the fact

of the committee having met with the directors and voting for ordering of materials is relied upon. The voting by the committee as well as the payments of instalments are referable wholly to the arrangement which was not completed. They never purported to act as shareholders in this company, but only as a committee. Whether they made themselves liable personally by ordering goods or not, that matter does not help to stop them from showing that they did not agree to become shareholders. As a fact creditors no doubt gave credit to the company, and if they relied on the subscribers coming in, they knew they were not obliged to come in.

As to conditional agreement where there was payment of a deposit, I refer to Pellatt's case, 2 Ch. Appeals, 527, and Simpson's case, 4 Ch. Appeals, 184. I also refer to an Ontario case: Re Standard Co. Turner's case, 4 Ont. R. 448, also Higginbotham's case, 12 Ont. L. R. 100, in which there was irregularity in creating some preference shares, and irregularity about allotting them, of which Higginbotham was not shown to have had notice until after the winding-up, but he had applied for and given his promissory note for the price of the shares, and had afterwards made payments thereon, and he had also attended meetings of the shareholders and moved resolutions thereat.

As to similar arrangements which were ultra vires or had fallen through, and it was sought to hold persons as shareholders who had taken part or acted upon the proposal. I refer first to Dougan's case, L. R. 8 Ch. Appeal, 540. There an amalgamation of the Scottish Company and the Empire Company was attempted. An agreement had been entered into for that purpose. A deed to carry it out was prepared and executed by one company, and also by the other according to English law, but not according to Scotch law, in the matter of the attestation. And before this was done a winding-up order was made. Dr. Dougan, who had been a shareholder and director of the company which was selling out, sent in his share certificates to the secretary of his company to have them exchanged, and certificates of shares in the other company were forwarded to him in exchange. He did not answer the letter or sign a receipt for the shares, and after the petition for the winding-up had been presented he returned the certificates. His name was entered on the register.

It was held first, for a reason not necessary to mention, that the amalgamation was ultra vires. Mellish, L.J., p. 545: "But even supposing the agreement had not been ultra vires, I think Dr. Dougan would not have been liable as a shareholder in the Empire Corporation." [He refers to cases of ultra vires.] . . . "But I think those authorities establish this proposition, that if the shareholder enters into no personal negotiation and only acts through his own company and does nothing but consent to and act upon the amalgamation, then unless the amalgamation is eventually completed he is not bound. That is shewn by Alabaster's case, L. R. 7 Eq. 273; and I think that case is good law. But in some cases the shareholder has been rash enough to make a personal application to the purchasing company, and then if the shares are registered in his name, he is bound, although the amalgamation goes off altogether. That was so in Leeke's case and Challis' case. The only question, therefore, is whether that class of decisions applies to the present case. Dr. Dougan took a prominent part in the arrangements for the sale. When the secretary sent round circulars asking for certificates Dr. Dougan sent in his certificates to Mr. Alexander to be exchanged. According to Alabaster's case, that is not entering into a personal negotiation with the purchasing company; it is only acting in pursuance of the agreement to amalgamate and he must be taken to have sent in his certificates to be exchanged only on the condition that the amalgamation was completed. I have already said that I think the amalgamation was ultra vires and I also think it was not completed." He then deals with the facts and adds: "The result of the evidence is that Dr. Dougan never intended to become a shareholder unless and until the arrangement was finally and effectually completed."

In Stace and Worth's case, 4 Ch. App. 682, it was sought to have them placed on the list of contributories of the London & Northern Insurance Corporation. They had been directors in an investment company. The Northern corporation could amalgamate with any other company by having an extraordinary meeting. The directors entered into an agreement with the investment company to take it over, and no extraordinary meeting was held. The agreement was acted upon. Stace & Worth acted on the board of directors of the London & Northern. They attended meetings signed policies of insurance, and took part in the proceedings as

directors from September, 1867, to May, 1868. It was alleged that they had taken shares in the corporation in exchange for those they had held in the company, but there was contradictory evidence on that point. The agreement was held void upon the ground that there were to be on the board of directors seven directors of the investment company to be elected by themselves, and the five present directors of the corporation, which could only have been valid if an extraordinary meeting had confirmed it. The investment company was to be wound up. James, V.C., whose judgment was sustained, said: "It is only necessary to point to that which is the most important one of all, I think, viz., that the directors of the amalgamated board shall consist of the present directors of the London & Northern Corporation and of seven of the directors of the investment company to be selected by themselves, that is to say, there was to be an entire change in the constitution of the company, a thing which was quite beyond the power of the directors to stipulate for. That clause seems to be of itself sufficient to make this agreement void or at least to make it what it really was, in fact, a provisional agreement which was only to take effect when it had been duly confirmed." See p. 685 of 4 Ch. App.

Then he deals with a clause in the agreement providing for a meeting of the shareholders to confirm the amalgamation after it was completed, and continues: "Therefore it was a provisional amalgamation subject to, and in fact it could not be otherwise than subject to, confirmation by the shareholders of the London & Northern, &c. The agreement, therefore, was in my opinion absolutely void."

"First it is said that there was an exchange of shares, that is to say, that they sent in their certificates of shares (at least one of them did) and obtained certificates of shares in exchange for them. I am of opinion that there was no authority on the part of the directors of the London & Northern Corporation or any person whatever to make that exchange or to give them these shares in exchange for those which they were giving up . . . It is then said that their names appear on the register of shareholders . . . I am of opinion that no one had any authority whatever to make out that list of shareholders, which was intended to be a list of shareholders of the amalgamated company, and that the transfer of names from the one company to the list of the other was as inoperative in point of law as if some had got hold of the book and transcribed into

it the names of the members of the House of Lords or Commons."

"Then it is said that these 'gentlemen sat as directors.' There is not the slightest pretence for saying that they ever became directors of the London & Northern Corporation, properly so called. They were provisionally under the agreement directors of the amalgamated company, and my opinion is that they never sat otherwise than as under the amalgamation, which was void, and as members of an amalgamated board of an amalgamated company, both the board and the company having only provisional existence."

I also refer to Beck's case, L. R. 9 Ch. 392, and Nelson's case, 1874 Weekly Notes, 197.

I think that the application to settle these persons on the list of contributories should be dismissed with costs.

Hunter's case.

Hunter had subscribed to the subscription list for 20 shares. He was a director of this company and attended the joint meetings of the committees. He has been placed on the list of contributories in respect to his old shares. There is no difference between his case and that of the other directors who have not been placed on the list of contributories, except that he had paid the first instalment.

I am of opinion this case is to governed by the principles that I have already stated.

This subscription was only to be made use of conditionally upon the arrangement for a union of the two bodies, going through as a whole, and his old shares being surrendered. He was not to be a shareholder in respect to the old shares, and also those in the subscription list. The payment of an instalment under the circumstances did not waive the condition.

I think the application to settle him on the list of contributories should be dismissed with costs.

RUSSELL, J., and TOWNSHEND, J., concurred.

DRYSDALE, J., dissented.

NOVA SCOTIA.

SUPREME COURT.

LONGLEY, J., at Sydney, C.B. APRIL 26TH, 1909.

SUTHERLAND ET AL. v. THE GRAND COUNCIL OF P. W. A. ET AL.

Workmen's Association—Action by Members against Council —Election of Council—Irregularity—Delegates to Grand Council—Right to Vote—Grounds upon which Courts Refuse to Interfere with Internal Concerns of such Associations.

T. R. Robertson, Harrington and Cameron for plaintiffs.
D. A. Cameron and Carroll, for defendants.

The facts are stated in the reasons for judgment.

LONGLEY, J.:—This is an action brought by three members alleged to be in good standing of the Provincial Workmen's Association, a body corporate, against the Grand Council of that body, and also against the individual members constituting the Grand Council. The plaintiffs bring the action on their own behalf and all the other members of the P. W. A., except the defendants. The object of the action is to attack the authority of the defendants to act as officers and a Grand Council of the body. They claim a declaration that the meeting of Grand Council held in September, 1908, at which the officers of said Grand Council were elected, was illegal and all business done void.

The Provincial Workmen's Association is an organization of working men, chiefly miners, organized in 1879, and incorporated in 1881. In addition to the Act of Incorporation a constitution and set of by-laws have been framed and adopted by the organization under which they have been acting for years. By Article III. of this constitution the head government of the Association is vested in a Council, to be called the Grand Council of the P. W. A. This Council is to consist of the Grand Master, Associate Grand Master, Grand Secretary, Grand Treasurer, Grand Chaplain, Grand Guardian, Grand Inner and Grand Outer Watchmen, and

experienced members duly elected by each of the lodges composing the Association. The Association consists of a number of subordinate lodges, working under the constitution and by-laws of the order, and all under the control of the Grand Council constituted as above—resembling in this regard most other organizations—such as the Masonic, the Temperance orders, and Synods and Church organizations.

The constitution provides that each lodge shall send a delegate to Grand Council for every one hundred members, and this has been interpreted by the Grand Council to mean that every fraction of one hundred members shall entitle to another delegate. For example, 70 members shall have one delegate, and 320 members shall be entitled to have four delegates. This number is to be determined from the average of the preceding half-yearly returns. Each subordinate lodge is required to make quarterly returns of the number of its members, and with these returns to send the lodge dues to the Grand Secretary at the rate per capita of six cents per month for each member, or twenty-four cents per quarter. These returns are sent according to forms furnished by the Grand Secretary. This officer adds together the membership according to these returns for the two quarters prior to the meeting of the Grand Council, and, dividing by two, obtains the average membership for the half year. This is the basis of representation, and the Grand Secretary, upon these returns, notifies each subordinate lodge of the number of delegates they are entitled to send. I may mention just here that the plaintiff objects to this method of determining the representation, holding that there are some initiation fees of 20c., each, included in the returns, and therefore the returns might not always exactly represent the actual membership. But it is clear that this is the basis of representation long established by the Grand Council, and it seems to me the most natural and safe one. It would never answer for the governing body of the order to be subject to such enumeration as any subordinate lodge might choose to make out. There must needs be a test which the Grand Council can apply, and I can conceive of none so convenient and effective as the quarterly returns to the Grand Secretary.

The legality of the regular annual meeting of the Grand Council in Halifax, September, 1908, is challenged by the plaintiffs on various grounds, with which I shall deal in detail.

1. That the Grand Officers present at the meeting were not entitled to vote because they had not been made delegates.

This objection seems to me trivial and would lead to an absurd result. The officers are to be elected each year at the last session of the Grand Council. The sittings may last several days. How could the business proceed if the officers, duly elected the previous year, could not participate in the work of the Council; and no officers be elected until the last session? But the words of the Constitution which I have already quoted seem to me to settle the matter beyond question. The Grand Council is to consist of the Grand Officers (naming them) and regularly appointed delegates. I therefore think that the Grand Officers were properly present in the discharge of their duties, and had full right to take part in the proceedings in every proper way.

2. Some objection was made to a man named Fergus Byrne sitting and temporarily holding a minor office. Whether he was a delegate legally qualified to sit was not proved before me, but it was proved that he did sit, and I regard this as presumptive evidence that he had a right to sit. It appears also that the office of Grand Outer Watchman being temporarily vacant, the Grand Master appointed Byrne to fill the post in the interim, and I think it cannot be denied that such proceedings are in accordance with the inherent right of any organization to make provision for the orderly conduct of its internal affairs.

3. It is charged that four delegates from Golden Rule Lodge were rejected and five other delegates seated. The facts are as follows: The returns to the Grand Secretary showed that Golden Rule Lodge was entitled to five delegates to Grand Council, and the Grand Secretary notified the lodge accordingly, and five delegates were regularly appointed at a regular meeting. A night or two later, though no notice in writing to rescind the appointment of these delegates, as the by-laws explicitly require, had been given, the members present undertook to pass a resolution dismissing those appointees, and electing four other delegates. Both sets of delegates came to the meeting of Grand Council. The matter was referred to a committee on credentials, according to the procedure, and in accordance with the practice prevailing in all organizations. The committee reported in favour of seating the five first appointed delegates, holding that their appointment had never been validly reversed by the lodge, and this report was adopted by Grand Council by a vote of 51 to 1.

It seems necessary at this stage to state what I conceive to be the law applying to the government of a regularly constituted organization. If acting under a statute these meetings must not contravene the provisions of the law. If the statute requires that ten days' notice of a meeting be sent to all shareholders of a company the failure to send this notice will make the meeting void, but in the matter of preserving order, in arranging the methods of doing business, in matters of mere procedure, Courts will not interfere. In all organizations of laymen, and often of men unskilled in parliamentary procedure, irregularities will occur, but unless anything is done in violation of express law, or done fraudulently and with improper motive, the organization is the supreme judge of its own proceedings, which Courts will never undertake to review.

If this is an accurate general statement of the law, then I do not regard the action of the Grand Council in seating the five delegates as a matter for review by this Court. I think the determination of the Committee was right, but, even if it had been irregular, yet, acting in good faith, and upon an honest belief that they were deciding according to their best interpretation of the rules, I still think, under the law, that the Court will not interfere.

4. Objections were made, practically identical with the case of Golden Rule Lodge, in the case of Olive Lodge and Power Lodge. Olive Lodge, according to the official returns to Grand Secretary, was entitled to have two delegates, and was so notified by Grand Secretary. They undertook to elect and send three. The credentials committee investigated the matter and reported that Olive Lodge was only entitled to two. This report was adopted by Grand Council 51 to 1. Whereupon the Grand Master stated that one of the delegates would have to retire, and one of the three voluntarily retired. Power Lodge was entitled, by the returns, to one delegate. They undertook to send two. The credentials committee reported that the Lodge was only entitled to one, which was approved by Grand Council 51 to 1. My observations in respect of Golden Rule Lodge govern these two cases. I think the Grand Lodge acted legally and in no sense have they done anything which in the slightest degree calls for any interference by this Court.

5. I have reserved what I conceive to be the only objection which rests upon debateable ground until the last. Article 13 of the Constitution declares that any lodge more than two months in arrears (in its per capita dues) shall have no

claim upon the Association, &c. Section 2 of said article declares that "Any lodge three months in arrears for per capita tax . . without cause deemed sufficient by Council, may after due notice be suspended, or have its charter revoked." Pretoria Lodge was not only three months in arrears, but 12 months. The learned counsel for plaintiffs urged that the charter of this lodge had not been revoked, and therefore that Pretoria Lodge was entitled to be represented at Grand Council. The lodge did elect four delegates—or five—the number is not important—and upon the report of the credentials committee they were not allowed to sit as delegates. The ground upon which they were excluded was not that their charter had been revoked—this could only be legally done after notice and a hearing—but the Grand Secretary, Moffatt, who gave evidence, very frankly and candidly on all points, said that the only basis of representation which Grand Council had recognized was the quarterly returns. Pretoria Lodge having sent no returns during the half year preceding the meeting, there was no possible basis upon which their representation could be determined. The Pretoria Lodge could not send any number of men they chose—the amount of their representation must be founded upon their returns and payments. The committee on credentials investigated the matter and reported that Pretoria Lodge could have no delegates because they had sent no returns upon which the number could be determined. This was adopted by Council 51 to 1. Upon careful consideration of this Act I see no violation of any law, nor even an irregularity. I think it was a matter of procedure fairly considered and done bona fide in accordance with a reasonable interpretation of the rules and regulations of the Association. I do not think it calls for any review by this Court. I conceive it to be simply an act of internal administration honestly done. There was some evidence that the Grand Secretary had written to some member of Pretoria Lodge, in a friendly way, before the meeting, intimating his desire to assist them in getting representation at Grand Council, spite of their failure to pay dues, and in one letter he intimates that if they send one or two delegates there might be no question raised. I regard these personal letters as in no way affecting the law. The Grand Master would not recognize any such arrangement, and notified the lodge that they could send no delegates, and this view was supported almost unanimously by the Grand Council.

I am unable on any of the grounds set forth to declare the meeting of September 18th as illegal, and I think the defendants were duly and regularly elected and properly fill the offices assigned to them.

I want to say that it appears from the evidence that the three plaintiffs, in January last, ceased to be members of the P. W. A., and since then have had no connection with the Association. It was urged that having now no interest in the result they could not carry on this action. This is my own view, but I deemed it in every way desirable to determine the matter upon the merits rather than upon a technical point like this, in order, if possible, to avert other forms of action.

It also appeared that some of the difficulties which have been raised in this case, arose from an effort on the part of a number of former members of the P. W. A. to break up the institution and merge it in another labor organization, called the United Mine Workers. I did not regard this fact as having any bearing on the issues in this case. The only question before me, I conceive, is whether the meeting on the 18th of September was legal or so illegal as to render its proceedings void. I do not think there is any warrant for holding the meeting illegal or interfering in any way with its proceedings.

I think the plaintiffs' action should be dismissed with costs.

NOVA SCOTIA.

SUPREME COURT.

LONGLEY, J., at Sydney. MAY 1ST, 1909.

SYDNEY BOAT AND MOTOR CO. v. GILLIS.

Contract—Failure to Perform—Refusal to Accept Motor Boat alleged not to have been constructed according to Specifications—"Substantial Performance."

G. A. R. Rowlings, for plaintiff.

Gillies & Hill, for defendant.

LONGLEY, J.:—This case was tried before Mr. Justice Russell at Sydney some time ago, and that learned Judge found that the contract had been substantially completed according to contract, and gave judgment for plaintiffs for full amount

of their claim, namely, the contract price of the motor boat, less the amount paid on account by defendant. Upon appeal to the full Court from this decision it was ordered that a new trial be had, it not being clear that the contract had been completed fully according to the specifications. From the opinions of several members of the Court I derive the conclusion that the chief difficulty was the failure of the plaintiffs to have put an anchor on board the boat prior to tendering her to defendant.

A new trial was had before me at the last sitting at Sydney. By agreement all the evidence on the former trial was admitted, and each party was at liberty to offer such further evidence as they thought requisite; and a number of witnesses were examined on both sides.

But when both parties have offered everything in their power and every fact is established, the case presents the same difficulties that it originally offered. The plaintiffs have added some counts to their statement of claim, which in effect claims damages for defendant's breach in refusing to take delivery of the boat when tendered. But this does not lessen the real difficulty. If the defendant had taken delivery of the boat at any stage, there would be some middle ground. If the boat had proved not up to the contract with its specifications, it would be possible to adjust the rights fairly between the parties, and the contract price would be reducible to the extent to which the boat failed to conform to contractual requirement. There is no middle ground here. The defendant simply refused point blank to accept the steamer, and before plaintiffs can recover anything they must establish clearly that their contract has been performed up to the specified requirements.

So far as the anchor is concerned the plaintiffs have added some further evidence. Mr. Dahl says that he had an interview with defendant previous to the tendering of the boat, at which he pointed out that the galvanized anchor could not be obtained without some delay, and as the defendant was pressing to have the boat immediately, he could supply an ordinary anchor of 70 lbs. with a cable rope attached, and it would be better for the purposes of such a steamer than the 90 lb. anchor with an iron cable, and the defendant agreed to the change. Dahl also says that the 70 lb. anchor was in their warehouse on the wharf where the boat was, and could be put on board at any minute. The reason it was not put on board before tender was simply that it might scratch the boat

needlessly if put in place before required. If the defendant had accepted the boat the anchor could have been put on at once. He says further that a 90 lb. galvanized anchor would cost delivered in Sydney, $9.50, whereas the 70 lb. anchor they had in stock cost $6. The defendant simply denies the conversation and agreement respecting the anchor, but I am inclined to accept Dahl's statement.

The defendant called several witnesses who have examined the boat since her sale under execution in the summer of 1907, and the general purport of their evidence is that the boat is unsuitable for the purposes for which she was intended, and not of the value which the contract called for. One declared that her hull had not been constructed in a workmanlike manner, and would cause leaks. He said in answer to a question from me that it would cost $6 to make it right. He also said there was a cross-grained plank in the hull which was not up to requirements of contract, and it would cost $5 to put in a suitable one. The figures are of no importance in this suit save as tending to rebut the idea of de minimis. But it must be stated that in the case of most of the witnesses they made examination of the boat a considerable time after the tender of the boat, and after she had been exposed by being beached for a winter. Also that when some of defendant's witnesses point out the respects in which this boat is unsuitable for a motor fishing boat, and the changes which are required to make her suitable, it is clear that the specifications do not require a boat of that character.

If I might be allowed to state the general impression which I derived from the evidence and all the surrounding circumstances, it is that the boat when completed did not meet the requirements of the defendant for a boat which could be used for outside fishing, but that this did not result so much from the failure of plaintiff to live up to the specifications, as to the deficiency of the specifications to secure such a boat. The boat as tendered in July, 1907, was not worth to the defendant or any other person her cost for the purpose for which she was designed, but it is difficult to attribute this fact to the failure of plaintiffs to comply with the specifications.

The defendant justified his refusal to take the boat in July to the failure of plaintiffs to complete her earlier, in time for use at the opening of navigation. I cannot regard this as available to him. He had been about the works up to the last minute. He had gone out twice in the latter part of June on

trial trips. Therefore I think this will not answer as a justification for refusing acceptance. His conduct rebuts the theory that time was the essence of the contract.

2. He says her engine did not work at either of the trial trips, and he would not take her for this reason. It is true the boat did not respond satisfactorily to her motive power on the two trips, but plaintiffs have reasonably explained this, and according to their witnesses her engine was working all right when she was finally tendered.

3. He says she was not built up to specifications. Most of the objections on this score are weak. The planking was of the required thickness. The engine was put in in substitution for the engine originally required by agreement with defendant. He does not deny this, but simply says that he agreed to accept the engine if it would work well, which it did not.

4. He says the boat was not completed according to contract, because hull was defective, whereas contract called for a boat "thoroughly built." A cross-grained and defective plank was put in hull, whereas contract required that "all lumber shall be strictly first class, free from say, rot, or other imperfections.

All other changes were made by mutual consent, and I do not think they require special consideration.

The difficult point for me is to decide whether the objections proved under clause four are to be regarded as coming under the doctrine of de minimis. It would require $11 to make them conform to the terms of the specification. The authorities are not conflicting upon this point, but the verdict of juries, as to "substantial performance," have been upheld when they have found differently on similar conditions of fact. The law is epitomized very fairly on this point in "Cyclopedia of Law & Proc." vol. 6, page 57:—

"To constitute substantial performance a general adherence to the plans prescribed is not sufficient, the builder not being entitled to wilfully or carelessly depart from minutest detail, to leave his work incomplete in any material respect. . . . There is a substantial performance, however, where a variation from the specifications of a contract is unintentional and unimportant, and one by which the building is not injured; where the defects can be remedied by the owner without great expenditure, and it is apparent the builder intended to fulfil his contract. . . . The defect, however, must not run through the whole, or be such that the object of the owner to have a specified amount of work done in a particular way

is not accomplished. Whether there has been a substantial performance, the evidence being contradictory, is one of fact, so it is one of fact whether the builder was wilfully negligent in failing substantially to perform the contract."

Acting as a jury in this troublesome case I do not think I can conscientiously say that the builder was wilfully negligent in respect of the defects in the hull to which I have referred. Nor can I say that these defects could not have been remedied by the owner without great expenditure, nor that the defects run through the whole contract. A New York case is cited in "Cyclopedia L. & P." (sup.) holding that "A failure to perform work to the extent of thirteen dollars does not show that a contract to build at a price of $390 was not substantially performed."

I feel, therefore, that the law compels me to find in this case that the contract has been substantially performed, and that plaintiffs are entitled to recover damages for the breach to the amount of the contract price, less the sum which defendant has already advanced, and less the $50 which plaintiff agreed to deduct, and less the sum now paid into Court on the sale of the boat under execution, and less the taxed costs of defendant on the former appeal. I have reached this conclusion reluctantly, because I recognize that the defendant has paid out a large sum for which he had received no consideration whatever. The plaintiff must have costs of suit.

NOVA SCOTIA.

SUPREME COURT.

LONGLEY, J., at Sydney. MAY 1ST, 1909.

DORA M. HAGARTY v. McGRATH AND TOWN OF NORTH SYDNEY.

Taxes—Seizure of Personal Property for Arrears—Horse—Replevin—Damages—Public Officer—Office of Town Treasurer Filled by Woman—Validity.

N. A. Macmillan, for plaintiff.

B. Archibald, for defendant.

LONGLEY, J.:—The facts of this case, as they appear to me, are substantially as follows: The plaintiff is a maiden lady

who lives, or at the time this action arose lived, with her brother William Hagarty on a farm or property within the limits of North Sydney. The farm belongs to William by will of his father, and the stock and other property on it, but it is clear from the evidence that for years Dora has been in charge of it, employing the help, selling the produce, paying the bills and transacting the business generally. For ten years past she has paid the taxes on the property to the town, though the assessment is made in William's name, and the receipts given to William as if paid by William. The taxes due in 1908 amounting to $34.50, were demanded as usual and in response Miss Hagarty sent a letter to the mayor animadverting upon the general conduct of the town affairs. But the portion of the letter which seems to have some bearing upon this case is as follows: "To His Worship the Mayor and Councillors, &c., Gentlemen,—One of your policemen showed up here this morning with a warrant for $34.50 for taxes for 1908, threatening all he would do and what he would not come back to do. I have been paying the taxes on this property for the last ten or twelve years. Just now I am not in a position to pay it, and it will be impossible for me to do so, so far as I can see now before the first of June, &c."

After the prescribed notice had been given as provided for by section 90 of c. 73 R. S., the treasurer of the town issued a warrant on the 28th of December, 1908, against William Hagarty, directed to any of the police constables of the town, and it was placed in the hands of the defendant McGrath, who is a police constable, and he went with it to Hagarty's house, where he found both William and Dora in the house. Not being able to get any settlement of the taxes, he announced that he would have to make a distress. He left the house for this purpose and William accompanied him. They went to the barn and McGrath proposed to take a certain horse, but William said that this horse had no shoes and consequently he had better take another one which he pointed out. The constable accepted this and William put the bridle on the horse and the constable took it to the town and put it in a livery stable.

A day or two afterwards Dora went to the town and tendered the amount due for taxes $34.50, and demanded the horse. The town authorities declined to give up the horse until the expenses on the warrant and for the keep of the horse had been paid. She refused to do this and replevied the horse, and claims damage for its seizure.

Her case is very simple. She says she bred this horse from a mare on the premises belonging to William and had brought it up and claimed it as her own ever since. As a matter of fact I am not able to see very clearly the distinction between her use of this horse and all the other horses and cattle on the place. She has really managed everything, and I do not think it can be fairly said she had "bred" this horse, any more than she has bred everything in the form of cattle on the place.

On cross-examination the plaintiff was confronted with her sworn statement before a stipendiary magistrate on a hearing under the Collection Act upon a judgment and execution against her by R. F. Phelan. The hearing was in April, 1908. In this she says: "I have no property, nothing I can call my own. I have no land. I have no money." Her explanation is that, some time before, she had sold this horse to a nephew for $130, of which he had paid her $100, but the horse remained in her stable and no attempt at delivery was made. But when it is necessary to get title to this horse for the purpose of this action, she says she told her nephew that she had changed her mind, and would not give up the horse just then, but if he would return $90 she would allow the $10 to remain as an earnest that she would give him the first right in case she should afterwards want to sell. Although the nephew confirms this story, I look upon it with the gravest suspicion, since the horse stood at all times in William's barn, and no outward indication of a sale has ever been furnished. William Hagarty on the stand simply said, "I never claimed this horse." Nor does he say that he claims any of the property.

The conclusion I have reached from the whole case is that this horse had just the same status as all the other property on William's farm. She had never been assessed upon it, and yet it was assessable property, and I think liable to be taken for William's taxes as any other property on the place.

I think the warrant was regularly issued, and properly executed and that the defendants are entitled to judgment for a return of the horse, or the payment of the taxes due by William Hagarty together with the legal and proper charges and expenses in connection with the warrant of distress. The defendants will have costs of the suit.

. . . Since the above was written I have received a written brief from plaintiff's salicitor, which I have carefully considered. He raised a point not taken on the trial, so far as I can remember, namely, that the clerk and treasurer of North Sydney, being a woman—Miss H. M. Holland—she is disqualified from exercising the functions of Town Clerk and Treasurer, and the warrant issued by her is void. I am unable to accept this view. The Towns Incorporation Act simply says that the Town Council shall appoint a clerk who shall be called Town Clerk, who shall hold office during good behaviour. (Section 111, c. 71.) Also section 112, "The Town Clerk shall, until the Council otherwise prescribes by by-law, perform the duties appertaining to the office of Treasurer." Miss Holland is performing these duties, and I shall assume no by-law has been passed prescribing otherwise. I am unable to think of any principle which prevents a woman from filling this office, the duties of which are, I think, altogether ministerial.

But it is also contended that in the warrant the treasurer signs "H. M. Holland, Act. Town Treasurer," and that the "Act." stands for "acting" Town Treasurer, which prevents her from issuing the warrant, since this function devolves upon the treasurer. Whether Miss Holland was the treasurer or only acting as deputy for the treasurer, I think her act is equally valid. The Interpretation Act, c. 1, R. S., clause 38, says: "Words directing or empowering a public officer of functionary to do any act or thing, or otherwise applying to him by his name of office, include his deputy in any case in which he is authorized to appoint a deputy, and also include his successors in office." Section 113, Towns Act, authorizes the appointment of a deputy. It is also claimed that sufficient proof of demand for payment of taxes upon William Hagarty was not submitted. The affidavit of the Town Clerk that the sum had been demanded, and her certificate under the seal of the town, were before me, in accordance with the practice for issuing warrants upon the authority of the Town Council.

In any case I do not think the plaintiff is in a position to profit by any irregularities, if any there were, because in my view, she has not established such an ownership in the horse as entitled her to claim its return under any circumstances. Such objections might be available to William Hagarty.

Judgment for defendants with costs.

NOVA SCOTIA.

SUPREME COURT.

LONGLEY, J., at Sydney. MAY 7TH, 1909.

ANGLE v. MUSGRAVE.

Land—Title—Crown Grant—Adverse Possession — Evidence —Will—Rents and Profits—Account.

N. A. McMillan, for plaintiff.
B. Archibald, for defendant.

LONGLEY, J.:—The plaintiff produces a paper title from the Crown, through several intervening parties.

1. Grant from Crown to Thomas Montcreef, June, 1786.
2. Grant from Crown to Edward Hickey, June, 1786.
3. Deed from Catherine Quinlan, heir of Hickey to Andrew Sellon, June 20th, 1817.
4. Samuel Sellon to Matthew Bradley, May 21st, 1860.
5. Will Matthew Bradley to George J. Bradley, August 21st, 1888.
6. Will George J. Bradley to plaintiff, April 23rd, 1907.

It is in evidence that Matthew Bradley was exercising ownership over the lot of land in dispute, a house property in Sydney, as late as 1888, when he died. The chain of plaintiff's title is perfect so far as I can see, except that he has simply put in evidence a certified copy of the will of George J. Bradley to plaintiff, executed in Montreal under the hand and seal of two notaries, and certified by the Registrar. I think I am able to receive this will under our Evidence Act. The only question I had was whether it should have been filed and proved in the Probate Court for Cape Breton County. The plaintiff contends that this is not necessary in the case of real estate which descends to the heir.

The defendant set up adverse possession, but totally failed in this. The evidence shews that as late as May 11th, 1901, defendant was negotiating with George J. Bradley for its purchase.

The facts upon which Musgrave relies in his defence are that Matthew Bradley owned three adjoining lots in Sydney, with houses upon them. One lot he bequeathed to his brother George J. Bradley, the one in question, the other to his sister Jane, and the third to his other sister, Mrs. Musgrave, wife of defendant. The executors of Matthew Bradley's will were

George J. and Musgrave. Matthew lived with Musgrave during his later years, and being somewhat feeble the Musgraves took care of him, and he took a general oversight of Matthew's affairs. Matthew dying in 1888, the will should have been immediately proved, but Musgrave did not present it for probate until 1896. George J. was living in Montreal at his brother's death, and continued to live there until he died, a year or more ago. At Musgrave's instance George renounced the executorship. Meanwhile Musgrave has been in full control of the lot willed to George, received all the rents and accounted to nobody.

Now that he is called upon to account he makes up a large bill which he says he had paid out on account of the place. The only evidence in support of this claim is his own, and should be received with caution. He swore that he made an agreement with Matthew Bradley by which he was to have the lot in question absolutely for his own, and he swore also that in 1889 or 1890, George J. Bradley confirmed this. Apart from the fact that real estate cannot be acquired by mere verbal agreements, he is conclusively contradicted on this point by his own letter to George J. Bradley in 1901, in which he offers him $200 for the lot. Nevertheless, as no attempt was made to contradict his statement of expenditures on this house and lot, I feel I must accept his statement on this point. I am inclined to think if he expended money on the repairs of the house under the sanction of the owner he is entitled to be repaid the money so expended, as also for the taxes.

Amount paid for			remodelling the house.....	$600 00
	"	"	taxes	240 00
1900	"	"	repairing wall	15 00
1904	"	"	installing water	30 00
1906	"	"	extra work	32 00
1907	"	"	shingles and labor new roof.	33 00
	"	"	putting in stairs	30 00
1906	"	"	painting and papering 3 rooms	15 00
	"	"	sealing kitchen and pantry storm doors	9 00
			Repairing stairs, platform..	7 00
			Glazing and painting doors, windows, &c.	5 00
				$1,016 00

I think defendant is entitled to be recouped this expenditure of $1,016.

I think also the plaintiff is entitled to receive the mesne profits and rents of the house which defendant has received during the period he has had the premises under his control and received the rent. I have very little data upon which to determine this accurately. It is in evidence before me that D. M. Currie occupied this house as the tenant of Matthew Bradley about 1888, the year when he died. Currie is not sure of the amount of rent paid, but about $25 a year. There is the evidence of defendant that the house partially blew over and his $600 was paid to put it in repair. It is now occupied as a double house by two tenants, who are paying $7 a month each, which would make their rental amount to $168 a year. It is also in evidence that in the boom time rents in Sydney were fully as high as at present. For nine years Sydney has had a great revival in business and land values, owing to the inauguration of the Steel & Iron Co.'s enterprise. Musgrave says that the houses have not been occupied all the time, but he is unable to give any detailed statement as to how long either of them has been vacant. I think a fair calculation is to allow an average rental of $120 a year for nine (9) years, which would make Musgrave's receipts for rentals $1,080.

I think the plaintiff should have his order for possession of the lot of land as claimed, together with $1,080 for mesne profits, less $1,016, allowed defendant for the money paid out, which would entitle plaintiff to judgment for the balance, $64. The plaintiff to have costs of suit on the main action, and defendant to have costs of his counterclaim.

NOVA SCOTIA.

SUPREME COURT.

LONGLEY, J., at Sydney. MAY 7TH, 1909.

GREENWELL, ASSIGNEE, v. MCKAY.

Debtor and Creditor—Assignment—Right of Assignee to take Possession of Goods as against Lessor Claiming Rent—Lease—Unlawful Detention of Goods by Lessors—Warrant.

W. R. Tobin, for plaintiff.

W. F. Canall, for defendant.

LONGLEY, J.:—The plaintiff is an official assignee for Cape Breton county, and as such the assignee of George H. Bentham, who, prior to January 6th, 1909, was doing business at Glace Bay. On the 6th of January he made an assignment to plaintiff of all he possessed under the Nova Scotia Assignment Act. Next day plaintiff went to Glace Bay to take possession of Bentham's effects. He was prevented by defendant from taking possession of the goods in Bentham's store, which, accepting the valuation of the sworn appraisers, I value at $152.67.

The circumstances are as follows: Bentham and one, Robert Wainwright, entered into a written lease of certain premises belonging to defendant. The lease was for five years, and the rental $40 a month, payable monthly in advance. The rent became payable on the 7th of each month, and had been paid up to January 7th, 1909. No rent was due until January 7th, when one month's rent became payable in advance. There was a special provision or condition in the lease, the essential part of which, so far as this action is concerned, is as follows: "If the said lessees shall make an assignment for the benefit of creditors, or becoming bankrupt or insolvent debtors, &c., then and in every such case, it shall be lawful for the lessor, his heirs, etc., into and upon the said premises or any part thereof in the name of the whole to re-enter and the same to have again, re-possess and enjoy as if these presents had never been executed, and the then current rent shall become immediately due and payable, and the next succeeding three months' rent shall also be at once due and payable, and the said term shall immediately become forfeitable and void."

On the 5th of January, before any rent was due, and before either of the lessees had made an assignment, or become bankrupt within the meaning of the Act, defendant issued a warrant of distress for three months' rent against the goods of Bentham in the premises so leased, and his bailiff entered said store and took possession of it and all the goods in it.

When Bentham was driven out of his store by defendant he went to Sydney and made his assignment to plaintiff the next day, the 6th. I cannot find that this act alone caused or justified the assignment, but no doubt it was the immediate cause of this step. Under this warrant the defendant on the 7th refused to allow plaintiff to take possession as assignee of Bentham's goods in this store.

Presently the defendant reached the conclusion that his warrant of distress had been premature, and would not be valid nor justified by the terms of the lease. So he notified plaintiff to come and take possession of the store and goods, which he did on the 18th, and instantly he entered possssion, the defendant's bailiff, under a new warrant, dated January 16th, seized the said goods and took possession of the building. The warrant was for $160, which embraced not only the month's rent in advance, $40, which became due the 7th of January, but the next three months' rent as provided for in the lease. Under this warrant the goods were appraised and sold at auction for $116.

The plaintiff, acting under a resolution of Bentham's creditors, now brings this action claiming a conversion of goods to which plaintiff, as assignee, was entitled.

Several interesting questions of law arise in respect of this transaction. First of all nothing is heard respecting Wainwright, one of the lessees. It does not appear that he has violated the terms of the lease or received any notification of distress or re-entry. For the present I shall ignore this fact, and assume that his relation to the lease is only formal or nominal.

The first matter that is clear to me is that defendant had no right to issue his warrant for three months' rent on the 5th of January and re-enter and hold the goods of Bentham, and it is clear that he is liable to plaintiff for the unlawful detention of these goods between January 7th and 18th. But if defendant's subsequent proceedings are regular and lawful the damages in such a case would be simply nominal.

Defendant's second warrant of distraint, dated January 16th, is directed against the goods of Bentham; but Bentham had no goods, the goods were then vested in the plaintiff. The first question is, "Can defendant exercise the power of distress against the assignee for three months' advance rent; I think, as a matter of law, the official assignee is not bound to accept a leasehold estate included in the assignment and, if he does not elect to do so, is not liable as assignee of the assignor's lease.

But still another question arises. Since the defendant entered and terminated the lease without any breach on the part of the lessee, does he not thereby lose his remedy of distress? There are several English and Ontario cases which determine that an acceleration clause in a lease is valid, and if there has been a breach the lessor may, if the terms warrant,

terminate the lease and distrain for current rent, three months before it is due. But in this case there had been no breach of the covenants of the lease on the lessee's part when the entry was made. This entry was abandoned afterwards in favor of the assignee, who was put in possession. Does the defendant's right assume another phase after he had put the assignee in possession? Can he distrain upon the assignee's goods for four months' rent in advance? Can he take the assignee's goods under a warrant of distress against Bentham, issued after the assignee had become possessed of Bentham's goods? I have not been able to find satisfactory authority covering the exact points of this case. I do find authority that if a lessor enter and evict the lessee the rent is suspended, and the eviction will become a bar to subsequently accruing rent. Can this unlawful entry of defendant on the 5th of January be regarded as an eviction within the meaning of these authorities? Woodfall, Ld. & Ten., 18th ed., 467.

Again the entry of defendant on the 5th of January may be said to have forced Bentham to make an assignment. Can defendant issue an illegal distress against his lessee when no rent is due, enter into his premises, and thus force him to an act of bankruptcy, and then by virtue of this act, to which he had forced him, secure his right to three months' advance rent?

All these questions are to me difficult and in a large degree novel. After a careful examination of the authorities and exercising my best judgment, I have reached the conclusion that defendant's warrant for four months' rent is not effective against the assignee. As, however, a month's rent became due on the 7th, when the plaintiff came to take possession of the premises, I think the defendant has a fair claim against the assignee for this amount.

I think the plaintiff is entitled to the value of the goods illegally seized under warrant on the 18th of January, and subsequently sold. I think the valuation of the sworn appraisers is a fairer guide than the proceeds of a forced sale. I therefore give judgment for the plaintiff for $152.67, less $40 rent due, $112.67 with costs of action.

If it should be held by the court of review that defendant's second warrant was effective against the goods of the assignee, I fix the damages for the unlawful detention between January 7th and January 18th at one dollar, and I think plaintiff should have costs.