

lands of one Graham under a written demise. A warrant in the usual form from Graham to Dillon was proved, authorizing him to distrain for arrears of rent alleged to be due and owing under the lease; and the alleged offence consisted in the resistance to the distress and rescue of animals taken in the name of a distress under this warrant as above stated. There was no evidence that the distress had been impounded.

For the prisoners it was contended that in order to prove an offence under sec. 144 (2b) of the Code it was necessary for the Crown to shew that the rent was due and in arrear, or at least that the evidence tendered by the prisoners to prove that there was no rent in arrear at the time of the distress should have been admitted. The Judge ruled that proof that rent was due was foreign to the case, and that the warrant was conclusive as to the rent being due; if it was not due, the prisoners had their civil remedy.

The appeal was heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A.

J. H. Moss, for prisoners.

J. R. Cartwright, K.C., for the Crown.

OSLER, J.A.—I am of opinion that the learned Judge's ruling was wrong on both points, and that the questions submitted should be answered in favour of the prisoners.

Section 144 (2b) of the Code enacts that "every one is guilty of an offence . . . who resists or wilfully obstructs any person in the lawful execution of any process against any land or goods, or in making any lawful distress or seizure.

The last branch of the sub-section is that under which, if at all, the indictment must be maintained, as a distress warrant for rent is not "process," the very definition of such a distress being a taking without legal process. It is of the essence of the statutory offence that the distress resisted should have been a lawful distress, and therefore, as the commission of an offence must be established against the accused before he can be convicted, it necessarily devolves upon the prosecution to prove the existence of all the ingredients which go to make it up, one of which, in the case of such a charge as the present, is the legality of the distress. If no rent is due and in arrear, it goes without saying that the distress is illegal, whatever may be the civil remedy open to the tenant. It seems, therefore, almost needless to say more than that, within the very words of the Act, if a lawful distress is not proved, the Crown has not established the commission of the offence mentioned in the sub-section. The whole