THE

Eastern Law Reporter

VOL. IX. TORONTO, APRIL 3, 1911. No. 8

PRINCE EDWARD ISLAND.

SUPREME COURT.

FEBRUARY 13TH, 1911.

HORACE HASZARD v. R. H. STERNS ET AL.

Distress for Rent—Pound Breach—Justification—Goods in Custodia Legis—Distress.

F. L. Haszard, K.C., and G. Gaudet, for plaintiff.

J. J. Johnston, K.C., and C. D. McCallum, for defendants.

The judgment of the Court was delivered by

FITZGERALD, V.-C.:—This was an action for pound breach tried before me and a jury last term.

The jury under the charge found a distress, an impounding and a pound breach, assessing the damages at $125, the value of the property rescued.

The rule nisi for a nonsuit, or in the alternative for a new trial was granted upon the following grounds:—

1. That at the time the alleged distress was made the tenancy between the plaintiff and his tenant Dr. E. E. Robins had terminated and distress could not be made.

2. That the first entry made by the plaintiff on the premises with the intention of taking possession of same was an eviction of the tenant and the right to distress ceased.

3. That the acceptance of the key by the plaintiff from the tenant's clerk or servant, was a surrender of the tenancy

and an acceptance of same, and the right of the landlord to distrain ceased.

4. That the alleged distress was void because when made no inventory and notice of distress was delivered or affixed as required by the provisions of the Statute, 51 Vict. ch. 3, intituled the Distress Act.

5. That the alleged distress was void because to effect same the plaintiff broke open the outer door of the premises.

6. That if a distress was made by the plaintiff at the time he first entered upon the premises on the day the alleged distress was made, the distress made on the second entry on the same day was illegal and void, as there cannot be a second distress for the same rent.

Or in the alternative for a new trial for non-direction.

The learned Judge having withdrawn from the jury and refused to charge the jury,—

1. On the question whether the entry made by the plaintiff to distrain was a breaking in of the outer door of the premises, and if the jury so found the distress was void.

2. The question whether the acceptance of the key by the plaintiff, and the first entry made by him on the premises, was a termination of the tenancy, and if the jury so found the distress was void.

The declaration contained the usual allegation of rent due, the taking of the goods in distress therefor, the impounding, and the pound breach by defendant.

There were three pleas, not guilty, a denial that the plaintiff had taken the goods as alleged, and a traverse of the impounding by the plaintiff.

At the trial I declined to nonsuit on the grounds set out in the rule, and withdrew from the consideration of the jury the two matters therein upon which a new trial is now asked, and upon which defendant sought to give evidence in justification of his pound breach; confining him to his pleadings and to the issue raised on the record.

There does not appear to be any question as to the law in this matter. It may be taken to be settled law, that in an action for pound breach the defendant cannot justify the breach on the ground either that the distress was without cause or that the plaintiff had no title to distrain; "the reason being, that the goods once impounded are then in custodia legis," and the defendant has no right to retake them, and if he does, he becomes a wrong-doer.

Cotsworth v. Bettison, 1 Ld. Ray 104 (decided in 1696), has never been questioned, and has been repeatedly confirmed by the more recent authorities. In that case it was argued, that if plaintiff had no title to the place where the animal was seized damage feasant, he could not distrain it, and consequently the distress was tortious, "and if the distress was tortious the impounding was tortious also, and then the defendant might well justify the breach of the pound." But per curiam, "if a distress be taken without cause and impounded, the party cannot justify the breach of the pound to take it out of the pound because the distress is now in custody of the law; that all other precedents in parco facto are in this manner."

Parrett Navigation Co. v. Stover, 6 M. & W. 564, decided in 1840, where the question came up on demurrer, upheld Cotsworth v. Bettison, holding that a declaration setting out only (without shewing right) a distress and an impounding was sufficient, as goods being alleged to have been impounded they were then in custody of the law, and the defendants had no right to retake them, and in doing so were wrong-doers. Castleman v. Hicks, 1 Car. & Mar. 266, Smith v. Wright, 6 H. & N. 820, Turner v. Ford, 15 M. & W. 212; and the late case of Jones v. Burnstein, [1899] 1 Q. B. 470, all confirm the law that goods impounded are "in custodia legis," without right on defendants part to retake.

Counsel for defendant cited two cases as opposed to this position, Browne v. Powell, 4 Bing, 230, and Berry v. Huckstable, 14 Jur. 718.

The decision in Browne v. Powell was, that a tender was not too late, as the facts shewed that the detainer on the premises was not an impounding, the cattle being on the way ultimately to a public pound. Best, C.J., it is true suggested that impounding in the pound of the Lord of the Manor was the only one sufficient to make a tender of amends too late, but he expressly refused to decide the case on that ground.

That distinction has never been revived in any subsequent decision. The authorities since the passing of 11 George II. ch. 19 (1738), whereby, in the interest of the tenant, the distrainer might impound the goods on the premises, recognize no difference in an impounding on the premises, or in a public pound, except that in the case of

animals, where they are impounded on the premises, the distrainor has to feed them, but otherwise when they are in a public pound. Cotsworth v. Bettison, Parrett Navigation Co. v. Stover, and Jones v. Burnstein, are all cases in which the impounding was made on the premises; and in them the doctrine of the goods being "in custodia legis" by reason of such impounding was established—a doctrine founded on the need for the peaceable enforcement of legal process, and for the prevention of lawless rescue, and as needful, if not more so, when the chattels are impounded upon private premises, as when in a parish pound.

In the other case cited, Berry v. Huckstable, the decision does not support defendants' contention. It went no further than to hold that a plea traversing the allegation in the declaration that the plaintiff was landlord was good as shewing that defendant did not hold of plaintiff as tenant, and therefore that plaintiff was not a "person aggrieved" under Statutes II. Wm. & M., ch. 5, and 11 Geo. II., ch. 19. It decided nothing more than that a plea similar to those pleaded here is good in law.

I think it is equally clear that the matters urged by the defendants as a justification for his pound breach could not be given in evidence under the plea pleaded by him. Castleman v. Hicks, 2 M. & Rob. 422, Myers v. Smith, 9 N. B. 207. Such issues could only be raised by special pleas which, had they been pleaded must under the authorities quoted, have been held bad on demurrer.

It is not necessary, taking this view of the case, to consider whether there was or was not a breaking by the landlord, or an eviction of his tenant by him. But it may be advisable to consider these questions.

After a careful review of the evidence and the authorities, I am of the opinion that there was neither.

The first is a matter of law, the facts being undisputed, and the two comparatively recent cases of Nash v. Lucas, L. R. 2 Q. B. 590, and Long v. Clarke, L. R. 1894, 1 Q. B. D. 119, wherein the case of Sandon v. Jarvis, 28 L. J. Ex. 156, is cited and approved, settle I think the law as to what is a lawful entry in making a distress.

The sole question is, what limitations the law imposes on a landlord in making it. He is a trespasser but is so permitted by the law of distress, but he must break nothing. He can enter through any opening, an unfastened door, an

open window, a hole in the wall, or over the wall, provided he does not break and enter, Long v. Clarke.

The evidence in this case shews that the door was opened for the landlord by the servant of the tenant, without any collusion with him, voluntary opened, and that he went in without breaking. In Sandon v. Jarvis, cited with approval in Nash v. Lucas, the officer touched the execution debtor by putting his hand through a pane of glass in a window which had been broken in a scuffle to which the officer was a party, though the pane was not broken by him, and it was held a legal arrest. The window being open the arrest was held lawful; and because it was opened, or broken open by some one, not in privity with the officer—by some trespasser maybe—the officer was justified in using such opening in making the arrest.

To hold that it is a breaking for a landlord making a distress to enter a door opened by the tenant's servant, without privity of intent—for of course with privity the act of the agent would be the act of the principal—to my mind could only be done confusing a trespass with a breaking. The act of entry is a trespass, but a lawful one by a landlord making a distress without a breaking; and once in without such breaking the landlord could enter and re-enter at his pleasure with or without a breaking, Sandon v. Jarvis (supra), and Mahomed v. The Queen, 4 Moore, P. C. 239.

That there was no eviction or intent to evict I think the evidence shews plainly, but that is a matter which if material to the issue, the jury should determine not I. Not being a matter of justification in the action I withdrew it from their consideration.

The want of inventory and notice I only refer to—as it is not a matter of justification in this suit, that it might not be thought I had any doubt upon the matter.

Our Statute 12 Edw. VII. ch. 12, sec. 1—in part a transcript of (Imp.) 2 Geo. II. ch. 19, sec. 19—covers all irregularities made or done after the distress had been made. The delivery of the inventory, and affixing of the notice of distress are undoubtedly both acts required to be done in making a distress, as well when the landlord distrains in person as when by bailiff. Both of these acts must necessarily be done after the distress has been made, but since the Act the irregularity of not performing them does not make the distress unlawful, nor the party making it a trespasser, the

tenant's remedy being in damages for the injury done him, Myers v. Smith, 9 N. B. 223, Attack v. Bramwell, 3 B. & S. 529.

The 6th ground asking for a nonsuit requires no comment. There was no attempt made to prove any second distress.

The rule must be discharged with costs.

PRINCE EDWARD ISLAND.

COURT OF CHANCERY.

FEBRUARY 13TH, 1911.

IN RE ROBERT McLAURIN LEGACY.

Will — Object of Testator's Bounty — Mistake — Name — Evidence—Admissibility.

G. Gaudet, for executors.

J. A. Macdonald and K. J. Martin, for petitioners.

Donald McKinnon, for Zion Presbyterian Church.

FITZGERALD, V.-C.:—This matter comes before me on a payment into Court of the sum of $375 by the executors of the will of the late Robert McLaurin under the provisions of the Trustee Act, 1910.

In the affidavit filed at the time the executors ground their right to make such payment on the wording of a particular bequest thus written in testator's will.

"To St. James Presbyterian Church the sum of Three hundred and seventy-five dollars which I owe to it," and to certain facts which came to their knowledge since the decease of the testator and pending their administration of his estate.

The trustees of St. James' Church now appeal by petition to have this legacy paid to them.

That I might be fully satisfied as to the facts so sworn to, I heard oral testimony—subject to the objection of the petitioners that no such testimony was admissible.

From this testimony it appears that there are two Presbyterian churches in this city, the testator's residence, one known as St. James' Presbyterian Church, the other as Zion Presbyterian Church. That the deceased was a life-long adherent and pew-holder of Zion Church, and a regular contributor to its support. That at the time of his death he was under obligation to pay to it the sums set out in the following account:—

1907.		
December 13	—To subscription to building fund of new church per his note for $100 for three years	$300 00
1909	—To amount due on current account as a contributor to its support..	30 00
	To additional subscription towards repairs and extra expenses.....	25 00
		$355 00

That deceased though he occasionally attended St. James' Church was not an adherent of it, did not subscribe towards its support and owed nothing to it. Both churches are in connected with the Presbyterian Church of the lower provinces.

I am asked to determine whether under these circumstances the executors can pay this legacy to St. James' Presbyterian Church as well as satisfy the testator's obligations mentioned, to Zion Presbyterian Church.

Many authorities were pressed upon me in support of the contention of the petitioners that no extraneous evidence either by affidavit or orally is admissible to shew to which of these churches this legacy is payable; most of them being decisions that no evidence is admissible for the purpose of indicating a testamentary intention.

It is not my purpose to review them, as undoubtedly this Court is not entitled to enquire into the intention of the testator apart from the language which he has used. In the goods of De Rosa, 2 L. R. 2, P. D. 66—to quote one case out of many settling the law in this respect.

This evidence can only be admitted upon another and quite a different principle. That is—as expressed by Lord Cairns in Charter v. Charter, L. R. 7 H. L. 377. "In all

cases of testamentary dispositions the Court has a right to ascertain all the facts which were known to the testator at the time he made his will, and thus to place itself in the testator's position in order to ascertain the bearing and application of the language he uses; and in order to ascertain whether there exists any person or thing to which the whole description given in the will can be reasonably and with sufficient certainly applied. Or, as Sir J. Wigram in his fifth proposition—quoted with approval in all cases—states it:—

"For the purpose of determining the object of a testator's bounty, a Court may enquire into every material fact relating to the person who claims to be interested under the will, and to the circumstances of the testator and of his family and affairs, for the purpose of enabling the Court to identify the person intended by the testator."

Many cases establish this principle as a correct statement of the law. I cite several. In the goods of Brake, L. R. C. P. D. 217. In Re Nun's trusts, L. R. 19 Eq., 331. In Re Wolverton, L. R., 6 Ch. Div., 197. In Re Fry, 22, W. Rep., 879, on appeal 813. In the goods of Chappell, L. R. (1894), p. 98. I only refer particularly to the latest of them, not cited on the argument: In Re Ofner, L. R. 1909, 1 Ch. 60, in which Farwell, L.J., held that in construing a will the Court has to ascertain not what the testator actually intended as distinguished from what his words have expressed, but what is the meaning of the words he has used. And any evidence is admissible which in its nature and effect explains what the testator has written, but none to shew what he really intended. And applying that principle to the case before the Court it reversed the decision of the Judge below and admitted evidence to shew that the name "Robert Ofner" in a bequest to "my grandnephew, Robert Ofner," was a mistake for Richard Ofner, it appearing that the testator had a grandnephew Richard, but none of the name of Robert.

The evidence adduced before me was, I think, properly admitted. It is confined entirely to the facts and surrounding circumstances explanatory of the testator's position and affairs at the time he made his will.

Looking at it as explanatory of the object of testator's bounty, I have to determine from the words used whether the testator meant the legacy for St. James' Presbyterian

Church, or for Zion Presbyterian Church; or shortly, is the word "St. James" a mistake for "Zion."

The words "which I owe to it" must be read with the other words of the bequest. They intend to state a fact. They make known the inducement for the legacy. They shew a ground work for the testator's bounty. They are a district ear-marking of the beneficiary to be. And now it appears as regards one of these churches named that the words are truly descriptive of a fact in relation to it. The testator at his death did owe Zion Church practically that amount.

The Court placing itself in the testator's position at the time he made his will knows that he was under an obligation to Zion Church, and his will shews an intention of satisfying an obligation to a church. As In the goods of Chappell, although the will on the face of it appears clear, directly you come to see who the person or thing in existence is, to whom it is meant to apply, it is found there is no person exactly answering the description, one answering correctly as to name, the other as to the testator being indebted to it. It is for the Court then to say which of the two it was the testator meant.

'St. James Presbyterian Church" correctly answers as to the name; "which I owe to it" correctly describes Zion Presbyterian Church as the church to which testator was indebted. I think the determining factor in arriving at testator's meaning is that one upon which there is no doubt, viz., the fact of an indebtedness to a church, which as the will shews, the testator desired to manifest. Momentarily to confuse the names of two churches in the same communion he might easily do. Wherein did the testator make a mistake? He made none as to his indebtedness, he did owe that amount. Was not the mistake made in the name? I think it was—bearing in mind the testator's expressed object and inducement in making this legacy at all, and that he was making provision for a church because he was indebted to a church, and that there was a greater likelihood of the mistake being made in the name than in the description.

The case of In re Fry, is a case in point where a similar difficulty presented itself to the Court. The words "my servant" were there held to control a devise, so that "Susannah Cole" was made to read "Ann Cole" because the

latter was then testator's servant, while the former had left his service, and had married; though it was quite possible that the testator intended the legacy for his old servant.

It appears to me that the circumstances here enable me to say, and I think there is sufficient evidence in this case to shew, that the testator when he used the name "St. James" in his will, by that he expressed "Zion."

I do not refer to the authorities quoted in support of petitioner's contention that these words "which I owe to it" are "falsa demonstratio," and whether there was or was not a debt due to St. James Presbyterian Church it would take by the bounty of the testator. We are here determining an initial question, viz., Is this church a legatee under the will at all? Does this bequest refer to it at all? Until that question is settled it is useless to discuss whether certain words in it render the legacy unavailable to the petitioners as legatees; for if they are not legatees they have no interest in the matter.

The order will be for payment to the Trustees of Zion Presbyterian Church.

There will be no order as to costs.

NOVA SCOTIA.

SUPREME COURT.

FULL COURT. FEBRUARY 19TH, 1911.

CROSBY ET AL. v. THE YARMOUTH STREET RAILWAY COMPANY AND THE YARMOUTH ELECTRIC COMPANY.

Waters and Watercourses — Blocking Stream by Dam — Riparian Rights — Obstruction to Mill — Damages—Injunction.

Appeal from the judgment of LAURENCE, J., in favour of plaintiffs in an action claiming an injunction to restrain defendants from backing up the waters of the Carlton branch of the Tusket river by means of their dam in such a way as to obstruct the operation of plaintiffs mill, and damages for such obstruction.

H. Mellish, K.C., and W. H. Covert, K.C., for appellants.
W. B. A. Ritchie, K.C., for respondents.

The judgment of the Court was delivered by

GRAHAM, E.J.:—The evidence shews that the dam in question, called the Electric Dam, on the Carlton or western branch of the Tusket River, is so constructed that it raises the level in that river to such an extent that the water interferes with the wheel of the plaintiffs' mill situate some distance above it on that stream. The evidence of the engineers, one on each side, besides a mass of evidence given by other witnesses, proves that fact. It is a material interference with the operation of the plaintiffs' mill.

Mr. Thomas says:—"One mile and three-quarters between the two dams. Then took elevation of bottom of plaintiff's lower water wheel. It was 20-18-82 or ten inches below elevation of electric dam spill-way. . . . I examined water wheel of plaintiffs'. Marks of water 30 inches up on wheel. . . . Head of water about seven feet. When 19 feet of water in electric dam there would be four inches water on plaintiffs' mill wheel. The outflow of water has been arrested by electric dam and velocity of stream reduced and pressure up-stream increased. This would cause an elevation up-stream. There should be 18 feet of water at electric to raise the water to bottom of plaintiffs' mill wheel. The dead water in space between water wheel and platform decreases efficiency of wheel. Seventeen feet of water at electric dam there would be no back water. The electric dam caused the back water."

Mr. Yorston says:—"With a head of seven feet a wheel submerged one foot in water its power would be diminished one-seventh and this is so whether still or running water. Deduct height of water on wheel from total head and you have the loss of head or power. If the raise of water is two feet in the river at the wheel there would be one foot of water on Crosby's wheel. A rise of two feet at the Crosby mill would indicate two feet at electric dam."

The evidence of witnesses not engineers is very convincing. Some of them prove a comparison between the state of things before the construction of the electric dam and also during a period when it was carried away with the conditions when it was in existence, and this shews the raising of the level of the water. There is also this striking

fact that other mills using the same dam have had similar effects produced during the same period.

There is evidence of an admission in the negotiations as to the height the defendants would raise the water, which supports the plaintiffs' contention. I agree with the finding of fact by the learned trial Judge.

The defendants made a contention in law to the effect that neither of these plaintiffs was in the position of a riparian owner and entitled to the privileges which they claimed has been interfered with. The plaintiffs' deed and a deed to his grantor have been put in evidence and the description shows that he is a riparian owner of the site and the premises owning to the centre of the river. The mill dam at one end rests on it and at the other end upon the opposite bank. No doubt these opposite properties being interested in the dam and water, have made an arrangement about the proprietorship of the dam. It is perfectly competent for them to do this, and as to the terms of that arrangement the defendants have nothing to say. I refer to Sanitary District Co. v. Adam, 179 Ill. 406.

The proprietors of the mill on the opposite bank were witnesses for the plaintiffs, and the defendants did not elicit from them any testimony to shew that there was not an arrangement between them as to the maintenance of the dam. The dam has been in existence for 70 years.

Something was said as to an intervening privilege in a third person between the plaintiff's mill and the plaintiff's bank, namely a flume carrying water from the mill pond to a mill which was lately in operation but is now rotted down on the other side of the road and running across the plaintiff's land. But that privilege does not sever in two parts the plaintiff's site or cut off his rights as a riparian proprietor. Howard A. Crosby says:—"Between our mill and bank there is a flume leading to Ben Annis' mill. Our site extends to and includes bank. This diagram represents the locality. My brother owns the land on the east bank. Have our yard there and our office."

The form of action is brought into question. The learned trial Judge has given a judgment to both plaintiffs against both defendants for $500 damages and for a restraining order. The plaintiff, Lorenzo G. Crosby, owns the property and the plaintiff, Howard E. Crosby, his brother, occupies it as a tenant from the other plaintiff.

The defendant, the Yarmouth Electric Company, has constructed and owns the electric dam and the site. It owns a majority of shares in the Yarmouth Street Railway Company. The railway company, apparently operates the dam and controls the raising of the water for the purpose of using power therefrom. Blake G. Burrill is the president of the railway company. The plaintiffs' solicitors, in a letter addressed to both companies, before action, made the complaint in respect to which the action is brought, and Mr Blake G. Burrill replied by a letter to which he signed the railway company's name. He also, later, wrote a letter in his own name addressed to Mr. L. G. Crosby. I infer from these letters that the Yarmouth Railway Company was actually engaged in operating the dam. In the first letter the company speaks of it as "our dam," and says:—

"It has always been our intention as soon as we demonstrated that we would interfere with any operators to approach such operators and arrange a method whereby their operations would not be interfered with."

In the later letter Mr. Burrill says:—"We received request from Mr. Howard, your brother, a few days ago to lower water on our dam, as I understood the message he wished to make repairs. We lowered the water to a point which we deemed adequate, and next day one of men going up to mill found nothing doing and no one about the mill. Again, a day or two later, we received request to lower the water as your brother desired to say. We accordingly lowered water again, and on going up to mill on the following day found nothing doing, your brother being up river in his motor boat."

"To-day is the third of very heavy rains, a real freshet, I fear, so I judge that for a few days sawing mill will be out of the question, as same as applied in the past before our dam was erected. Our superintendent was in error when he advised me that 17½ feet on dam would be adequate for our purposes. At this season, when the lighting comes on before 6 p.m. and before the motors in the various factories have shut down, these items plus the car load gives us about all we can handle. We are still of the opinion, however, that a foot of water off the dam will not interfere with the operation of your mill. A few days ago when in Carlton the water was going over spillway and yet Durkee & Nicholls, I noted, were running their mill."

Mr. Yorston says:—"Electric dam is used to generate current. Know that R. R. Co. is run by electricity. Transmission wire brings current to Yarmouth to the Electric Company which runs the street raiway in Yarmouth."

Lorenzo G. Crosby says:—"He (Mr. Blake Burrill, the president of the street railway company) agreed that water would be kept down hereafter to 17 feet of water in their pond. I so informed my co-plaintiff in presence of Burrill. He said to Burrill, 'If you do that I don't think it will hurt us.' This last of October 1909. After this had correspondence with Burrill."

Howard A. Crosby says—"Brother here in 1909. Last of October. Saw him and Blake Burrill together. He, brother, asked me if 17 feet of water would hurt mill. I said that would be all right to Burrill. Blackburn (the superintendent) said 'we cannot do with less than 21 feet of water.' He, Burrill, said Blackburn had nothing to do with it, I am manager."

Neither Mr. Burrill nor Blackburn nor any official of either company went into the witness box. Their only witness was Mr. Yorston, an engineer.

In so far as the restraining order is concerned I am of opinion that both plaintiffs are entitled to maintain the action against both defendants. The owner, Lorenzo G. Crosby, has a right as revisioner to maintain it in view of danger of being treated as acquiescing (Gale on Easements, 582) and the other plaintiff is receiving present injury. I have shewn reasons for inferring that both companies are responsible for the wrong. I refer to the case of White v. Jamieson, L. R. 18 Eq. 303. As to the damages there is a difficulty. The plaintiff, Howard A. Crosby, the tenant, is the only plaintiff entitled to damages other than perhaps nominal damages. But this part of the decision may be varied. Notwithstanding the joinder of the two plaintiffs one of the plaintiffs may recover severally as well as jointly with his co-plaintiff. Under O. 18, r. 6, "claims by plaintiffs jointly may be joined with claims by them or any of them separately against the same defendant."

Then I am of the opinion that the amount of damages is too large. They are assessed at $500. The period of injury is supposed to begin in August 1909. The learned Judge has allowed this sum on the basis apparently (I say that because the plaintiffs claimed it before him) of a loss

of profits from two verbal contracts made, one, the 1st of August with Jas. C. Graham to saw 600,000 feet at $3, and one with Max Nicholl, made in the summer while water was down, to saw for him 50,000 feet at the same price and profit, to be sawn after Graham's. Graham's contract was off in a week; the logs were not even cut down in the woods; never were cut by Graham anyway. The same thing happened in Nicholls' case. The cutting would not take place in the ordinary course until September or October. They say, of course, that they foresaw the trouble about the waters backing up and did not even effect a start.

This electric dam was not finished until the last of March, 1909, and it broke in a few days. It was complained about on April 12th. It was repaired in August, 1909, and the water turned on again. The plaintiff on the 19th of August commenced to note the height of water shewing on his wheel. I think there was not much opportunity for making the deductions which Graham and Nicholl made. The objection to allowing the profits on those verbal contracts is that they were not sufficiently certain to be realized by performance of the contracts. They were too speculative and contingent and they were not necessarily in the contemplation of the defendants when they operated the dam injuriously. There is no proof that the defendants even suspected the existence of such contracts. Hadley v. Baxendale, 9 Exch 341; Pictou Foundry Co. v. Archibald, 30 N. S. R. 262, at 269; Walrath v. Redfield, 11 Barb, 368; Schuylkill v. Freedly, 6 Whart. 109.

The case of Bruhm v. Ford, 33 N. S. R., 323 would seem to exclude recovery for loss of profits in any case and to make a rental value the basis. But evidence of a loss of profits even in a mill case has been considered useful. The cases are mentioned in Fibre Co. v. Electric Co., 95 Maine, 327; Simmons v. Brown, 73 Am. Dec. 66; White v. Moseley, 8 Pick. 359.

In estimating the plaintiffs' damages it would not be correct to assume continuous operations. One witness says that the mills at this place do not saw in January, February or March. One of the plaintiffs says no logs in my dam in September to be cut. The logs contemplated under the two contracts I have mentioned would not in the ordinary course have reached the mill until after that date. The negotiations with Saunders were not made until February,

1910. The action was brought 2nd April, 1910. This plaintiff says he had logs of his own sufficient to produce 350,000 in the pond that spring. He worked 33 days at them. He only produced three and a half thousand a day, which would not pay hire. When there was no obstruction he says he sawed on some days during that summer as much as five and a half thousand. In my opinion $150 would compensate him for his loss in this way. To which must be added $15 for an injury to the lower floor and platform of the mill.

The plaintiff, Howard A. Crosby, alone will have judgment for damages in these sums and the judgment will be varied accordingly.

As to the costs of the appeal there will be no order.

PRINCE EDWARD ISLAND.

COURT OF CHANCERY.

E. R. BROW v. SIMON W. CRABBE AND MARK WRIGHT.

Bill of Sale—Delay in Registration—Effect of.

W. E. Bentley and G. Gaudet, for complainants.

W. S. Stewart, K.C., and J. A. Mathieson, K.C., for defendant Crabbe.

K. J. Martin, for defendant Wright.

FITZGERALD, V.-C.:—This bill was filed in the name of the assignee by certain creditors of the above named insolvent Mark Wright, under an order made by me on the 16th day of April last, made under the provisions of the Provincial Statute, 61 Vict. ch. 4, respecting assignments for the benefit of creditors.

The insolvent demurred to the bill on the ground that he was not a necessary or proper party, and should not have been joined therein as co-defendant. On the 7th October last judgment was given upholding the demurrer, and his name was struck out of the bill as joint defendant.

I have given this case no little degree of thought and research, and though materially assisted by the argument of

counsel on both sides, I have found myself at times perplexed by apparently irreconcilable decisions.

I will first consider the law, and afterwards state the facts as I find them.

The principle decided in Ex parte Fisher, L. R. 7 Ch. App. 663; Ex parte King, L. R. 6, Ch. D. 256; In Re Gibson, L. R. 8 Ch. Div. 230; Ex parte Kilner, L. R. 13, Ch. Div. 254; Ex parte Hauxwell, L. R. 23 Ch. Div. 626; and in Re Jackson v. Bassford, L. R. 1906, 2 Ch. 466, in which Mr. Justice Buckley has so lucidly reviewed most of these cases is, I think, clear.

I think it may be stated thus:—

When the giving of a security is purposely postponed until the trader is in a state of insolvency, in order to prevent the destruction of his credit which would result from its registry, such a postponement is evidence of an intention to commit an actual fraud against the general creditors.

Or, in other words, that in such a case, the promise or agreement to give the security cannot be legally given effect to by calling for performance at a time when in the absence of the promise the security would have been a fraudulent preference.

In these cases such previous promise or agreement had been made for value and during the solvency of the debtor. But the Courts, while admitting that when a sum of money is advanced on the faith of a promise that a security will be given, the rule is that such sum is to be treated as a present advance on such security, refused to protect such transactions when the giving of such security was designedly postponed for the purposes I have stated. In all of them the reason for such postponement was the necessity for registration within a given time, with its consequent notice to creditors and the destruction of the traders credit; resulting as Chief Judge Bacon said, in this position on the part of the lender, viz.: "I will not take your bill of sale now, because I must register it, and if I register it your credit will be destroyed."

To apply this principle to cases where, though there is no delay in the execution, there is one in the registration of the security it was contended was only rational; the object of both transactions being the same, viz., to bolster up the credit of the debtor, and on insolvency to obtain a preference.

In Ex parte Hauxwell, Lord Justice Lindley apparently recognised this, when he says, "If I thought that there had been conniving at the non-execution, or non-registration of the bill of sale I should not have hesitated for a moment to apply the doctrine of Ex parte Fisher;" and Strong, Chief Justice, in Clarkson v. McMaster, 25 S. C. R. 96, makes the same application to an agreement between a mortgage and mortgagee of a chattel mortgage that there should be neither registration nor immediate possession, saying, "whether the mortgagor was or was not insolvent at the date of the mortgage, the agreement in my opinion constituted what has been called a fraud upon the statute, and this upon the authority of Ex parte Fisher—in itself constitutes a distinct ground for holding the mortgage to have been a nullity as against creditors from the beginning, and therefore void as against them."—Barker, C.J., in Took Bros. v. Brock & Patterson, 3 N. B. Eq. 496, commenting on that case says: "The Chief Justice in that case holds the principle of Ex parte Fisher, applicable to cases where assignments are attacked under the Preference Act, and I can see no difference in principle when, in order to avoid the destruction of credit which results from a registry of a chattel mortgage, there is an agreement not to register, and where there is an agreement not to give the bill of sale until it is required, as in the case of Ex parte Fisher in order to avoid the destruction of credit by registry."

It would thus appear from these cases that an agreement to refrain from the registration of a security, equally with a postponement of the giving thereof, at the instance and for the benefit of the bankrupt, is evidence that the assignment was made with the intent to defeat or delay creditors within the meaning either of the Act 13 Eliz. ch. 5, or the sections—common to all such legislation—of 61 Vict. ch. 4, making void preferential assignments executed with such intent.

I now, however, have to refer to a case decided in the Privy Council in 1895, on appeal from the Supreme Court of New South Wales, In re Cook, Morris v. Morris, L. R. 1895, A. C. 625.

That was a case in which it was admitted that an advance had been made in good faith to a person then solvent, the creditor then taking as security a bill of sale of all the stock in trade, book debts and other property of the grantor. Of which security at the time of its execution it was admitted

that the grantee was prima facie entitled to the benefit. He did not, however, register it, and possession was not taken until immediately before the bankruptcy.

The Colonial Court of Appeal held that the doctrine of Ex parte Fisher applied, and "that there was a close analogy between the case of postponing the giving a bill of sale, and postponement in entering into possession."

Their Lordships of the Privy Council decided otherwise, as I read their decision.

They at the outset dealt with the evidence in reference to the registration of the bill of sale, evidence in which there was a conflict whether the registration was postponed to save the credit of the bankrupt, or only at the personal desire of the grantee. They held that "the sole reason" for non-registration was that given by the grantee, and that there was no agreement that it was at the instance, and for the benefit of the bankrupt.

This finding would have ended the matter, had it not been found by the Judge of the Court of first instance that the bankrupt informed the grantee that he would give him information if his circumstances should become precarious so that the grantee could either register the bill of sale, or take possession under it. The Court of first instance held, admitting that the bankrupt volunteered to give this information, that did not shew an intent to defeat or delay creditors. This holding their lordships upheld, and in doing so considered the principle enunciated in Ex parte Fisher.

They narrowed the issue to the question with "what intent was the assignment made, and not why the grantee refrained from registering, or postponing taking possession," and seeing no evidence that the assignee was otherwise than a perfectly honest and straightforward one, held that there was no other intent on the part of the grantee than "to obtain security for his loan," and said, "it was immaterial to enquire why the appellant (the grantee) refrained from registering, or postponed taking possession. He was under no legal obligation to do either. No doubt unless he registered or took possession, he incurred the risk of losing his security. So long as he did neither his security would have been avoided by an execution in bankruptcy. But he was entitled to run this risk if he pleased. Subject to this risk the law in England as well as in New South Wales, allows a

title to be acquired by an assignment without delivery of possession."

To this expression of opinion, Lord Herschell in giving judgment, also added the following:—

"It is quite true that credit may probably have been given to the bankrupt after the date of the bill of sale which he would not have obtained if that transaction had been made public, either by registration, or a change in possession. But when the Legislature determined to interfere with secret bills of sale they did not consider all assignments void unless accompanied by delivery or followed by registration. The operation of the Bills of Sale Act was much more limited."

Their lordships, in conclusion, said that they saw no analogy between the case of postponing the giving of a bill of sale, and postponement in entering into possession, holding that "in the case under appeal, the bill of sale was granted in respect of a present advance by a person not shewn to be insolvent. The title of the grantee was then complete, and did not depend upon his taking possession, though, owing to his not doing so, the provisions of the Bills of Sale Act might in certain events have deprived him of his security. Beyond this his title was unaffected by it."

The Bills of Sale Act of this province is similar to the one considered in the above case in that it does not necessitate registry, and allows a title to be acquired under chattel mortgages without possession or registration, only avoiding them, as to third persons who are execution creditors or are holders of registered bills of sale.

The case of Morris v. Morris is the only English case in which the question of non-registration as the single element of intent to defeat and delay creditors is considered.

It distinguishes Ex parte Fisher, (and necessarily the other cases following in support of it), as being a case where the bill of sale relied on was given by an insolvent person without any present advance, and which of itself could not avail the grantee; as one in which the grantee invoked the aid of a prior promise made at the time of the advance, but which, for the reasons given, the Court held would not avail him, and declined to see any analogy between the postponement of the giving, and of the registration.

I am bound by Morris v. Morris, and if I have construed it correctly, I must hold that a perfectly legal and bona fide assignment finished and completed at the time the ad-

vance is made to a solvent person, cannot be attacked under our Bills of Sale Act for the reasons contended for here; and that its non-registry, even when registry is delayed until the grantor should give the grantee information that his circumstances are precarious, does not invalidate it under the Act of Elizabeth or of our statute making void preferential assignments.

Now I refer to the facts of the case before me.

I find that the bill of sale for $2,500 mentioned in this bill of complaint, given by the insolvent to the defendant Simon W. Crabbe, on the second day of November, A.D. 1908, was a bona fide assignment, and was given and executed at that date to secure an indorsement by the defendant of certain notes to that amount, the amount of which notes was to be, and was used by the grantor as an additional capital in a new business then engaged in by him.

That at such time, so far as appears, the grantor was solvent, and that the defendant had no reason to suppose otherwise.

I further find, though the defendant denies it so far as his memory serves, that after its execution when defendant shewed it to the grantor asking what he would do with it, that the grantor said to him, "You will have to do what you like. Of course it will suit me better if you put it in your safe. I have no request to make. I will not ask you not to register it, it is up to you to do as you wish;" to which defendant answered, "all right I will see."

I see no reason to doubt the grantor Mark Wright's truthfulness, and as against the denial of this fact by the defendant in this form, "we had no conversation about the bill of sale at all, that I remember of in any shape or form," I must accept the affirmative oath of an occurrence by one whose credibility I have no reason to doubt.

I further find that the defendant did put this bill of sale into his safe, as suggested, and did not register it until the 25th day of January, A.D. 1910, when he ascertained that the grantor was seeking a compromise from his creditors, and on asking him found that it was so and when as he stated in his evidence, "he thought it was time he recorded the bill of sale," and when as a fact the grantor was undoubtedly insolvent.

I am unable to see any difference in the facts in this case and those in Morris v. Morris. In both a legal and bona

fide assignment is executed at the time of the advancement, and by a solvent person. In both, possession or registration is delayed until insolvency, the delay in one being until information is given him by the grantor—under voluntary promise to do so—that his circumstances are precarious; in the other the delay being after the suggestion of the grantor that it would suit him better for the grantee to put the document in his safe, but leaving the grantee perfectly free to register or not just as he wished.

I must, therefore, under the authority of this case decline to hold this bill of sale is null and void as prayed for, consequently the bill of complaint must be dismissed with costs.

NOVA SCOTIA.

SUPREME COURT.

APPEAL.

FULL COURT. FEBRUARY 4TH, 1911.

SHAND v. POWER.

Trespass—Land—Occupation of Premises under Agreement to Purchase—Breach of Contract—Possession—Assault.

Appeal from the judgment of LAURENCE, J., in favour of plaintiff in an action claiming damages for trespass and for assault.

J. J. Ritchie, K.C., in support of appeal.

G. A. R. Rawlings, contra.

SIR CHARLES TOWNSHEND, C.J.:—The learned trial Judge in my opinion erred in the view he took of this case and in the conclusion at which he arrived. There is no evidence whatever of any assault, even if an assault were properly charged in the statement of claim, which has not been done. The plaintiff occupied a house owned by the defendant under an agreement to purchase. The time for performance of that agreement had long expired without a dollar having been paid. The defendant had demanded possession, but the plaintiff and family continued in occu-

pation. The law justified the defendant in regaining possession provided he could do so peaceably and without any breach of the peace. The defendant and his agents did for the day get into the house without violence and the plaintiff retired to an adjoining house, but returned in the evening, when defendant and his agents retired, and she still retains possession of the house although defendant has a clear right to it. There is some evidence of furniture and mats being disturbed by the men, but even taking plaintiff's own account, which is denied by defendant's witnesses, the disturbance was of the most trivial character, and, finally, there is no claim for injury or disturbance of personal property.

The defendant, as I have pointed out, being the owner, and at the time entitled to the immediate possession, must certainly recover on his counterclaim in ejectment. There is no valid defence made out to his right of recovery.

In the result the judgment for damages must be set aside and the action dismissed with costs, and the judgment dismissing the counterclaim must be reversed and judgment entered for the defendant with costs and the costs of this appeal.

GRAHAM, E.J.:—The Birbeck Company had foreclosed its mortgage and bought in at the sheriff's sale the house of Shand now in question. It sold again to Shand for $500, but Shand had to borrow the money from Power and the deed was made directly to Power and an option to purchase was given to Shand, enabling him to purchase within three years from the 6th of April, 1906, and this term had elapsed. It is not clear whether the sheriff gave a deed to anyone or not but if he did not the deed of the Birbeck Company would be effective as an assignment of the mortgage. All of this time Shand remained in possession, or, rather, his wife the present plaintiff and his sons did, for he went abroad recently.

It may be that Shand had a right to redeem, but this is not material in this case, for the defendant Power had the legal title.

He tried to get possession and took two or three men with him, and they did enter the house while some of the family were in and they occupied it for a few hours. They were drinking in the house and Mrs. Shand was frightened,

but in my opinion there was nothing which could be called an assault. She has brought an action of trespass and also for an assault, but I think she cannot succeed. As between the case of Newton v. Harland, 1 M. & G. 644, and Harvey v. Brydges, 14 M. & W., at p. 442, Lord Selborne in Laws v. Telford, 1 App. Cas. 426, seems to recognise the latter by saying:—

"And in Harvey v. Brydges it is pointed out that so far as relates to the fact of possession and its legal consequences it makes no difference whether it has been taken by the legal owner forcibly or not."

It is unnecessary to say whether under Beddal v. Maitland, 17 Ch. D. 174, the defendant would have been liable in damages notwithstanding if an independent assault or injury to furniture had been committed, because no such assault or injury in fact took place. The action is misconceived.

As to the counterclaim to recover the land the plaintiff in her pleading in reply does not allege as a defence that she is not withholding the possession. I say this because it is not clear whether she remained in or not, or whether Power continued to hold possession. Therefore the defendant is entitled to succeed upon the counterclaim.

The appeal must be allowed with costs.

RUSSELL, J.:—The decision in this case seems to be put on the ground that defendant committed a trespass in taking forcible possession of his property. The cases are clear that while it may be an indictable offence to so enter the entry is not an injuria for which damages can be claimed. But it is said that there was an assault and if there was, damages could be awarded on that account if their is a claim for assault. I think the statement of claim, although informal, is sufficient in this respect, but I can find no evidence whatever of any assault.

The defendant's counterclaim in ejectment should not have been dismissed. Plaintiff was in possession and claiming the right to hold the property adversely. Her husband had entered into an agreement based upon defendant's title under a deed from the former mortgagee who had foreclosed and sold. It is contended that defendant merely advanced money to enable the plaintiff's husband to secure his property and that the relations between the latter and

the defendant were those of mortgagor and mortgagee. This does not seem to me to make any substantial difference. The defendant has the legal title to the property and the right to bring an action of ejectment whether as absolute owner, as would appear from the face of the documents, or as mortgagee, the time having expired for payment under the agreement. The defence to the counterclaim raised in the plaintiff's reply which is brought into the defence to the counterclaim by reference is really no defence at all and under the former practice would have been demurrable. It shews no equity. The counterclaim is rightly brought against the party actually in possession and claiming the right to be in possession.

The appeal should be allowed with costs.

MEAGHER and DRYSDALE, JJ., concurred.

NOVA SCOTIA.

SUPREME COURT.

CHAMBERS.

LONGLEY, J. FEBRUARY 17TH, 1911.

RE N. R. NEILY.

Canada Temperance Act — Certiorari — Conviction — Third Offence — Penalty and Imprisonment — "Calendar Months"—Deputy Stipendiary Magistrate—Jurisdiction —Amendment—Evidence.

Application for a writ of certiorari to remove a conviction for a third offence aainst the Canada Temperance Act.

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

W. E. Roscoe, K.C., contra.

LONGLEY, J.:—This is an application for a writ of certiorari made on behalf of Norman R. Neily against a conviction made by the stipendiary magistrate of Bridge-

town for a third offence under the Canada Temperance Act with imprisonment for a penalty.

Although several grounds were put forth for such a writ I confess I would not have regarded any of them as requiring serious consideration if the learned counsel making the application had not pressed them vigorously, strenuously and persistently.

The first ground is that the magistrate in his memorandum of conviction adjudged as a penalty for the offence imprisonment for two months, while, when the warrant of commitment was made out and signed he was directed to be imprisoned for two calendar months. My own conviction is that in view of the words of the interpretation clause of Dominion Statutes "two months" means in all proceedings under Dominion Statutes two calendar months and there is no substantial variation between conviction and warrant. But if there by any possibility was, it is clearly a matter for amendment by the Court above, since two calendar months is well within the limit of the term which the magistrate is authorised to impose.

The two second grounds urged stand without any evidence to support them and nothing on the face of the proceedings below justifies certiorari on any such grounds.

The fourth and most seriously urged ground is that the conviction for a first offence proved before the stipendiary in this case was bad because it was made by a deputy stipendiary purporting to act in the temporary absence of the stipendiary, whereas, as a matter of fact, the stipendiary was permanently residing outside of Bridgetown.

As to the fact in this regard there are conflicting affidavits, but I do not think it necessary for me to decide where the weight of evidence lies. My opinion is that under the law and practice the Court above cannot enter into a consideration of such a question on certiorari. The defendant had full opportunity to combat the validity of both these previous convictions when the certificates were offered in evidence in this case to the magistrate. If either of these previous convictions was illegal and bad he had the right to have them or either of them set aside by certiorari. He did nothing of the kind. His counsel stood by when the certificates of the previous convictions were tendered in evidence and offered to the magistrate not a single particle

of evidence impeaching their validity. Upon the face of the proceedings, therefore, it is clear the magistrate had jurisdiction to make a conviction for a third offence and this Court will not go behind the face of the proceedings in these circumstances to question jurisdiction.

Mr. Ritchie cited cases where on certiorari the Court had allowed a convicted party to shew by extraneous evidence that he was not served at all with the summons. The constable proved service of A. before the magistrate who thereby obtained jurisdiction and proceeded to conviction without A. knowing anything about it, the constable having mistakenly served B. instead of A. Such a condition of facts will justify quashing conviction on certiorari for it appears that the magistrate never had jurisdiction owing to an error in serving the wrong party.

But that is quite a different matter from a case in which the defendant is admittedly served, appears by counsel, notes the evidence of previous convictions offered in proof as the law prescribes, takes no step to impeach their validity, and then, after the magistrate has acquired ample jurisdiction comes to this Court and on certiorari proceedings asks practically for a new trial in order that he may now impeach the validity of convictions which he failed to attempt to impeach before the justice. Such is not my conception of the scope and purpose of the writ of certiorari.

The learned counsel incidentally raised the question of the justice having failed to hear and consider the complainant's witnesses before issuing summons. I have never interpreted the recent amendment in the light in which it is now urged, and I am supported in this view by the judgment of this Court in R. v. Neilson, where it is expressly decided that this amendment was not applicable to proceedings under the Summary Convictions Act.

I see no substantial grounds to justify a writ of certiorari which, considering the serious position of the applicant, I would feel bound to issue if there appeared any legal warrant for it whatever.

Application refused.

NOVA SCOTIA.

SUPREME COURT.

TRIAL.

FEBRUARY 21ST, 1911.

THE BRAS D'OR LIME CO. v. THE DOMINION IRON & STEEL CO.

Water and Watercourses—Riparian Rights—Using Water for Manufacturing Purposes—Injunction.

Action to determine the rights of the parties with respect to the use of the waters of a stream.

G. A. R. Rawlings, for the plaintiff.
W. Crowe, K.C., for the defendant.

LONGLEY, J.:—These two companies are doing business side by side at Marble Mountain, Inverness Co. A large export of limestone is the principal feature of that locality. The plaintiff company have been operating on their present land and premises for a long period, and prior to 1901 a marble company was carrying on business on the adjoining lot, which was afterwards purchased by defendant company about 1901. The plaintiff company own certain lands upon which their works are located, and their title to such lands was fully established by documentary evidence extending back to the original Crown grant. Running through their lands is a brook of fair dimensions discharging a good volume of water most of the year, which volume is naturally diminished somewhat in the dry season. As quarrying requires steam machinery which requires water, and as the plaintiff company is carrying on barrel making and has several houses for its manager and other employees the use of the water of this stream is of great importance to them. The plaintiff company do not claim riparian proprietorship of the whole stream but only of the lower part of it, and the defendant company at present may be regarded for all practical purposes as the riparian proprietors of the upper part of the stream, though they only acquired the riparian ownership about 1908.

In 1905 or 1906 both the lime company plaintiff and the marble company, the predecessors of defendant company, were occupying and carrying on quarrying operations on their respective lots, and Mr. McLaughlin, who is a director and large stockholder and an important factor in plaintiff company, was manager of both companies. The marble company needed water for their operations, and Mr. McLaughlin as manager laid a pipe line from the stream in question which, for convenience, I shall call the Brown brook, to the works of the marble company and part of this pipe line was laid over the land of plaintiff company. No objection was made at the time to this and when defendant company obtained a convenience of the marble company's property about 1901, they found this pipe line in full operation and furnishing water for the marble company's operations and they continued without let or hinderrance to use it for their operations. As this quarry is the chief if not the sole supply for the large iron and steel operations of defendant company it need scarcely be said that upon their acquisition of the property operations were enormously increased. Their annual output of limestone is about 350,000 tons. In their quarrying operations they use six steam boilers, and except in certain very dry periods in the summer these boilers are fed from the water carried by the pipe line laid as aforesaid by Mr. McLaughlin.

When defendant company first began work Mr. McLaughlin was their operating superintendent. Mr. Meisner was the manager of mining operations of defendant company, and in 1903 he wrote to Mr. McLaughlin asking him to state definitely the status of defendant company in the use of this water. Mr. McLaughlin referred him to the plaintiff company, and the correspondence revealed the fact that the plaintiff company denied the right of defendant company to use this water but did not require them to stop such use, but suggested remuneration. Nothing further was done and matters went on as before until about 1908 when plaintiff sent defendant company a bill for the use of the water for a period of years which the latter declined to recognise.

The plaintiff company now bring action against defendant company to settle the several rights between them, and one of the claims made by plaintiff company is a declara-

tion that defendants have no right to use the water of this stream as they are now using it and an injunction restraining them from using it in the future.

It should be mentioned that plaintiff company, in addition to their rights as riparian proprietors of the lower part of said stream, produced a deed from the owner of the land on the upper portion of said stream giving to plaintiff or their predecessors in title the use of the water of said stream as they may see fit. The deed conveying this right is loosely drawn and conveys land adjoining under boundaries which would extend beyond the limits of any land owned by the grantors. But as I am of opinion under the authorities that interests of this kind cannot be effectually conveyed to the detriment of bona fide riparian proprietors, even though the riparian title be subsequently obtained, I am going to quite ignore this deed and deal with the whole matter as if no such deed had been given.

The evidence shews that the defendant company have built a dam on this brook opposite to the land they own as riparian proprietors, which collects the water above it into a receiver to which their pipe line is laid, and that their daily consumption of water through this pipe for operating their boilers is about 27,000 gallons, and in addition they consume something more for domestic purposes and they also have their supply available for some of the hydrants erected to guard against fire.

The evidence also discloses that the flow of the water of this stream below the dam amounts approximately to 167,000 gallons per day as a minimum, and 800,000 or 900,000 gallons a day as a maximum. It is also clear that, up to the present, the plaintiff company have experienced no diminution in their water supply that interferes with their present operations, and it also appears that they have a steady supply of water from an independent spring which, the weight of evidence shews, is independent of the brook, though Mr. McLaughlin claims that it is really an outflow of the stream.

I am now called upon to determine the legal rights of the opposing parties as to the use of this stream. Stated in general terms, I conceive the law to be that riparian owners have certainly well defined rights of enjoyment of the waters of a running stream. The upper owners may use and consume the water for domestic purposes, that is for water for

use in their families, and for their cattle, etc. They may also use the water for other purposes, such as running a mill, etc., provided that, after doing its work for such purposes, it shall return to the stream and flow with undiminished volume to the lower riparian proprietor. But I can find no authority for the proposition that an upper riparian proprietor can divert a considerable volume of the water of a stream for purely commercial purposes without returning it to the stream. In this case defendants are taking say 30,000 gallons a day and permanently diverting it from the stream and thus perceptibly diminishing the flow to the lower riparian proprietor. As I conceive the law it matters not if this diversion cannot be shewn to produce present injury to the lower riparian poprietor. He is entitled to have his rights preserved and the contingencies of the future regarded.

If I have correctly stated the law then defendants' use of a pipe line which conveys at least 30,000 gallons a day of the waters of this stream permanently from the stream to run their works is illegal and I am bound so to hold.

But the defendants say that they have used this pipe line for ten years by plaintiffs' leave; that it was placed there fifteen years ago with plaintiffs' leave; that such leave has never been formally revoked; that a few years ago plaintiffs having reached the point in their quarrying operations where the original pipe was laid requested defendants to remove it to another place away from their workings, which defendants did; and afterwards still further changed its position until it was laid practically wholly in their own land. All these things are proved, but in my view they come short of prescriptive use which defendants do not pretend to claim; and in my judgment all these things do not prevent plaintiffs from revoking their leave and standing upon their legal rights. And while no formal notice of such revocation prior to this action was shewn I cannot see how I can regard this action as other than a revocation and the placing of the two parties on their legal rights.

But the circumstances I have detailed seem to me to constitute a factor in applying the remedy. Injunction is asked for and injunction is the natural remedy and is sanctioned by authority when the diversion is wilful. But hav-

ing regard to the usage of fifteen years and to the fact that after defendant company had used this water to the knowledge of plaintiff company for nine years the only proposition as submitted in November, 1908, by plaintiff company was that defendants should pay $300 a year rental for use of water, I am disposed to think it would be a harsh and needless exercise of judicial discretion to grant an injunction at this stage. The plaintiff company are entitled to a declaration that the present use of the water by defendant company is illegal, but it seems to me that the way should be left open for a friendly adjustment of the matter between the two companies before invoking the last drastic remedy, which can be supplied at a later stage if it becomes really necessary. The defendants' present pipe line passes over their own land except for a few feet near the corner of plaintiffs' land. The trespass is of the most trifling character and the damage merely nominal. For this I award $1.

In this action the plaintiff company have raised another claim. In addition to the land of which they hold the fee simple they have acquired from the predecessors in title the rights to the limestone within certain areas of which defendant company now have the fee simple. On some portions of the land which defendants hold in fee simple as to the surface rights the defendants have dumped the refuse of their quarries. The plaintiffs complain that when they come to work their quarry under these dumps the cost of such quarrying will be increased and claim either damages for placing these dumps or an injunction compelling defendants remove the stuff so dumped.

I confess frankly I cannot appreciate this claim in any aspect. The man who purchases mineral rights merely in any land, whether from the Crown or a private owner, must, as I understand the law, win his mineral subject to the rights of the owner of the surface. And the fact that the minerals in the soil have been leased does not as I understand the law, in the slightest degree abridge the right of the surface owner to use his soil in any reasonable manner he chooses. The erection of a building on the surface would necessitate compensation for such building if the owners of the mineral rights wished to pursue their mining under it and to its injury. I think the defendants have a perfect right to deposit refuse stone, etc., etc., from their quarries upon their

own land and I therefore am of opinion that plaintiffs' claim totally fails on this account.

The declaration also claims damages for obstructing a right of way which plaintiffs have over certain land of defendants, but no evidence of any such obstruction was offered and plaintiffs' claim on this count also fails.

A fourth claim is also made on account of the careless and negligent operation of the blasting in defendants' quarries. It is claimed that defendants are constantly hurling rock and debris on plaintiffs' land as a result of their blasting in the operation of their quarries. If the only complaint was the occasional sending over of rock upon plaintiff company's land the question could hardly be regarded as serious because all the land in the vicinity is rough land valuable only for the limestone beneath the surface. But plaintiff company allege that these stones sometimes strike their buildings and that the inmates are intimidated and that their men lose time when the whistle for defendants' blasts is sounded in taking cover. Mr. McLean made an elaborate calculation in minutes which in the course of a year expanded into days and weeks of the time lost by his workmen in taking cover which I confess impressed me very slightly.

It is unnecessary to reaffirm the trite and undisputed principle that parties carrying on blasting operations must use care and must not interfere with the rights of residents in proximity, and if this is done persistently and injuriously they can be restrained. But when called upon to apply judicial remedies all the surrounding circumstances must be fairly taken into account. What are these? For fifteen years at least two companies have been carrying on quarrying operations at Marble Mountain side by side. Ten years ago the defendant company acquired the rights of the marble company, and then began quarrying on an immensely larger scale. The plaintiffs' output is under 20,000 tons a year; the defendants' over 350,000. Their respective quarries are within one hundred feet of each other, and both of them are blasting every day. It is impossible to blast without explosion, and with explosion there is inevitable danger of stones being sent to a more or less distance. The defendants' quarries, in addition to being much larger, are located on a higher plane than plaintiffs'

which would naturally result in larger chances of stones sometimes going on to plaintiffs' land than the plaintiffs' going on theirs. These two companies for ten years have worked in a friendly spirit. There were three instances in the last seven years proved in which plaintiffs' buildings were struck, which the defendants promptly repaired as soon as notified. The damage as shewn by the evidence in one case amounted to as much as one dollar. Not a single creature of the animal kingdom has been injured in all those ten years. What happens is that when defendants' quarry is ready for a blast a whistle is blown and all persons in the vicinity with this notice are on guard, as happens in blasting in a city. The workmen in plaintiffs' quarries stop and gape at the blast ready to take cover if they observe rocks coming in their direction. In like fashion when plaintiffs' quarries are ready for a blast warning is given and defendants' workmen pause and gape until the blast is over. An attempt was made to shew that defendants' methods of blasting were careless and not according to the best modern methods. It was alleged they used too much dynamite and practiced seam blasting. I do not regard these charges as established. The defendants' manager affirmed that only half as much dynamite was used at present as was used in 1906 and prior. The experts satisfied me that in certain cases and under certain circumstances blasting in seams was commercially necessary and not unreasonably hazardous.

Under these circumstances I am asked to grant an injunction forbidding defendants to send a stone over on plaintiffs' land seventy-five feet away. I think I would be abusing the power vested in me to take any such step.

In thus declining an injunction now, and under existing conditions, no inference is to be drawn that defendants are not strictly required to carry on their blasting operations with due care; nor that an injunction would not promptly follow any clear proof that they were systematically carrying on their work in a negligent, reckless and dangerous manner. All I am saying is that in my judgment no such case has been before me. I discount enormously the alarmist declarations of some interested parties produced by plaintiff company as to their fears. No great fear need be felt by a few families when not an injury has resulted to a human being in ten years. Proof was given that, even in the limited operations of plaintiff company, stones

were occasionally thrown upon defendants' land. Blasting, if it is not to be regarded as a farce, must be regulated reasonably and not reduced to such limits in a sparse and barren locality that no industry could be carried on.

I decline an injunction at this stage and the damage inflicted by defendant company on plaintiffs by throwing more stones than have been thrown on defendants' land by plaintiff company is very slight and difficult to compute. I fix this at ten dollars as the utmost that can be reasonably awarded.

My conclusions are.—

1. Plaintiffs are entitled to a declaration that defendants' present use of water from Brown's brook to carry on their quarrying industry is in excess of their rights as riparian proprietors and illegal, and $1 damage for trespass in carrying their line over plaintiffs' land.

2. Plaintiffs are to recover ten dollars damages for sending rock on plaintiffs' land.

3. Plaintiffs to have general costs of the action, less any deductions that defendants incurred in meeting plaintiff's claim respecting the depositing of dumps by defendants on their own land, and the claim for obstructing the alleged right of way.

NOVA SCOTIA.

SUPREME COURT.

FULL COURT. FEBRUARY 18TH, 1911.

ST. CHARLES v. VASALLO.

Contract—Sale of Goods—Illegality—Intoxicating Liquors—Principal and Agent.

Appeal from the judgment of LAURENCE, J., in favour of plaintiff, in an action for goods sold and delivered. The defence was that the goods in question, being intoxicating liquors, were sold by plaintiff company through an agent, plaintiffs through such agent having knowledge that they were to be disposed of in a place where the Canada Temperance Act was in force at the time.

F. McDonald, for appellant.

J. J. Ritchie, K.C., for respondent.

RUSSELL, J.:—The contract was no doubt made in Montreal, but if the goods were sold there with the knowledge on the part of the sellers that they were bought for the purpose of being retailed at Sydney in violation of the Canada Temperance Act, the plaintiff cannot recover the price. We may fairly agree with the learned trial Judge that the plaintiff did not actually know that the goods were to be so used and a mere suspicion would not be sufficient to invalidate the sale. But it is impossible under the evidence to suppose that the agent was not aware of the purpose with which the goods were bought. He was the ordinary commercial agent employed to solicit orders for the goods and he had clear knowledge that the defendant's business was an unlawful one. The general principle applicable to such cases is thus stated by the authors of the article on in Cyc, one of whom is Professor Goddard of the University of Michigan:—

"The duty of an agent to inform his principal of all material facts is a duty which the law conclusively presumes that the agent has performed, and a principal is therefore affected with knowledge of all material facts of which the agent receives notice or acquires knowledge while acting in the course of his employment and within the scope of his authority, although the agent does not in fact inform his principal thereof."

The agent was undoubtedly acting in the course of his employment and within the scope of his authority in soliciting the order in the present case, and the principals, according to this statement of the law, which is in line with all the statements that I have ever read, are conclusively presumed to have the knowledge possessed by the agent with regard to the transaction. The fact that they were not bound to accept the order so given has no bearing whatever, that I can see, upon the question. They did in fact accept and act upon the order, but that is neither here nor there. The agent was their agent and acting within the scope of his authority, and whether they accepted the order or not, and the field is therefore presented for the operation of the principle as to knowledge. Of course if they had not accepted the order the question would

not have arisen, but that does not affect the operation of the principle that the agent's knowledge was their knowledge.

The authors referred to cite cases from all the States of the Union, one of which, from Massachusetts, is exactly in point to the effect that, "if an agent negotiating a sale knows that the purchaser intends to use the purchased article in violation of the law, such knowledge is notice to the principal." The judgment of the Court, per Morton, J., fully sustains the statement in the headnote. The case was, like the one before us, a sale of intoxicating liquors to a purchaser who, as the agent knew, intended to use them in violation of the liquor laws, Commonwealth v. Sampson, 113 Mass. 191.

In view of these authorities I think it was an error to hold the defendants liable. The contract was void for illegality and the appeal must be allowed with costs.

SIR CHARLES TOWNSHEND, C.J., concurred.

GRAHAM, E.J.:—I concur in the opinion delivered by Mr. Justice Russell, but I wish to add a word to distinguish this case from that of Craigellachie Glenlivet Distillery Co. v. Bigelow, 37 N. S. R. 482 and 37 S. C. C. 55.

The question is whether the knowledge of the agent is the knowledge of the principal. In that case the trial Judge found that Eagar & Son, commission merchants at Halifax, had nothing to do but merely receive and transmit orders for goods, and he also found that he was not such an agent that his knowledge could be imputed to the people in Glasgow any more than the errand boy who stamped and mailed the letters, or the telegraph company transmitting the order of the defendant. Here the commercial traveller of the plaintiff company was its regular employee whose duty it was to visit each locality, solicit orders and negotiate a contract for sale. This contract was subject of course to the veto of the principal, but I think that this restriction of his power did not constitute him any the less an agent whose knowledge would be the knowledge of the principal. It would surely be the duty of such an agent to report to his principal that the Canada Temperance Act was in force in that locality and that the liquors would be in immediate danger of seizure and destruction if sent there.

DRYSDALE, J.:—The defence here is that the goods were sold to defendant by plaintiff company, the company well knowing at the time of sale that the goods were to be sold in Cape Breton county in violation of the Canada Temperance Act, then in force in said county and then known by plaintiffs to so have been in force. On this question the learned trial Judge, Mr. Justice Laurence, made the following findings:—

"The real question in this case is, I think, where was this contract of sale made? Gautier was an agent of plaintiff, but according to the evidence of St. Charles, only to receive orders for goods, which orders were subject to acceptance or rejection by the plaintiff, and until the order was approved by the plaintiff at Montreal the contract of sale was not completed and the plaintiff denies any knowledge of the illegal use or sale to be made of the goods, and they certainly did nothing to facilitate any known breach of the law and in pursuance of this finding directed judgment for the plaintiff company for $355.15, the amount due plaintiffs on the exchange accepted by defendant for the goods sold, with costs.

An examination of the evidence herein convinces me that the finding of the learned trial Judge was right and ought to be supported. I think that the case of Craigellachie, &c., v. Bigelow, 37 N. S. R. 482, and on appeal to the Supreme Court of Canada, 37 S. C. C. 55, ought to be held conclusive here as to the plaintiff's right to recover. To my mind there is no evidence that the plaintiff company at the time of the sale had actual knowledge that the purchaser intended to resell the liquors illegally, and no facts proved from which such knowledge could reasonably be inferred. The contract of sale was made in Montreal; the plaintiff's agent, Gautier, had no authority to make sales but merely to transmit orders which were dealt with by the company in Montreal and accepted or rejected as the company after investigation and consideration saw fit. It is said that the evidence establishes knowledge on the part of Gautier that the goods in question were intended for illegal sale in Cape Breton county. I think the evidence falls short of this, but even if Gautier suspected such an intention or could be reasonably said to have such knowledge, nothing was communicated to the plaintiff company to bring home to them any such knowledge. It is said that the facts disclosed by defendant in

evidence were sufficient to indicate to Gautier an intention on the part of defendant to illegally sell the goods when received, contrary to the Act then in force respecting the sale of intoxicants in Cape Breton county. Whilst I am of opinion the evidence falls short of this, I am further of opinion that the inferences to be drawn from the facts proved are not binding on the plaintiffs. It is clear that Gautier did not disclose such facts to plaintiff and in view of his limited employment I do not think his konwledge became the knowledge of the company.

It is a familiar rule in connection with incorporated companies that knowledge acquired by an agent of a company will not be imputed to the company unless he has a duty to communicate such knowledge to the company sought to be affected by the notice, and a duty is imposed upon him by such company to receive the notice. Or, to state the rule more concisely, if an agent has authority to act for a company his knowledge to affect the company must be as to matters within the scope of his authority. In the case at bar the agent had merely authority to solicit and submit orders. All matters, such as the credit and standing of the proposed purchaser, were not entrusted to him, but were no doubt purposely and carefully kept in the company's hands, and contracts entered into or not in pursuance of such enquiry as its proper agents at its place of business saw fit to make under such circumstances. I cannot think this company affected with knowledge of defendant's standing or intentions, even if disclosed to Gautier, or that such matters can reasonably be said to have been within the scope of the agent's authority. Had Gautier been entrusted with authority to make the sale I could understand his knowledge as to matters affecting the sale being the company's knowledge, but on the unquestioned evidence as to the limited authority of the agent here I cannot persuade myself that defendant has brought home to plaintiff that actual knowledge necessary of defendant's illegal intention at the time of entering into the contract to render the contract illegal.

I am of opinion the appeal should be dismissed with costs.

NOVA SCOTIA.

SUPREME COURT.

APPEAL.

FULL COURT. DECEMBER 15TH, 1910.

DENNIS v. THE CITY OF HALIFAX.

Municipal Corporations—Water Supply—Meters—Removal by Owner of Premises — Order to Restrain Municipal Authorities from Replacing Meters.

Appeal from the judgment of GRAHAM, E.J. (reported 9 E. L. R. 189), refusing to continue a restraining order to restrain defendants from turning the water off from plaintiff's premises in consequence of his refusal to allow a water meter removed by him to be replaced.

E. P. Allison, in support of appeal.

F. H. Bell, K.C., contra. (Not called on.)

The judgment of the Court was delivered by

DRYSDALE, J.:—The only question here is what is meant by service pipe in the legislation contained in the consolidated City charter of 1907 in respect of water meters. It seems reasonably clear that in the matter of supplying water to premises under the provisions of said charter the term "service pipe" is used to designate the pipe leading from the street main to and through the wall of a house or property for the purpose of supplying the premises to be served with water. When a house abuts on the street the city must put such service pipe through the wall of the house. In cases where the house stands back from the street line the service pipe is nevertheless to be carried to the house, but the expense beyond the street line falls on the owner. There are many provisions in the Act dealing with the service pipe, and I conclude, after an examination of the Act, that all of them are consistent with the view that "service pipe" as used in the legislation referred to means the pipe leading from the main through and into the premises to be served with water. Once it is concluded that the service

pipe is the pipe leading through the wall and into the premises for the purpose of interior supply, all the provisions of the Act respecting meters, the placing thereof, inspection, examining, reading and the entry of the premises for such purposes is given a place. To adopt the contention of plaintiff's counsel that the service pipe mentioned in sec. 464 of the Act means only the pipe on the street, would involve us with a lot of legislation applicable only to a few meters installed under a former statute, and with a scheme of legislation whereby it was intended that a special excavation should be made on the street in front of every property abutting the street in order that the meters contemplated by the present Act should be affixed to the service pipe under the street, and in connection with such excavations permanent traps and underground places kept for the examination and reading of the meters. This is not, I think, the scheme of legislation as disclosed by the Act.

I am of opinion the Act contemplates a service pipe being led through the wall and into premises to be served with water, and the affixing of the meter on such service pipe inside the premises. So construed I think effect is given to all the sections and a reasonable intention indicated by all the clauses when considered as a whole and by individual clauses when taken separately.

In my opinion the appeal should be dismissed with costs.

NOVA SCOTIA.

SUPREME COURT.

FULL COURT. FEBRUARY 4TH, 1911.

THE KING v. OGILVIE.

Liquor License Act—Conviction—Appeal from Judgment of County Court Quashing Conviction—Partnership—Want of License—Evidence of Sale—Parties—Penalty.

Appeal from the judgment of FINLAYSON, Co.C.J., quashing a conviction made by A. D. McCuish, Esq., stipendiary

magistrate, Glace Bay, C.B., for a sale of liquor in violation of the provisions of the Provincial Liquor License Act.

J. McK. Cameron, in support of appeal.

W. T. O'Connor, K.C., contra.

GRAHAM, E.J.:—This is an appeal from a decision of the County Court Judge for District No. 7, who quashed a conviction of a stipendiary magistrate made under the Nova Scotia Liquor License Act for selling intoxicating liquor without a license. The defendant was a member of the firm of McKinlay & Ogilvie, and he alone was summoned for the offence. This firm does business at Glace Bay and their bill head, which I shall copy presently, shews the nature of the business.

In my opinion the defendant should have been convicted by the County Court Judge under the evidence.

John Marsh, the vendee, says:

I am slightly acquainted with Mr. Ogilvie. We had quite a lot of dealing with Mr. Ogilvie since the 1st of January, A.D. 1910. We bought some candy, pop and beer. It would be about the 4th of January, A.D. 1910, that another order of beer was received from McKinlay & Ogilvie by me. It was from John McDougall representing McKinlay & Ogilvie that I received the order about the 4th of January, 1910. I paid John McDougall for the order received. I can read and write. I did not have any personal dealings with Mr. Ogilvie. I know Mr. Ogilvie's place of business. They carry on a bottling manufactory. That is about all I saw going on. The firm is carried on in the name of McKinlay & Ogilvie. I have seen McKinlay referred to a couple of times in the firm. I know Mr. Ogilvie in Court referred to in the firm. (A slip produced in Court marked Exhibit A., from McKinlay & Ogilvie). I got this slip from John McDougall. I understand the initials signed on the bottom of slip, J. McD. The bill produced in Court is for stout. Two barrels of stout, price $16. I understand dark and light beer to be ale and porter. I got dark and light beer. I drank considerable of this beer and got full on it. The bottles were in barrels packed with straw; the light beer was not labelled; nothing at all on it. The dark beer was labelled Howard's Extra Stout. I returned

some of the bottles. Exhibit "B" produced in Court from McKinlay & Ogilvie . "A" and "B" represent the same item. I know McKinlay & Ogilvie's factory is in the town of Glace Bay. John McDougall goes around on the pop team yet. (Objected to).

By D. Cameron:—

I thought I was dealing with McKinlay & Ogilvie. I dealt with Fried in the fall of 1909. I never saw Mr. Ogilvie to buy anything from him or pay any bills to him. I don't know of any stuff called Nova Stout. Never handled any of it. I had this stuff for sale. I drank quite a lot of it myself. I was not approached by anyone save serving me with papers that I was to be up against Mr. Ogilvie. I wouldn't swear that J. McDougall is going around for McKinlay & Ogilvie.

By J. McK. Cameron.—

I understand the Reserve Mineral Works are carried on by McKinlay & Ogilvie. I am not positive if Mr. Ogilvie is a member of the firm. I realised that I was dealing with the firm of McKinlay & Ogilvie and the defendant to be a member.

McKinlay, of the firm of McKinlay & Ogilvie, called by the prosecution, says:—

I reside at McKay's corners in the town of Glace Bay. I am a bottler and jobber. I carry on business under the name of Reserve Mineral Water Works. The owners are Peter E. Ogilvie and myself. The Reserve Mineral Water Works is not registered. The firm of McKinlay & Ogilvie is registered. Mr. Ogilvie and myself are in partnership in both companies. We have been carrying on that business since 1901. I presume Peter E. Ogilvie is the defendant in this action. It looks like his signature. (Bond shewn witness.) It looks like the signature of Peter E. Ogilvie my partner. We carry on different kinds of business; jobbing business in all beverages; we handle oatmeal stout, Nova stout, Miners' stout, peptonised malt. We are not agents for Howard's brewery. We have handled some of their stuff for manufacturing purposes. Do not sell any of their bottled goods. I do not know very much about the bottling business. Mr. Ogilvie looks after the bottling. I look after the most of the business. We have a book-keeper to look after the business of collecting. I cannot tell if the

stuff we send out is labelled. I do not label any goods with Howard's labels. We buy bottles labelled Howard's and send them out. I never sold or delivered a bottle of Howard's stuff. We have four or five drivers on the road. We had John McDougall, a driver, with us up till to-day. I did not know there was a subpœna out for him. I might have been around when McDougall's team got in last night. He was in our employ the first of the year driving a team or doing whatever he was asked to do. "B" A. D. M. This is one of the forms of our firm. The signature is that of our book-keeper. "A" A. D. McC. is one of our firm forms. It looks like McDougall's signature. Two barrels of stout might be Nova stout. It is not intoxicating to my knowledge. I have no knowledge of this transaction "A." $16 would be the price of two barrels of oatmeal stout. Exhibit "B" of 15th, $16, 2 bbls. I presume this was delivered by McDougall if he got the bill. I am not much around the factory. I would not know if Howard's ale was bottled in our factory, but I do not believe it was. Mr. Ogilvie stays around the factory. I generally see the correspondence. Mr. Ogilvie opens correspondence first, and I open it sometimes. I am not agent of Howards. I never knew that we were the only ones that handle Howard's goods. I think there are lots of people who handle their goods. I do not know if Ogilvie is agent. I have no idea of any other stout except what I have told already. I am not aware of beer we sold being intoxicating. It is hurting the business of the brewers' carbonate beer. We buy our goods labelled in Halifax and sell them. We did not buy any goods from Howards that we sell. The firms from whom we buy only put up, so far as I know, non-intoxicating goods. The only stout we sell are Nova stout and oatmeal stout, guaranteed non-intoxicating. They claim it is not intoxicating. I know Joe Marsh. I am not sure if he was a customer of ours this spring.

The following are exhibits "A" and "B":—

"A."

P. O. Address, McKay's Corner.

M. J. Marsh.

In account with McKinlay & Ogilvie, manufacturers of fruit syrups and fine carbonated beverages, wholesale dealers

in cigars and confectionery, biscuits, &c. McKay's Corner C. B.

January 15th, 1910.

Accounts must be paid fortnightly.

McLeod's Crossing.

Siphons.	Gals. cider.
Pop, ginger beer.	Penny goods 725.
Pints.	Cigars, cigarettes.
Quarts.	
2 bbls. stout	$16

Total.

Cash. 8

6642. Do not destroy this bill, it is valuable.

No. of cases delivered.

No. of cases returned.

Delivered by J. McD.

All bottles and siphons not returned must be paid for.

The Norton Company, Limited, Toronto and Montreal, sole manufacturers.

The automatic book.

"B."

Ledger No. 104. Phone 40.

McKay's Corner,
Glace Bay, C.B., Jan. 15th, 1910.

J. Marsh,

To McKinlay & Ogilvie, Dr.

Wholesale dealers in cigars, cigarettes, confectionery, fruit, &c., manufacturers of carbonated beverages, syrups, cigars, &c.

Cases and bottles are not sold but remain our property.

		Dr.	Cr.
	To accounts rendered	$ 8 71	
Jan. 4.	Goods	4 20	$8 00
" 4.	"	13 20	
" 15.	"	16 00	8 00
		$42 11	$16 00
		16 00	
		26 11	
		13 00	
		$13 11	

Exhibit "A" is a slip left by the firm's teamster at Marsh's with the two barrels; and "B." is an account between McKinlay and Ogilvie and Marsh up to the 15th January, 1910. These are of importance. The learned County Court Judge seems to have lost sight of them. The slip is on paper which enables a duplicate copy to be made with one writing, and it is on one of the forms of that firm, a printed form. It is dated the 15th of January, and on that date at the end is a credit of cash $8.00. At the foot of it, opposite to the printed words "Delivered by" is written the initials of the teamster, "J. McD." and that handwriting is proved by McKinlay. The account is made out by the book-keeper of that firm.

Now the teamster was not put in the witness box nor did this defendant offer himself as a witness.

The firm deals in what McKinlay calls Nova stout and oatmeal stout. These are names. He can only say "it is not intoxicating to my knowledge." They bought it "guaranteed not intoxicating." "They claim it is not intoxicating." Marsh, however, proves that it is intoxicating. The magistrate found that it was intoxicating and the learned County Court Judge says he "has no fault to find" with that finding.

The evidence of Marsh, coupled with the admissions of McKinlay make a case against the defendant. His denials are all consistent with this view of the facts. It is a bottling business and it is Mr. Ogilvie who looks after the bottling and he opens the correspondence. The firm buys bottles labelled "Howards" and send them out. They do not buy the stuff itself from Howards. They buy it labelled in Halifax and sell it.

We have then this form dealing in stout, labelled "Howards Extra Stout." The teamster of the firm delivers to Marsh the two barrels of stout; he leaves with Marsh the firm's slip "A" shewing a sale of the two barrels of stout to Marsh by this firm. It is of the 15th of January, with a cash credit upon it of $8. Marsh also produces an account from this firm which includes on the 15th of January an item "goods" (it is all goods) $16 and on that date a credit in cash of $8.

Marsh says "I paid John McDougall for the order received." To prove knowledge on the part of this firm evidence may be given of another transaction. There was a previous

transaction between the firm and Marsh. In that account is an item "Jany. 4, Goods $4.20," and a cash deposit of $8. Marsh says: "It would be about the 4th January, 1910, that another order of beer was received from McKinlay & Ogilvie by me. It was from John McDougall representing McKinlay & Ogilvie that I received the order about the 4th January, 1910."

Marsh says also that he returned some of the bottles; that he had this stuff for sale.

It is plain that there was an infraction of the law by this firm. The learned County Court Judge says that the firm "probably" could have been convicted if it had been charged. He also says "there is no doubt of the liability of McDougall."

I cannot see then why the defendant Ogilvie is not to be convicted. Of course the firm's teamster was not a principal selling on his own account, nor the firm's book-keeper making out these accounts for any but his master's.

In the case of Commonwealth v. Nichols 10 Met. 269, (after citing the cases of principals being held liable criminally for acts of servants in publishing libels and in smuggling cases. R. v. Almon, 5 Bur. 2686; R. v. Walter, 3 Esp. 21; R. v. Gutch, 1 Moo. & Malk. 437, and Attorney-General v. Siddon, 1 Cromp. & Jer. 220), the Court says:—

"It seems to us that the case of a sale of liquors prohibited by law at the shop or establishment of the principal by an agent or servant usually employed in conducting his business is one of that class in which the master may properly be charged criminally for the act of the servant. . . . We think that a sale by the servant in the shop of the master is only prima facie evidence of such sale by the master as would subject him to the penalty for violating the statute prohibiting the sale of spirituous liquors without license; that the relation of these parties the fact that the defendant was in possession of the shop and was the owner of the liquor and that the sale was made by his servant furnish strong evidence to authorize and require the jury to find the defendant guilty."

The case before us is somewhat stronger. The premises and liquor are those of this firm. Their accounts record the sale. The firm's book-keeper and the teamster are connected as indicated with the transaction. The defendant's partner says he did not sell the liquor. Then who did make the

contract if it was not the defendant? It was with him that Marsh says he had quite a lot of dealing since the 1st of January, 1910. The firm and each member of it is prima facie presumed to know what is entered in its accounts and of money payments made to it. I think it is a plain transaction.

The non-joinder of the other member of the firm is not material in this kind of offence. The penalty is several.

The appeal should be allowed with costs and the decision of the County Court Judge should be reversed with costs and the conviction restored.

RUSSELL, J. announced that he had a short opinion, which it was not necessary to read, concurring in the opinion just read.

The other members of the Court concurred.

NOVA SCOTIA.

COUNTY COURT, DISTRICT NO. 6.

DECEMBER 9TH, 1910.

AIKINS v. SIMPSON.

Justice of Peace — Excessive Fees — Action for Penalty — Criminal Code, sec. 1134—Jurisdiction—Conviction for Infringement of Canada Temperance Act.

R. R. Griffin, for plaintiff.

D. P. Floyd, for defendant.

MACGILLIVRAY, Co.C.J.:—This is an action qui tam to recover a penalty under the provisions of section 1134 of the Criminal Code, 1906, which prescribes (so far as is necessary for the purpose of this action):—

(1) Every justice before whom any conviction takes place who receives a larger amount of fees than by law he is authorised to receive, and every justice who upon or under colour or pretence of any information, complaint or judicial proceedings or enquiry had or taken before him, wilfully exacts, receives or appropriates, or retains any fees, moneys or payments which he is not by law authorised to receive, or to be paid, shall incur a penalty of eighty dollars, together with the costs of suit, in discretion of the Court, which may be recovered by any person who sues for the same by action of debt or information in any Court of record in the province in which such return ought to have been or is made.

(2) One moiety of such penalty shall belong to the person suing and the other moiety to His Majesty for the use of the public of Canada.

The defendants is a justice of the peace and stipendiary magistrate in and for the county of Guysboro. As such magistrate he convicted the plaintiff on the 12th day of March, 1910, for having unlawfully sold intoxicating liquors contrary to the second part of the Canada Temperance Act, in force in and throughout the said county, and for such offence the accused was to forfeit and pay the sum of $50 penalty, and $41.40 costs. The plaintiff claims that the defendant as such justice and magistrate wrongfully and illegally taxed and allowed items which he adjudged by said conviction, and wilfully received said costs and fees from the plaintiff, being costs and fees, moneys and payments which he is not by law authorised to receive. That the plaintiff by reason of the alleged wilful and wrongful acts of the defendant is thereby aggrieved, and suffered loss and damage.

The defendant pleads that the costs were correct and legal and properly allowed, and merely law authorised and not contrary to the Criminal Code, and were properly collected. The defendant pleads also that the conviction under which the said costs and fees were collected and allowed, was not set aside or quashed before action; and also that the notice before action does not set forth the cause of action as set forth within statement of claim.

The material issue raised by the pleadings is: Whether or not the defendant wilfully exacted and received from the plaintiff fees which he was not by law authorised to receive.

Counsel for defendant took preliminary objection at the trial that the Attorney-General of Canada or of this province should be made a party to the action; or the leave of such attorney should have been obtained to commence the action. I am of opinion that this objection cannot prevail. It is well settled in actions of this kind that particularly the party aggrieved (as the plaintiff alleges to be) has the exclusive right, without leave, to commence and prosecute the action to recover the penalty given by the statute. It is not in general necessary for the plaintiff in a qui tam action to obtain an authority to sue from the Crown or from the party entitled to the penalties (Vide Cole v. Coulton, 29 L. J. M. C. 125). The section of the

Code gives the right to the plaintiff. Sub-section 2 thereof provides for the disposition of the penalty.

Counsel for the defendant contends that the notice of action does not comply with the requirements of section 12 of chapter 400 R. S. N. S. "Of protection of justices of the peace and others." Counsel for the plaintiff urges that in a qui tam action this does not apply. I think it does. This action is in the nature of a civil action, an action for debt, and the procedure in such actions is under the exclusive power, and comes within the class of subjects exclusively assigned to provincial legislatures, namely to make laws in relation to procedure in civil matters in Courts constituted by them (Vide sub-section 14, section 92 B. N. A. Act.) The provisions of said section 12 is to the effect that no action shall be commenced against a justice until one month at least after notice in writing of the intended action, to be delivered to him at his usual place of abode, stating the cause of action and the Court in which the intended action is to be brought, clearly and explicitly, also the name and place of abode of the person intending to sue. The plaintiff gives notice (a letter addressed to the defendant dated March 23rd, 1910, referring to the liquor case under the Canada Temperance Act), that he the plaintiff had been convicted by the defendant on the 12th day, in that month of March, and that he objected to paying the fees charged against him in the case, and that the defendant knew he did not use him right in charging him such fees; and notified the defendant right then, that he was going to begin an action against him in the County Court at Guysboro, because the defendant wilfully exacted and received from him a larger amount of fees in the case than the law allows; and stated his name and place of abode. This notice was served on the defendant personally by the plaintiff on the 24th day of March, aforesaid. The action was commenced on the 29th day of June, 1910. I think this notice fully complies with the requirements of the statute and was served in ample time before the commencement of the action.

Defendant's counsel also urges that the conviction against the plaintiff should be quashed before action as prescribed by sec. 6 of ch. 40, R. S. N. S. 1900. This chapter makes provision for the protection of justices of the peace in actions brought against them for any acts done by

them in the execution of their office, in respect to matters within their jurisdiction when it is alleged that such acts were done maliciously and without probable cause, and for acts done in which they have no jurisdiction, or exceed their jurisdiction. I do not think that this action falls within the category of such actions; and therefore the provisions of sec. 6 do not apply. This is an action of a different character, one given for taking excessive fees in a case over which the justice had jurisdiction and where the conviction may be perfectly valid and consequently cannot be quashed. Yet the action may be founded on the right given if the offence be proved as laid, namely, wilfully exacting and receiving fees which he is not by law authorised to receive. The making up of costs does not go to the jurisdiction. Excessive costs is not a ground for quashing conviction, but the magistrate is liable on criminal information.

Having disposed of the technical objections I come to the material fact in issue, namely, whether or not the defendant had wilfuly exacted and received from the plaintiff fees which he was not by law authorised to receive.

The proceeding in which the plaintiff had been convicted and paid fees adjudged by the conviction was within his jurisdiction, and was had under the provisions of Part XV. of the Criminal Code of "Summary Conviction," sec. 770 thereof provides that.

The fees mentioned in the following tariff and no other shall be and constitute the fees to be taken on proceedings before justices under this part:—

"Fees to be taken by justices of the peace or their clerks.

1.	Information for warrant for witnesses and warrant	$ 50
2.	Information and complaint and warrant or summons	50
3.	Warrant where summons issued in first instance	10
4.	Each necessary copy of summons or warrant	10
5.	Each summons or warrant to or for a witness or witnesses (only one summons on each side to be charged for in each case which may contain any number of names; if the justice of the case requires it, additional summons shall be issued without charge)	10

6. Each necessary copy of summons or warrant for witness 10
7. For every recognizance 25
8. For hearing and determining case 50
9. If case lasts over two hours 1 00
10. Where one justice alone cannot lawfully hear and determine the case, the same for hearing and determining to be allowed to the associate justice.
11. For each warrant of distress and commitment 25
12. For making up record of conviction or order where the same is ordered to be returned to sessions or on certiorari 1 00
13. For copy of any other paper connected with any case and the minutes of the same if demanded per folio of 100 words 05
14. For every bill of costs when demanded to be made out in detail 10

I have copied in full the scale of fees given by the statute, so that I may point out any items in the taxed bill of costs in the proceedings against the plaintiff, and complained of in this action, that are unauthorised by the scale. The defendant taxed his fees, after conviction in the action namely, The King v. William O. Aikins, as follows:—

Information summons and copy	$ 60
Summons, witness	10
6 copies, 10c. each	60
2 affidavits, 10c. each	20
First hearing and adjournment	1 00
4 warrants, 25c. each	1 00
4 copies, 10c. each	40
Second hearing	1 00
3 recognisances, 25c. each	75
Third hearing	1 00
5 recognisances	1 25
Fourth hearing	1 00
Record of conviction	1 00
Summons witnesses	10
Affidavit	10
	$10 10

The defendant in his evidence acknowledges that three of the hearings were adjournments. For each of these he charges $1 besides charging for the recognisances consequent on the adjournments. Fees for adjournments are not allowed in the above scale, nor are fees for affidavits. Neither are there fees for "record of conviction" except where the same is ordered in the conviction against plaintiff. Again the hearing lasted a few minutes. The accused pleaded guilty to the charge preferred against him, and was accordingly convicted. For such hearings where the case did not last over two hours, the fee is fifty cents. Only one summons to witnesses allowed to be charged for in this case.

The items in the taxed bill (supra) unauthorised by the above scale are:—

2 affidavits, 10c.	$ 20
3 adjournments, $1	3 00
Overcharged on hearing	50
Record conviction	1 00
Summons witnesses (two last items in the bill)	10
Affidavit (last item in the bill)	10
Amount	$4 90

which deducted from the taxed bill leaves a balance of $5.20, which are the fees the defendant should have charged. The accused herein offered to pay the fine $50, and these corrected fees together with constables, $20.95, and witnesses $10.35 fees, amounting in all to $86.50; but the defendant refused to take this amount insisting that he had a right to the full fees charged by him. The accused (plaintiff herein) was obliged to pay the full amount namely $91.40, which the defendant herein as such magistrate received, retaining thereof the sum of $10.10 as his own fees.

It may be urged that the defendant did not charge for informations and warrants to witnesses according to scale of fees, and for bill of costs made out in detail, demanded by the accused. I have no evidence before me that such warrants were issued, except by inferring the same from the taxed bill by the defendant. Giving him the benefit of such inference the bill should be taxed:—

Information, summons and copy	$ 60
Summons to witnesses	10
6 copies, 10c.	60
4 informations for warrants for witnesses and 4 warrants, 50c.	2 00
4 copies warrants, 10c.	40
3 recognisances on 2 adjournments, 25c.	75
5 recognisances on 3rd adjournment, 25c.	1 25
Bill of costs in detail	10
Amount	$5 80

which being deducted from the taxed bill leaves a balance of $4.30 received by the defendant as such magistrate unauthorised not mentioned in the tariff of fees.

I therefore find that the defendant received, at least, the sum of $4.30 more than he was authorised to receive as stipendiary magistrate and justice of the peace in issuing process, and hearing and determining the information laid before him against the plaintiff of having violated the provisions of the second part of the Canada Temperance Act, in force in the said county of Guysboro at the time; and upon the hearing and determination of said information the plaintiff had been convicted by the defendant on the 12th day of March, 1910, to forfeit and pay the sum of $50 and $41.40 costs, making in all the sum of $91.40.

After taking and receiving such unauthorised fees, the defendant receives due notice of this action, but refuses to make amends. After action he pleads justification and goes to trial on the issue raised by the plea. I must therefore find that he wilfully received a larger amount of fees than he was authorised to receive, whereupon I decide that he is amenable to pay the penalty, namely $80, incurred by him on account of his contravening the provisions of the Code cited in the early part of this decision.

The plaintiff will have judgment to recover the said sum of $80, penalty to be disposed of as provided by sub-sec. 2 of said sec. 1134 of the Code, together with his costs of suit which I shall certify the plaintiff is entitled to recover.

DOMINION OF CANADA.

EXCHEQUER COURT. FEBRUARY 9TH, 1911.

ALPHONSE POIRIER v. HIS MAJESTY THE KING.

Contract — Supply of Hay to Dominion Government for South African War Purposes—Hay Rejected as not up to Standard—Sale by Crown's Servants for Less than Contract Price—Claim for Difference in Price—Conversion—Crown's Position in Relation to Tortious Breach of Contract by its Servants—Counterclaim by Crown for Excess of Space Used by Suppliant's Bales—Evidence.

A. Lemieux, K.C., and J. H. Beauregard, for suppliant.

R. C. Smith, K.C., for respondent.

CASSELS, J.:—This is a claim by Alphonse Poirier in respect of hay delivered at St. John, N.B., under contracts entered into by the Minister of Agriculture for and on behalf of the Imperial Government. The contracts are similar to those dealt with in the case of Boulay v. The King, 12 Ex. C. R. p. 198; 43 S. C. R. p. 61.

One material difference between the claim put forward in the Boulay case and the case in question is, that in the present case the petitioner admits that the hay, the subject matter of the present petition, was rightly rejected, his claims are of two-fold character. A part of his claim is for the payment of 33,680 pounds of hay which he alleges the Department received, and for which it is said the Crown is indebted to him in the sum of $235.76. The second part of his claim is in respect of 267,750 pounds of hay sold by employees of the Government. The petition claims that this sale was illegal, and asks for damages for the illegal conversion of his hay. His claim on this account amounts to the sum of $1,095.99.

After setting out in his petition the contracts the petitioner alleges as follows:

In paragraph 3:—

"Que, par une des conditions des dits contrats, le dit Departement ne devenait proprietaire que du foin, expedie par votre requerant, ou'il n'avait pas rejete' avant son chargement sur des bateaux a vapeur, St. Jean, Nouveau Brunswick, appert aux dits contrats, lesquels, pour plus amples

informations, sont produits au soutien des presentes comme Exhibits Nos. 1, 2, 3, 4, 5 et 6."

In paragraph 6:—

"Que sur lo quantite de foin ainsi livre par votre requerant durant les annees de 1901 et de 1902, le dit Departement a rejete, en petites quantites, pour chacune des dites deux annees 144, 878 livres et 243, 743 respectivement, en tout 388, 621, livres qui ont continue a etre la propriete de votre requerant, appert aux etats fournis par le dit Departement et qui seront produits au souten des presentes comme Exhibits Nos. 31, 15 et 14 et a certaines lettres en date des 27 aout 1902 et 10 decembre 1902 par lesquelles il est clairement admis que 370,350 (au lieu de 388,621) livres de foin ont ete rejetees, en petits lots, par le dit Departement durant les annees 1901 et 1902; appert egalement a ces lettres qui seront produites commes Exhibits Nos. 11 at 21."

In paragraph 7:—

"Que votre requerant admet avoir recu du dit Departement 102,000 livres du foin ainsi rejete durant les dites deux annees."

In paragraph 8:—

"Que la balance du foin ainsi rejete, savoir 286,621 livres valant $14. la tonne, le dit Departement, par ses officiers et preposes, se l'est approprie, s'en est empare et l'a vendue, parait-il, pour la somme de $910.35 que votre requerant admet avoir recue sans prejudice toute-fois a ses droits."

In paragraph 9:—

"Que de dit Departement, par ses officiers et preposes, n'avait pas le droit en vertu d' aucune convention, ou de la loi, de s'emparer et de vendre le foin de votre requerant ainsi rejete par lue, et il n'y a jamais ete autorise par votre requerant."

In paragraph 11:—

"Que 'en agissant ainsi le dit Departement, par ses officiers eta preposes a manque a ses obligations et a par la fait perare a votre requerant la somme de $1,095.99, puisque de fait ce dernier aurait vendu cette balance du foin, savoir $286.621 a raison de $14. la tonne, soit $3.006.34 sur lesquelles il (votre Requerant) n'a recu, comme

susdit, que 910 35

lui causant une perte seche de $1,095 99

And also in paragraph 12:—

"Que cotte perte de $1,095.99 resulte de l'inexecution des obligations du dit Departement ainsi que de la faute et de la negligence de ses officiers et preposes, dont l'intime est responsible."

The petitioner then sets out in the subsequent paragraphs his claims in respect of 345 bales of hay weighing 33,680 pounds, and claims the sum of $235.76 on this account. The Crown denies the right of the petitioner to receive this sum of money, and it sets out in the alternative, as follows:—

"23. In the alternative he says that in the final settlement of the accounts of the suppliant with the Department of Agriculture, his account was on the 12th of August, 1902, credited with 43,633 pounds of hay which at $14 a ton, amounted to $305.43, which was above the value of the said car load in the petition of right alleged to have been sent as aforesaid."

The case came on for trial in Montreal on the first day of March, 1910, there being an agreement between the counsel for the suppliant and the counsel for the Crown, that only the evidence in support of the suppliant's case should be then adduced, and the further trial of the case to enable the Crown to put in their evidence to take place in Ottawa at some time to be agreed upon.

The case was concluded on the 13th day of January last at Ottawa. During the progress of the trial it became apparent that the contention of the Corwn set out in the 23rd paragraph of the defence quoted was not well founded. The explanation given in the earlier stages of the trial in regard to the 4,3633 pounds of hay was, that prior to the 12th day of August, 1902, when the final account was rendered and final payment made, the plaintiff had made a claim in respect of the 33,680 pounds referred to in paragraph 13 of the petition. According to the evidence of Mr. Moore the Department found that they had received the amount of 43,633 pounds of hay, which had not been paid for—whose hay this was they did not know—but as Mr. Poirier was making the claim they gave him the benefit of the credit. During the progress of the trial it was clearly proved that the hay in question, namely, the 43,633 pounds, was the hay of the suppliant, and that the suppliant was entitled as a right to the payment therefor; and upon the true facts coming to light his claim for an offset of $305.43 was abandoned.

It was also clearly proved and admitted by a letter among the exhibits written on behalf of the Crown, that the contention of the petitioner in regard to the claim for 33,680 pounds was well founded. The mistake arose from the fact that the hay had been loaded upon a car of the Canadian Pacific Railway Company, No. 2543. This car in transit had been destroyed, and the hay was transhipped to car No. 19084, and was received by the Department at St. John. By the admission of the respondent the suppliant is entitled to receive from the Crown the value of this hay amounting to $235.76, and the claimed offset in respect of the 43,633 pounds is abandoned.

The further claim made on behalf of the suppliant is as follows: It is admitted by both parties that the total quantity of hay rejected by the officers at St. John amounted to 370,350 pounds of hay. Of this amount 102,600 pounds was delivered to the suppliant or his nominees. The claim made is in respect of the balance 267,750 pounds. Immense quantities of hay were being purchased for shipment to South Africa. The suppliant did not see fit until late in December of 1901, to send anyone to St. John or to write to any one to take care of his rejected hay. His hay, together with the rejected hay, belonging to other shippers, was placed in the sheds on the wharf. Congestion took place and the officers of the railway required the hay to be removed. Thereupon sales were from time to time made of this blended hay. The average price received for the hay, comprising a portion of the petitioner's rejected hay and the hay of other shippers, came to $6.80 per ton. This sum amounting to $910.35 the suppliant was credited with and he admits having received it. His complaint, however, is that his hay was sold by the officials in St. John without any authority from him. The price of $6.80 was below the value of the hay, and he claims as damage valuing his hay at $14 per ton for the difference between $6.80 per ton and $14, which he claims his hay should have realised. It has to be borne in mind that while the suppliant received the $6.80 per ton in cash, he practically received the sum of $9.80 per ton. The freight on the hay from the point of shipment to St. John was $3 per ton; this amount was payable by Mr. Poirier in respect of the hay carried for him. The Department, in addition to crediting him with cash for $6.80 released him from the freight of $3. Mr. Poirier in this way

was receiving in fact at the rate of $9.80 per ton. In the view I take of this branch of the case, I do not propose to enter into the question as to what amount Mr. Poirier should have received for his hay. It may eventually turn out that the $9.80 a ton was ample. In this particular case upon the facts stated, and as the case is presented both by the petition and during the conduct of the case, I do not think there is any liability on behalf of the Crown.

The act complained of both in the petition and during the progress of the trial by the suppliant was that it was a tortious act by employees in the service of the Crown. The claim put forward is one of wrongful conversion, and I do not see that the Crown can be held responsible for the torts of its employees. The case of the Windsor & Annapolis Railway Company v. The Queen, 11 App. Cas. p. 607, cited by Mr. Lemieux is a case of a different character. All that was there decided is that the Crown may be liable in damages for breach of a contract. In the case before me the hay was the property of the suppliant. There was no contractual relation whatever in regard to the hay. Clode on Petition of Right, page 136 et seq. deals with the question. He also refers to the American case of Langford v. The United States, 101 U. S. Reports, p. 341. The question is also discussed in some of the reasons for judgment in the case of Boulay v. The King, 43 S. C. R. p. 61.

I think, therefore, that in respect of the petition, the suppliant is entitled to be paid the sum of $235.76 hereinbefore mentioned; and that that portion of the petition which claims damages for the wrongful conversion of the hay must be dismissed.

I proceed now to deal with the counterclaim filed on behalf of the Crown.

The Attorney-General, on behalf of the respondent in his counterclaim, alleges as follows:

"1. By contracts respectively dated the 19th September, 1901, the 15th November, 1901, the 20th December, 1901, and the 26th December, 1901, the Commissioner of Agriculture agreed with the suppliant for the purchase from the latter of certain quantities of hay therein particularly mentioned and described and upon the terms and conditions therein contained.

"2. It was one of the terms and conditions mentioned in the preceding paragraph that the hay was to be com-

pressed to stow in not more than 70 cubic feet per ton, that hay occupying more than 70 cubic feet per ton might be accepted at the option of the Department, but only at a reduction of $1.50 per ton from the contract price for every ten feet or any part thereof stowage space required per ton, in excess of the standard specified.

"3. All of the hay shipped by the suppliant between the 4th November, 1901, and the 31st of January, 1902, exceeded the limit of stowage specified in the said Clause 3.

"4. The suppliant is indebted to His Majesty the King in the sum of $3,525.72, the amount of the reductions from the contract price provided by the contract and incurred in respect of the hay mentioned in the preceding paragraph."

Clause 3 of the contract reads as follows:

"The hay to be compressed to stow in not more than seventy (70) cubic feet per ton; hay occupying more than seventy cubic feet per ton may be accepted at the option of the Department, but only at a reduction of $1.50 per ton from the contract price for every ten feet, or any part thereof, stowage space required, per ton, in excess of the standard herein specified."

While the language of the contract has to be construed as it is written, it is well to understand the object of this clause. Moore in his evidence puts it in this way: "Clause 3 of the agreement referred to the compression of the hay; the compression of the hay was a very important point, because we chartered our steamers at so much per cubic foot for cargo space under deck."

"The Court: Who paid that freight? A. We did.

"Q. Are the Dominion Government out anything? A. We paid for stowage.

"Q. Somebody lost. Did the British Government? A. If we exceeded our limit of the amount offered them our Department would have to pay. We stated we could deliver 15,000 a month at Cape Town at a certain price—and to get that down there we had to get a certain amount of space in the ship. We had to compete with the United States and the Argentine and Australia for getting this business for Canada."

Again he says:

"We are anxious to get as much hay in the ships as possible. The more hay we get into a ship it reduced the freight."

Further on he states:

"It cost us roughly $1.50 for every ten cubic feet in stowage; and that is the way we arrived at that figure in the contract. If a ton of hay occupied more than 70 cubic feet, which was a reasonable stowage limit with those steam presses—if it occupied ten feet more than that amount the shippers would receive $1.50 less. It is an important matter to the shipper. This hay was put through the steam compressors. It was hard compression and hard on the press. If a shipper could compress to 80 feet, and he could supply the hay under our contract calling for 70 cubic feet compression, and have it accepted, when it occupied 80 or 90 cubic feet per ton, it would be a decided advantage to him, because he could run his press without any danger of breakage and have no large bills for repairs, and have no loss of time on that part of his staff and in that way it would cost him less money."

The witness produced the stowage book. He states that the measurements were made by Lieutenant Bell, who was the Inspector of Weights and Measures. A copy of the book is filed—marked respondent's exhibit "K."

On the 27th August, 1902, a final settlement was made—marked suppliant's exhibit No. 17. It appears that at the date of this settlement Mr. Poirier, the suppliant, had been overpaid the sum of $393.54. The Department had received $910.35, the proceeds of the hay sold in St. John. The way in which the settlement was carried out was dividing $910.35 into two cheques; one for $393.54 and one for $516.81. The cheque for $393.54 was endorsed over by Mr. Poirier, and thus the amount of his over-payment was repaid. At the time of this balancing in August, 1902, no claim was made on the part of the Department for the alleged repayment of the $1.50 referred to in the counterclaim. Mr. Moore explained it as follows:

"Q. The Court: Have you looked at the settlements of Mr. Poirier? A. Yes. There was no deduction made with Poirier.

"The Court: Why was that? A. They wanted to be as generous with the shippers as they could be. We remitted the freight also on the culled hay we sold—I don't know why."

From August, 1902, until about 1907 no claim was ever put forward upon the part of the Government for repayment

of the amount now claimed in the counterclaim, namely $1.50 per ton. Had the claim been made in August of 1902, Poirier would, no doubt, have been in a better position to meet the case than five years later. There is not what can be called strictly a settlement of accounts in 1902; and if there had been the effect of the action taken by the suppliant Poirier would be to open up the settlement—and the counterclaim being filed on behalf of the Crown I would probably have been compelled to allow their claim had sufficient proof been adduced in support of it. Having regard to the circumstances detailed, I think it incumbent upon the Crown to give strict proof in support of their contention. In this I think they have failed. The contracts of September 19th, 1901, November 15th, 1901, December 20th, 1901, and December 26th, 1901, are all similar in language so far. as clause 3 is concerned. In the contracts of the 22nd January, 1902, and the 22nd February, 1902, instead of clause 3 containing the words "more than seventy (70) cubic feet per ton." it is "more than seventy-five cubic feet per ton." In other respects they are the same. The Department have placed a construction upon this clause 3 which certainly presses hardly on the vendor. The obvious meaning of clause 3 is that $1.50 per ton should be deducted from the contract price for every ten feet "stowage space required per ton in excess of the standard herein specified." This, no doubt, was framed for the purpose of meeting the case put by Mr. Moore in his evidence quoted, namely, that for every loss of ten feet of cubic space, there was a monetary loss of $1.50. The Department, however, seem to take the view of the contract which would enable them to deduct $1.50 per ton for every ton compressed in such a way as to require more than seventy cubic feet per ton, even if the excess was merely one cubic foot. The result of their method of construing the contract would be that if a ton of hay was so compressed that it occupied 71 cubic feet instead of 70, Mr. Poirier would only receive $12.50 per ton, instead of his contract price of $14 per ton. The contract in clause 3 is open to doubt as to its true meaning by the interposition of the words "or any part thereof" after the words "for every ten feet." I should hesitate before accepting the construction placed upon it by the Department of Agriculture. I think, however, there is no proper proof of the non-compliance with this particular provision of the contract. The book produced by the De-

partment is relied upon under the Canada Evidence Act as proof. These books are compiled from the slips prepared by Lieutenant Bell. Lieutenant Bell was appointed for the purpose of seeing that the various contracts were lived up to. He states in his evidence that all the hay passed through his hands. He is asked:

"Q. Did you immediately report the measurements of all the bales of hay that you measured there in St. John? A. I did. That is to say, after each day's work the actual figures were returned to Ottawa on a slip which was provided for the purpose. The slip bore the number of each car, the number of the bales tested in the car, and the number of bales that were eventually shipped from the car.

"Q. The record in Ottawa was the record of your daily reports? A. Yes, actually."

His evidence goes no further than the record produced from the book. I find nothing in the contract which permitted Lieutenant Bell to test a certain number of bales and to conclude that because this particular number of bales occupied proportionately more space than that provided by the contract, therefore it was to be assumed as against the suppliant, Mr. Poirier, that the balance of the bales making up the ton of hay measured the same as those bales tested. The contract provides for an excess per ton. In my opinion if the Department had intended or were entitled to charge this sum of $1.50 per ton, they should have had a proper measurement, not jumping at it in the manner in which Lieutenant Bell performed his work.

Referring to the statement, exhibit "K" a copy of the book—take for illustration Number 1—Car No. 18198; shipping date November 4th; net weight of hay accepted 43,629 pounds; number of bales tested, five; measurement per cubic feet, seventy-three; reduction per ton $1.50; and reduction per carload $32.72. A bale of hay is said to contain 100 pounds, a ton of hay 2,000 pounds. The 43,629 pounds being the weight of the hay accepted, amounts to almost 22 tons. Lieutenant Bell tested out of these 22 tons five bales, or if it were averaged by the ton about 25 pounds of hay per ton. It would probably have turned out, or at all events might have turned out that if he had made a proper examination that while a considerable number of the bales might have been in excess of the 70 cubic feet, others might have been under, so that when the whole thing was

computed Mr. Poirier might have been found to have complied with his contract. In my opinion this method of arriving at the amount due is not sufficient to prove the claim put forward.

The contract calls for a reduction of $1.50 per ton from the contract price. There is no provision for payment for excess of space occupied by any particular bale. If after the lapse of time and what has taken place, assuming the contention of the Department as to the meaning of clause 3 to be in their favour, I think they would have to prove the truth of their allegations by evidence stronger than that adduced before me. I think the Crown have failed to support their counterclaim, and the counterclaim should be dismissed.

That portion of the counterclaim referred to in section 5 of the counterclaim is as follows:—

"In the final settlement of the accounts of the suppliant with the Department of Agriculture the account of the former was on the 12th August, 1902, credited with 43,633 pounds of hay at $14 a ton amounting to $305.43, being in respect of a carload of hay referred to in paragraph 13 of the petition of right, and alleged to have been delivered by the suppliant but which the Attorney-General claims was never received by the respondent," has been dealt with in the judgment on the main case and was abandoned.

The result of the whole case is that the suppliant Poirier succeeds as to the sum of $235.76. He also succeeds in respect to the claim put forward by the Crown in respect to the 43,633 pounds of hay referred to in the 23rd clause of the defence. He fails in regard to the damages claimed for the wrongful conversion of his hay amounting to a sum over $1,000. The defence fails entirely as to their counterclaim. To adjust the different items that would be allowed for costs to and against the suppliant, and to or against the respondent, will be difficult. I think if the suppliant is allowed $250 for his costs it will be about the correct amount. Judgment will therefore be entered for the suppliant for the sum of two hundred and thirty-five dollars and seventy-six cents, and for two hundred and fifty dollars costs. The counterclaim is dismissed, no further costs to or against the respondent.