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NOVA SCOTIA.

SUPREME COURT AT SYDNEY. MAY 7TH, 1909.

LAFFIN v. ELSWORTH.

Land—Deed—Action for Possession—Evidence of Possession.

W. F. Carroll, for plaintiff.
J. M. Cameron, for defendant.

LONGLEY, J.:—In July, 1867, Richard Elsworth of Barrachois or Lingan, C. B., gave a deed of a small piece of land, two acres, to Walter Young and Michael Laffin of the same place. The consideration was $100, and the deed was immediately recorded. What was the object in buying this small area from Elsworth's large holding in no way appears from the evidence, nor is there any express evidence of Young and Laffin's entry into possession. Young has since died and his wife, Georgina, one of the plaintiffs, is his devisee. Michael Laffin died without will, and his several heirs constitute the other plaintiffs. They are bringing suit against defendants for the possession of this lot, which defendants admit they are withholding.

The only difficulty in the way is the doctrine laid down in Cunard v. Irvine, 2 N. S. R. 31, lack of specific acts of possession. All that I can do in this case is to marshal the evidence, mostly incidents, which may be sufficient to take the case out of the Cunard v. Irvine decision, affirmed later in McLeod v. Delaney, 29 N. S. R. 133. I apprehend that where a deed

from a man in possession of land to another is clearly established, the disposition of courts would be to be satisfied with very slight evidence of possession.

Edward Elsworth gave this deed to Young and Laffin. His sons are the defendants here, and continue to live on the homestead of which this piece of land now in dispute was in 1867 a part. I am disposed to think that this is fair evidence that Young and Laffin derived their title to the 2-acre lot from a man who had possession and occupation of it as part of his general holding.

Again it appears in evidence that the Elsworths (sons, defendants) up to within a year or two, fenced their lot up to the line of plaintiff's lot, leaving this 2-acre lot outside their holding, and unfenced. I regard this as an incident from which a strong inference can be drawn that defendants recognized plaintiffs' rights in this 2-acre lot.

Again the first pretense of claim to this lot set up by defendants was only a short time ago. The deed reserves a right of way. The Elsworths had attempted to sell this right of way to James Hall. John T. Laffin, one of the plaintiffs, told Elsworth that he could not do this. Elsworth then said that if Laffin was going to be uppish he would take the whole lot in. Whereupon in face of Laffin's protest he did, within two or three years, put for the first time a fence about this lot, resulting in this action to contest his right to do so. I think the plaintiffs' drawing attention of one of defendants to a violation of the right of way, reserved in deed, and denying his right to interfere with the terms of the deed, or interfere with the enjoyment of plaintiffs' possession of the lot, may be regarded as an entry.

Again, a new coal mining enterprise is about being opened up near the land in question, and the company are acquiring land in the vicinity. They took an option on a portion of the land of one of the defendants. In giving the option he gives as one of the boundaries of the lot he is proposing to sell, "to adjoin lands owned by the late Michael Laffin of Lingan." The only land to which this description could possibly apply is the lot now in dispute and which had been conveyed to Michael Laffin and Walter Young by this defendant's father. I look upon this as another strong recognition by defendants of plaintiffs' rights in the lot in question.

Still another piece of evidence must be weighed in this regard. In the examination of John T. Laffin, one of the plaintiffs, this occurred:—

Q. "Did you ever have any talk with Edward Elsworth after that?" (meaning after the dispute above referred to). "A. Not after that, but some time before that I was talking to him. I wanted to buy another piece of land from Elsworth. This land in dispute came into the conversation. He said he was not very well satisfied about Young claiming this part of the land because he did not think his father had been paid for Young's part, but as far as the Laffin part is concerned it was all right."

This is the plaintiffs' case. The defendants offered no evidence. I think this case essentially different from Cunard v. Irvine. I think there is evidence that the grantor, Richard Elsworth, had been in possession of this lot when he gave the deed to Laffin and Young, and I think there is strong evidence that defendants recognized plaintiffs' title to the lot in dispute. There is no pretence of adverse possession by defendants. The lot has simply been unfenced and unoccupied since the deed. In my view plaintiffs are entitled to recover possession. They have sustained only nominal damages, which I fix at one dollar.

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SUPREME COURT.

FULL COURT. APRIL 5TH, 1909.

REX v. WILSON.

N. S. Liquor License Act—Offence—Sale of Malt Extract—"Low Grade Ale"—Percentage of Alcohol—Conviction Set aside by County Court Judge—Appeal.

Defendant was convicted, before V. J. Paton, Esquire, stipendiary magistrate for the town of Bridgewater, N.S., of an offence against the Liquor License Act in that he sold to one Mary A. Allen a beverage labelled Wilson's Malt Extract. The evidence before the magistrate shewed that the article was a "low grade ale." There was an appeal to FORBES, CO. C.J., for district No. 2, who heard further evi-

dence, including that of Maynard Bowman, official analyst for N. S. & P. E. I., who had examined the contents of some of the bottles seized and found them to contain 3.58 of alcohol. The County Court Judge set aside the conviction on the ground that there was not sufficient evidence to sustain the conviction as to an illegal sale within the town, to which the magistrate's jurisdiction was limited; his judgment on this point was reversed for the reasons stated below.

A. Roberts, for prosecutor.

J. A. McLean, K.C., for defendant.

RUSSELL, J.:—The only point in this case relied on by the defendant is that there was no proof that the sale of the liquor in question took place in the town of Bridgewater. The purchaser swore that she bought the liquor from the defendant and that it was delivered at her house at Bridgewater by the defendant's team. The policeman swears that the defendant's factory and residence are in the town of Bridgewater, that he puts up bottled drinks there which are sold and delivered from there in the town of Bridgewater. It does not seem to me to be a very long inference that the defendant's teamster when he brought the liquor to the purchaser, brought it from the defendant's place of business in the town, and that the sale took place at the place of business of the defendant. I do not think that any juryman would have any reasonable doubt or could be properly instructed that he should have any doubt that the sale took place within the town. The judgment of the learned County Court Judge to the contrary should, I think, be reversed and the conviction affirmed.

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

NOVA SCOTIA.

COUNTY COURT FOR DISTRICT NO. 5.

IN CHAMBERS. JUNE 1ST, 1909.

IN RE ANGUS McDONALD.

Debtor and Creditor—Execution—Commitment of Debtor—Irregularity—Discharge—Examiner.

This was a proceeding under the "Liberty of the Subject Act" (R. S. N. S. c. 181) on behalf of Angus McDon-

ald, a prisoner confined in the common jail at Amherst, under an execution to take the body under the Collection Act (R. S. N. S. c. 182) issued by J. Alder Davis, Esq., a stipendiary magistrate for the county of Cumberland. The judgment was obtained before said stipendiary and he made an order for payment of $1.50 per month against the debtor. The debtor was not present when the order was made but it was presented to him and he was required to sign the following waiver on the face of the order: "I hereby waive all irregularities herein and consent to the foregoing order for payments." This order was signed as a Justice of the Peace. In default of payment an execution to take the body was issued by the same magistrate. This execution was directed to a constable. It was argued on behalf of the prisoner that the order in the absence of the debtor was irregular, that under section 29 (4) of the Collection Act the execution must be directed to the sheriff, that the words "warrant or process" in section 7 (a) did not include execution to take the body, and that under section 6 (c) only a stipendiary or a commissioner can be such examiner. It was pleaded on behalf of the creditor that the memorandum of waiver waived all irregularities and that the debtor need not appear, that under section 7 (b) any warrant or process may be directed to a constable, and that a justice may be the examiner, sec. 6 (d).

J. A. Ralston, for the prisoner.

C. R. Smith, K.C., for the creditor.

PATTERSON, CO. C.J.:—I feel obliged to grant the order applied for in this matter. I greatly regret that I have not had an opportunity to look into the authorities and examine the question as to whether a debtor can consent to an order for payment by instalments being made against him in his absence. Under the circumstances I cannot take him to do so. I desire it to be distinctly understood that I am expressing no opinion on this point. I grant the order for discharge because I think sec. 29, sub-sec. (4) of The Collection Act makes it perfectly clear that the execution issued for failure to comply for an order for payment by instalments must be directed to the sheriff. In this matter the execution is not directed to the sheriff and McDonald is in consequence entitled to his discharge.

I may perhaps add that, in my opinion, when the judgment is obtained in the Court of or before a stipendiary magistrate, only that stipendiary magistrate or a commissioner can be the examiner. On this ground too, if it were necessary, I would have to order the man's release.

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SUPREME COURT.

TOWNSHEND, C.J., IN CHAMBERS. JUNE 15TH, 1909.

IN RE ALFRED LEBLANC.

Canada Temperance Act—Second Offence—Conviction—Irregularity—Costs of Conveyance to Jail—Discharge of Prisoner.

John J. Power, K.C., for the prisoner.

Stuart Jenks, Deputy Attorney-General, for the Crown.

This was a proceeding under the "Liberty of Subject Act" (R. S. N. S. c. 181) on behalf of Alfred LeBlanc, a prisoner confined in the common jail at Amherst, under the following warrant of commitment issued by Alexander G. Mackenzie, Esq., stipendiary magistrate:—

"Be it remembered that on this 10th day of April in the year of our Lord one thousand nine hundred and nine, at the Police Office in the said town of Amherst in the county of Cumberland, Alfred LeBlanc of the said town, clerk, is convicted before the undersigned, Alexander G. Mackenzie, stipendiary magistrate in and for the said town of Amherst, for that he the said Alfred LeBlanc, did between the 31st day of January, A.D. 1909, and the 30th day of March, A.D. 1909, within the said town of Amherst, unlawfully sell intoxicating liquor, contrary to the provisions of the second part of the Canada Temperance Act, then and now in force in and throughout the said county of Cumberland; and further that the said Alfred LeBlanc was previously, to wit, on the 30th day of January, A.D. 1909, at the police office in the said town of Amherst

in the county of Cumberland, convicted before the undersigned Alexander G. Mackenzie, stipendiary magistrate in and for the said town of Amherst, for that he, the said Alfred LeBlanc did, between the 31st day of October, A.D. 1908, and the 26th day of January, 1909, within the said town of Amherst, unlawfully sell intoxicating liquor, contrary to the provisions of the Canada Temperance Act then and now in force in and throughout the said county of Cumberland;

"And I adjudge for the said offence hereinbefore first charged and mentioned against the said Alfred LeBlanc, the same being his second offence against the provisions of the second part of the Canada Temperance Act then and now in force in and throughout the said county of Cumberland, that the said Alfred LeBlanc shall forfeit and pay as a penalty the sum of one hundred dollars, to be paid and applied according to law, and the further sum of $9.80 to be paid to J. Henry Arthur of the said town, Scott Act inspector, the informant herein, for his costs in this behalf, the said several sums to be payable forthwith, and in default of immediate payment I further adjudge that the said Alfred LeBlanc be imprisoned in the common jail for the county of Cumberland at Amherst in the said county, for the period of sixty days, unless the said sums are sooner paid.

"Given under my hand and seal at Amherst in the county aforesaid the day and year first above written.

Alexander G. Mackenzie, L.S.,
A stipendiary magistrate in and for the said town of Amherst in the county of Cumberland."

As will be seen the costs of conveyance to jail were not included in the warrant of commitment. It was argued that Van Tassel's Case (5 Can. C. C. 133), applied to section 872 (b) (now 739(b)) as well as 872 (a) (now 739 (a)) of the Code.

TOWNSHEND, C.J.:—I shall follow Van Tassel's case and order the prisoner's discharge.*

*EDITOR'S NOTE:—See *Rex* v. *Hines*, *post*, p. 149.

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SUPREME COURT. JUNE 1ST, 1909.

ROSS McLEAN v. HENRY C. GASS.

Action for False Imprisonment and Malicious Prosecution—Prosecution under N. S. Liquor License Act—Search Warrant—Interference by Plaintiff with Execution of Warrant—Empty Threats—Wrongful Arrest—Damages.

J. B. Bill, for plaintiff.

T. D. McLellan, K.C., and A. C. Patterson, for defendant.

TOWNSHEND, C.J.:—This is an action for false imprisonment and malicious prosecution arising out of the same matter. With regard to the part relating to malicious prosecution, I held at the trial that there was no want of reasonable and probable cause, and for this reason an action on this ground could not be maintained. The defendant is a police officer for the town of Truro and in that capacity laid an information under the Liquor License Act against Abner McNutt, proprietor of the Windsor Hotel, before Stipendiary Magistrate Crowe, from whom he obtained a warrant on the 2nd day of March, 1907, authorising him to search the hotel for liquor. Armed with this warrant he took with him License Inspector Johnson, and Inspector Smith and another police officer, Snyde, entered the premises, made a search and found nothing in the shape of liquor. Plaintiff was then boarding at the hotel, as he had been for some years before, and had a bedroom in which he kept a trunk. In the course of the search Johnson entered plaintiff's room, opened and searched the trunk and place, to his satisfaction that no liquor was to be found there. While he was in the act of making the search of plaintiff's trunk, the plaintiff came up to the room, and used very violent language and threats against Johnson—saying that he would shoot him if he had pistols, but he did not actually interfere, or use any force or effort to prevent Johnson carrying out his purpose. The row, which I have no doubt plaintiff created by his loud and foul language, brought the defendant upstairs, and apparently on his remonstrating with plaintiff, the latter abused him in much the same way,

but offered no personal or actual violence to defendant or to any of the officers. I believe the defendant and his witnesses when they swear that plaintiff was much under the influence of liquor at the time. After much altercation defendant arrested the plaintiff, who no doubt struggled and resisted so much that defendant called on the others to assist him. Defendant then put handcuffs on plaintiff, took him out of the hotel, placed him in a cab, and put him in the town lock-up. This was on Saturday evening about nine o'clock, and plaintiff was kept in custody from that time until Monday morning. On Monday morning defendant went before the Stipendiary Crowe and laid an information against plaintiff that "he did wilfully obstruct Herbert H. Johnson, additional license inspector of the town of Truro, in the execution of his duty in making a search for liquor within the Windsor Hotel in Truro aforesaid under the provision of the Liquor License Act. Under this charge plaintiff was brought before the stipendiary, who heard the witnesses and dismissed the charge.

These are the circumstances substantially detailed in the evidence and I find the following facts:—

(1) That there was no interference or obstruction by the plaintiff with Johnson, or defendant, or the other officer, in the discharge of their duty—mere blustering words, foul language or empty threats of an intoxicated man do not amount to obstruction.

(2) That so far as the search of the plaintiff's room and trunk were concerned the examination had been completed before plaintiff's arrest, and that nothing he did prevented any further search the officers desired to make.

(3) That there was no necessity at the time or afterwards for defendant arresting the plaintiff on the alleged charge.

(4) I am of the opinion that neither the defendant nor any of the officers were alarmed or frightened by anything the plaintiff did or said while making the search. The fact that the stipendiary magistrate, after hearing the evidence, dismissed the charge, strongly confirms me in the conclusion at which I have arrived. The affair was then recent, and he probably knew more of the parties than I could possibly know.

I think plaintiff's arrest was not only unjustifiable in law, but the manner in which it was carried out was harsh and inexcusable. Even if plaintiff had obstructed him, the

defendant had no reason to suppose he would run away, and a summons on the Monday following would have answered the purpose. Instead of this moderate and reasonable course the plaintiff, then an intoxicated man, is hauled out of the house, handcuffed and thrown into jail on Saturday, where, if he is to be believed, he suffered from the cold at that time of year, and defendant does not pretend he notified the keeper that plaintiff was in the lockup. There were some questions of law raised by the plaintiff's counsel which is not necessary for me to decide in the view I take of the facts, but I mention them in case this matter goes further, to inform the Court of appeal that they were before me.

In fixing the damages, I must take into consideration the plaintiff's conduct throughout, which does not commend itself to me. I disbelieve some of the evidence given by himself and witnesses in reference to his own condition and conduct at the time, but in view of the unnecessary and unjustifiable proceedings of defendant, I feel bound to award him substantial damages, which I fix at fifty dollars. Judgment for plaintiff for that amount with costs.

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SUPREME COURT. JUNE 1ST, 1909.

EUGENE ILER AND JENNIE ILER v. HENRY C. GASS.

Assault—Bodily Injury—Police Officer Arresting Woman for Drunkenness—Technical Assault—Notice of Action—Plea.

J. P. Bill, for plaintiff.

S. D. McKellan, K.C., and A. C. Patterson, for defendant.

TOWNSHEND, C.J.:—The defendant, chief of police of the town of Truro, is charged with an assault upon plaintiff's wife, who was then in an advanced stage of pregnancy, and that such assault caused her premature delivery, much pain and suffering and extra expense.

As usual in such cases the witnesses differ widely as to exactly what occurred. The defendant, besides denying the assault by him, at the trial added another defence under R. S. chap. 7, sec. 245, sub-sec. 2 (a), the Towns' Incorporation Act, which authorizes any peace officer to arrest, without warrant, any person drunk or feigning to be drunk. I am of opinion that he failed to make out successfully this latter defence, for although he believed at the time from what he had seen she was under the influence of liquor, it was proved beyond question that she was not, and was on the street quietly proceeding to her home. It was late at night, about 10 o'clock, and no doubt defendant was deceived by appearance, and if he intended to arrest her for that offence he was mistaken, which will not excuse the alleged assault. In the conflict of evidence I come to the conclusion that the account given by defendant and his witnesses more accurately represents the true facts than those sworn to by plaintiffs and witnesses. I am convinced that Mrs. Iler greatly exaggerated what occurred, that defendant did nothing more than place his hand on her arm and shoulder, and asked her what the trouble was, and then asked the other officer if any of them knew her. One of them recognised her, and either at his request or her own, this officer accompanied her to her home. I think he did no more than place his hand on her arm, and she, turning around, he at once withdrew it, and that he in no way roughly used her or did anything which could have caused a shock to the plaintiff. The question remains, whether what he did do in this case amounted to an assault. This must depend on the intent with which he did it. Was it merely to attract her attention or did he do it with the intent of arresting her under the belief that she was intoxicated. If the latter, I think in the absence of any evidence that she was, he is responsible for his action. A technical assault was committed. Weighing all the circumstances, I think at the time he placed his hand on her arm, he did it with the intention of making an arrest for which there was no justification.

With respect to the damages they must depend on the question whether what he did led to the illness and premature birth. After considering all the facts, I cannot adopt that view. As already stated, accepting defendant's version as corroborated by his witnesses, there was nothing whatever in all he did to cause any such result. The medical testimony was merely to the effect that a proceeding such

as the wife swore to might account for her condition. I think defendant, after he discovered his mistake, showed all proper consideration for her and called at her home to express his regret at what had occurred.

Holding this view I fix the damages for the assault at five dollars, for which plaintiff will have judgment without costs.

Defendant's counsel contended that plaintiff's notice of action was insufficient. I do not enter into this question for the reason that there is no plea on the record raising that defence, and in consequence defendant cannot avail himself of the irregularity of the notice if it is so.

Judgment for plaintiff.

NOVA SCOTIA.

SUPREME COURT AT WINDSOR. JUNE 8TH, 1909.

REYNOLDS v. LAFFIN.

Trespass to Land — Highway — Gate — Fences — Title — Easement — Adverse Possession — User.

H. W. Sangster, for plaintiff.

W. M. Christie, K.C., for defendant.

This action was brought in 1906 and is for destroying gate and trespassing on plaintiff's lands. The defence is that the gate was across a public way. The second action was brought in 1908 and is for tearing down fences and going over plaintiff's lands. The defence is that defendant claims right of way by uninterrupted user for more than 20 years before first action. The two cases were tried together.

The following authorities were relied on for plaintiff:—

Gale on Easements, 1908 ed., p. 193; Bright v. Walker, 1 C. M. & R. 220; Symons v. Leaker, L. R. 15 Q. B. D. 629; McDonald v. McDougall, 30 N. S. R. 305; Goddard on Easements, 5th ed. 219; James v. Plant, 4 A. & E. 761.

For defendant:—Cap. 167, sec. 31, R. S. N. S.; Hollins v. Verney, 13 Q. B. D. 304; Knock v. Knock, 29 N. S. R. 267; 27 S. C. R. 664.

TOWNSHEND, C.J.:—The defence to this action is that the gate broken down by defendant was across a public highway on which he had the right and was in the habit of travelling over to get to a part of his own land. The fact is admitted that the gate was across an old road and not now generally used by the travelling public, as another road more convenient has been made. No legal steps, however, had been taken by the municipal council to close this road to the public and it was therefore competent for the defendant to use it for all such purposes as he required. He was therefore justified in removing anything which obstructed his right to travel over it. Plaintiff's lands along this road were not enclosed with a fence, and in consequence it is claimed that defendant's cattle came on his land committing trespass. There was some question as to whether the cattle were defendant's or his sons, and also whether they came in from the road or through the defective fence dividing plaintiff's and defendant's lands. On the whole I am convinced that some of the cattle at least belonged to the defendant and on some occasion strayed on to plaintiff's land from the road. The land, however, was only in rough pasture not at that time cultivated and the cattle were removed by the defendant as soon as he was aware of it. The damages therefore would be merely nominal, which I fix at five dollars; for which plaintiff will have judgment without costs. I decline to give costs in view of the trifling character of the trespass and because the real cause of action was for pulling down gate, on which plaintiff failed.

The following is the judgment in the second action:—

TOWNSHEND, C.J.:—This is an action for breaking and entering and committing trespasses on plaintiff's lands. The trespass consisted in taking down a portion of plaintiff's fence and crossing with teams and carriages to lands of defendant in the rear. The defence is that defendant had gained a right of way over the lands in question by user for more than twenty years.

It is clearly proved that defendant in assertion of the right did remove certain panels of plaintiff's fence which blocked the right of way claimed. The defence of a public right of way was also set up, but in my opinion wholly failed.

It has been satisfactorily established that defendant for the period claimed and longer has made use of this road

across plaintiff's lands from the main road to his own lands to the south, and has always travelled on foot and with his teams and cattle along the one track. The road extended across plaintiff's land to a point marked X on the plan L. B/1 in evidence, on the division line between plaintiff and defendant, then ran a short distance on defendant's land, curved back on to plaintiff's land and ran to the old Faulkner house. Defendant says: "I agreed to purchase this land from David Faulkner and went into possession 23 years ago. I have been in possession ever since. This house that Alfred Laffin is now occupying I have been in possession of for about the same time." On a survey being made it would appear that the house was actually on the land of plaintiff, but a fence was made around it to the westward, leaving it in defendant's possession and it has always been occupied by defendant or under him, and from this house the defendant and those under him have unquestionably used this right of way for the required period. Defendant has for 25 years cultivated his land on his own side and got on the highway over this road without any objection until now. The defendant put in no deeds, although he stated that he had two deeds of the property he now owns, but swears that he had a bond for a deed and went into possession of the land in question about 26 years ago after David Faulkner got it from Fred. Faulkner. Of this 26 years he was tenant one year only. He got a bond for a deed the year after he became tenant and got the deeds when land was paid for in 1897 and 1898. He purchased both lots at the same time. The road he used out to the Joseph Faulkner house is the same as he now claims. "The road which is turned up is the road from the Joseph Faulkner house to the main road." Under this evidence plaintiff contends two things: 1st. That not being tenant in fee he could not gain a right of way by user. 2nd. That the house being on the Reynolds' (plaintiff's lot) as a fact no right of way could be gained across it during defendant's occupancy. There is no doubt considerable difficulty in determining exactly the legal right of the parties under this state of facts.

With some hesitation I hold that defendant, having established a title by a possession and occupancy of over 21 years to the lands in rear, although not the owner in fee, during the whole period was acquiring simultaneously with his title to the land the right of way across plaintiff's land. He had the equitable ownership until he got his deed and

from that date he was the legal owner. There was no legal proof either of the bond or of the deeds, and his right must depend on his title acquired by possession.

As to the second point, I think the defendant having held the land on which the house was built for over 20 years and when a division was made, his possession was recognised, and land on which the house was built having been conceded to him, the right of way was gained exactly as if part of defendant's lot. Some contention was made that he was merely a tenant at will during the first 9 years of his occupancy, but I think that after the first year, he having contracted to purchase, he was not a tenant at will but equitable owner until it ripened into a title either by deed or his possession. Apart however from the question of the location of the house, it was proved that he used the road to go on to his own land in rear for the purpose of working the same, which appears to me to do away with any difficulty on that question.

In my opinion defendant is entitled to judgment with costs.

NOVA SCOTIA.

SUPREME COURT AT WINDSOR. MAY 28TH, 1909.

FINLEY v. MILLER.

Contract — Landlord and Tenant — Lease — Rent — Lessor Boarding with Lessee.

E. J. Morse, for plaintiff.

B. T. Graham, for defendant.

TOWNSHEND, C.J.:—This plaintiff married defendant's adopted daughter, and having no home of his own where he could take her at once, resided in the house of defendant. Defendant had a small place in which he kept a store and also entertainment for travellers. Shortly after the marriage, negotiations took place between plaintiff and defendant under which plaintiff agreed to purchase the property. These negotiations went off, and a new arrangement was made by which plaintiff leased the property from defendant, the latter keeping a room for himself, and was to board with plaintiff. Defendant had in his house, as he

contends, about a year's supplies, worth, according to the only evidence before me, $106.52.

The defence is that plaintiff agreed to accept these supplies in payment of one year's board from defendant. Sometime after the marriage in the following June plaintiff left the place and went to the United States, leaving his wife who continued to do housekeeping for defendant. He remained away between 2 and 3 years and then returned, but for some reason his wife was not willing that he should return to live with her and her adopted father. Plaintiff has brought this action for 52 weeks' board at $3 per week, in all $156, from July 15th, 1906, to July 15th, 1907, being for the first year.

The sole issue then is whether plaintiff entered into the alleged agreement with defendant to accept the supplies in the house, which was undoubtedly used by the family, for that year's board.

The defendant is corroborated by plaintiff's wife that such was the agreement between them. The plaintiff, while denying it, is unsupported in any way, and in my view the arrangement was a suitable one. The supplies were proved to be worth $106.52, nearly sufficient in themselves to pay the alleged claim. It is evident that the plaintiff did very little toward working the place and matters went on about the same as before he became an inmate of the family. Looking at the whole evidence and surrounding circumstances I believe that the agreement set up by the defendant was made. I was impressed with the truthfulness of the defendant, a very old man, in giving his testimony. I therefore find a verdict for defendant with costs.

NOVA SCOTIA.

SUPREME COURT AT WINDSOR. JUNE 9TH, 1909.

GASS v. THE ALFRED DICKIE LUMBER COMPANY, LIMITED, AND ALFRED DICKIE.

Contract—Part Performance—Damages for Breach—Debtor and Creditor—Judgment—Agreement for Settlement between Parties—Consideration—Promissory Note—Subsequent Parol Agreement—Enforcement—Statute of Frauds.

W. C. Robinson, for plaintiff.

W. H. Fulton, for defendants.

The facts are set out in the judgment of the Chief Justice.

The following authorities were relied on for plaintiff:—

Fry, Spec. Perf., 4th ed., secs. 335 and 632. Parkes v. Taswell, 2 DeG. & J. 559, at page 571. Fry, Spec. Perf., 578 et seq. Lavery v. Pursell, 39 Ch. D. 508. Fry, secs. 53 and 1578 et seq. Homfray v. Fothergill, L. R. 1 Eq. 567. See cases cited Fry, page 22 (3).

Defendants relied on:—

Section 7, s.-s. d. of cap. 141, R. S. N. S. Leake on Contracts, 4th ed., pp. 197-8. Fry, Spec. Perf., 4th ed., sec. 634, p. 277. Lindsay v. Lynch, 2 Sch. & Lef. 1. Price v. Salusbury, 32 Beav. 446. Also Fry, Spec. Perf., sec. 613, p. 269, and sec. 580, p. 256.

TOWNSHEND, C.J.:—This is an action for specific performance and damages for breach of contract. The plaintiff became largely indebted to the defendant company for which the company held a judgment, owned security on personal property as well as an assignment of a life policy. The plaintiff being unable to meet this large indebtedness an agreement in writing was made between the parties on the 23rd day of July, 1907, as set forth in the statement of claim, for "the settlement in full to date of all matters outstanding between the said parties, debts, accounts, notes, judgments, mortgages, bills of sale, life policy and other securities," the consideration of which was thirteen thousand dollars to be paid by plaintiff, for which he gave his promissory note to the defendant company payable in three months at the Royal Bank. The defendant company on payment of the said note agreed to accept that sum in full for all its claims against plaintiff, and to transfer to plaintiff all the securities then held by them for the said debt and release all judgments, mortgages or other liens held by it, and plaintiff agreed to pay legal costs due Hugh McKenzie and Henry Dickie for collecting notes.

The note would fall due on the 17th October, 1907, and plaintiff was unable to meet it. Plaintiff says that on or about that date he entered into another agreement with the defendant company, by which the company in consideration of his conveying to it certain real estate at Shubenacadie and other places, a mortgage for $2,500 on the old place at Shubenacadie, four promissory notes for $125 each made

by his wife, agreed to pay the plaintiff $1,000 in cash and a release in full of the $13,000 note and all other securities as settled in the agreement of July 23rd, 1907, and to assign the life policy to plaintiff's wife on payment of $2,500 and interest from the 18th day of October, and to convey to his wife all the plaintiff's personal property on which the defendant company had a lien.

This latter alleged agreement is the contract plaintiff now seeks to enforce. It is not in writing, nor was there any written evidence to support it except a memorandum of the various properties proposed to be transferred with valuations, but unsigned by any of the parties. The defendant company utterly deny that any such agreement was made between them. Both Dickie and Cameron, who compose the defendant company, swore most positively that they never had any negotiations of the kind with plaintiff, and in explanation of their paying to plaintiff at the time $1,000 say that plaintiff represented to them that he had a friend who was prepared to pay up his note to them, but to get him to do so, he must be in a position to give a clear title to his property, and that he must have $1,000 to pay up some judgments standing on record against him before the defendant company's judgment, and that it was for that purpose alone they advanced the $1,000. Plaintiff denies the truth of these statements and asserts that the $1,000 was paid in part performance of the alleged agreement. He has further sworn that for the purpose of carrying out the agreement and at the request, or at least with the concurrence of the defendants, he went to Windsor and employed a solicitor to prepare the documents necessary to carry it out, that is to say, deeds of all the properties mentioned in the memorandum, transfer of other securities, a mortgage for $2,500, and a satisfaction piece of defendant's judgment against him. The deeds were all signed by himself as well as his wife, with her release of dower. Having them duly executed he presented them to defendants at their office and requested their signature to such of them as it was necessary for them to execute. The defendants Dickie and Cameron did sign them, although the company's seal was not affixed, and after doing so refused to deliver them or to proceed further. There is much to be said in favour of either side as to whether an agreement was entered into. On the one hand it would seem strange for the defendants to agree to advance $1,000 more and accept the properties mentioned

in full payment of the $13,000 note and the additional $1,000, when, as a matter of fact, all these lands were already covered by the lien of defendant's judgment, and it was only necessary for them to sell the same and get the title without adding another $1,000 to plaintiff's already large debt. It is suggested as one motive for doing so, they saved the heavy expenses incident to a sale under the judgment, but even so, these expenses would hardly go to $1,000. A further suggestion, perhaps of more weight, was that by this arrangement they got the release of plaintiff's wife's dower. On the other hand it is incomprehensible, if they did not so agree, that plaintiff would go to Windsor, have all these documents prepared by a solicitor in exact accordance with what he claims was agreed, have his wife's dower released, have the deeds made to defendants, present them to defendants so executed, and that defendants themselves at least partially signed and executed those necessary for their signature. No remonstrance or objection appears to have been made by the defendants at the time that the deeds conveying the properties were made to them, while some changes were made in the particulars. Their explanation that the $1,000 was given to plaintiff to enable him to pay off antecedent judgments to their own so that he could give a clear title to the friend who was to assist him, is hardly consistent with signing the instruments presented to them. While it may be that they thought in advancing the money to pay off the judgments they were only doing what must be done anyway to clear the title for their own benefit. Such memorandum and correspondence as there is, in my opinion are favourable to plaintiff's version of the agreement. Before going to Windsor defendant gave him $146, part of the $1,000, and promised to arrange the balance after seeing their banker in Halifax. When in Windsor getting the legal documents prepared, plaintiff received from Cameron from Halifax a telegram in which he informed him that the balance of the $1,000 would be forthcoming, and apparently refers to the same proposition then outstanding between plaintiff and defendants, of which the bank did not approve. Plaintiff, on receipt of this, wrote a letter to defendants from Windsor informing them of his progress about the documents and asking for a cheque for balance of the $1,000 to be sent to him there, which, however, was not done. This letter defendants do not admit having received, but in this I think they are mistaken as a letter from defendant Dickie to

plaintiff is apparently in reply to some statements in his letter.

Under this evidence I come to the conclusion that the agreement as set forth in the settlement of claim was made and entered into between the parties when it was found plaintiff would be unable to pay the note for $13,000.

The defendants have pleaded the Statute of Frauds, contending that this agreement, if made, falls within sec. 7, sub-sec. (d) chap. 141, Rev. Stats. and relating to lands, is therefore unenforceable, there being nothing in writing signed by the parties, and that if partly within the statute it is all within it, for which 4th ed. Leake on Contracts, pages 197-8 is cited. To meet this contention plaintiff alleged part performance in the payment of $1,000 and the delivery of a deed of part of the lands. I am of opinion that defendants' point is well taken, that the transaction falls within the statute, and for that reason cannot be enforced. Payment of a portion of the purchase money cannot be treated as part performance so as to take it out of the statute, and the delivery of the deed was not in carrying out the alleged agreement but for another purpose. Vide Fry, Sp. Perfm., sec. 613, also Price v. Salusbury, 32 Beav. 446.

In this view of the law governing this case my judgment must be for defendant company with costs.

NOVA SCOTIA.

BEFORE THE JUDGE IN EQUITY (AT ANTIGONISH.) JUNE 16TH, 1909.

CARRIGAN ET AL. v. LAWRIE.

Land—Title—Trespass—Conventional Boundary—Absence of Fences—Survey—Possessio Pedis.

Chisholm and A. McDonald, for plaintiffs.

Gregory, K.C., for defendant.

GRAHAM, E.J.:—The line run in this case between the plaintiffs' and the defendant's adjoining lots at Sand Point, Straits of Canso, by the surveyor, Taylor, possesses all of

the requisites of a conventional line and settles the dispute as to the alleged trespasses.

There was a real dispute as to the locality of the line. The defendant had cut trees towards the rear of the lots where there was no fence to indicate where the line was. The land had never been fenced or used. They agreed that the surveyor, Taylor, should run the line for them. He was brought there at the instance of the plaintiffs and the parties agreed to abide by his line. The plaintiff, Edward Carrigan, and the defendant agreed upon the starting point, a bolt was put down, they accompanied him out nearly to the rear assisting him in the survey, and paid in equal shares the amount charged by him for his services. Afterward the plaintiffs raised a dispute as to cutting by the defendant within this line.

The law upon this subject is well settled in this province by the cases of Woodbery v. Gates, 3 N. S. R. 255, Davison v. Kinsman, 2 N. S. R. 1, and the case of Reid v. Smith, 7 N. S. R. 262, following those cases, is very similar to this case.

The conventional line in this case is not in conflict with any written deed. As a fact the plaintiffs have no documentary title to their lot. Their only possession would be a possessio pedis. And in respect to the cutting beyond the lake to the westward, they had not even a possessio pedis. As to the other cutting in the pasture, it is not clear that they had a possessio pedis there. But assuming that they had, it is all within this conventional line on the defendant's land. The evidence clearly supports this conventional line. The plaintiffs' other side line had been established and agreed on by them. The surveyor started at a stake agreed on in that line and ran across the plaintiffs' lot. The 18 rods did not bring him to the fence on the other side of the plaintiffs' lot by about 30 feet. The 58 panels of this fence to the front had been made by the plaintiffs for a number of years and the next 57 panels had been kept up by the defendant for at least 18 years.

When the surveyor came to the end of the 18 rods the defendant claimed that he should run the side line back from that point. The plaintiff Edward Carrigan claimed that he should continue on until the side fence was reached. They compromised by dividing the 30 feet between them, two-thirds to the plaintiffs and one-third to defendant, and there they put down the bolt and ran the side line. The defendant that spring moved a part of the fence which he

kept up to the surveyed line and the other part of it the following spring.

The plaintiff Edward Carrigan's admission in cross-examination is strong. He says: "I agreed that the stake should be driven there, and that that should be the starting point of the line and that they should run the line from the rear back, taking that stake as a starting point. Then I started out and helped them to run this line. I did some blazing myself right back to the rear. We went back about three miles. All the time they were running the line back I knew Taylor was running that line to make a division line between me and Lawrie. After I got home I paid Taylor one-half."

The plaintiff Nancy Carrigan is a widow and mother of the plaintiff Edward Carrigan, who is one of the heirs and who has been on the place since his father's death. She agreed to the running of this line, and is bound by it even if her right is a sufficient title to enable her to maintain trespass.

The action will be dismissed with costs.

NOVA SCOTIA.

SUPREME COURT, CIVIL SITTINGS. MAY 18TH, 1909.

McPHERSON v. JUDGE.

Contract—Work and Labour—Repairing Steamers—Defective Performance—Counterclaim for Damages.

W. B. A. Ritchie, K.C. and Robertson, for plaintiff.
McInnes, K.C. and Mellish, K.C., for defendants.

LONGLEY, J.:—The plaintiff sues for $269.59, which he claims for work on certain small steamers belonging to defendants. This claim is admitted but it is met by a counterclaim for a much larger sum founded on the following circumstances:—

The plaintiff is a ship carpenter and as such was employed by defendants to caulk and otherwise repair a steamer "Annie," belonging to them, He did the repairs and also caulked the boat. It had a tank capable of holding 10,000

gallons of water, which it was the business of defendants to supply to ships in the harbour. This tank, which occupied the middle and forward part of the steamer together with the engine-room, which was in the rear, filled about all the space in the boat, which was only 28 tons capacity.

It was this tank in the inside which plaintiff was employed to caulk so that it would be tight and hold water. After the work had been done the tank was filled or partially filled with water and worked all right for two or three days. On Saturday night following the repairs the boat was moored at her wharf near Cunard's with the tank half full of water. On Monday morning she was found by the officers in a sinking condition and did sink, and tugs and pulleys were employed both on the water and on the wharf to get her up. When examined, after being floated, it was found that a leak existed in the tank about 18 inches long on the side and where the caulking ought to have been, but which then had no caulking. The theory of defendants is that the water in the tank escaping freely through the leak accumulated in the rear of the boat, and this with the weight of the engine and boiler submerged the stem and caused the boat to sink; and the defendants claim damages against the plaintiff for negligence in the caulking and they include in their damages the costs of raising the boat—amounting to $418.50—and also damages for loss of the use of the boat for several days at $25 per day.

Several arguments arise largely of fact upon which I have to make findings:—

1. I find that the weight of evidence is that the sinking of the boat was due to the discharge of water from the leak in the tank.

2. The next important matter is the question whether this was due to the culpable negligence of the plaintiff or his employees. The plaintiff personally knew nothing of the matter. The work was undertaken by his foreman and executed by men whom his foreman employed, but I think there is no doubt that if the work was negligently done the plaintiff is responsible. The instruction I give myself for making this finding is, "If the plaintiff employed suitable, competent and efficient men to do this work and these men performed the work in a careful and business-like manner then the plaintiff is not liable in damages." If the job was done with reasonable care and efficiency such as an honest workman would do, then if it turned out that a leak ensued

some days after, it must be put down as an incident which is liable to happen under any circumstances, and which no reasonable care and prudence could have avoided. Acting on this instruction I must examine the evidence and make a finding of fact.

I find that the men employed to caulk this tank were competent and efficient caulkers having full experience in their work and enjoying the confidence of those engaged in the trade. The three men who did the work were put upon the stand and swore that whatever work they had done was done thoroughly and in a workmanlike manner—to use their own words—"the best I knew how." One of them, Chipman, was present at the conclusion of the job and he himself put on the tar or pitch which is the last act of the caulking process. It is put over the seams which have been caulked to keep the oakum dry and preserve it from the effects of the water. He says in effect that when he put on the pitch he examined the caulking as he went along and he is satisfied that all the seams were properly filled over the entire inner surface of the tank. He said that on a portion of the work the old caulking was first "housed" in and then the new caulking put in on this, and I cannot find that this is unusual or unworkmanlike, nor that it was the cause of the leakage which caused the boat to sink. I have no reason whatever to believe that any of the men employed to do this work were careless or negligent in any way in doing their work. Therefore, acting under the instructions I have given myself above, I find that the work was done in a proper and workmanlike manner, and the plaintiff has not been shewn to be negligent on the performance of the work and is not therefore liable in negligence to defendants.

3. In case it should be determined by a Court of Review that my instructions to myself are erroneous in law I wish to say that if plaintiff is liable in any way to defendants on account of the work, then I do not think that defendants are entitled to recover damages on the basis claimed. In any case I am of opinion if plaintiff is liable at all he is only liable for such damage as would be naturally in contemplation of the parties when the work was done. The plaintiff, I think, cannot fairly be held liable for the exceptional and extraordinary results which flowed from this leak. He could not be assumed to know that a leak in the side of this tank would result in the sinking of the boat. Ordinarily

the result of a leak in the tank would be that the water would flow out and be wasted. He could not, without special notice, be assumed to know that the water leaking out would go to the stem in such a way as to cause the sinking of the boat. That seems to me to be an unusual special result that could not have been in the contemplation of the parties. A leak in the hull of the boat of similar dimensions would have wrought no such consequences. Water would have flowed in which would have to be pumped out and the leak stopped. I think if plaintiff is responsible for damages at all he would only be responsible for such as would naturally flow from a leak and the loss of the service of the steamer while this defect was being remedied, which I fix at $75.

It is perhaps fair that I should mention that this difficulty occurred in midsummer, 1907, and that the defendants never made any claim upon plaintiff until December, when he sent in his bill for repairs, when they offered to set one claim against the other, which plaintiff declined.

I give judgment for plaintiff for amount of his claim, $268.59, and costs of suit including costs of counterclaim.

NOVA SCOTIA.

SUPREME COURT, CIVIL SITTINGS. MAY 21ST, 1909.

COULSTRING v. N. S. TELEPHONE CO. ET AL.

Highway—Obstruction—Damage to Business of Boarding-house Keeper—Permission of City Engineer to Obstruct for Building Purposes—Effect of.

W. A. Henry, K.C., for plaintiff.

W. B. A. Ritchie, K.C., H. Mellish, K.C. and J. A. Chisholm, K.C., for defendants.

The facts are stated in the reasons for judgment of

RUSSELL, J.:—The Nova Scotia Telephone Company employed the other defendant, E. J. Horne, to erect for them a building at the corner of Salter and Hollis streets, Halifax. The contractor obtained a written permit signed by the deputy of the city engineer to put up a hoarding to

occupy four feet of the sidewalk, which might continue until January, 1908. The city engineer gave verbal permission to the contractor to occupy the sidewalk to the extent actually enclosed, which was more like seven or eight feet, and to continue the occupation until it was ultimately removed. Shortly after the erection of the building was commenced the tramway company began to tear up the street for the purpose of relaying their track or laying a double track, and a paving company excavated the street on the east and west sides of the track for the purpose of laying it in concrete. All these operations were carried on at once and were highly inconvenient to the plaintiff, who occupied as tenant the house and lot belonging to the defendant company and immediately adjoining on the south the lot on which they were erecting their building. The evidence as to the extent to which the sidewalk was occupied by the defendants' operations is somewhat conflicting, but I think it is pretty well established that there was at the narrowest part of the passage two feet between the hoarding and the outside of the curb. The contractor had also laid a plank walk outside the curb over the gutter, which after remaining a few days was torn up by the paving company in the course of their operations. The telephone company also excavated a trench about three feet deep and eighteen inches wide from the south-east corner of their building to the telephone pole on the sidewalk, about in line with the north side line of the plaintiff's house produced to the sidewalk. This operation occupied only a few days and cannot have caused any material damage to the plaintiffs. Moreover there was no suggestion that it was negligently done or done without the proper authority.

The plaintiffs claim that in consequence of the operations of the defendants they have suffered material damage. They, or the female portion of the family, were conducting a boarding house with an average of from seven to thirteen boarders, numbering up to thirty during exhibition week, and they claim that in consequence of the obstruction caused by the operations of the defendants the access to their house became so inconvenient that the boarders left them for more convenient and agreeable quarters.

I think they were in fact put to a great deal of inconvenience, and that the loss of their boarders was very probably due to the disturbed conditions of the neighbourhood; but I think also that their troubles are attributable in a far

greater degree to the operations of the tram company and the paving company, than to those of the telephone company and its contractor. The plaintiff had a good deal to say about the débris piled on the sidewalk and street, but among the last things he said, when called in rebuttal, was the statement that this débris was piled on the sidewalk by the paving company. He mentions also freestone, which he says was from the defendants' building operations, but I do not believe that the passage way outside of the hoarding was to any appreciable extent obstructed by the defendants' building operations, and there is no clear proof, nor any very strong probability, so far as I can see, that a single boarder would have left the house on account of the inconvenience caused by the enclosure of a portion of the sidewalk. Nor is it clear to my mind that the boarders would have stayed with the plaintiff notwithstanding the operations of the tram company and the paving company, even if the sidewalk had remained wholly unobstructed by the defendants. In other words it is not proved to my satisfaction that the damage suffered by the plaintiffs as boarding-house keepers is in any degree attributable to the operations of the defendants. If I were satisfied that the plaintiffs had thus suffered because of the defendants' operations I should have considered them entitled to recover under the authority of Fritz v. Hobson, 14 Ch. D. 542, unless the defendants could justify under the permission of the city engineer.

I think that the loss of custom would constitute such special damage apart from the inconvenience of the public at large as would entitle the plaintiffs to recover from a wrongdoer although the act of the latter was also a public nuisance subjecting him to the risk of an indictment. I am not so clear that the mere inconvenience, if such, was caused to any material extent by the restriction of the sidewalk from ten feet or more to two feet, would so entitle the plaintiff to recover. The whole public were subjected to this inconvenience and suffered from it in the same manner as the plaintiffs did. Everyone who had occasion to pass along the eastern side of the street must have been put to precisely the same inconvenience in this respect as the plaintiffs and their boarders. Some may have suffered in even a greater degree than the plaintiffs because of their more frequent use of the street.

I also incline to think that the acts of the defendants may be justified under the permission of the city engineer.

In clause 16, as well as clause 19, the ordinances refer to a permission of the city engineer as a warrant for a use of the streets which would otherwise be unauthorized and illegal. In clause 16 it seems clear that a written permission could not have been contemplated, and the fact that in other clauses such as 18 and 20 a permission in writing is specially mentioned as a prerequisite leads to the fair inference that where writing is not mentioned a verbal permission will suffice. The use of the expressions in clause 19, "therein directed" and "therein prescribed," does certainly suggest that the draftsman had in mind a permit in writing, but the clause in which these expressions occur is of a penal nature and cannot be enlarged by inference or conjecture. I do not think that a builder or contractor who had received permission from the city engineer to place his building material on the street could under this clause be punished for doing so because his permission was not in writing. On the contrary he would perhaps be entitled after acting upon the permission to receive a permit in writing, and after receiving it would of course under clause 20 be required to exhibit it when requested by the city engineer, that is, if clause 20 has any reference to such a permit as that in question here. The clauses relating to obstructions on the streets are not clearly drafted in the respect referred to, and in view of the express requirements in some of the clauses that the permit shall be in writing, it may be that clause 20 refers solely to permits for those uses of the streets to which such express requirement refers, namely the removal of a building under clause 18 and the erecting of a scaffold under clause 21.

For these reasons I think that the action of the plaintiffs must be dismissed.

NOVA SCOTIA.

SUPREME COURT CHAMBERS. JUNE 22ND, 1909.

REX v. LORRIMER.

Canada Temperance Act — Conviction — Habeas Corpus — Certiorari—Actions against Magistrate—Defendant Convicted a Second Time by Magistrate Pending Actions for Taking Excessive Fees and for False Imprisonment—Discharge of Prisoner.

Motion on the return of orders in the nature of writs of habeas corpus and certiorari in aid thereof under Revised Statutes 1900, c. 181, "Of the Liberty of the Subject," and on notice to the convicting justice, for an order to discharge the defendant from the common jail of Pictou where he was imprisoned under a warrant of commitment issued on a conviction made on May the 21st, 1909, by Struan G. Robertson, an additional stipendiary magistrate for the town of Westville, for the offence of unlawfully selling intoxicating liquor at Westville, between April the 23rd and May the 6th, 1909, contrary to Part II. of the Canada Temperance Act.

On the 5th of May, 1909, the defendant had been convicted before the same justice for a similar offence, committed within a previous period, and fined $50 and costs, and at the conclusion of that trial the defendant contended that unlawful and excessive fees were demanded from him for costs when he tendered what he was advised was the proper amount for penalty and costs, which was refused. The defendant then went to jail under the conviction and, later on, paid the amount demanded, $59.10, under protest. After the laying of the information for the offence first above stated, and before the hearing, Lorrimer brought an action against and served process on the magistrate for taking excessive fees, under section 1,133 of the Code, and also gave him a notice of action for damages for the false imprisonment in committing him to jail, both in respect to the conviction of May the 5th.

The motion was made on the grounds (1) that section 655 of the Criminal Code was not complied with; (2) that the justice was disqualified by reason of the above pending litigation which the learned Judge found as a fact was

instituted in good faith; (3) on the ground that on the trial which led to the conviction of May the 31st, 1909, no evidence was given of the non-existence of licenses in the county of Pictou for the sale of spirituous liquors within 30 days of the order in council bringing the Act into force in Pictou county as required by Dominion Acts 1884, cap. 31.

Argued June 17th; decided June 22nd.

John J. Power, K.C., in support of motion.

H. S. McKay, for the prosecutor.

RUSSELL, J.:—The first objection taken to the conviction in this case is that it is based on mere information and alleged belief and that there is nothing to shew that the magistrate complied with the requirements of section 655 of the Criminal Code, which is made applicable to the proceedings. It is contended that he should have heard the allegations of the informant and considered them and passed judgment upon their sufficiency before issuing a warrant. The New Brunswick cases, ex parte Boyce, 24 N. B. R. 347, and ex parte Grundy, 12 Can. C. C. 65, support this contention, and shew that in the absence of a compliance with the requirement the magistrate has no jurisdiction of the person of the defendant and the conviction is void. It is not, however, affirmatively shown to me that the statute was not complied with and I am not clear that I may not properly assume that the magistrate satisfied himself before issuing the warrant that there were sufficient grounds. No authorities were cited to me on this point and it was not in fact discussed. I therefore pass no judgment upon it.

The affidavits show a rather remarkable condition of affairs in the town in which the prosecution took place, and one that should not be allowed to continue for a single day beyond the time required for the proper steps to be taken to change it. It seems that the regular stipendiary magistrate of the town declines to discharge his duty and will not issue process against the proprietor of the hotel in which the alleged illegal sale took place, nor against anybody selling in that hotel. The consequence is that the Inspector is obliged to bring his prosecutions before the magistrate who acted in this case, Struan G. Robertson, Esquire. He is a legal practitioner and in his professional capacity as well as individually he has been concerned in litigation against the proprietor of the hotel, or the person who was the pro-

prietor. The defendant in this case was brought before him and convicted on the 5th of May, 1909, and a dispute arose or at least a difference as to the fees chargeable against the defendant. A tender was made of the amount claimed by the defendant's counsel to be the maximum, but the tender was not accepted and defendant went to jail, after which he paid the amount demanded under protest. The next day a second information was laid before Mr. Robertson and while it was pending, notice of action at the suit of this defendant was served upon the magistrate for a cause of action arising out of the previous conviction and imprisonment. If this notice was served merely for the purpose of disqualifying the magistrate, it should not and could not be allowed to have that effect. If on the other hand the action is brought in good faith for the purpose of obtaining redress for a grievance which the suitor believes that he has suffered at the hands of the magistrate, it seems obvious that the tendency of it is to create a bias in the mind of the magistrate. I have no doubt that the action is brought in good faith, and with a genuine belief on the part of the litigant that he has a good cause of action. I do not deem it proper that I should examine the affidavits for the purpose of determining which of the parties should succeed in that action, which is a matter sub judice. I think that the relations between the magistrate and the defendant, the effect of which is heightened by the relations between the magistrate and the proprietor of the hotel in which defendant was employed, render it highly inexpedient that he should try cases against any of the parties standing in such relations. The magistrate has properly declined to act in cases against the proprietor for this reason and would have declined jurisdiction in the present case if it had been possible to call in another justice. He persisted in trying the case only from the very worthy motive of obviating the miscarriage of justice which he assumed must otherwise take place, and I cannot say as a clear matter of law that the relations between the defendant and himself constituted a ground of disqualification. It would seem from the decision of Barker, C.J., in Ex parte Gallagher, 14 Can. C. C. 38, that the litigation must be actually pending and that a notice of action is not enough, but the notice of action in the present case was a step in the litigation required by the procedure of the Court and but for which the action itself would have been brought and would have been pending. I think that may make a difference.

Moreover, apart from the case in which the notice was served, there was an action for a penalty at the suit of the defendant against the magistrate actually pending at the date of the trial, though not at the date of the information. On the other hand, as Barker, C.J., points out in the case last mentioned, there was no room for bias to have any effect, because there was no defence and the evidence was all one way. This, however, is not to my mind entirely conclusive. It is important not only that justice should be administered without fear, favour or affection, but that criminals should be made to feel that it is so administered, and if the relations between the judge and the criminal are such as to naturally create in the latter the conviction that the judge is biassed against him, the harm done is less, it is true, than if actual injustice were inflicted, but yet it is substantial.

The further objection is taken that there was no proof of the condition precedent to the Canada Temperance Act being brought into force in Pictou county, that is to say, that there was no proof that there were no licenses in force in Pictou county at the time when the proclamation was made bringing the Canada Temperance Act into effect. This point has been dealt with in a judgment of my learned brother Lawrence, allowing a certiorari in the case of Rex v. Wallace. The question is to come before the court in banco and no opinion of mine can influence its determination. I must hold myself free to express such opinion as may seem right after the fuller argument which will no doubt take place on the hearing of the motion before the full court. But in the meantime I think it is my duty to give the defendant the benefit of the doubt. Indeed it seems clear from the judgment referred to that it hardly admits of any doubt that to justify a conviction under the Canada Temperance Act it must be shewn that the Act is in force, and that in order to show this, it must be proved that there were in fact no licenses in force at the date of the proclamation. In the words of Mr. Justice Lawrence, "the non-existence of licenses is a fact which must be proved so that the court may see that the proclamation is applicable to the particular county where the offence was alleged to have been committed." For this reason and because of the doubts as to the validity of the conviction in consequence of the circumstances referred to in the preceding paragraph, I think that the prisoner should be discharged on the usual terms

NOVA SCOTIA.

BEFORE THE JUDGE IN EQUITY (AT ANTIGONISH.) JUNE 16TH, 1909.

OVERSEERS OF THE POOR, ETC., v. McGILLIVRAY.

Bastardy—Order of Affiliation—Corroborative Evidence of Mother of Child.

Griffin, for plaintiffs.

Girroir, for defendant.

GRAHAM, E.J.:—The magistrate has made an order of affiliation in this case (a bastardy case) and there is an appeal by the putative father to the Supreme Court. I have heard the testimony orally in open court, and I think that the appeal must fail.

Our legislature has never adopted a provision similar to 7 and 8 Vic., c. 101, s. 3 (Imperial) or 35 and 36 Vic., c. 65, s. 4, requiring "the evidence of the mother to be corroborated in some material particular by other evidence." But I am asked on the strength of the Case of Overseers of the Poor v. McLellan, 9 N. S. R. 95, to hold that without such legislation the law is that there must be such corroborative evidence in order to confirm the decision below. Of course that case does not uphold any such view. But I quite concede that the reasons which induced the British Parliament to pass such statutes requiring corroborative evidence must be present to the mind of every Judge when he hears any such case, and the mother and putative father are in conflict in their testimony. The danger likely to arise from the uncorroborated evidence given by a mother making such an accusation and the ease with which she can make it, have generally been present to the minds of male Judges. But there is no rule of law about it, it is a matter of practical expediency and good sense that one should adopt such evidence guardedly.

In this case there was no testimony suggesting that any person other than the defendant was the father. The mother was cross-examined, and it appears that no one was, at the time the child was begotten, keeping her company.

The defendant was living in a house alone and this girl, who lived at a neighbour's, in a farming country, was employed by him to come to his house frequently to make his bed, wash dishes and do other woman's work, when they would necessarily be and were frequently alone together. This fact is proved by other testimony and it was the case about the time when the child would, in the ordinary course, have been begotten.

The defendant knew at the time that this unfortunate girl had some time before this given birth to a bastard child.

According to the girl's testimony sexual intercourse took place with the defendant on several occasions, and to some questions put by myself, I would think that the girl must have been very artful if she could fabricate off hand the answers which she gave with such circumstantiality. The defendant, on the other hand, interposes nothing but bare denial and was not wholly satisfactory about that.

I thought that she was telling the truth. Moreover, the magistrate had believed her. She has no pecuniary interest in the result so far as I can see.

If I were to distinguish this from the case of Overseers of the Poor v. McLellan just cited, in which a new trial was granted, I would only be distinguishing in respect to fact. In that case the mother had in the first instance under the statute charged the parentage upon another person. There the "defendant was a married man occupying a respectable position in society." I quote from Sir Wm. Young, C.J. The jury stood seven to nine. The Court exercised a discretion that may have appeared proper under the circumstances of the case.

But even if there was a statute as it exists in England, I refer to what Field, J., said in Cole v. Manning, 2 Q. B. D. 614, "Suppose that in the summer of 1874 the appellant and the respondent had been seen walking together in a lonely spot such as might be convenient for the commission of immoral acts, certainly that would be a material corroboration of the appellant's evidence as to the paternity of her illegitimate child."

In this case before me there was abundance of opportunity and there was, I think, the disposition.

The appeal must be dismissed with costs and the decision below confirmed. If an order has not already been made, I direct the stipendiary magistrate appealed from to make such order of affiliation.

NEW BRUNSWICK.

SUPREME COURT IN EQUITY. JUNE 29TH, 1909.

SEELY ET AL. v. KERR ET AL.

Lease from Civic Corporation—Foreshore or Water Lots—Damaging Erections—Legislative Authority—Injunction.

A. O. Earle, K.C. and A. A. Wilson, K.C., for the plaintiffs.

C. N. Skinner, K.C., for the defendants.

BARKER, C.J.:—This is a motion on notice for an injunction to restrain the defendants from further proceeding with the building of a wharf on a water lot leased to them by the city of St. John so as to obstruct the plaintiff's access by water to his lot, also under lease to him from the city. The facts are not complicated and there is substantially no dispute in reference to them. It appears that by a certain indenture of lease dated February 2nd, 1882, the city of St. John leased to one John Sandall a certain water lot described in the lease as follows:—"that certain lot, piece or parcel of land, beach or flats situate lying and being in Sydney Ward in the said city and known and distinguished in the plan of water lots laid out by the said mayor, aldermen and commonalty of the city of St. John approved of in common council the 26th October, A.D. 1836, and on file in the office of the common clerk of the said city by the number (2) two block A., the said lot being 50 feet front on Charlotte street extending back preserving the same breadth 80 feet or to the east side line of the wharf erected as and for a public highway on the east side of Sydney Market slip." The term was seven years from May 1st, 1877, and the annual rent was $14. In addition to the usual covenants for payment of rent and the right to re-enter in case of default, the lease contains a proviso that in case the lessee shall during the term erect or put upon the lot any wharves, bridges, buildings or other erections, the value of the same shall at the expiration of the term be appraised by two persons, one to be chosen by the lessor and one by the lessee, which two in case of their disagreement shall choose a third, and the value so appraised the city agreed to pay or renew

the lease for a term not less then seven years upon the same terms. This lease was in fact a renewal of a similar lease made by the city to Sandall dated March 16th, 1858, for twelve years. On the 26th November, 1879, the city leased to one Joseph A. McAvity water lot No. 1 in block A. for a term of years at an annual rental of $14, and in all respects upon the same terms and conditions as the lease to Sandall. Lot 1. leased to McAvity is of the same size as lot 2, it lies directly north of it and is bounded on its eastern side by the western side of Charlotte street and on the west by the Sydney Market wharf. This last lease is also a renewal of a similar lease made by the city to one John McAvity dated March 17th, 1858, for twelve years. It appears that many years ago—the precise time is not stated but I should say some forty odd years ago—wharves were built on these two lots and they were eventually used together as one lot. Their value, if unobstructed, is placed at $3,000, and the rent last year was $450. Through a series of intermediate assignments the present plaintiff became the assignee of these leases and of the improvements upon the lots in question on the 18th June, 1900, since which time he has been in possession of them as the tenant of the city. None of these leases contain any reservation of any kind by the city as to the use or occupation of the adjoining water lots. The western side of Charlotte street at this point extends down in a southerly direction to what is known as the Ballast wharf, a distance of some seven hundred feet. It runs below high water mark and is built up as a wharf at which vessels load and discharge and for which the city collects wharfage. At the southern side of the plaintiff's lot No. 2 there is at high water an average depth of water of about ten feet, and schooners of from eighty to one hundred and fifty tons come and discharge cargo there, though at low water the ground is dry. The wharves have been used at various times for different purposes as the business of the owner for the time being required—sometimes as a lumber yard and sometimes as a coal yard—and vessels came there discharging lumber or coal at the southern side of the lot as required for the business at the time being carried on there.

The defendants are a corporation under the New Brunswick Joint Stock Companies Act, and Francis Kerr is its manager and principal shareholder. On the 10th March last (1909) he obtained for the defendants from the city

of St. John a lease of water lot No. 3 lying immediately to the south of the plaintiff's lot. It extends along the southern line of lot No. 2, and across the southern end of the Sydney street wharf, in all a distance of one hundred and forty feet and has a width of one hundred feet, making a lot one hundred by one hundred and forty feet. The defendants have in course of erection on this lot a wharf, occupying its entire area, for the purpose of carrying on the coal business. The effect of this structure is to deprive the plaintiff altogether of access to his wharf by water as the defendants' wharf occupies the entire water frontage of eighty feet which the plaintiff and others used as I have described. The defendants' lease was not produced but I understand that it is precisely similar in terms to the plaintiff's lease except as to the rent reserved. Speaking in general terms the situation of these lots is this. They are both held by tenants of the same landlord under leases, one granted over forty years ago, the other a few months ago; they are both water lots lying between high and low water mark and forming a part of the foreshore owned by the city when the first lease was made and continuously since; the wharf now under construction by the defendants will when completed close up the water frontage of the plaintiff's lot, the effect of which will necessarily be to materially reduce its value. The defendants say that they have by virtue of their lease authority to do this—not that the lease in any way specifically authorizes it, for it does not—but simply as a result of the demise itself. At first blush it seems a somewhat startling proposition that under the conditions existing here, the city can thus enrich one of its tenants at the expense of another, or increase the harbour facilities for the benefit of the public by expropriating the property of a private citizen without his consent and without compensation. I thought it likely that the recorder of the city, who appeared for the defendants and is necessarily familiar with the legislation procured by the city during the last century, would cite some statute bearing on the subject, but with the exception of the charter of the city he has produced none, and I therefore assume that there is none. This reduces the question to a comparatively narrow compass.

It is scarcely necessary to point out that by the charter of the city of St. John, confirmed as it was by an Act of the legislature, the title to these water lots between high and low water mark is vested in the city. In addition to this

the city by the express terms of the charter is made the conservator of the water of the harbour and has the sole power of amending and improving the same for the more convenient, safe and easy navigating, anchoring, riding and fastening the shipping resorting to the city; and for the better regulating and ordering the same, the city shall and may, as it shall see proper, erect and build such and so many piers and wharves into the river and for the loading and unloading of goods as for the making docks and slips for the purposes aforesaid, so always as such piers or wharves so to be erected do not extend to the taking away of any person's right or property, without his, her or their consent, or by some known law of the said province of New Brunswick or by the law of the land. Without the authority of the city the erection of a wharf such as the defendants are constructing would be altogether illegal and the structure would be an obstruction to the public navigation and removable by the city authorities as a nuisance: Brown v. Reed, 2 Pug. 206; Eagles v. Merritt, 2 Allen 550.

That a private individual may have rights in public navigable waters beyond his rights as one of the public is settled by Lyon v. Wardens of the Fishmongers Co., 1 A. C. 662. The question arose between two riparian owners on the Thames, the control of which is vested in a board of conservators who are given powers similar in many respects in reference to that river to those given by the city charter to the city in reference to the harbour. One of these riparian proprietors was proceeding under a license from the conservators to erect an embankment in front of a wharf on a portion of the property of the other, the effect of which would have been to take away his access to the river at that point. The license was granted in pursuance of section 53 of the Thames Conservancy Act, which provides as follows:—"It shall be lawful for the conservators to grant to the owner or occupier of any land fronting and immediately adjoining the river Thames a license to make any dock, basin, pier, jetty, wharf, quay, or embankment, wall or other work, immediately in front of his land, and into the body of the said river, upon payment of such fair and reasonable consideration as is by this Act directed, and under and subject to such other conditions and restrictions as the conservators shall think fit to impose." Speaking of this section, Lord Cairns says: "My Lords, it is to be observed that the power granted by the 53rd section to the

conservators is not simply a power to be exercised by them with any view to the improvement of the navigation of the Thames. It is of course, a power which, like every other power given them by the Act, they are to exercise so as to preserve the navigation from injury; but subject to this, it is a power of granting to individuals, upon a money payment, the privilege of doing what they otherwise could not do in a navigable river, of pushing out an embankment or work in front of their land into the body of the river. . . . Now, it is further to be observed that no compensation whatever is provided by the Conservancy Act, for any injury done to the adjacent owners of lands on the banks of the river, by the execution of a license granted under the 53rd section. Admitting, therefore, as may well be done, that a license under the 53rd section would be a perfect justification for an embankment made by a riparian owner in front of his own land, so far as it merely affected the public right of navigation, it would appear to be, à priori, in the very highest degree improbable that an Act of Parliament could intend, through the operation of that section, to authorise the conservators to permit one riparian owner to affect injuriously the land of another riparian owner, in consideration of a payment to be made, not to the person injured, but to the conservators themselves."

Is there any substantial distinction between the two cases? In the one we find the conservators granting a license authorizing the building of an embankment for a pecuniary compensation; in the other they gave a lease for a term of years at an annual rent of a part of the foreshore, not specifically but impliedly authorizing the erection of a wharf on the demised lot. In both cases, while we may assume that the conservators did not consider the erections injurious to the public right of navigation, they became private property and were intended for the special use and advantage of private individuals. In both cases the sole question involved was the right of access to one's property by water. The effect of the license as well as the lease was only to prevent the erections authorised to be built on the lot from being indictable as public nuisances by reason of their interfering with the public rights of navigation. In the same case Lord Cairns says: "Unquestionably the owner of a wharf on the river bank has, like every other subject of the realm, the right of navigating the river as one of the public. This,

however, is not a right coming to him qua owner or occupier of any lands on the bank, nor is it a right which, per se, he enjoys in a manner different from any other member of the public. But when this right of navigation is connected with an exclusive access to and from a particular wharf, it assumes a very different character. It ceases to be a right held in common with the rest of the public, for other members of the public have no access to or from the river at the particular place; and it becomes a form of enjoyment of the land, and of the river in connection with the land, the disturbance of which may be vindicated in damages by an action, or restrained by an injunction. . . . The taking away of river frontage of a wharf, or the raising of an impediment along the frontage, interrupting the access between the wharf and the river, may be an injury to the public right of navigation; but it is not the less an injury to the owner of the wharf, which, in the absence of any Parliamentary authority, would be compensated by damages, or altogether prevented."

The right of access to one's property by water and by land is governed by the same principle. This Court recognized that doctrine in Byron v. Stimpson, 1 P. & B. 697, where it was held that a riparian owner whose land was bounded by high water mark was entitled to an unobstructed access from his land to the navigable waters of the sea. In the Attorney-General v. The Conservators of the Thames, 1 H. & M. 1, Wood, V.-C., at page 31, is thus reported: "The plaintiff, an innkeeper on the banks of a navigable river, complained that the access of the public to his house was obstructed by timber which the defendant had placed in the river; and it would be the height of absurdity to say that a private right is not interfered with, when a man who has been accustomed to enter his house from a highway, finds his doorway made impassable so that he no longer has access to his house from a public righway. This would equally be a private injury to him, whether the right of the public to pass and re-pass along the highway were or were not at the same time interfered with."

Has the city any better right to take from the plaintiff his right of access by water than they have to take away his right of access by land from Charlotte street by some structure in no way connected with the street maintenance? Rose v. Groves, 5 Man. & G. 613.

The precise nature of this right of access has come up for discussion in many cases in reference to compensation to be paid by railway and other companies vested with the power of expropriating private lands. The statutes under which the compensation was claimed are not all alike, but in all the right of access both by land and water has been held an injury to the property which must be paid for. The Duke of Buccleuch v. Metropolitan Board of Works, L. R. 5 H. L. 418; The Metropolitan Board of Works v. McCarthy, L. R. 7 H. L. 243; North Shore Railway Co., v. Pion, 14 A. C. 612.

It was held in the Lyons v. Fishmongers case that the right of access which was sought to be taken away was a right within the saving clause in the Thames Conservancy Act, and therefore the Conservancy authorities had no power to license the building of the embankment. On this point Lord Cairns says: "It appears to me impossible to say that a mode of enjoyment of land on the bank of a navigable river which is thus valuable, and as to which a landowner can thus protect himself against disturbance, is otherwise than a right or claim to which the owner of land on the bank of the river is by law entitled within the meaning of such a saving clause as that which I have read." Section 179 of the Thames Act which is there referred to is as follows: "None of the powers by this Act conferred, or anything in this Act contained, shall extend to take away, alter, or abridge, any right, claim, privilege, franchise, exemption, or immunity to which any owner or occupier of any lands, tenements, or hereditaments on the banks of the river, &c." The saving clause in the charter of the city is—"so always as such piers or wharves so to be erected or streets so to be laid out, do not extend to the taking away of any person's right or property, without his, her or their consent, or by some known laws of the said province of New Brunswick or by the law of the land." In reference to the saving clause in the Thames Act, Lord Selborne says: "That a public body, such as the Thames Conservancy Board, should be empowered by Parliament to sell, for money, to private persons, the right to execute, for their own benefit, works injuriously affecting the land of an adjoining proprietor without compensating him for that injury (which is the contention of the respondents) is inconsistent with the ordinary principles and with the general course of public legislation on such subjects. When, therefore, we find in the Act which

is alleged to confer such powers a saving clause in the large and untechnical terms of the 179th section, by which (without any forced or unreasonable extension of their natural meaning) this class of rights may be sufficiently protected, I think we ought not to hesitate to construe it so as to afford that protection."

The principal value of a wharf property consists in its right of access by water, and, as applied to the plaintiff's property the right is one which under the saving clause in the charter neither the city nor its lessee could without his consent take away from him. See per King, J. in Magee v. The Mayor, etc., of St. John, 23 N. B. R. 275, at page 300.

I think the plaintiff is entitled to an injunction restraining the defendants from obstructing his access to his wharf by the wharf which they are building or have completed on their lot. At the hearing, if I am right in my view, the plaintiff will be entitled to a mandatory injunction for the removal of the obstructions or for damages. I shall not exercise the power which the Court has on this motion to grant a mandatory injunction, although in view of the defendants' action after notice of this motion was given I think I would be justified in doing so. See Daniel v. Ferguson (1891), 2 Ch. D. 27; Smith v. Day, 13 Ch. D. 651.

The defendants will be restrained from erecting or permitting to be erected any wharf or other structure on the lot occupied by them under the lease dated March 10th, 1909, from the city of St. John, mentioned in the plaintiff's bill and lying immediately to the south of plaintiff's lot No. 2 mentioned in the bill, whereby the plaintiff's right of access to the waters of the harbour of St. John on the southern side of his wharf, or the privilege heretofore enjoyed by the plaintiff of loading and unloading, embarking and disembarking goods on the south side of the said wharf, may be defeated, destroyed or prejudiced.

Costs reserved.

NEW BRUNSWICK.

SUPREME COURT IN EQUITY. MAY 18TH, 1909.

ROBINSON v. ESTABROOKS AND McALARY.

Lease — Improvident Contract — Misrepresentation — Fraud.

M. G. Teed, K.C., and A. H. Hanington, K.C., for the plaintiff.

H. H. McLean, K.C., and F. R. Taylor, for the defendants.

BARKER, C.J.:—The plaintiff, who is an unmarried woman living in the city of St. John, is the owner of a property fronting on Douglas Avenue about 400 or 500 feet from the junction of that street with Main street. It has a frontage of some 80 feet on the Avenue and extends back some 150 feet. On it stands a four storey brick building some 40 feet wide. In the ground flat there are two shops capable of being used together and the three upper flats are used as tenements. On the rear of the lot there is a warehouse used in connection with the stores, a barn and some sheds. The plaintiff purchased the property from one Watson in August, 1906, for the sum of $6,400. It was then and apparently is yet subject to two mortgages, one for $2,500, and one for $1,000. The difference between the amount of these two mortgages and the purchase money, $2,900, the plaintiff paid in cash at the time of the purchase. In the latter part of 1907 or the early part of 1908 the defendant McAlary, who had been in business for some five or six years, and the defendant Estabrooks, who had never been in business at all on his own account, entered into partnership with a view of carrying on a wholesale and retail grocery business, and for that purpose they applied to the plaintiff for a lease of a portion of the premises I have described and which had been vacant for some time. As a result of the negotiations the plaintiff and defendants, on the 4th February, 1908, entered into a lease for a term of five years from May 1st, 1908, at an annual rental of $175, with a covenant for a renewal for a further term of five years. This lease is under seal; it was executed on the day

it bears date by the plaintiff and defendants, in the presence of one H. A. Estabrooks, who is a father of the defendant of that name, and it was registered on the 24th February. The premises demised as described in the lease are as follows:—"Two stores and rooms (including the refrigerator) and all appurtenances in connection therewith situated in brick building No. 34, 36, 38 Douglas Avenue, St. John, N.B., also including the warehouses, barn, carriage sheds and out buildings situate in rear of said brick building, with privilege of erecting a new warehouse if desired in connection with the said premises, with right of way to and from said premises, and yard room, to be free from all taxes, bills of every kind and nature whatsoever." The lease contains the usual covenant for payment of rent and also a provision for a renewal "for a further term of five years or more and containing and subject to precisely the came covenants, provisions and agreements as are herein contained." In May, 1908, the plaintiff commenced this suit for the purpose of setting aside the lease on the ground that it had been procured by means of fraud and misrepresentation. In section 9 of the bill the plaintiff alleges that what she agreed to lease to the defendants were the two stores, the use of the refrigerator, the upper or northerly warehouse and a shed adjoining it on the north side of the lot, with the right of way to the rear of the lot—also a right to repair the shed or to rebuild the same—and that the improvements were to belong to her and that the tenancy was to be only for five years without any right of renewal, and the lease was to be upon the covenants and conditions usually contained in a lease of that nature. It is alleged in the same section that negotiations for renting the property commenced in the autumn of 1907 and that the plaintiff finally agreed to give a lease such as I have mentioned. In section 11 the plaintiff alleges that the defendant McAlary asked her to agree to a renewal of the term, but she distinctly refused to do so. The bill also alleged that the plaintiff is very ignorant of business matters, that she had no independent advice, that $175 a year is a grossly inadequate rent for the premises, that she was induced to permit or assent to the defendant McAlary drawing the lease, that he did draw it and represented the lease in question to be in accordance with the terms agreed on which I have mentioned. The bill also alleged that McAlary read over the lease to the plaintiff, "but," to quote from section

12, "in so reading the same, did not make the said plaintiff understand, and the said plaintiff did not understand and the said defendant Joseph A. McAlary did not read the said lease so that the plaintiff could understand that the said lease contained anything more than as above set forth as having been agreed to." The bill also alleges that the plaintiff was thus induced to execute the lease believing it to be in accordance with the terms settled upon as set forth in section 9. Section 17 of the bill is as follows: "That the said plaintiff charges and alleges that the said defendants have by "fraud and misrepresentation induced the said plaintiff to execute the said instrument which was so executed by her, as above set forth." The bill prays for a decree setting aside the lease on the ground of fraud, and, failing that, for a decree rectifying the lease by striking out certain portions and inserting the usual covenants and conditions which it is said were improperly omitted.

In the view I take of the evidence in this case it is unnecessary to discuss these two heads of relief separately. If the plaintiff can succeed at all it must, I think, be on the ground of fraud, and in disposing of that question the other will be disposed of also.

This plaintiff is not a woman whose mental powers were either naturally weak or had been impaired by old age or disease. On the contrary she manages her own affairs without assistance and her capacity to make a contract such as this lease is, and to fully understand its nature and effect, is not questioned. She is not in straitened circumstances driving her to make improvident bargains in order to relieve her pressing necessities. On the contrary she is a woman of property amply sufficient for her maintenance in comfort. The bill alleges that she is very ignorant of business affairs. But her own evidence disproves that, at all events so far as the particular kind of business involved in this dispute is concerned. She seems to have bought and sold valuable properties without the assistance of any one; she rented her premises, made out and served notices to quit, collected rents and managed her property in all its details without requiring aid from any one. In section 9 of the bill she has placed herself on record in regard to this very transaction as one who for weeks was in negotiation with McAlary over this lease, who absolutely refused to any renewal clause and who finally consented to an arrangement as clear cut, as positive and as business like as only one of experience and

knowledge of such affairs could have secured. All these attendant circumstances which make success easy for those who set out to defraud in transactions of this character are absent here. In such a case questions such as the improvidence of the contract, the inadequacy of the rent, the unfairness of the provisions of the agreement and the supposed inequality of the terms upon which the parties met, have but little bearing on the real matter in dispute.

The facts are, I think, against the plaintiff even on those minor points. When the plaintiff purchased the property in 1906 the stores, warehouse and barn leased to these defendants were rented for $164. The sheds are of little or no value. Secord occupied the stores in 1905 and 1906 at a rental of $100 a year. He refused to pay an advanced rent in May, 1907, and moved his business elsewhere. The stores were vacant from May, 1907, until these defendants took them, though the plaintiff naturally tried to find a tenant. In addition to this the premises were out of repair; the stores had to be cleaned up and shelving put in with an office. This cost the sum of $257.51. The defendants were also obliged to expend $32.67 in fitting up a stall in the warehouse and the cost of the repairs necessary to put the warehouse and barn in good order was estimated at from three to five hundred dollars. In addition to this if the defendants carry out their intention of erecting a new warehouse it will revert to the plaintiff at the end of the term. There is no evidence that the plaintiff could have got an increased rent and there is strong evidence that as a business stand it is not nearly so valuable as it would be on Main street, a few hundred feet away. There is nothing improvident, I think, in the lease or the rent reserved. It was also contended that this lease must be set aside on the ground that the plaintiff had no independent or competent advice. I am at a loss to see how any such question can arise here. The plaintiff's competency to contract is in no way disputed, neither is her capacity to fully comprehend the nature and effect of the business in hand. Why is her freedom to contract to be enjoyed only in the presence of an adviser whom she has not asked for and does not require? It was said that McAlary stood in some fiduciary relation to the plaintiff in reference to this property, which entitled her to the protection of an independent adviser, and therefore upon well settled equitable rules, the lease would be set aside on that ground. There is absolutely nothing in the

evidence, as given by the plaintiff herself, to show any such fiduciary relation. The only fact that seemed to be relied on was that he offered to draw the lease and she consented to his doing so. He says that she complained of lawyer's charges and he then said he would draw the lease and if it did not suit her she need not sign it. The independent advice to which a donor or grantor is entitled when dealing with a person occupying some fiduciary relation to him is for his protection in making the contract, so that the person who is to receive the benefit may not secure it as a result of the influence naturally arising out of the relation itself, or of the influence actively used in his own favour. In this particular case, before anything was said about drawing the lease, the parties had settled between themselves all the terms of the contract and agreed to them; and the provisions of the lease, whether good for the defendants or not, could in no possible way be attributed to a fiduciary relation subsequently created, even if what took place could under any circumstances be construed as having that effect, which as at present advised I think it could not. The verbal agreement was binding as a tenancy at will, and it only required a writing to satisfy the Statute of Frauds. What McAlary was to do was simply to reduce the verbal arrangement into writing for the signatures of the parties, without in any way altering the effect, adding such clauses as might be usual in such instruments in order to secure the performance of their mutual obligations according to their intention. If in doing so an error as to some material matter should be made either by way of mistake, inadvertence or fraud, and the plaintiff executed the instrument, she might, on a proper case shewn, have it rectified so as to conform to the actual agreement between the parties or have it set aside on the ground of fraud. No question of independent advice could arise—the necessity for that ended when the negotiations culminated in a complete and concluded agreement. The only thing which might be said is that where fraud is charged, as it is here, he was given a chance of smuggling something into the lease for his own benefit with a dishonest intention. Coming now to the substantial point in this—that is the charge of fraud and misrepresentation—what are the facts? I have already mentioned the plaintiff's position as to the premises and her anxiety to secure a tenant. What was the defendants' position? They were starting a business in premises which were originally built and for a long time

occupied in a business such as they were opening. They required the warehouse to store their heavy goods in and the barn and outbuildings to stable their horses and delivery wagons used in connection with their business. They had a business to make on premises for which there seemed no demand. In view of the situation of both parties the lease in question seems to me not unreasonable. The plaintiff's account of this transaction is that McAlary came to her and offered $150 for the two stores, what she calls the upper half of the warehouse, the right of way to the rear of the lot from the street and a shed. She asked $200, but they eventually agreed on $175. There was nothing, she says, about the barn or a renewal or improvements. That was the result of their negotiations. The defendant McAlary, she says, drew the lease in question and took it to her, and when both defendants were there read it over to her, and that as he read it, all the property described was the two stores, the refrigerator, the upper half of the warehouse, the shed and the right of way, and to quote her own language, "he nodded his head at the same time, to make it sure." As to the renewal clause her evidence is as follows:—

"Q. When he read it to you, did he read anything about renewal and what if anything took place if he did?

A. He said I gave it to him for five years and then at their request he said have it for five more; and I said no, not at all, never, and he said if you don't want to at the end of the five you need not give it, you need not renew it. I never intended to renew it, never.

Q. What he read was for five years, and at their request a renewal for five years more, and you objected to it?

A. Yes, I objected to it and didn't give it and it rested there."

This is the actual lease in dispute and by the plaintiff's evidence just quoted, it will be seen that McAlary read the precise provision for renewal as it is in the lease which she then signed. The examination continues:—

"Q. And he said if at the end of five years you didn't want to give it you need not?

A. Yes.

Q. Did you sign it having that understanding in your mind that you need not give it unless you wished?

A. Certainly.

Q. Was anything said or did you understand anything being said that at their request you were to make a lease for more than five years by way of renewal?

A. No, never.

Q. You never understood anything about more than five years?

A. I never."

How it is possible for these statements to be reconciled I don't know. In answer to a question she had said that he read this very renewal clause from the lease and that when he read that it was for five years and at their request a renewal for five more she objected to it and didn't give it. And a moment afterwards she said she understood nothing about a renewal—it was only for five years. The plaintiff says this was the occasion when the lease was executed, both defendants were there and McAlary read it over to her to see if it was right. She was then asked:—

"Q. After it was read over in this way did you read it yourself?

A. I never read it. He says I did. I never read it.

Q. Did he hand it to you?

A. Yes, he handed it to me but I didn't read it. There was a lot of fine writing between it and it seemed kind of dark and I said I suppose it is all right, I didn't read it."

She then tells how the witness was sent for and the lease was executed in his presence. There is no pretence that the lease was changed in any way and it is clear from the plaintiff's own testimony that she must have signed the lease with the renewal clause in it just as she says McAlary read it to her, though she did object. This is important because the defendants say that she did object at first but afterwards consented to the clause. Later on in her evidence the plaintiff states that on this occasion there was no one present but McAlary and herself. On her cross-examination she swears positively that the lease was only read to her once on the day it was executed and that when the witness and the defendant Estabrooks came it was not read over to her. McAlary's evidence as to what took place when the lease was executed is this. There is no dispute as to the statement that the plaintiff and defendants executed this lease when they were all together on the 4th February, 1908, in the presence of Henry A. Estabrooks, who signed as the sub-

scribing witness. McAlary says that when the lease was prepared by him he and the other defendant went to the plaintiff's home, that he read it over to her precisely as it is now except her second name was not in, that he omitted nothing from it, that he handed the plaintiff the lease and told her to read it over for herself and see that everything was right, that she had it in her hand for fully fifteen minutes. She objected to the renewal and said she wouldn't sign it at all. The defendants then said they could not take the premises on any other condition, because there was a lot of repairs—that Estabrooks got up to go out, saying it was no use. They then offered to leave the lease with her, to take her time and look it over. When Estabrooks got up to go out the plaintiff said she might as well sign the lease now as ever. McAlary said "you need not sign it now if you don't want," that he did not want her to sign it, if it was not right. Estabrooks then went out and brought back his father as a witness and after he came, the lease was again read over just as it is, omitting nothing, that the plaintiff and others said it was satisfactory. The plaintiff went and got the ink, her middle name was inserted where necessary and the parties executed it. McAlary then told the plaintiff that he would give her a copy later on, to which she replied "all right, any time." This witness also states that just before signing the lease the defendant Estabrooks asked her if she had given Watson and Goddard notice to quit. They then occupied the barn and warehouse, and she said she had and added: "Whether you lease the premises or not they have to go because they are not paying the rent." The defendant Estabrooks, previous to his going into this business, was in his father's employ at Gagetown. He says that he came down to St. John about the 10th of January when he and McAlary inspected these premises with a view of making the plaintiff an offer. After they had gone over the buildings they made her an offer of $150 for the two stores, the buildings in the rear and barn and shed, that is the premises mentioned in the lease. She wanted $200. They then told her they could not see their way clear to give it and she wanted to know if they wouldn't think it over, which they agreed to do. Five years was the time mentioned. After talking the matter over they concluded to offer $175. He went home and about the latter part of the month he heard from McAlary and by appointment he came to St. John on the 3rd of February, his father accom-

panying him on some business of his own. On the afternoon of the 4th February they took the lease and went to the plaintiff when the lease was read to her by McAlary just as it is. The plaintiff objected to nothing, except the renewal clause. His evidence on this point is as follows:—

"Q. Did he read the whole lease?

A. He did.

Q. Everything that is in it.

A. He did.

Q. And Miss Robinson objected to the clause for renewal after he had read it?

A. Yes.

Q. What did she say about it?

A. Said she couldn't give a lease for renewal; she wouldn't sign a lease like that.

Q. Was anything said by you or McAlary then to her?

A. I told her that was my errand down and if she didn't care to sign it we wouldn't take it on any other terms.

Q. What business did you and McAlary intend to carry on there?

A. Grocery business.

Q. Wholesale and retail grocery business?

A. Yes.

Q. And you wanted the property for a longer term than five years, if you were successful there?

A. Certainly, and it had to be repaired.

Q. When you said you would not take it on any other terms but with a right of a further term of renewal, what did Miss Robinson say or do then?

A. I got up to go and she said she might as well sign it now as any time.

Q. Said she would sign it?

A. She would sign it."

He then went to a store where his father was not far away and brought him to the plaintiff. He says that the lease was given to the plaintiff by McAlary to read—that she had it in her hands for fifteen or twenty minutes, long enough to read it, and she was turning the sheets over and acting as if reading it. That was before Henry Estabrooks came in. After he had come and while he and the defendants and plaintiff were all together, this witness states that the lease was again read over by McAlary and the plaintiff made no objection to it and it was signed. He also states

that before the lease was signed he asked the plaintiff if she had given Watson and Goddard notice to quit and she said she had, that they were poor tenants and didn't pay their rent.

Henry A. Estabrooks' evidence entirely corroborates that of the defendants as to what took place at the time of the execution of the lease on the 4th February, at the plaintiff's house. He says he recollects that McAlary, who read it, mentioned the renewal clause and the barn and outbuildings just as they are mentioned in the lease. He also says that before the lease was signed Ashley Estabrooks asked the plaintiff if she had notified the parties in the barn to quit the 1st of May, and she said she had.

In Hutchinson v. Calder, a case noted in Cassels' Dig. 785, the Supreme Court of Canada is thus reported—"Where the Court below dismissed the plaintiff's bill praying for the rescission of an executed contract, held that a clear case of fraud must be established to obtain the rescission of an executed contract, and the allegations of fraud made by the plaintiff being uncorroborated and contradicted in every particular by the defendant, neither the Court below nor the Court in appeal would be justified in rescinding the contract in question." The evidence to which I have referred brings this case within the rule laid down in the authority just quoted, and I should be justified in dismissing the bill without further remark. It is, however, only fair in cases of this kind to those who have been deliberately charged with gross fraud that if the Court entertains the view that the charge has been entirely disproved, it should say so and not take refuge behind a mere technical rule. There are other portions of the evidence which in this connection should not be lost sight of. Some reliance was placed on the fact that no copy of this lease was given to the plaintiff until she had made repeated applications for it. It cannot be that the defendants were in any way keeping the matter a secret because they put it on the public records within three weeks of its date. When the plaintiff's mind became so disturbed by the rumours as to the iniquity of this lease set afloat by some of her meddlesome neighbours, she applied to the defendants for a copy of it. This was in the latter part of March or early part of April, and the evidence shews that she received it about the middle of April. And yet she never even read it until about the first

of May. She says she "chased" after the defendants for this copy, went repeatedly for it, so great was her anxiety as to its contents and the rights she had given the defendants under it, and when she got it she did not take the trouble to look at it. Unless the plaintiff's account is much exaggerated, it seems incredible to me that she should have treated the copy with such indifference. It is equally incredible that if this lease was read to the plaintiff certainly on two occasions, as these witnesses positively swear, in its present form and without omissions, that she should not have understood that the barn was included. A technical term or a formal covenant she might have misunderstood, but the words of the lease are the two stores and rooms, &c., "including the warehouse, barn, carriage sheds and outbuildings," &c. For McAlary, in the presence of his partner, to attempt such a piece of deception by purposely omitting these words seems silly, for Estabrooks, unless a party to the fraud, must have detected it. There was no more reason for omitting the words, "barn," "carriage sheds," &c., than for omitting the renewal clause. Of the two perhaps that was the more important provision. Besides this the lease was immediately handed the plaintiff so that she might read it, and the fraud would be discovered. This lease, however, was not the only paper executed that day. It was part of the arrangement that the defendants were to have immediate possession of the premises in order to make the necessary repairs. A written agreement to this effect authorising them to take possession for that purpose was put in evidence. It was signed by the plaintiff at the same time as the lease, in presence of the same witness, and it describes the property in the same words as are used in the lease. The plaintiff admits she made a verbal agreement to that effect, but she says positively that the signature to that paper is not hers and that she never heard of the paper until long after the transaction took place. As to this paper she is positively contradicted by the two defendants who were present when it was signed, and who say it was read over to her and by Estabrooks, the witness to the signature. In addition to this she swore positively that the signature to the lease in dispute, the instrument which she wishes to set aside, was not hers, and it was with great reluctance that she eventually admitted that it might be. Her signature to her answer to the cross interrogatories filed in the suit was shewn her and she swore most positively

that it was not genuine. To charge this lady with a wilful disregard for the truth would, I have no doubt, be doing her an injustice. I cannot, however, satisfactorily account for the pertinacity with which she adhered to statements which were palpably incorrect, and others which were not only improbable in themselves, but were positively contradicted, by at least three witnesses. It is sufficient for me to say that it is quite impossible for this Court to accept her evidence as a basis for granting the relief asked for, and I think the fraud with which the defendants are charged is not proved.

Mr. Teed contended that if all other relief was refused the plaintiff was at least entitled to have the words "or more" struck out of the renewal clause so that it would be limited to a second term of only five years and no more. It would seem from the defendants' evidence that they only expected a lease for five years and a renewal for five, and that would be the meaning of it if the word "or" were expunged. They consent to the words "or more" being struck out if there is any doubt in reference to the meaning of the clause in its present form. Had that been made the only ground of complaint originally, I have no doubt this litigation might have been avoided.

There will be a decree expunging the words "or more" in the renewal clause, the defendants consenting thereto, and in other respects the bill will be dismissed.

The plaintiff must pay the costs.

NOVA SCOTIA.

SUPREME COURT. JANUARY 8TH, 1908.

NEIL D. MACINTOSH AND THE CAPE BRETON RAILWAY COMPANY LIMITED.

Railway — Passenger's Luggage — Negligence — Loss — Liability.

A. D. Gunn, for plaintiff.

D. A. Hearn, K.C. and G. W. Kyte, K.C., for defendants.

GRAHAM, E.J.:—The plaintiff had a through ticket from Boston to St. Peters of the Boston & Maine Railroad Company, the last stage of the journey being over the line of the defendant company, viz., between Point Tupper and St. Peters. He checked his luggage through, namely, 2 trunks, and having an excess of luggage, viz., 45 lbs. charged at 88 cents, it was sent forward to its destination at St. Peters with a collection ticket attached to the trunk in question to be collected there. One of the trunks contained a relative's articles, and it went safely.

The plaintiff arrived at St. Peters on the evening of Thursday the 16th January, 1908. His trunk (the one in question) and a trunk of one Murdock McKillop, which had been delayed, arrived there by the same train.

McKillop's brother Angus presented his check, and the baggage master not noticing that the numbers on the checks did not correspond, in mistake gave him the plaintiff's trunk, which he took home to Framboise, 30 miles distant.

The next day the plaintiff presented his check for his own trunk and of course it was not there. The defendant got into communication with McKillop that day. Angus McKillop arrived home with the plaintiff's trunk on Friday, having sojourned one night on the way. It remained at McKillop's from Friday to the following Tuesday. Murdock McKillop knew that it was not his own trunk, but he opened it to learn whose trunk it was, he says; and the fact, was discovered by an envelope found in it addressed to the plaintiff.

On Tuesday Murdock McKillop returned the trunk as far as Grand River, where he left it in charge of the postmaster, to be forwarded by the mail couriers. One mail courier took it to Lower L'Ardoise, and another mail courier took it from there to the defendant at St. Peters. This was about Thursday or Friday, about a week after it had first arrived there. It was stored over night at Grand River, and from there to St. Peters it has not a continuous journey. On the following Sunday the plaintiff was informed of its return. Later he called for it, and it was opened and examined in his presence. The plaintiff says that there had been removed from the trunk the following articles: 1 coat, 1 corduroy coat, 1 pair trousers, 1 hat, 2 pair low shoes, 1 carriage rubber coat, 1 pair leather gloves, and 2 pairs of socks, all worth about $41.10; also $75 in money,

and a bank book of his sister's and some papers. The money, he says, was in an envelope containing photographs, which envelope was produced from the trunk in Court. The plaintiff says that he packed these things in this trunk in Boston. He saw two of the articles when his luggage was examined by the customs officer at Vanceboro.

The defendants have called as witnesses (two under commission) the McKillops, the two mail couriers and two of the three persons with whom the trunk was stored en route. They generally deny taking anything out of it, and, with the exception of the McKillops, that it was opened at any time.

As to the plaintiff's testimony I found no reason for disbelieving it. I do believe him. I do not think that having found that his trunk had gone astray he was equal to concocting the story. He did not appear to be the kind of man who would be bold enough to run the risk of bringing an action and going on the witness stand, with, at most, $125 to gain, unless these articles were in the trunk.

His cross-examination was severe, and I thought he came out of it very well, as well as most do who are telling the mere truth and who are all the time labouring under the disadvantage of being expressly suspected of having done a disgracefully dishonest thing. The defendants' counsel attempted to make two points against him. One was in connection with his statement to Mr. Morrison as to the source of the money. I think Mr. Morrison misunderstood him. He was trying to find out the truth of the matter and probably commenced by asking him what bank he had kept his money in, or some such question; and the plaintiff told him, and it was true, that he had formerly kept money in that bank, but he did not claim and does not claim to have taken this money from that bank. He says he got it from the man who employed him and had it in a drawer and when he was leaving took it, namely $53, which he carried in his pocket, and $75 which he carried in this trunk.

The other point was this: When he was giving reasons for the truth of his story to the defendants' agent, he suggested weighing his trunk, and it was found to weigh 120 lbs., and he appealed to the excess weight which shewed 195 lbs. But that was the weight of the two trunks as I have already mentioned, but it was when he saw the error

and called the attention of the defendants' agent to the fact that the collection ticket shewed that the weight given was of two trunks. I think it happens that when a man, a suspected man, is arguing in favour of his innocence, he sometimes innocently enough puts forth a reason which may be found to be untenable.

Dealing with the mere fact of the difference in weight, 75 lbs. would be greatly in excess of the weight of the missing articles; and there is room for the missing articles and a trunk of 60 lbs. or thereabouts.

I think it was not an unreasonable thing that when he had $128 he carried of that sum $75 in his trunk.

I find as a fact that the missing articles were put into the trunk in Boston, and I infer that they were still there when the trunk reached St. Peters the first time.

The defendant negligently gave that trunk with those articles in it to some one else. It was a trunk with a very common lock. McKillop and McKillop's sister each had a key which would open that trunk. I think that the theory is more probable that the articles and money were stolen from the trunk during the period between the time it arrived at and was returned to St. Peters, than either the theory that they were removed between Boston and St. Peters, which is really not put forward, or the theory that the plaintiff never had these things there or had them in the other trunk all the time.

I find in favour of the plaintiff. He will have judgment against the defendants for the value of the missing articles, $41.10, and for the money $75, in all $116.10 and his costs.

NOVA SCOTIA.

SUPREME COURT. APRIL 21ST, 1909.

CHENG FUN, CHENG SAM, YIP CHING, TAM KELL, YOU MAK, JOL LUM, SAM WING & SAM LOG v. P. C. CAMPBELL.

Chinese Immigration Act — Offence against — Criminal Character of Same—Commitment for Trial—Reserved Case—Discharge of Prisoners—Malicious Prosecution—Costs.

Finlay McDonald, J. W. Madden and Neil D. McMillan, for plaintiffs.

Hugh Ross, and R. T. McIlreith, for defendant.

LONGLEY, J.:—In August, 1907, a number of Chinamen were landed clandestinely at night on the coast of Cape Breton. The captain who landed them committed a breach of the law, and is liable to fine and imprisonment. The Chinamen themselves having made no report to the customs authorities and paid no head tax, though the law expressly requires it, were believed by the authorities to have committed a breach of the law and liable to prosecution and punishment. The customs officer at Sydney having been advised by the preventive officer of the secret landing of these men, the collector detailed the defendant, P. C. Campbell, one of the officers of the department at Sydney, to look after the matter. He with the aid of the police of the city soon rounded up these men and put them in prison. Their names were unknown, and no warrant was filed in the first instance. Later the defendant filed an information prepared and furthered by the solicitor representing the defendant at Sydney, upon which the stipendiary issued a warrant. The form of this warrant not being deemed sufficient to disclose an offence, an order for the discharge of the Chinamen was filed by Mr. Justice Russell. (See 3 E. L. R. 551.) The defendant acting under advice, then laid another information somewhat fuller and more specific in its terms, under which these men were again put in custody. The defendant honestly believed that an offence against the Act had been committed. The stipendiary thought so, and

committed them for trial, after preliminary hearing, and the County Judge thought so who tried them, and imposed a penalty of $100 each, which was paid.

Subsequently, the conviction having been subject to review by the Supreme Court on a reserve case, the full bench decided that the Act charged and proved did not constitute a criminal offence and the discharge of all the prisoners was ordered.

Eight of them have now brought action against the defendant Campbell for false imprisonment. No malicious prosecution is alleged. If the action had been for malicious prosecution in my judgment it must have failed, for I have no doubt defendant acted upon reasonable and probable cause and had no object but the discharge of official duty imposed upon him by his superiors. But in the case of false imprisonment where it has been held that the prisoners were held without any criminal charge having been made, my view is that the defendant, under the law, becomes liable for any actual damages which plaintiffs suffered as a result of the imprisonment, even though he acted in good faith.

One of these actions, Sam Chak v. Campbell, was tried before me with a jury. Under my instructions they gave a verdict against defendant for $40, amount paid to solicitor for procuring his release from custody, and $7 for loss of time.

After this cause had been disposed of the counsel for both parties agreed that I should dispose of the remaining seven causes upon practically the same evidence taken in Chak case. I thought the jury in the Chak case gave rather too small damages for legal expenses because the whole case has been brought out on Chak case, which was made a test case, and therefore the legal expenses were only nominal in the other cases, although plaintiffs' solicitor deposed that he prepared papers in all the cases. I think it would be fair to allow solicitors' fee of $15 in each of the other seven cases. Having some discretion in regard to allowing for loss of time, which the jury fixed at $7, I am not disposed to allow any but nominal damages on this account. These men were clandestine intruders who did not shew me that they had any employment provided for on their entrance into the province. They may not have committed a crime, but they did knowingly evade the law, avoided the Customs House and paid no head tax. They

deserve, therefore, it seems to me, no consideration except that which the law makes imperative. I allow them each $1 for all other loss, except legal expenses. The plaintiffs each claim in their damages a return of the $100 fine which was paid and taken into possession by the Dominion Government. Defendant's counsel strongly contended that this law should not be considered in awarding damages. My view is that the plaintiffs are undoubtedly entitled to have this fine illegally imposed, returned. It ought to have been returned as soon as the judgment of the Supreme Court had been given, as the Dominion Government is undoubtedly the real defendant in this case, the defendant Campbell having merely acted under the instruction of the customs Department and that of Trade and Commerce. I have come to the conclusion, not without doubt, that it is within my authority to award damages resulting from this illegal imprisonment.

As to costs in the Sam Chak case, the plaintiff deserves full costs of the cause. The trial in the other cases was entirely formal. As I understand it, the parties agreed that I should dispose of them in the light of the evidence in the Chak case, according to my best discretion. I therefore think that the plaintiffs in the other seven causes now before me, should only have the actual costs of the Court pleadings, entry, etc., and I think to avoid the need of a number of taxations, that it would be fair and reasonable to fix the plaintiffs' solicitors' costs in these seven cases, at $25 in each case, together with such disbursements for sheriff and prothonotary and witness fees, as have been made.

I therefore give judgment for the plaintiff in each of the seven cases before me as follows:—

Refund of fine	$100 00
Legal expenses	15 00
Other damages	1 00
	$116 00

Together with costs on the basis already stated.

NOTE:—As the solicitor for plaintiff objects to my fixing the costs of these suits, I modify that part of my judgment, but commend what I have said to the taxing master.

NOVA SCOTIA.

COUNTY COURT FOR DISTRICT NO. 7. MAY 30TH, 1909.

REX v. JOSEPH HINES.

Imprisonment under Conviction for Second Offence against N. S. Liquor License Act—Release—Irregularity in Proceedings—Costs of Conveying Defendant to Jail.

In the matter of the Liberty of the Subject Act.

A. D. Gunn, for applicant.
Finlay McDonald, contra.

FINLAYSON, Co.C.J.:—The defendant applies under the Liberty of the Subject Act for release from imprisonment. The return of the jailer shows that he is held under a warrant of commitment upon a conviction for a second offence under the N. S. Liquor License Act, Ch. 100, R. S. N. S. 1900.

The grounds upon which his counsel asks for his release is:—

First: that the warrant if issued in the first instance does not disclose the offence for which he was proceeded against, that he offered to file an affidavit that he was misled, but the magistrate refused an adjournment.

Second: that the warrant was bad inasmuch as it directed the accused to be brought before the magistrate, when in fact the magistrate issuing the warrant was the only one who could hear the offence.

Thirdly: that a warrant could not issue in the first instance on merely a sworn information.

Fourthly: that the information was bad, containing several erasures.

Fifth: that the warrant of commitment is bad inasmuch as it directed the payment of costs of conveying to jail and no costs are included in the warrant and endorsed thereon. The counsel for prosecution contends that I should not go behind the warrant of commitment in this case, as doing so would be virtually granting certiorari, which has been

taken away by the statute except on condition of making the affidavit required by the statute. While I consider there is a good deal of force in this contention, the practice in Nova Scotia has been different and Judges here hold the right to look at all the papers on record to see whether the applicant is legally held or not.

I do not intend to express an opinion on many of the points raised by the applicant, as I think the decisions require me to hold the warrant of commitment is invalid because the amount of the costs of conveying the defendant to jail is not fixed in the instrument or endorsed thereon; see R. v. McDonald, 2 Can. C. 504.*

It is true a second warrant was handed me at the argument which seems to be a good warrant, but as I had not been asked to amend the return and as the second warrant does not shew that it is in substitution for or in amendment of the first, I do not consider that I am at liberty to consider it: Re Venot, 6 Can. Cr. C. 209. The defendant will be discharged with the usual protection of the jailer and by the prisoner's consent to the commiting magistrate.

*Editor's Note:—See *In re LeBlanc*, *ante* p. 94, where a similar point was decided.

NOVA SCOTIA.

County Court for District No. 7. May 15th, 1909.

REX v. WILLIAM ENDLER.

Magistrate — Proceedings before — Contempt — Commitment—Jurisdiction—Liquor License Act.

A. D. Gunn, for motion.

D. A. Cameron, contra.

Finlayson, Co. C.J.:—The defendant applies to me under the Act for securing the liberty of the subject for his release from jail, under a warrant of commitment under sec. 186 N. S. L. L. A., for contempt of Court for not answering a question asked by the magistrate. Defendant's counsel contends that the magistrate has no power to commit for contempt.

Secondly, that this is an offence created by statute, and that the applicant should have been regularly proceeded against in the same manner as for any other offence under the License Act.

Thirdly, that the warrant of commitment is bad, inasmuch as it has not set forth the question or questions asked and which the applicant is required to answer.

Fourthly, that the magistrate adjourned the matter on the 29th, without fixing a date for the hearing at which the applicant was committed. This last objection, if a fact, would in my opinion be fatal, but in view of the positive statement of the magistrate to the contrary I must find the proceeding regular and that there was an adjournment to the 31st, the date on which applicant was committed. I must also hold the warrant of commitment good, as it follows the words of the statute, and in this case the words as set forth in the warrant constitute the question asked. I do not mean to imply that following the words in a statute is at all times sufficient, but in this case the language of the statute forms the question asked. I do not think it necessary for me to decide whether a magistrate has ordinarily the power to commit for contempt committed in the face of the Court, and I am not aware that there is any specific authority on the matter. The reasoning in the leading case of In re Fernandez, 30 L. J. C. P. at p. 332, in relation to contempt for refusing to answer a question, may be of some value—although the decision is not an authority for inferior Courts much less a Magistrates' Court. Willes, J., says, quoting Blackstone, that a witness refusing to answer commits an offence for which as being a contempt of Court he may be instantly apprehended and imprisoned at the discretion of the Judge without further proof or examination. Byles, J., in the same case says the power of commitment for contempt is almost indispensable to the administration of justice and it is the knowledge that it is indispensable which makes its exercise exceedingly rare.

I have no doubt that a magistrate has no power to commit for the ordinary case of contempt committed even in the face of his Court unless given him by statute, but it seems to me that if independently of statute the magistrate has no power to commit a witness for contempt for refusing to answer a question which in the opinion of the magistrate is a question he should answer, the administration of justice

in the Magistrates' Court would be farcical. Burns, J.P., vol. 1, p. 844 (30th ed.), quoting 2 Hawk. c. 16, says: "It is said that wheresoever a justice of the peace is empowered by statute to bind a person over, or cause him to do so a certain thing and such person being in his presence, shall refuse to be bound or do such thing, the Justice may commit him to jail to remain there till he shall comply." However, in this case the magistrate has the power to commit a witness refusing to answer: sec. 161 N. S. L. L. A., and sec. 186, under which the applicant was committed, is in my opinion an enlargement of the power given under sec. 161. Holding these views I must refuse the application, without costs.