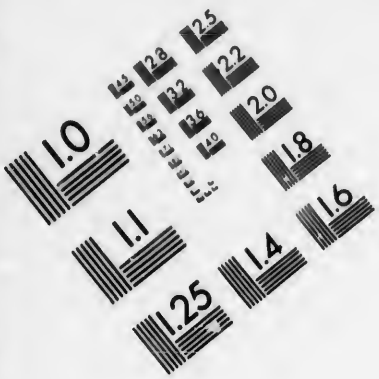

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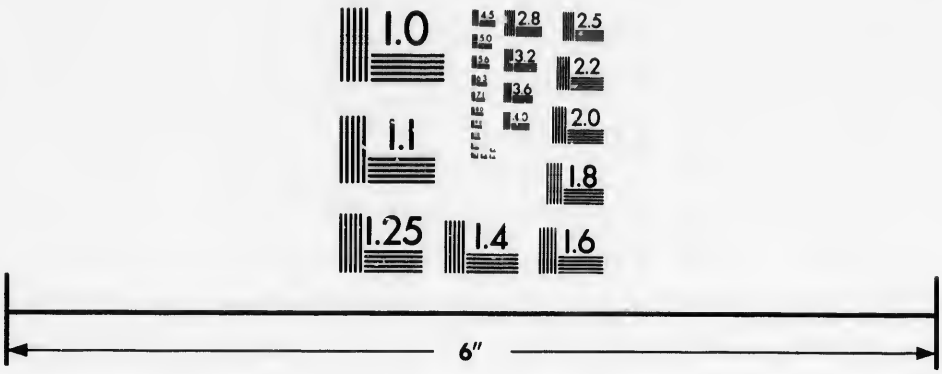

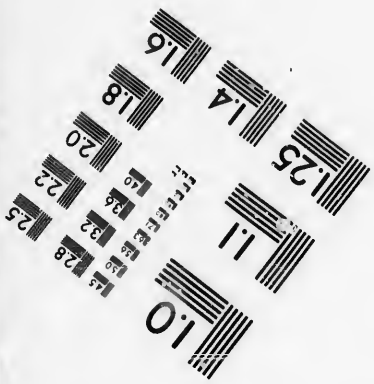

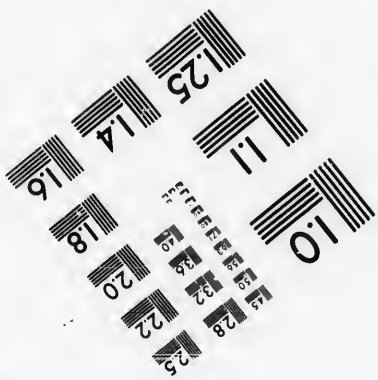

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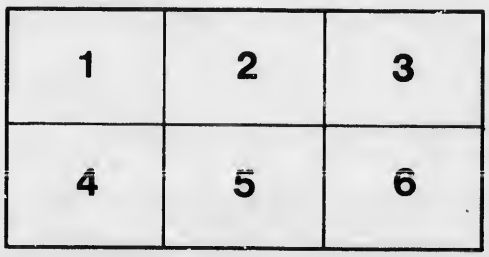

In the Supreme Court of Canada.

ON APPEAL

FROM THE SUPREME COURT OF NOVA SCOTIA.

SIMON FRASER, Appellant,

versus

SILAS R. TUPPER, Respondent.

IN THE MATTER OF SIMON FRASER'S APPLICATION FOR HIS DISCHARGE FROM CUSTODY.

APPELLANT'S FACTUM.

SEDGEWICK & STEWART, ATTORNEYS OF APPELLANT.

THOMPSON & GRAHAM, ATTORNEYS OF RESPONDENT.

HALIFAX, N. S.
Morning Herald Office, 58 Granville Street.
1880.

SUPREME COURT OF CANADA.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

SIMON FRASER, Appellant.

vs.

SILAS R. TUPPER, Respondent.

IN THE MATTER OF SIMON FRASER'S APPLICATION FOR HIS DISCHARGE FROM CUSTODY.

The Appellant, Simon Fraser, was committed to gaol under the two warrants or executions, set out on page 7 of the printed Case. These warrants were issued by virtue of the two convictions set out in pages 11 and 12 of the Case. The proceedings attacked were taken in the Town Court of Truro, over which Mr. Frederick A. Lawrence, Stipendiary Magistrate of the Town of Truro, presides.

The Appellant will contend that he was illegally detained in prison,—

I. Because the Town Court of Truro, in which court the proceedings attacked were instituted, had no jurisdiction to try offences under chapter 75 of the Revised Statutes, "Of Licenses for the sale of Intoxicating Liquors," where the penalty under the statute is fine, and imprisonment in case of non-payment.

The Town of Truro was incorporated under Cap. 47 of the Acts of the Nova Scotia Parliament of 1875. No court was created by that Act; but under section 37, the Town Council had power to "make all rules necessary for the creating, and for the conduct, management, and regulation of the police and Municipal Court of the Town." Shortly after the incorporation of the Town, the Council passed a number of by-laws, and among others, those printed in the Case (pages 12–14), all of which were approved by the Governor in Council on the 3d August, 1875. It will be contended that these by-laws, as far as they purport to give jurisdiction to the Municipal Court, were *ultra vires;* but in any case they do not affect these proceedings, for in the

following year the Act of Incorporation was amended by chapter 49 of the Acts of 1876, the sections of which relating to this case are as follows:—

"1. The Municipal Courts of the Town of Truro incorporated by chapter forty-seven of the acts of eighteen hundred and seventy-five shall be, a Court for the trial of civil causes, known as the Town Court, to be presided over by the Recorder or Stipendiary Magistrate, and a Court for the transaction of all police and criminal business of the town, known as the Police Court, to be presided over by the Recorder, Mayor or any Councillor. The Town Clerk shall be and act as the clerk of such courts.

"2. The offices of Recorder and Stipendiary Magistrate of the Town may be filled by one and the same person, appointed by the Mayor and Council. He shall be a Justice of the Peace and a barrister of at least three years standing. In case of the temporary absence of the Recorder from the town, or of his disability through sickness or otherwise to perform his duties, the Council may appoint a suitable person to fill such office during his absence or incapacity.

* * * * * *

"5. The Town Court shall have jurisdiction, cognizance and power to try and determine in a summary way without a jury, all civil actions or dealings *ex contracto*, in which the whole cause of action shall have arisen within the town of Truro, and in which the cause of action does not exceed eighty dollars, or where there are balances not exceeding eighty dollars upon accounts stated and settled previous to suit, and all such civil contracts, where the amount originally due has been reduced to eighty dollars or less by payment of cash, and when the defendant shall prove an offset of greater amount than the plaintiff has proved may give judgment in favor of the defendant for the balance due him; and shall try in a summary way, without a jury actions *ex delicto* in the nature of replevin, trespass to land or buildings or other real estate, in which the title or right of possession is not the object of controversy, provided the cause of such action originated within the limits of the town, and the damages claimed in any such case do not exceed sixty dollars. Such Court shall have and possess all the powers in civil matters within the municipality, conferred upon one or more Justices of the Peace or Stipendiary or Police Magistrate by any Act of the Province of Nova Scotia, or hitherto exercisable or held by them or him; and such Court shall have power whenever a defendant in any suit resides without the limits of the town, or is temporarily absent from the municipality, but resides or is within the boundaries of the County of Colchester to issue its writs and processes of every description against him, and to cause the same to be duly served and executed in any part of such county by the officers of such Court, and by any constable of the County of Colchester, and to adjudicate upon the same."

The Town Court, therefore, has jurisdiction to try only "civil actions," and can exercise its functions in civil matters alone.

Section 2 of Cap. 75 of the Revised Statutes of Nova Scotia creates the offence, and section 6 enacts the penalty, as follows:—

"6. The penalties for violating the law relating to the sale of intoxicating liquors shall hereafter be: For the first offence, ten dollars or imprisonment for twenty days in the county or district jail in the event of non-payment of the fine; for the second offence, twenty dollars or forty days imprisonment; for the third offence forty dollars or eighty days imprisonment; and for every subsequent offence, eighty dollars or three months imprisonment."

The whole chapter relating to licenses shows in itself that these proceedings are not civil in their nature. For violation of section 35 fine *and* imprisonment may be imposed; section 23 provides that the defendant may give evidence on his own behalf,—an unnecessary and meaningless provision were these *civil* proceedings. See sections 41 and 49, Cap. 96, Revised Statutes, "Of Witnesses and Evidence."

In support of the contention that the question adjudicated upon by the Town Court of Truro was not a civil matter will be cited the following authorities:—

Rex vs. Crofts, 2 Str. 1120.
Paly on Summary Convictions, 6th ed., 118.
Munn vs. Owen, 9 B. & C., 595, 599.
Butt vs. Conant, 1 B. & B. 548, 575.
Huntley vs. Liscomb, 2 B. & P. 530.
Easton's Case, 12 A. & E. 645.
Attorney-General vs. Siddon, 1 Cr. & J. 220.
Cattell vs. Ireson, E. B. & E. 91.
Parker vs. Green, 2 B. & S. 299.
Regina vs. Sullivan, L. R. 8 Ir., C. L. 404.
Regina vs. Fletcher, L. R. 2 Q. B. D. 43.
Regina vs. Steel, L. R. 2 Q. B. Div. 37.
Drake vs. Beech, L. R. 2 Ex. D.v. 335.
In re Lucas & McGlashan, 29 U. C. Q. B. 81.
Regina vs. Roddy, 43 U. C. Q. B. 291.
Specht vs. The Commonwealth, 24 Penn. 103.

The statutes under consideration must be strictly construed.

Sedgwick on Statutes, 2nd ed., 299 *et seq.*
Do. do. do. 279 *et seq.*

The contention of the respondent that the by-laws of the town, passed previously to chapter 49 of the Acts of 1876 give jurisdiction to the Town Court in this case is completely met by Mr. Justice Weatherbe. (See pages 24 and 25 of the Case.)

II. It will further be contended that neither the Town Court of Truro nor Justices of the Peace have power to summarily convict Tenders under section 6 of chapter 75 of the Revised Statutes, for the following reasons:

(*a*) The power of summary conviction is a purely statutory power unknown to the common law, and the right to exercise such power must be conferred and regulated by statute. 1 Burns Justice, 409.

(*b*) Statutes conferring such powers must be strictly construed.

(*c*) Section 23 of chapter 75 was enacted when no imprisonment was imposed in lieu of non-payment, and provided a proper method of procedure for the recovery of fines alone. Compare section 2 cap. 22 Revised Statutes, 2nd series, with sec. 2 cap. 19 Revised Statutes, 3rd series. Prior to the statute of 1863, cap. 17, when imprisonment was first authorized, the word "penalties" meant money penalties only. We contend the word "penalties" in section 23 retains its original meaning, and refers only to cases where a fine alone is imposed, (see sections 14, 15, 16, 17 18, 26, 27, 29, 30, 33 and 35), and the section should be construed to read as follows: "When a fine alone is imposed under this chapter, such fine may be recovered," &c. In support of this contention it will be noted that the word "recovered" is used, a word ap-

plicable to the recovery of money only, and not applicable when the punishment of imprisonment may be imposed.

(*d*) It will be observed that nowhere in the statutes of Nova Scotia is express authority given to Justices of the Peace or Stipendiary Magistrates to try the offence of selling liquor without license. Section 4 does so expressly in relation to another offence; and they would have it under section 23 (construing it as we have done) in conjunction with section 8 of cap. 1 of the Revised Statutes, 4th series. If they possess such power they have it under section 23 only.

(*e*) By construing section 23 as having relation to money penalties alone, the forms appended to the statute become applicable and useful. Form F must have been intended to apply only to a case where a *judgment* for a sum of money was recovered, as in a *qui tam* action, but could not be intended for a case where imprisonment for a definite time was imposed.

(*f*) The Legislature having prohibited the sale of intoxicating liquor without license, having imposed a punishment for such offence, but having prescribed no tribunal for the trial of the offender, it follows therefore that the offence is a misdemeanor, and can be tried only by the Supreme Court after indictment found.

III. The appellant will contend that he should have been discharged from custody because the convictions by virtue of which he was arrested (see pages 11 and 12 of printed case) are bad on their face, and even although the proceedings below may be a *civil* matter.

The following considerations are urged in support of this contention:

(*a*) Although the magistrate evidently intended to adopt Form D, given in the Appendix to chapter 75, it is submitted that such form, for the reasons above stated, is inapplicable, and that such conviction must contain all the allegations required by the Common Law: These are, "an information or charge against the defendant; a summons or notice of the information, in order that he may appear and make his defence; his appearance or non-appearance; his confession or defence; the evidence, if he does not confess; and the judgment or adjudication. (Hurd on Habeas Corpus, 401.) The convictions in question clearly do not contain all these particulars, and are therefore bad.

(*b*) It is submitted, however, that Form D, even if it be the proper form of a conviction, still requires the common law essentials of a conviction to be stated. "The manner of the party's conviction" must be stated; that is to say: his presence or absence; his confession or defence; the manner of proving the previous convictions; (is Ellen Davis to be presumed to have proved the three previous convictions, as well as the illicit sale?) and the punishment adjudged, which must be a punishment prescribed by statute, no more and no less.

As to the general qualities of a conviction, see Paly on Convictions, 6th Ed., 184; Hurd on Habeas Corpus, 402.

(*c*) It is submitted that the convictions are bad, more particularly because the statutory punishment is not awarded. The period of imprisonment to be undergone in case of non-payment

is not stated in either conviction. The statute gives the defendant an option. The Justices have no option; they must impose the prescribed punishment, giving the defendant the advantage of adopting either alternative.

Robson vs. Spearman, *et al.*, 3 Barn & Ald. 493.

In this case, Abbott, C. J., says:

"It was his (the justice's) duty to have pursued the words of the statute of the 49 Geo. III, c. 68. If he had so done, it would have given the party committed the option either of paying the money or of staying three months in prison, and being thereby altogether discharged from payment. This warrant is for his imprisonment till he shall pay the money, and deprives the party of that advantage. The difference is a most material one, and gives the party committed a right of action against the magistrate."

IV. Irrespective of the question as to whether the proceedings below were of a civil or criminal nature, it will also be urged that the detention of the appellant under the two warrants or executions (see page 7) was illegal, by reason of the following considerations:

(*a*) The first execution or warrant has left out an essential allegation, which Form F (assuming that to be the proper form) absolutely requires. It does not state the offence as in the conviction, "for selling intoxicating liquors without license." The defendant should know which of the fourteen offences under chapter 75 he is charged with. The commitment affords him no information.

(*b*) Both commitments are bad, as far as they justify detention in gaol, because the Justice cannot commit until he has ascertained the want of sufficient goods to answer the penalty, such want to be regularly certified by the officer's return; and there is no such certificate on the warrants in question.

Rex vs. Hawkins, Fort. 272.
Paley on Convictions, 333, *et seq.*

Lord Holt, it is submitted, lays down the proper procedure in Rex vs. Chandler, Holt, 214.

(*c*) The commitment must state the offence, as in the conviction, and must show a good conviction.

Re Peerless, 1 Q. B. 143.
R. vs. Chaney, 6 Dowl. 281.

Nor will the Court assume a good conviction to support a commitment.

R. vs. Tordoft, 5 Q. B. 933.
R. vs. Cavanagh, 1 Dowl. N. S. 547.
R. vs. King, 1 D & L. 723.

(*d*) The commitments in question do not lay any foundation for the order to arrest. No adjudication or sentence is recited. The mandatory part is a *non sequitur*, and no legal reason is given for such mandate.

(*e*) The chief objection, however, to the commitments, is that they do not determine or indicate the period of imprisonment. It must be distinctly stated in the warrant, whether the

commitment be for a certain time. The defendant ought to know for what he is in custody, and how and when he may regain his liberty.

Dr. Groenvelt's case, 1 Ld Raymond, 213.
R vs. Rogers, 1 D & R. 156.
Ex parte Addis, 2 D & R. 167.
R. vs. Helps, 3 M. & S. 331.
Robson vs. Spearman, 3 B. & Ald. 593.
R. vs. Hall, Cowp. 60.
Clark vs. Woods, *et al*, 2 Exch. 395.

(*f*) Had the commitments recited valid convictions with the fine adjudged, and the imprisonment in lieu of payment imposed in such case, both the gaoler and defendant would have been able to know when the latter could be legally discharged "in due course of law." Under these commitments the gaoler may have to consult a legal adviser as to his right to detain the defendant.

(*g*) The commitments in question, if upheld, would condemn the defendant to perpetual imprisonment, in case of non-payment of the fine. The penalty is a punishment, and it is submitted he could not be discharged under the Insolvent Act (Appendix, Revised Statutes, p. 96), because he does not come within the purview of that statute. If he does, he can apply at once and be discharged, although the very statute under which he is committed expressly fixes the period of his imprisonment.

(*h*) A consideration of the manifest absurdities into which we are driven by the contention that Form F is the form to be used in the case of convictions like the one under discussion, would lead to the conclusion that such form is not applicable except to cases where a penalty alone is imposed, and where it may be collected in the same way as an ordinary debt.

Where it is impossible to reconcile a form with a statute, upon ordinary principles, the form must give way.

Reg. vs. Baines, 12 A. & E. 227.
Potter's Dwarris, 113.

V. The prisoner should have been discharged under the second commitment, even admitting the respondent's contention below, viz., that the matter in question was civil in its nature, and that the forms used were applicable to the circumstances, because if the plaintiff's demand was a debt, and recoverable as a debt, it could only be recovered under the provisions of chapter 91 of the Revised Statutes relating to procedure before Justices of the Peace in civil cases. Section 8 of that chapter is as follows: "When the defendant does not personally appear, the Justice shall not proceed in the cause unless the constable shall make an affidavit that he has delivered a copy of such writ with a statement in writing of the plaintiff's particulars annexed to the defendant." * * * The defendant was not personally present at the trial, and no affidavit was produced that he was served with the summons. It has been decided by our own Supreme Court that unless such affidavit was produced at the trial below, and that fact appeared upon the conviction, the commitment was void, and the prisoner entitled to be discharged.

Re Donald McEachern, Supreme Court, N. S., January, 1880.

SAM'L G. RIGBY,
Appellant's Counsel.

ROBT SEDGEWICK,
Atty. of Appellant.