

## DAMAGES FOR BREACH OF CONTRACT.

George Hatcly v John Cheyne and Leslie Cheyne. The following were the issues in this case as duly adjusted :—

1. Did the defendants, or one or other of them, agree with the plaintiff to carry for him a transit theodolite and stand, the property of plaintiff, from Campbelltown to Invercargill, by the steamer *Aphrasia*.

2. Did the defendants or any one of them receive delivery of said theodolite and stand, or was the same delivered to defendants or any one of them.

3. Have the defendants failed to deliver the said theodolite and stand to the plaintiff at Invercargill or elsewhere.

4. What damages, if any, is the plaintiff entitled to.

A jury having been empannelled, Mr Matheson was chosen foreman.

Mr Harvey appeared for the plaintiff, and Mr McDonald for the defendant. Mr Harvey, in opening the case, said the points to be tried were, whether Messrs Cheyne and Co., as the owners of the Aphrasia, and having taken charge of the theodolite were common carriers, and whether they had failed to deliver the said theodolite in Invercargill. The damages were laid at the value of the theodolite, L40. He would call Mr O'Toole.

Christopher Francis de Sales O'Toole, Sub-Collector of Customs for the Bluff Harbor.—Was there in September last. Knows the plaintiff and the defendants, and the vessel of the latter, the Aphrasia. The Aphrasia is employed in trading between Campbelltown and Invercargill. The owners are carriers of merchandise and stock. Have seen a theodolite the property of the plaintiff, and a box and stand. About the 15th September last had occasion to go on board the Aphrasia, and there saw John Cheyne with a box he supposed to contain a theodolite, the property of plaintiff, under his care, which he conveyed to his boat. The box was of the same type as usually contains a theodolite. Is not certain as to the date. Thinks it was upon a Saturday.

Cross-examined by Mr McDonald: It was a mahogany box with brass bands that I saw Cheyne carrying. The plaintiff had been surveying at the Bluff, and I had seen this box on several occasions,

and am of opinion it was his property; it was about ten to half-past eleven when I saw this box in the possession of Captain Cheyne; Cheyne brought the box from Hughes's store; am not aware where he took it to; don't know whether there was anything in the box or not; it was about the 18th Sept.

By Mr Harvey: George Hately said he was the plaintiff: was down at the Bluff in the month of September; knew the defendants; think it was on the 13th that he had a communication with defendant, John Cheyne; asked him to take charge of a theodolite and stand to Invercargill, which he said he would do; left theodolite and stand in Hughes's store, in charge of Miss Johnston; the theodolite was enclosed in a mahogany box, with a rope round it; am certain that it was in the box, because he had personally put it in the box, and locked it, placing the key in his pocket; there was a rope tied round it; there were brass handles attached to the box; the stand, along with the box, was given in charge to Miss Johnston; witness then proceeded to Invercargill, and waited for the Aphrasia; after her arrival saw the defendant, John Cheyne, and inquired if he had it, and he said, "Yes, I think I have;" witness went with the defendant to the Aphrasia, and both looked on board the steamer for the theodolite, and not having found it, defendant said he thought he had not got it; have frequently since made application for the theodolite to both defendants, and they said they had never received charge of it; have to this day seen no part of it except the stand, which was exhibited by Daniel Wilson; understand that the defendants ply for hire.

and am of opinion it was his property; it was about ten to half-past eleven when I saw this box in the possession of Captain Cheyne; Cheyne brought the box from Hughes's store; am not aware where he took it to; don't know whether there was anything in the box or not; it was about the 18th Sept.

By Mr Harvey: George Hately said he was the plaintiff: was down at the Bluff in the month of September; knew the defendants; think it was on the 13th that he had a communication with defendant, John Cheyne; asked him to take charge of a theodolite and stand to Invercargill, which he said he would do; left theodolite and stand in Hughes's store, in charge of Miss Johnston; the theodolite was enclosed in a mahogany box, with a rope round it; am certain that it was in the box, because he had personally put it in the box, and locked it, placing the key in his pocket; there was a rope tied round it; there were brass handles attached to the box; the stand, along with the box, was given in charge to Miss Johnston; witness then proceeded to Invercargill, and waited for the *Aphrasia*; after her arrival saw the defendant, John Cheyne, and inquired if he had it, and he said, "Yes, I think I have;" witness went with the defendant to the *Aphrasia*, and both looked on board the steamer for the theodolite, and not having found it, defendant said he thought he had not got it; have frequently since made application for the theodolite to both defendants, and they said they had never received charge of it; have to this day seen no part of it except the stand, which was exhibited by Daniel Wilson; understand that the defendants ply for hire.



Cross-examined by Mr M'Donald : After a conversation with Captain Cheyne, I was left under the impression that he was to take charge of theodolite and stand to Invercargill ; nothing was said about freight ; I told Cheyne where the theodolite and stand were ; I told him they were at Hughes's store ; Cheyne simply agreed to take theodolite and stand ; he did not say that if sent on board he would take charge of them ; left theodolite and stand at Hughes's store on the day previous to my conversation with the captain ; Miss Johnston was in the shop at the time I left theodolite and stand ; am sure the theodolite was in the box when I left it at the store ; about one or two days after I put theodolite in Miss Johnston's charge, had conversation with Cheyne in Invercargill ; defendant did not say when asked if he had the theodolite on board, " Not that I am aware of ; " I went on board the steamer with him : to-day is the first time that I have seen theodolite and stand since I last saw it at the Bluff ; had never offered to pay Messrs Cheyne freight.

By the Bench : The value of the theodolite and stand was £40.

By Mr Harvey : Mary Ann Johnston said that in the month of September last she was in charge of Mr. Hughes's store at the Bluff ; there was a theodolite left by Mr Hately in the store, at the time the Robert Henderson was at the Bluff ; it was in a box—a small square box, apparently mahogany ; there was a strap round it ; do not know whether it was heavy or light ; it was taken from out the store by the defendant, Mr John Cheyne ; asked him to take it, telling him it was Mr Hately's ; he took it under his arm and carried it down to

the beach ; in addition to the box there were the legs, he also took them ; when I gave the box to Cheyne, it was in the same state as when received ; have occasionally had goods down by the Aphrasia.

Cross-examined by Mr Macdonald : Have no recollection of the date other than the presence of the Robert Henderson ; don't distinctly recollect the box being left by Mr Hately at the store, but recollect the fact of its being taken away. The said box was taken away four or five days after left in store ; gave the box to John Cheyne ; he asked who the box was for ; I told him ; I said it was Mr Hately's theodolite, and that it was to go to Invercargill ; he said nothing that I remember ; saw him go towards the beach but did not see him go on board ; did not see him stop any where ; did not ask Captain Cheyne for a receipt ; I believe it is usual to take receipts in such cases, but our clerk was not in and I don't keep the books ; I did not think of asking for a receipt.

By Mr Harvey : Daniel Wilson said he resided at the Bluff ; some time ago picked up the legs of an instrument at Bluff Harbor he supposed about eight months ago ; had them with him to-day ; have shewn them to Mr Hately ; they must have come up with the tide when I found them.

Cross-examined by Mr McDonald : I know Hughes's hotel in Campbelltown ; picked the legs up about three miles from that, inward.

This was the case for the plaintiff.

Mr McDonald said that the case was a simple one. He was of opinion that when they heard the evidence for the defendants they would be satisfied with their freedom from liability. He would be able to show by John Cheyne's evidence,



that he had never seen the theodolite.

By Mr Macdonald: John Cheyne said he was one of the defendants; remembered the month of September last. Saw Mr Hatcly then in Invercargill; did not see him at the Bluff. When he saw him he asked witness to bring up his theodolite from the Bluff, and to take particular care of it. Witness said "yes, provided it was sent on board." He said Mr Furlong would bring it on board. This was about the 15th September. Saw him again upon arrival from the Bluff, saw nothing of the theodolite nor of the box at Invercargill. Met Mr Hatcly near the Victoria Hotel on the last occasion. He asked if witness had the theodolite on board; he replied it might be—had not seen it, but would see on going on board; the mate gave a receipt for everything. On searching found it was not on board; returned to Mr Hatcly and informed him; Mr Hatcly never offered to pay freight. Knew all the cargo that had come on board the Aphrasia that trip from the Bluff; there were three boxes on board addressed to other parties.

Cross-examined by Mr Harvey: I swear that I never had a conversation with Mr Hatcly at Hughes' Hotel about the theodolite. Do not remember being in Hughes' store before going on board my vessel. Swear that Miss Johnstone did not give me a small mahogany box with straps round it, and the legs of a theodolite. If Miss Johnstone has sworn that such was the case she has sworn untruly.

Know Mr O'Toole the sub-collector, if he has sworn that he saw me with them under my arm he has sworn falsely; Mr O'Toole did not go off in the same boat with me to the Aphrasia. I never received the box.

Neither counsel addressed the jury.

His Honor summed up shortly—stating that it was a disagreeable case, for the reason that some of the witness's had sworn in direct contradiction to each other. It was for the jury to decide whether the oath of Captain Cheyne would avail against those of Miss Johnstone and Mr O'Toole. He then read over the evidence of these three witnesses, commenting upon the chief features.

After a short consultation the jury found for plaintiff in all the numbers of the issues.

This case closed the present sittings of the Supreme Court; the proceedings terminating at 6 30 p. m.