

## IRELAND.

## APPEAL FROM THE COURT OF EXCHEQUER CHAMBER.

TOMKINS—*Plaintiff in error.*ATTORNEY-GENERAL—*Defendant in error.*June 14—16,  
1813.

EVIDENCE.

UPON an information against the Master of an American vessel on 48 Geo. 3, cap. 56, sect. 11, to recover penalties incurred under that statute. Copy of entry in a Custom-House book offered to be given in evidence. Objected, that the original ought to have been produced. Court of King's Bench decides that copy ought not to have been received, but this reversed by Court of Exchequer Chamber. House of Lords decides, that, under the circumstances of the particular case, the copy might be read, and judgment of Court of Exchequer Chamber was affirmed.

Information, *ex officio*, against Plaintiff in error, filed Hilary, 48th King, to recover penalties incurred under the statute of 43d Geo. 3.

AN information, *ex officio*, was filed in the Court of King's Bench, in Ireland, by his Majesty's Attorney General there, as of Hilary Term, in the 48th year of his Majesty's reign, against the Appellant, who was the Master of an American ship called the *Charles Carter*, of Norfolk, of four hundred tons burthen, to recover penalties incurred under the statute 43d Geo. 3, cap. 56, sect. 11, by having on board his said ship more persons than the number allowed by that statute, which enacts,  
 “ That it shall not be lawful for any Master or  
 “ other person taking or having the charge or com-  
 “ mand of any ship or vessel, other than a British  
 “ ship or vessel, owned, navigated, and registered  
 “ according to law, clearing out from any port or  
 “ place in the United Kingdom aforesaid, from and

“ after the said 1st day of July, 1803, to have or  
 “ take on board a greater number of persons, in-  
 “ cluding the crew, than in the proportion of one  
 “ person for every five tons of the burthen of such  
 “ ship or vessel; and every such ship or vessel  
 “ shall be deemed and taken to be of such tonnage  
 “ or burthen as shall be ascertained by the oath of  
 “ the Master or other person having or taking the  
 “ charge or command thereof, taken before the Col-  
 “ lector, or other chief officer of the Customs, at  
 “ the port from whence such ship or vessel shall  
 “ be cleared out; which oath the said Collector or  
 “ chief officer is hereby authorised and required to  
 “ administer; and it shall and may be lawful for  
 “ such Collector or chief officer to muster the pas-  
 “ sengers and crew, and to search and inspect every  
 “ such ship or vessel, and if more persons shall be  
 “ found on board than the proportion herein al-  
 “ lowed, every such Master or other person, as  
 “ aforesaid, shall forfeit and pay the sum of fifty  
 “ pounds for every person so taken on board be-  
 “ yond the proportion herein allowed; one moiety  
 “ whereof shall go to His Majesty, his heirs or suc-  
 “ cessors, and the other half to such Collector or  
 “ other officer aforesaid, who is hereby empowered  
 “ to seize and detain such ship or vessel, until such  
 “ penalties shall be paid.”

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The information stated that John Tomkins, Information:  
 having the command of the said ship, which was  
 clearing out of the port of Newry, on the 6th July,  
 1806, had and took on board *forty-two persons*  
 more than in the proportion of one person for every  
 five tons of the burthen of said ship, whereby he

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forfeited fifty pounds for each person so taken on board, beyond that proportion, amounting in the whole to the sum of 2,100*l.* And the information concluded in these words:—“Whereby His Majesty’s Attorney General, on behalf of his said Majesty, prayeth the consideration of this Court in the premises, and that the said sum of two thousand and one hundred pounds so forfeited by the said John Tomkins may be adjudged to his said Majesty, and that the said John Tomkins may appear here in Court to answer concerning the offence aforesaid, and concerning the said sum of money.”

Trial. 1808.

The Plaintiff in error pleaded the general issue, and the trial took place at Downpatrick, at the Spring Assizes, 1808, when the following evidence was given for the Crown:—

Evidence on  
the part of  
the Crown.

“That the Plaintiff in error was Master or Captain of the American ship called the Charles Carter, lying in the port of Newry, in the summer of the year 1806; and that the said plaintiff in error, to clear out the said ship from the said port of Newry for Norfolk and Baltimore in America, applied to Robert Cosgrave, Esq. Comptroller of the said port of Newry, the 16th day of June, in the year 1806, and delivered to the said Robert Cosgrave a muster-roll, containing a list of all the persons, sailors included, who intended to sail on board the said ship from the said port of Newry to Norfolk and Baltimore in America, and that the entire number of persons in the said muster-roll amounted to forty-nine persons. That afterwards, on the 3d day of July, in the same year 1806, the Plaintiff in error again

“ applied to the said Robert Cosgrave, and produced  
 “ to him the persons who he said intended to sail on  
 “ board the said ship from Newry to the said ports of  
 “ Norfolk and Baltimore, amounting to forty-six per-  
 “ sons and no more ; and that the said persons were  
 “ examined by the said Robert Cosgrave, and William  
 “ Moore, a justice of peace, on board the said ship,  
 “ and were duly certified by them. That the Plain-  
 “ tiff in error swore before the said Robert Cosgrave,  
 “ that the said ship was of the burthen of four hun-  
 “ dred tons ; and that after delivering in the said  
 “ muster-roll, and after the said persons were so mus-  
 “ tered and certified at the request of the Plaintiff in  
 “ error, he, the Plaintiff in error, again applied to the  
 “ said Robert Cosgrave to clear out the said ship for  
 “ the said voyage. And that thereupon he, the said  
 “ Robert Cosgrave, gave the certificate of the clear-  
 “ ance, or outvoice, to the Plaintiff in error, for forty-  
 “ six persons to go out on board the said ship, in-  
 “ cluding sailors, at his the said Plaintiff’s request, on  
 “ the 4th day of July, in the said year 1806. That a  
 “ clearance contains the ship’s name, where she is  
 “ bound to, the place she belongs to, the Master’s  
 “ name, and her lading. That the certificate of clear-  
 “ ance then delivered to the Plaintiff in error con-  
 “ tained these particulars. No notice to produce such  
 “ certificate was served on the Plaintiff in error.  
 “ That the particulars of every clearance are first  
 “ taken from the Master, and are always entered in  
 “ a book at the Custom-House, for the purpose of  
 “ making such entries, which are signed by the Mas-  
 “ ters of vessels applying for clearances. That the  
 “ said outvoice-book, containing such entries, was

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“ then in the Custom-House at Newry ; and it was  
 “ said by Robert Cosgrave, on his cross-examination,  
 “ that he had heard that, many years ago, the  
 “ Custom-House books had been produced on a re-  
 “ venue trial at Down-Patrick. And the said Attor-  
 “ ney-General did further give in evidence copies of  
 “ entries from the said outvoice or clearing-book,  
 “ which were proved by Robert Cosgrave, the Comp-  
 “ troller of the said port of Newry, to be true copies  
 “ in his hand-writing, and compared by him, and to  
 “ have been attested by the Collector of the said port  
 “ of Newry ; which entries contained the ship’s  
 “ name, her destination, the Master’s name, the  
 “ port she belonged to, and her lading. And the  
 “ said Robert Cosgrave swore, that the certificate  
 “ of the clearance delivered to the Plaintiff in  
 “ error was conformable to the said entries, and  
 “ that the said entries were made by him, the  
 “ said Robert Cosgrave, in his own hand-writing,  
 “ on the application of the Plaintiff in error, and  
 “ were signed by the Plaintiff in error. And the  
 “ Attorney-General further gave in evidence, that  
 “ the Plaintiff in error, after obtaining the said  
 “ clearance, sailed in the said ship out of the said  
 “ port of Newry, and that the said ship was on  
 “ the 6th day of July, in the said year 1806, stop-  
 “ ped in her voyage, and detained by one of His  
 “ Majesty’s cruisers outside of the said port of  
 “ Newry, having then on board one hundred and  
 “ twenty-two persons, passengers and sailors, whom  
 “ the Plaintiff in error confessed to be persons who  
 “ were taken on board the said ship by him at  
 “ Newry, for the purpose of sailing from the said

“port of Newry to the said ports of Norfolk and  
 “Baltimore in America.”

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The Counsel for the Plaintiff in error insisted that no legal proof had been given of the ship having cleared out of the port of Newry; that *copies* of the entries in the Custom-House books ought not to be received in evidence; but that the originals ought to be produced. The Judge admitted the evidence, and a verdict was found for the Crown. A bill of exceptions was tendered and signed, and the question was argued in the Court of King's Bench, which gave judgment for the Plaintiff in error. This judgment was afterwards reversed in the Exchequer Chamber; whereupon the Plaintiff in error brought his writ of error in the House of Lords.

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 Proceedings  
 below.

*Messrs. Scarlet and Richardson* (for Plaintiff in error.) The Custom-House books ought to have been produced, and copies of the entries were not admissible evidence; and no legal evidence was given of the ship having cleared out, which was necessary to be proved in order to convict the Plaintiff in error.

This was a question of great importance as to the law of evidence, (though the case had no other merits,) and one which had very much divided the Judges both here and in Ireland. The fundamental principle of the law of evidence was, however, in favour of the Plaintiff in error. The best evidence that the nature of the case could afford ought to be produced, and the question was, Whether this was a case within the exceptions to that rule? Records were excepted, and the Courts, upon the same

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Lynch v.  
Clerke, 3 Salk.  
153.—Mann  
v. Carey,  
3 Salk. 155.—  
Gery v. Hop-  
kins, 2 Ray,  
851, and  
7 Mod. 129.

14th and 15th  
Car. 2, cap. 9.  
(Irish stat.)

principle, extended the exception to documents of a public nature which it would be dangerous to remove; and on this principle, copies of the entries in the Bank and East India transfer-books were admitted as evidence; and a number of cases in the time of Holt, and succeeding Judges of the Court of King's Bench, had been decided on this ground. Holt said that the Bank books were by Act of Parliament the titles of the holders of stock. This was the principle. It was important that these books should be always in some secure custody. The principle did not apply to Custom-House books, and the originals had been always produced in practice here. The error in Ireland arose from their not considering the different meanings of the words 'public documents.' The principle did not apply to the books of every public body. The transfer-books of the Bank and East India Company formed the titles of a great number of individuals. Not so the Custom-House books. If a copy of any Custom-House book entry had been evidence, it would have been that of entries in the ship register-book, because the titles of a number of individuals to their ships were there concerned; and yet that book had been always produced at Guildhall and the Assizes. The argument in Ireland had turned much upon the Irish statute 14th and 15th Ch. 2, cap. 9, which directed that the books should be *kept* at the Custom-House; but there was no magic in the word *keep*. It was only by distortion of its meaning that it was held to be necessary that the books should always be *detained* there. There could be no reason for not producing the original book, as these books need

not be kept continuously. One book would do as well as another. The revenue was received, and the book might be laid aside. Every tide-waiter's books, every book relating to tolls, canals, &c. were public documents, if the argument on the other side was well-founded.

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Another ground was, that this was an instrument deriving its validity from the signature of the party, and there was no example of hand-writing being proved by a copy. It was admitted that Cosgrave saw the Master sign the entry; but if the original existed in circumstances in which it was possible to have it produced, it ought to have been produced. In a case where the Crown was the prosecutor, it would be dangerous to refuse the original when the Crown had the control over it, and could easily produce it.

Another objection was, that the clearance had not been proved. What was the clearance? The certificate, or cocket, was in fact the clearance. No notice had been given to the Plaintiff in error to produce the original, and they were not therefore in a situation to give the copy in evidence. But at any rate it was not a copy of the clearance which they produced; but a copy of the memorandums which formed the ground of the cocket.

There were objections also in point of form, of which they had a right to take advantage, as the whole had been brought before their Lordships on the general error. The objections were these:—

1st, The information did not state the *searching* for, and *finding* on board, the illegal number of persons.

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2d, It prayed the whole penalty to the Crown; whereas, one half was given by the statute to the officer.

3d, It did not state that the men were found on board *at or after* the time of the clearance, which was necessary, as having them on board *before* was no offence. They had followed the words of the 11th section, but that had a reference to the first; and in a criminal case, it was not sufficient to follow the words of the Act, unless they imported an offence. (*Vide Rex v. Ethrington*, 2 East. C. L. 635.)

*Sir R. Dallas* (Solicitor-General) and *Mr. Abbott* (for Defendant in error.) The original question was, Whether the books themselves, which the Defendant in error contended were of a public nature, ought to have been produced in evidence? The other points now insisted upon were wholly new, and ought (they submitted) to be laid entirely out of the case. It must be admitted, that the best evidence the case could afford ought to be produced, not only on the general principle, but also on the ground of the presumption, that where the original was withheld it contained something different from what appeared in the copy. But this only applied where it was as easy to produce the original as to produce a copy. The point to be proved here was the clearance out, and the evidence offered was a copy of the entries in the Custom-House book; and the question was, Whether this was not equivalent to the original? How could it be contended that this was not a public book? 1st, It was in the

custody of the Crown in the Custom-House. 2d, It was kept by a public officer sworn to do his duty. 3d, The entries were the evidence of the clearing out and in of ships. It was then to be considered, whether, on principles of public policy, it was not competent for Courts of Justice to take copies as evidence. The rule was not so strict as to require originals to be always produced; and they contended, that, on the sense and reason of the thing, as well as on analogous cases, these books came within the principle of the exceptions as stated by Gilbert in his book on the Law of Evidence. The reason of public policy and convenience was directly applicable to the present case. This was a public document that might be wanted every hour of the day, which was liable to be lost if carried about, and which, if it were necessary to produce the original, might be called for in many different places at the same time. This view of the question was also supported by a variety of analogous cases in regard to the transfer-books of the Bank and East India Company, Journals of the Lords and Commons, &c.

They did not mean that in every case a copy would be sufficient. Suppose a Master swore falsely to the tonnage, and were indicted; there it might be necessary to produce the original; but this was not a case of that description. Nothing depended here on the signature of the Master.

*Lord Chancellor.* Then you argue that the entry is the original, without the signature.

*Sir R. Dallas.* Yes. It was not necessary by law, though the officer might require it for his own

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Rex. v. Worrenham,  
1 Ray. 705.—  
Lynch v. Clerke. 3 Salk. 155.—King v. Smith, 1 Str. 126.—  
Downes v. Mooreman, Bun. 189. 191.  
Jones v. Randall, Cowp. 17.  
Rex v. Lord G. Gordon, Doug. 569, (590.)—Rex v. James, Carth. 220.

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satisfaction. A clearance meant no more than that the officer permitted the Master to depart—gave him his *bene decessit*, or '*quietus*;' and this fact Cosgrave's evidence would have proved, though neither original nor copy had been produced.

*Lord Chancellor.* Where there was a written warrant, the proof could not be by parole; the written instrument must be produced.

*Mr. Abbott.* Suppose the certificate were itself the clearance, the officer (he submitted) might prove it by parole. The particulars were not wanted, but only the fact that it had been given. But the entries were the clearance; and supposing they required the signature of the Master, the officer swore positively that they were signed, and that alone was wanted, and not the contents. Suppose, however, they had been under the necessity of proving the contents of the entries signed by the Master; the question would come round to this, whether the copies, with the evidence of the Master as to the signing, were not sufficient? and upon the reason of the thing, and analogous cases, they must be held to be sufficient.

*Mr. Scarlet* (in reply.) The clearance was the certificate or cocket—(*quo quietus est*;) and Hale, in his *Treatise de Jure Maris*, said, that the clearance was the same as the sufferance: it began with the word 'suffer.' The whole of the Act on which the information was founded pointed to this conclusion, that the cocket was the essential document. This ought to have been produced; but they had got no notice to that effect. *Mr. Abbott*

said that no written evidence was necessary: he did not admit that; but suppose it was so, their Lordships must take the evidence as it was offered; and if they struck out the written documents, the case would be left without any evidence of the clearance. Mr. Abbott also appeared to think the certificate was something different from the permission; but, at all events, if the alleged permission was in writing, it ought to be produced; because, instead of a permission to go, the paper might turn out to be a command to stay. This book was a document not of a public, but of a private nature; and therefore neither the reason nor the cases had any application: It derived its validity from the signature, and the hand-writing ought to have been proved.

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*Lord Chancellor.* If the book was not evidence of the clearance, it signified nothing whether the book or a copy were produced. When had the ship cleared out?

*Mr. Scarlet.* When the Master obtained the certificate.

*Lord Chancellor.* Then all the rest signified nothing. Suppose notice had been given to produce the certificate, and it had not been produced; would not the copy of it then be evidence, though this book had never existed?

*Mr. Scarlet.* He thought it would. Though the Master had done every thing, if he did not get that document, (certificate,) he was not cleared. The statute meant a final clearance, as there always remained a *locus penitentiæ*, by returning the men from on board before the final clearance. This

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was a criminal case, and the Act ought to be construed most favourably for the accused. He did not find that any thing had been said on the other side to show that the Plaintiff in error was not at liberty to object to the form of the record.

*Lord Chancellor.* If any thing turned upon that, an opportunity would be given them to argue it, as they had been taken unprepared. The House would take time to consider this question.

July 12, 1813.  
Observations  
and Judgment.

Under the  
particular cir-  
cumstances of  
the case, copy  
was evidence.

*Lord Eldon* (Chancellor.) The objections in point of form, even supposing they could be gone into, did not appear to him capable of being sustained. The question then was, Whether a copy of entries in a certain Irish Custom-House book ought to be received in evidence? *Under the circumstances of this particular case*, he thought that a copy of the book might be given in evidence.

Ordered and adjudged, that the judgment of the Court of Exchequer Chamber be *affirmed*.

Agents for Plaintiff in error, PALMER, TOMLINSONS, and THOMSON.

Agents for Defendant in error, GORDON and HAMILTON.