he has not, I think, satisfactorily explained how it happened that he drove on, and without warning caused the accident. The pursuer had at common law a right to be on the carriageway, and besides that, there does not appear to be any properly constructed footpath on this road. In the circumstances, I am for sustaining the appeal.

Lord Ormidale and Lord Gifford concurred.

The Court sustained the appeal, and awarded £6, 6s. of damages.

Counsel for Pursuer (Appellant) Young. Agents—White Millar, Robson, & Innes, S.S.C.

Counsel for Defender (Respondent) Guthrie Smith. Agents—Carment, Wedderburn, & Watson, S.S.C.

*Thursday, March 20.**

FIRST DIVISION.

[Exchequer Case.

M'INTOSH BROTHERS *v.* INLAND REVENUE.

Revenue—Exchequer Act (23 and 24 Vict. cap. 114), sec. 170—"Offending Herein"—Penalty—Failure to Enter Spirits in Stock-Book.

Where a spirit dealer failed to enter in his stock-book different parcels of spirits received or sent out on a series of days, and had on the same day both sent out and received spirits also without making any entry, *held*, under section 170 of the Excise Act (23 and 24 Vict. c. 114), (1) that he was liable in a penalty for each day's failure to enter spirits either received or sent out; and (2) that to send out and to receive spirits on the same day without entry constituted two separate offences.

Question, Whether there was liability in several penalties for different failures on the same day?

Exchequer Act (23 and 24 Vict. cap. 114), sec. 176—Where Unentered Spirits obtained by "Grogging."

Where a spirit dealer had in his stock a large quantity of spirits derived by the process called "grogging," in excess of what he had entered in his stock-book, *held* that he was liable in the penalties imposed by 23 and 24 Vict. sec. 176, the fact of excess being sufficient without reference to its source.

This case was stated for the opinion of the Court of Exchequer by the Quarter Sessions of the County of Edinburgh in an appeal from the Petty Sessions at the instance of M'Intosh Brothers, spirit merchants in Leith, against James R. Wilson, the Excise officer there, the appellants having been convicted of certain infringements of the Excise Statute (23 and 24 Vict. cap. 114), secs. 170 and 176. The charges were of two kinds—"(1) That the appellants failed to enter in their stock-book, which they are ordered to keep by section 170 of that Act, certain quantities of spirits received into stock and sent out of stock; and (2) That on a balance of their stock-book being made in terms of section 176 of that Act, on the 3d and 4th days of October 1877, the appellants were found to have an excess of stock beyond what was shown in their stock-book." Under the first head there were six counts, charging in all twenty-one specific instances of infringement of sec. 170, which was as follows:—"Every rectifier, dealer, and retailer respectively shall provide himself with a book prepared according to a pattern to be given to him on his application to the proper officer, and shall on the same day on which he receives any spirits into his stock or possession, and at such time on that day as he may be requested to do so by any officer, and if not so requested, then at latest before the expiration of that day, write and enter in such book, and in the proper columns respectively prepared for the purpose, the date when, and the christian and surname of the person, or the name of the firm from whom and of what place, the spirits were received, the number of gallons, and the kind or quality of the spirits, and the strength thereof; and every rectifier, dealer, and retailer respectively shall also on the same day on which he shall send out of his stock or possession any spirits in a quantity requiring a certificate as hereinafter mentioned, and at such time on that day as he may be requested as aforesaid, and if not so requested, then at latest before the expiration of the day, write and enter in like manner in the said book the day when, and the christian and surname of the person, or the name of the firm and of what place, to whom such spirits were sent, the quantity and the kind or quality of such spirits, and the strength thereof, and also the number of gallons, and the fraction of a gallon at proof . . . ; and if any rectifier, dealer, or retailer shall refuse or neglect to provide such book, or to make due entries therein as aforesaid, or shall cancel, alter, obliterate, or destroy any part of such book, or any entry therein, or make any false entry therein, or hinder or obstruct any officer from or in examining such book, or making any minute therein or taking any extract therefrom; or if such book shall not be preserved or not produced by the rectifier, dealer, or retailer as hereinbefore directed, such rectifier, dealer, or retailer offending herein shall forfeit the sum of one hundred pounds."

It appeared that there was a failure to enter spirits received upon the 11th, 19th, 20th, and 27th September 1877, and that failure to enter spirits sent out occurred on the 10th, 11th, and several days till the 29th September, and also on the 1st and 2d October. It appeared further that upon the 11th, 19th, and 27th September there was a failure both to enter spirits received and to enter spirits sent out.

Under the second head there was one count charging one specific infringement of sec. 176, and one count for the forfeiture of the excess of stock under that section.

Section 176 was as follows:—"Any officer may at any time take an account of the quantity of all spirits in the stock or possession of a dealer or retailer, and if it be found that the quantity of spirits remaining in the stock or possession of such dealer or retailer exceeds the quantity, which ought to be therein as appears on balancing the book by this Act directed to be kept by him, of spirits received into and sent out of his stock or pos-

* Decided December 21, 1878.

session (all spirits for that purpose being computed at proof), the excess shall be deemed to be spirits illegally received, and a quantity of spirits equal to such excess shall be forfeited and may be seized by any officer out of any part of the stock of such dealer or retailer, who shall also forfeit the sum of twenty shillings for every gallon of such excess; and it shall also be lawful for any officer to enter into the premises of a dealer or retailer, and to examine and take samples of any spirits in his stock or possession, paying for such samples the usual price thereof."

In this case, in calculating the stock the Excise took into account spirits in a large number of casks within the entered premises of the appellants, which spirits were to a great extent derived by a process commonly known as grogging—"This" (it was explained in the case) "is the term used in the spirit trade for the practice by which the spirits which have been absorbed by the wood of casks is recovered. When a cask is filled with spirits, a certain quantity of the spirit is absorbed by the wood, and when the cask is emptied, a quantity of water is put into it, and allowed to remain for a month or thereby, the cask being rolled about at intervals. By the end of that time, the absorbed spirits have been extracted by the water (there being a chemical affinity between alcohol and the water, in consequence of which the extraction of the alcohol from the wood is accomplished) and the mixture is technically called 'grog.' This may be prepared for the market by rectifying or otherwise, or may be used for reducing the strength of strong spirits." 390 such casks were under the process of grogging when the appellants' stock was taken on 3d and 4th October 1877.

The Quarter Sessions dismissed the appeal, and confirmed the conviction in the Court below. The appellants requested a case for the opinion of the Court of Exchequer.

The following questions were, *inter alia*, stated for the opinion of the Court:—"Whether the appellants are in the circumstances liable in more than a penalty of £100 in all for the twenty-one failures to make due entries in their stock-book, as libelled? and whether, if liable in more than £100 for the twenty-one failures, they are liable in separate penalties for omitting to enter spirits received, and also spirits sent out, when these transactions occurred on the same day? and whether the appellants were rightly convicted under section 176, in respect of the excess of spirits in so far as obtained by the process of grogging, and which excess so obtained amounted to 173·9 proof gallons of spirits?"

At advising—

Lord President—There are seven questions submitted for the opinion of the Court in this case, but of these four have been withdrawn, and there only remain for consideration the second, third, and sixth.

The second question is, whether the appellants are in the circumstances liable in more than a penalty of £100 in all for the twenty-one failures to make due entries in their stock-book as libelled. Now, it is explained in the case that the appellants pleaded that the twenty-one failures charged really constituted one offence, or at least that all the offences on one day, whether those offences were by non-entry of spirits sent out or spirits taken in, constituted one offence. —"We held that as the Act required each parcel of spirits to be entered separately in the stock-book on the day on which it was sent out or in which it was taken in, each omission to make such entry was a complete act in itself, and that in respect of each such omission the appellants became liable in the statutory penalty on the lapse of the day on which each transaction took place." The failure to enter spirits either received or sent out is given in detail in the case, and it appears that there was a failure to enter spirits received upon the 11th, 19th, 20th, and 27th September 1877. The failure to enter spirits sent out occurred on the 10th, 11th, and several days till the 29th of September, and also on the 1st and 2d of October; and it appears further from that statement that upon the 11th, the 19th, and the 27th of September there was a failure both to enter spirits received and to enter spirits sent out. That is the detail of the charges. Now, the question comes to be, whether each day's failure, in the first place, to enter spirits sent out is in itself a separate offence within the 170th section of the statute,—not each failure within the period of twenty-four hours, but each day's failure,—and that depends of course upon the construction of the Act. The argument of the appellants, as I understood it, was this, that however often a rectifier or dealer may fail to enter in his book spirits received or sent out, he can be guilty of only one offence until he is found out; that is to say, when the prosecution is brought, however often he may have offended—however many days or months in the year past he may have offended in this respect—he is only to be charged with one penalty—that is to say, with the same penalty as a man who has committed a single contravention of the statute the day before the prosecution is brought. Now, that appears to me to be a very unreasonable and inadmissible construction of such an Act of Parliament. It seems to me that whenever a man fails in any of the particulars specified in this clause he commits a contravention of the statute, and the only question that creates any difficulty at all is, whether an offence of this kind may not be committed more than once on the same day; and I am not prepared to say that under certain circumstances it might not be so. Suppose that at an early hour of the day the dealer or rectifier should be required by the Excise officer to make an entry, and refuse to do so, and then again in the after part of the day the same thing should occur with reference to another quantity of spirits either sent out or received, it would be a question whether that would not constitute two offences on the same day.

But then we have not such facts stated to us in this case, and I think the fair view of the facts stated in the case is this, that there was a failure in the course of each of the days specified in the case. Whether there was one or more failures within the day is left uncertain, but then, if he is not required by the Excise officer to make an entry at a particular hour he is entitled to make it at any part of the day, and he will sufficiently comply with the statute, I apprehend, if at the end of the day, supposing he has not been in

the meantime required to make an entry by the Excise officer, he should make the entries of the whole of the spirits sent out or received that day. Therefore, in the state of the facts before us, I do not think there can be more than one offence in each day, which I understand is the substance of the judgment in this respect pronounced by the Quarter Sessions. We had an argument to the effect that there could not be more than one offence charged at the same time because of the language in which the penalty is here imposed. I confess I cannot read the statute in that sense at all. It appears to me that the rectifier, dealer, or retailer is "offending herein" whenever in the course of any day he closes his book for the day without having entered spirits received or spirits sent out. On the first part of the case, therefore, I do not entertain any doubt.

The second question is with regard to the possibility of charging two offences upon the 11th, 19th, and 27th of September, because upon these days there was a failure to enter spirits received and also a failure to enter spirits sent out. Now, these are two quite distinct acts, and they are quite separately provided for in the Act of Parliament, and therefore they constitute separate offences. My opinion therefore is, that as regards the days in question—the 11th, 19th, and 27th—on each of these there were two distinct offences committed, one in failing to enter spirits received, and another in failing to enter spirits sent out.

But there remains for consideration a further question still, the sixth—whether the appellants were rightly convicted under section 176 in respect of an excess of spirits in so far as obtained by the process of grogging, and which excess so obtained amounted to 173·9 proof gallons Now, the Quarter Sessions inform us in this case that it appeared from the evidence that in calculating the stock the Excise had taken into account spirits in a large number of casks within the entered premises of the appellants, which spirits were to a great extent derived by a process commonly known as "grogging," which they explain at some length afterwards, and that the excess in stock to the extent of 173·9 proof gallons of spirits had arisen from this operation of grogging, which the appellants pleaded was a legal operation.—"But we held that the fact of there being in stock a larger quantity of spirits than was shown in the stock-book was the only fact with which we had to do under the statute, and that we could not enter upon any consideration of the source or sources from which this excess might have arisen." Now, I think the Quarter Sessions have taken a sound view of the 176th section of the statute. It is very precise and very clear in its terms. What is the precise *species facti* which is to lead to the forfeiture and penalty there enacted? That the quantity of spirits remaining in the stock of the dealer exceeds the quantity which ought to be there, as appears on balancing the books. If that is the state of the fact in the dealer's premises, then he is within the operation of the 176th section of the statute, and the consequences must follow. These Excise statutes do not deal with good and bad faith, or with guilt and innocence. They have nothing to do with that. The circumstances which lead a man within the grip of the law in a case of this kind may be of the most innocent description, and I have seen many cases in which it was so—many cases in which the application of the rule of the statute inferred the greatest injustice. But that cannot prevent the Court from being called upon to administer the statute as it stands, and we are instructed by the Legislature that it is imperatively necessary for the benefit of the Commissioners of Excise—or the Commissioners of Inland Revenue now—that they should have this provision in their favour, that whenever this Act applies, forfeiture and penalty shall follow without any inquiry beyond it. It appears to me that the facts here reported by the Quarter Sessions square exactly with the facts described in the statute, and it is impossible to go beyond them. One can easily see that the case which has occurred here—the case of spirits obtained by the process now known under this slang name of grogging—was probably not in the contemplation of the Legislature when the statute was passed; and perhaps if it had been known at that time some provision might have been made to prevent this clause of the statute operating in such a way as to prevent a dealer from obtaining spirits by grogging. We cannot tell; and it is not for us to speculate whether hereafter this process of grogging may not be reckoned as a productive industry, and as such entitled to so much deference that upon sound principles of economical science provision will require to be made by the Legislature not to suppress but to encourage grogging. That may very possibly be, but in the meantime the statute as it stands operates as a stern prohibition against any spirits in any way which shall have the effect of putting the dealer in the position contemplated by the 176th section. I am therefore of opinion that the Quarter Sessions are right on this branch of the case also.

Lord Deas, Lord Mure, and Lord Shand concurred.

The Court therefore found that the 1st, 4th, 5th, and 7th questions had been withdrawn by the appellants, answered the 2nd, 3rd, and 6th in the affirmative, and affirmed the determination of the Quarter Sesssions.

Counsel for Appellants — Dean of Faculty (Fraser) — M'Kechnie. Agent — W. G. Roy, S.S.C.

Counsel for Inland Revenue—Solicitor General (Macdonald)—Rutherfurd. Agent—Solicitor of Inland Revenue.