

## QUEEN vs. CHABAUD.

*Gunpowder Ordinance No. 2, 1853, sect. 13.—Certificate.  
of J.P.*

*An order signed by a Justice of the Peace that a dealer in arms, &c., is authorized to sell a pistol to the person named therein, is not such a certificate as is required by the 13th section of the Gunpowder and Firearms Ordinance, No. 2, 1853, in that it does not certify that the person named is, to the knowledge of the Justice of the Peace, a fit and proper person to obtain such permission.*

The accused, L. A. Chabaud and F. M. Legg, were indicted in the Eastern Districts Court and convicted of the crime of contravening the 13th section of Ordinance No. 2, 1853, regulating the dealing in Gunpowder, Firearms, and Lead.

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The indictment contained two counts, the first alleging the contravention of the Ordinance on the 26th October, by the delivery, without the production of the certificate required by the 13th section, of a pistol to one Walton, a farmer; and the second, the delivery without a certificate of a gun on the 11th November to one Zwaartboy. It appeared that a firm of licensed dealers carried on business at Sand-flats under the style of J. Edwards & Co. Legg and one J. Edwards took an active part in the business, and Chabaud, who was a Justice of the Peace for the district, was also a partner. Chabaud, in his character of J.P., gave the following order:—

“Permission is hereby granted to Messrs. J. Edwards & Co. to sell to Mr. W. Walton one revolver, which he requires for his own use.”

Upon this order Legg in person sold and delivered a revolver to Walton, Chabaud being present at the transaction. This was the delivery laid in the first count of the indictment. Subsequently, Chabaud, as a J.P., gave to Zwaartboy a certificate in the terms of Schedule No. 4, to Ordinance No. 2, 1853, as follows:—

“I, Louis A. Chabaud, do hereby certify that the bearer, Piet Zwaartboy, of Bushman’s Run, is to my knowledge a fit and proper person to obtain and have one gun, one pound powder, 250 caps and 4½ lbs. lead, which he requires for his own use.”

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Upon this certificate Zwaartboy bought a gun at Edwards & Co.'s store. The second count of the indictment was based upon the delivery of this gun. It was not shewn that either Chabaud or Legg were present at this sale, but presumably the sale had been made by a clerk. Upon the circumstances becoming known to Government, Chabaud's commission as J.P. was cancelled.

The accused were tried before Mr. Justice SMITH and a jury, and both before and after verdict Counsel moved in arrest of judgment. The presiding Judge overruled the applications, but reserved the matters brought forward for the opinion of the Supreme Court. Sentence was passed, but execution was stayed.

*Cole*, for the accused, moved to have the conviction quashed, on the ground as regards Chabaud, that the offence being that of delivering a weapon there was no evidence to go to the jury of any delivery by Chabaud. And as to both prisoners, that they were protected by the proviso to the 13th section of the Ordinance No. 2, 1853, viz., "that no certificate granted in contravention of this provision (viz., that no Justice of the Peace residing within twelve miles of the Magistrate's office shall grant any certificate) shall be deemed to be invalid, so as to subject any person acting upon it to any pains or penalties."

*Upington*, for the Crown, contended that both the permit and the certificate were valueless, as Chabaud was himself a dealer and that this was known to Legg (*vide* sect. 8, Ordinance No. 2, 1853). As to the permit, it was not in form, the essential part of the certificate required by law being that the person authorized to purchase was a fit and proper person to the knowledge of the Magistrate or J.P.

*Cole*, in reply, submitted that the indictment did not allege that the permit or certificate given were bad. The 8th section of the Ordinance did not apply here.

DE VILLIERS, C.J. : It is not in our power to quash the conviction ; all we can do is to express our opinion on the matters reserved by the Court below.\* The 13th section of

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\* Since this decision Act No. 5, 1879, provides a procedure for appeal in criminal cases.—Ed.

the Gunpowder Ordinance, which the accused were charged with contravening, imposes a penalty for the delivery of any guns, gunpowder, lead, &c., "provided that nothing in this section contained shall be deemed or taken to prevent any sale, &c., to any person who shall produce and deposit with the person delivering the gun or other matter or thing mentioned in such certificate, a written certificate signed by either a Resident Magistrate or Justice of the Peace, certifying that the bearer, who must be named in such certificate, is to the knowledge of the person signing the certificate a fit and proper person to obtain such gun, &c., which certificate shall in substance correspond with the form marked No. 4 in the Schedule to this Ordinance annexed." As to the first count, there can be no doubt that a delivery of a pistol to Walton has been proved to have taken place at the shop of Edwards & Co., of which firm both Chabaud and Legg were partners. The sale was made by Legg himself, and apparently in the presence of Chabaud. Chabaud by being present at the transaction may well be taken to have authorized it. But he went further, and gave a written permit to the purchaser to receive the pistol from Edwards & Co. From these circumstances the jury were justified in finding that there had been a delivery of the pistol both by Legg and by Chabaud. Then comes the question, whether the permit given by Chabaud affords any defence to either of the accused. To decide this, we must look at its form. All the permit says is that permission is given to Edwards & Co. to sell a revolver to Walton. But that permit is not in terms of the requirements of the 13th section of the Ordinance. It does not say that Walton is to the knowledge of Chabaud, a J.P., a fit and proper person to obtain such pistol. This seems to me to be a substantial variance from the form given in the Schedule to the Ordinance. So that independently of any question whether or not Chabaud could give a certificate at all to buy from himself, there has been a contravention of the 13th section established under the first count. Under the second count it seems to me that the matter is more doubtful. There a certificate in proper form was given, and it was not specially addressed to Edwards & Co. Moreover there was no evidence that either Chabaud or Legg was present at the sale or delivery of the gun to Zwaartboy. Although in civil matters a principal

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is liable for the acts of his servants or agents acting in the course of their employment, I do not think that the Courts have gone so far as to extend that doctrine to a criminal liability for the act of an agent, where it is not shewn that there was a command or authority to commit the offence. On these grounds I am of opinion that the conviction on the first count should stand, but that there was no evidence to go to the jury on the second count.

DENYSSEN, J. : I am of the same opinion. It is a material part of the certificate that the person desiring to purchase firearms is known to the Magistrate or J.P. as a fit and proper person to possess them. There is no doubt that Chabaud was present at the sale and delivery of the revolver ; but there may be some doubt as to his cognizance of the sale of the gun, and the Court should give the accused the benefit of such a doubt.

FITZPATRICK, J. : I also concur.

[Crown Attorneys, REID & NEPHEW.]  
[Prisoners' Attorney, PIERS.]

### MCLEOD'S TRUSTEES vs. BENJAMIN.

*Insolvency.—Ord. No. 6, 1843, sect. 83.—Onus of proof.*

*In an action to set aside, under the 83rd section of the Insolvent Ordinance, an alienation of property made before insolvency, it is for the plaintiff to prove that at the time of the transaction challenged the insolvent's liabilities fairly calculated exceeded his assets fairly valued, and then the onus is upon the person upholding the transaction to show bona fides and just and valuable consideration.*

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„ 14.  
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Trustees vs.  
Benjamin.

The plaintiffs, who were the trustees of the insolvent estate of W. McLeod & Co., sued the defendant Benjamin in an action to have a certain alienation, cession, and delivery of certain promissory notes, and the payment of certain monies, declared null and void and set aside, first, under the 83rd section of the Insolvent Ordinance, on the