

MR. PENDERGAST TO THE ATTORNEY GENERAL.

Dunedin, Otago, New Zealand,
May 29th, 1865.

M'KENZIE V. SUPERINTENDENT, SOUTHLAND.

MY DEAR SIR,—

In this case, an action against the Superintendent of Southland, the plaintiff having obtained Judgment, has issued a writ of *fi. fa.* and the Sheriff has seized Railway plant and other chattels purchased out of money appropriated by the Provincial Council for the purpose of a Railway. An arrangement was made that the Sheriff should not sell for six weeks, the delay being asked for the purpose of getting the means to pay the debt. This having failed and as it was considered by the advisers of the Superintendent of Southland. That all property purchased out of Provincial Revenues must be considered Crown property and not liable to be seized in execution; and it being by them also considered that the "Provincial Law Suits Act, 1858," Section 4, pointed out the only means of obtaining the fruits of a judgment obtained under that Act, a rule *nisi* was obtained with a stay of proceedings calling on the execution creditors to shew cause why the writ of *fi. fa.* should not be set aside. The rule was obtained on Wednesday, the 23rd, and served on the Solicitors of the Execution creditor on Friday the 25th (Thursday being a holiday). The Registrar of the Supreme Court telegraphed to the Sheriff on Wednesday that the rule *nisi* had been granted. The Sheriff was informed that it had been so granted by the Provincial Solicitor of Southland, nevertheless the Sheriff on Saturday morning sold to Messrs. McKenzie, the execution creditors, the whole of the Railway plant valued at £20,000 for £260.

The object of this letter is to ask you whether you deem it desirable to make any claim to the property on behalf of the Crown.

It was suggested during the argument of another case (*Eccles v. Superintendent of Southland*) that the property might be deemed to be in the Crown, and that a notice of such claim might be served on the Sheriff and that he might then interplead. However this may be, do you think it necessary that anything should be done on behalf of the Crown in your name, either a Bill in Equity claiming an injunction or a notice to the Sheriff or any other proceeding? I find in a late case, *Attorney General v. Wilkinson*, 29 L. J., Chancery, an injunction was granted restraining an execution creditor who had issued a *fi. fa.* and intended to have seized the property vested in guardians of the poor, Vice Chancellor Wood did not grant the injunction. On appeal, the Lords Justices granted the injunction. It is a question which requires to be decided immediately as the judgment in the Rule in *McKenzie v. Superintendent of Southland* will be given without delay.

I am &c.,

The Hon. the Attorney-General.

JAMES PRENDERGAST.

No. 44.

OPINION OF COUNSEL.

RE M'KENZIE VERSUS SUPERINTENDENT, SOUTHLAND.

I think the course to be taken in this matter is that some independent person, not immediately connected with the Provincial Government, for instance a member of the Council, should make an application to a Judge of the Supreme Court to set aside the Writ issued, and the Execution. I think that it would be as well to make this attempt. It may fail of success on the ground that the application can only be made by the party to the suit. However, I think that the application ought to be successful by whomsoever made.

Affidavits should be prepared showing all the facts.

The Suit.

The Judgment.

The issue of the Writ and delivery to the Sheriff.

The seizure, the advertisements of sale.

The arrangement entered into by the Deputy Superintendent, and threats of Sheriff to sell.

The fact that the applicant is a British subject and an inhabitant of Southland, and if it be so a member of the Council, and belief that the Sheriff will proceed to sell.

In addition to this proceeding I think that a debt due, for instance servant's wages, or a sum due for goods sold, should be put into my hands to sue the Superintendent upon. Messrs. Gillies and Turton should be instructed to act for the Superintendent as they have hitherto. The action might perhaps be commenced at Invercargill at once. The Superintendent might allow judgment to be signed at once and the writ of *fi. fa.*, issued but not put in Sheriff's hands though it might be threatened.

If this course is adopted I will instruct Mr. Harvey, my agent at Invercargill, to act in the matter for me up to the issue of the writ *fi. fa.*, the rest of the proceedings must be carried on