PAPERS

RELATIVE TO

THE MINING ENCROACHMENT CASE,

EAGER *v.* GRACE.

(*Return to an Order of the House of Representatives, No.* 33, *dated* 19*th September*, 1872.)

"That all correspondence received by Government relating to the mining encroachment case of 'Eagar *v.* Grace,' of the Shotover, Wakatipu District, Province of Otago, wherein it is shown that the Warden for the said district gave judgment, awarding damages amounting to £8,000; and also the judgment delivered by Mr. Justice Chapman on the 14th August, 1872, in the case of the 'Queen *v.* Beetham, Warden, and Another,' having reference to the said case, 'Eager *v.* Grace,' be laid upon the Table of the House."

(*Mr. Bradshaw.*)

WELLINGTON.

1872.

PAPERS RELATIVE TO THE MINING ENCROACHMENT CASE.

No. 1.

Mr. J. B. Bradshaw to the Hon. the Colonial Secretary.

Sir,— House of Representatives, Wellington, 15th August, 1872.

The inclosed letters—one from Henry Eager to myself, and one from Wesley Turton to Henry Eager, of Queenstown, relative to a mining case pending the decision of the Courts of law—I received a few days ago. I herewith inclose these letters to you, with a request that you will be good enough to give the matter consideration, as desired by Mr. Eager.

The case seems to be a very hard one, and one which is deserving of consideration by the Attorney-General.

I have, &c.,

The Hon. the Colonial Secretary. J. B. Bradshaw.

Enclosure 1 in No. 1.

Mr. H. Eager to Mr. J. B. Bradshaw.

Sir,— Queenstown, 2nd August, 1872.

I take a liberty in writing to you, but, under the circumstances, I have no alternative. I am the plaintiff in the encroachment case of Eager *v.* Grace. I inclose you a statement of my case from the commencement up to the present time. What I take the liberty of asking you to do for me is, to lay my case before the Government, and see if it is not possible that my claim and the defendant's could not be placed under injunction, and all works suspended until our case is decided by law.

I know that, being a perfect stranger to you, I am asking a great favour; but at the same time it is a question that affects all the diggers, and you being an old resident in our district, I suppose, as a public man, you take some interest in our affairs.

The facts of our case are these: I recovered a verdict against Grace, for £8,000 and expenses, for encroaching on my claim—a leasehold claim—and blocking out a large portion of my ground. Since then, I obtained a writ of execution on their property, which was placed in the hands of the bailiff, who seized their claim. Their counsel, Mr. G. B. Barton and Mr. Macassey, of Dunedin, applied for and obtained a rule *nisi* to stay proceedings until the validity of Mr. Beetham's judgment was tested in the Supreme Court.

Grace's partners then, by force and intimidation, took possession of the tunnel from the bailiff, and have been working day and night since, with a number of hired men, for the known purpose of working out their claim and leaving the Colony. In the meantime, I can get no protection by law, and am completely ruined with law expenses; and if it were not for the public raising money for me to carry on, I should have no alternative but to give up the action, allow myself to be robbed, and forfeit my own claim to pay expenses.

My case has been postponed from time to time for several months. Judge Chapman, of Dunedin, has heard the arguments of Grace's counsel and mine on the rule *nisi*, and reserved his judgment, which has put me to the expense of another delay. In the meantime the opposite party continue taking the gold out of their claim and depreciating my security in case I win the appeal that they have sought for in the District Court, and their lawyers have caused to be adjourned from time to time.

In conclusion, I refer you to Mr. Hallenstein, of Queenstown, who can confirm what I have stated; and hoping you will make some effort in my behalf,

I have, &c.,

Henry Eager.

Enclosure 2 in No. 1.

Mr. W. Turton to Mr. H. Eager.

Dear Sir,— Queenstown, 2nd August, 1872.

Yourself v. *Grace.*

As requested, I now beg to state shortly how your case stands. The action was commenced on 23rd March last, to recover damages against the defendant for an encroachment on your mining lease, and was heard before the Warden and four assessors on 12th, 13th, 19th, and 20th April, on which last-mentioned day a verdict was found in your favour for £8,124 10s. 5d., and £86 6s. costs. On the 2nd May last you had a warrant of distress issued to recover the amount of your verdict, and on the following day the bailiff took possession of Grace's claim and had his tunnel locked up. On the same day (3rd May) the defendant obtained a rule *nisi* against you in the Supreme Court, to obtain a writ of prohibition, on two grounds—first, that the Warden's Court was illegally constituted, inasmuch as the Warden and Assessors acted together throughout as co-ordinate judges of law and fact; and

secondly, that the distress warrant was issued before the expiration of the time limited for appealing from the Warden's decision. This rule was not argued in Dunedin until the middle of last month, and no decision has yet been given on it. Indeed, it is very hard to say when His Honor Mr. Justice Chapman will give judgment. This rule contains a stay of proceedings, pending the rule being argued and decided. Nevertheless, in spite of this fact, the defendant and his alleged partners, on 24th May, retake possession of the tunnel from the bailiff, and have been working out the claim ever since.

For their conduct in interfering with the bailiff, you, on the 17th ultimo, got a rule *nisi* to have the defendant and his alleged partners committed for contempt of Court.

There is no knowing when this rule will be heard.

I have tried to get an injunction on the claim from the Warden, and have been refused. I have been advised by counsel in Dunedin that you cannot get an injunction from the Supreme Court.

I may mention that the defendant did not lodge his notice of appeal until the very last day allowed for doing so, viz., on the 4th May.

Since the first rule *nisi* was obtained, the District Court has sat twice, but the Judge refuses to go on with the appeal until the Supreme Court gives judgment on the rule that has been argued. The appeal stands adjourned to 17th instant.

If something is not done very soon, the defendant's claim will be worked out, and you will be left with nothing to come down on.

I have, &c.,
WESLEY TURTON.

No. 2.

WEDNESDAY, 14TH AUGUST. Before His Honor Mr. Justice Chapman.

THE QUEEN *v.* BEETHAM (WARDEN) AND ANOTHER.

His Honor delivered the following judgment in this case:—

Rule *nisi* directed to Beetham, Warden of the Gold Fields at Queenstown, and Eager, plaintiff in the action of Eager *v.* Grace, to show cause why a writ of prohibition should not issue on two grounds. First, that the Warden's Court at which the complaint of Eager against Grace was heard was illegally constituted, inasmuch as the Warden and Assessors acted together as co-ordinate judges of law and fact; and secondly, that the distress warrant or execution was issued before the expiration of the time limited for appeal from the decision of the said Warden's Court. The rule was argued before me on the 11th, 12th, 13th, 17th, and 23rd of July, when I took time to consider my judgment. The length to which the argument extended affords a presumption of the importance, as well as the difficulty, of the question involved in the first ground. Very little guidance is afforded by the decisions of other Courts, and my decision must ultimately turn on the language of the several sections of "The Gold Fields Act, 1866," which apply to the constitution and practice of the Wardens' Courts; for it is from the language of the Act alone that the intention of the Legislature must be collected.

I start with this proposition: that if an Act of the Legislature constitutes a Court, consisting of a presiding Judge (by whatsoever name he may be called) and Assessors or Jurors, the maxim of the common law expressive of the distinct functions of the Judge and the Jurors must prevail, unless by the language of the Statute a contrary intention be manifested. The question, therefore, involves a careful examination of the wording of the sections providing for the constitution of the Warden's Court with or without Assessors, compared with the language of some of the sections treating of the District Courts when assisted by Assessors. In this I have been greatly assisted by the learned counsel on both sides. Of the constitution of the District Courts and their Assessors there cannot be a doubt. The Assessors are treated as composing a Jury. They make oath "a true verdict to give." The presiding Judge instructs them in the law, and they deliver their verdict in the same manner as any other jury. *Primâ facie*, therefore, there is nothing in the name Assessors to lead to an inference that they are other than Jurors. But there are undoubtedly peculiarities in the language of the sections relating to the Wardens' Courts, and to the functions of the Assessors, distinct from the language of the sections relating to the District Courts. Much ingenuity and critical acumen has been displayed by the learned counsel on both sides: and not without reason,—for the whole question turns upon whether these peculiarities are sufficient to warrant the inference that the legislation intended that the maxim of the common law already referred to should be departed from, and that the Warden and Assessors should act together as one body, deciding either unanimously or by a majority, upon which I shall have something to say hereafter. By section 60 of the Act, the Wardens have power to act alone or with Assessors. The next five sections provide for the jurisdiction of the Wardens' Courts, both territorially and with reference to the subject-matter of complaints, including cases of encroachment. By section 68, the Warden is required to make such decree or give such judgment as shall be just, without regard to any rule of law, or practice of any Court of law or equity. This is similar to provisions in several English Statutes, establishing Courts of request or Courts of conscience—the import of which was very carefully considered by Mr. Justice Richmond in *Pearson* v. *Clark*, 1, Macas. 136, upon a careful review of the judgment of the Court of C.P. in *Scott* v. *Bye*, 2, Bing., 344. Section 8 of "The Gold Fields Amendment Act, 1867," No. 2 (No. 1 provides only for the delegation of the Governor's powers), repeats the provisions of 68; and adds that the Warden's decision shall comply therewith, and with the provisions of the Gold Fields Act, the Amending Act, and the Rules and Regulations made, or to be made, under the Acts. The Act of 1866 provides for the summoning of Assessors, and clearly shows that the Warden may act "alone or with Assessors," and several provisions follow as to Assessors; but by a strange oversight, no provision was made for the number of Assessors, or as to the terms and conditions upon which they were to be resorted to. This omission, however, was discovered shortly after the passing of the Act, and by section 4 of the Amending Act of 1867, No. 2, provision was made for the number of the Assessors, for summoning them on the requisition of either party or at the discretion of the Warden, and for their payment, as effectually as is done by section 89

in the case of Assessors in the District Courts. The oath which Assessors in the Wardens' Courts are required to take differs from that which the Assessors in the District Courts take. The latter swear "to give a true verdict according to the evidence;" whereas the Assessors in the Wardens' Courts swear to give "a true finding and decision" according to the evidence. This seems to show that their finding was intended by the Legislature to be more than a verdict, upon which judgment was afterwards to be entered by the Court;—that it was, in fact, to be the final decision. And this view is strengthened by section 69, which enacts that "a minute of every such decision shall be entered by the Warden in a book to be kept by him for that purpose, and shall be signed by the persons who concur in making such decision;" and no formal order shall be necessary, &c. I cannot doubt, therefore, that the Legislature intended to give to the Wardens and Assessors a concurrent and co-ordinate jurisdiction over the whole case. They are to give such a finding and decision, according to their judgment and conscience, as is just: the Wardens taking care to keep them within the provisions of the several Gold Fields Acts, and the Rules and Regulations made under the authority of those Acts, which constitute the special law of the Courts created by those Acts.

In deciding the case of *Pearson* v. *Clarke*, Mr. Justice Richmond found himself slightly embarrassed by the language of "The Resident Magistrates Jurisdiction Act, 1862," which gives an appeal on a point or points of law only, which seemed at first sight to militate against a decision according to equity and good conscience. There was this dilemma: Was the Supreme Court, on hearing the appeal, to make itself a Court of conscience, or did it compel the Justices to follow legal technicalities, as the Supreme Court does? But there is no such source of embarrassment in the Gold Fields Acts—there is nothing to prevent the Warden or the Warden and Assessors from coming to a decision which he and they deem just, without regard to rules of law or the practice of any Court of law or equity, because the appeal is not on matter of law only, but is also on questions of fact. I do not think this releases the Warden from directing the Assessors in any point of law which may arise, and it is certainly his especial duty to know the provisions of the Statutes under which he acts, and to keep the Assessors within their provisions; but when he has done that, the "finding and decision" must still be just, in accordance with the 68th section. There is, no doubt, a difficulty under the Act of 1866, not removed by any subsequent Act. There is a total silence as to the necessity for unanimous decision or decision by the majority. The 69th section, by providing that a minute of the decision shall be signed "by the persons who concur therein," seems to imply that there may be persons who do not concur therein; and, therefore, that the finding and decision by a majority was contemplated: but what majority? A majority of the four Assessors, or a majority consisting of two Assessors and the Warden? This is nowhere cleared up. It does not occur in this case, because the Assessors and the Warden were unanimous; but unless some provision be made, more specific and clear than is implied by the expression the "persons who concur," cases of great difficulty may arise. The County Courts Act of Victoria provides that when the two Assessors agree, their verdict shall be the judgment, and that when they are divided, the decision of one Assessor and the Judge shall be the judgment. The Victoria Mining Statute is equally unambiguous, though by a different contrivance. In *Broadbent* v. *Vanrennan*, where a Judge of the County Court sat alone by the choice of the parties, Sir William Stawell spoke of the Judge directing himself on the law, and then as a jury deciding on the facts, keeping the two functions distinct. But the constitution of the County Court, and its ordinary course of practice (above a certain amount), are similar to the practice of the Supreme Court. There is no deciding "in a summary way." The parties may dispense with Assessors, but when they do so, they give to the Judge jurisdiction over the facts, without disturbing his normal jurisdiction in matters of law. But the reverse is the case in the Warden's Court. He decides in a summary way. The parties may have the assistance of Assessors if they desire it, but, as it seems to me, without changing the summary nature of the proceedings and decision. They assist the Warden, and with him form one Court. For this view I have already given my reasons as drawn from the Statute of 1866.

After a careful examination of the several affidavits and the reports of the trial, I come to the conclusion that the Court of the Warden before which *Eager* v. *Grace* was heard was not illegally constituted, and that there is, so far, no ground for a writ of prohibition. All the points raised before the Warden may be taken on appeal, and are proper subjects for the consideration of the District Court, as such Court of appeal. Some, perhaps, may have been good grounds for a rehearing before the Warden, but an appeal, lying, as it does, to a professional Judge, both on questions of law and of fact, is a much more satisfactory proceeding. It is, in fact, a new trial, which meets all that the case requires. I come now to the second point. Did the writ of execution issue too soon? If so, is that a ground for prohibition? An appeal is a remedy by Statute. An appeal never lies unless given by Statute—*Rex* v. *Cashiobury Justices* (3, D. & R. 35). We must look to the Statute giving an appeal for all the terms and conditions upon which appeal is allowed. *Primâ facie*, execution is the consequence of judgment; and I think that where a Statute does not expressly or impliedly take away that consequence, there is no stay. No case was cited to show that a stay of execution follows from the mere giving of an appeal; and my reason for thinking that it cannot be so is, that an appeal being a creation of the Statute Law, no incident can be engrafted on it but such as the Statute warrants. In numerous cases where Statutes confer a right of appeal, they also contain provisions as to stay of execution, security, or restitution. Power given to a Court by Statute to stay execution, with or without conditions, implies that such power would not otherwise exist. Mr. Macassey has cited many such instances. They all seem to me to show that without such enactment there would be no stay of execution. The learned counsel has very ingeniously argued that those Statutes which use some such words as these:—"There shall be no stay of execution unless the appellant give security,"—imply that there would have been a stay of execution without such words. But what they seem to me to import is this: Unless the appellant give security, the ordinary consequences of judgment, viz., execution, shall follow. But in the Gold Fields Act there is no such provision, and the words of the 81st section, empowering the Judge of the District Court, "if necessary, to order restitution as the case may require," seems to admit of no other construction than that execution had previously issued. I certainly think that it is to be lamented that the Statute did not provide for a stay of execution on terms:

for restitution may not always repair the mischief done; but, subject to that inconvenience, I believe the whole justice of the case will be met by the appeal, which lies on matter of fact as well as law, as expressed by the 81st section—contrary to the Victoria Statute, according to the case cited, *Regina* v. *Brewer*. The appeal to the District Court, as I have already said, reopens the whole case. It is a complete rehearing, or new trial, before a competent tribunal, presided over by a professional Judge, where the whole law applicable to the case, the facts, and the evidence, are gone into and considered.

For these reasons, this rule will be discharged with costs.

Mr. Smith: I ask your Honor for leave to appeal.

His Honor: Of course you will have leave. I do not know that it is necessary to ask for leave.