

to be allowed to external circumstances, affecting the construction of the letters patent, for without the aid of such circumstances it has not been argued that the defence can succeed.

When the case of *The Queen v. The Bishop of Huron* was before the Court of Common Pleas, I took every possible pains to ascertain what were the facts, so far as any record could be found of them in the public offices, connected with the issuing of the patent. Whatever my anticipations might have been, I found nothing to strengthen the defence, and on the facts proved in that case I thought and still think the conviction right. I felt the doubt which embarrassed my brother Hagarty, whether the patent did identify the land intended to be appropriated, and whether, therefore, it was not void for uncertainty.

The general rule applicable to the construction of grants from the Crown, is that they shall be construed most favourably for the king. Though where the grant is *ex speciali gratia, certa scientia et mero motu*, the construction and leaning are to be in favour of the subject (Com. Dig. Grant, G. 12. Bac Abr. Prærog. F. 2. Vin. Abr. Prærog. Ec. 3). And if the grant be capable of two constructions by the one of which it will be valid, and by the other void, it shall receive that interpretation which will give it effect. "For the king's honour and for the benefit of the subject, such construction shall be made, that the king's charter shall take effect, for it was not the king's intent to make a void grant (St. Saviour's case, 10 Co. 676.), and in Sir J. Molyneux's case (6 Co. 6) it is said: "Note the gravity of the ancient sages of the law to construe the king's grant beneficially for his honour and the relief of the subject, and not to make any strict or literal construction in subversion of such grants."

Looking no further than the language of the patent there is no difficulty. It arises in applying it to the subject matter, to the ascertaining the thing granted. The rule *id certum est quod certum reddi potest* applies in the case of the Crown, and if the grant has relation to that which is certain, even though it be but mere matter of fact, or *in pais*, it is sufficient (Com. Dig. Grant G. 5. Vin. Ab. Prærog. R.).

We may without hesitation interpret the words, that "tract of land being part of the town plot of London on which the Episcopal Church of England now stands," to mean the land on which the church was standing used for divine worship according to the rites of the Church of England, and then one certainty is obtained, and I agree fully with those who contend that something more was meant than the actual ground covered by the fabric itself, the quantity expressed in the patent,  $4\frac{7}{8}$  acres, is enough to establish that conclusion; and in the quantity expressed we have a second certainty, for I treat the words "or thereabouts" as equivalent to the common phrase "more or less." But I wholly disclaim attaching any importance, in the construction of the patent, to the conversation held by Colonel Askin with the Lieutenant-Governor. For the purpose of generally identifying the locality of the proposed site, it is (assuming it to be evidence at all, on which it is not necessary to express an opinion) really of no value, for we need not seek outside the patent for that purpose, as the land to be granted was that on which the church actually stood at that time though such a description would not have been applicable when his Excellency visited the proposed site. Then the suggestion itself, "send down your plan, &c.," amounts to no more than the expression of a wish that the application might be put into a definite shape, and a readiness to give it the most favourable reception. But it conveyed no authority to survey or mark out and appropriate any particular piece of land, nor did Colonel Askin so understand it, for he made no survey, but merely a sketch to accompany a petition for a certain site for a church and burial ground. As to any order in council for the grant of the land as pointed out by the sketch, I am compelled to say, I think there is no legal evidence that it ever existed, and the evidence tends in my humble judgment to negative its existence. With the utmost confidence in the integrity and good faith of the witnesses who speak of having seen a copy of it, I think they are under some mistake, and if such order is material to the defence it is not proved. All the evidence refers to a copy, for though Mr. Lawson speaks of "the order in council," he is evidently referring to the same paper of which the Bishop of Huron had just before spoken, as the copy, and he says immediately after-

wards that he had applied at the government office for the original, and could not find any entry in any of the books or records in relation to it. So far there is no proof of the existence of an original of the supposed copy. And if there had been any such order we might reasonably expect to find it referred to on the face of the patent as the authority for the grant, whereas there is a reference to a different order as the authority, viz., an order of the 15th January, 1836. The lapse of more than twenty years may well account for an error of recollection as to the nature of the document which no witness speaks of having seen since the date of the patent. And the well known reputation of the then clerk of the executive council (Mr. Beikie) for scrupulous exactness in the business of his office, renders it next to impossible that he should have issued a copy of an order in council for a grant of land, of which order no trace can be found in any of the books or records of the period. That no such order reached the Surveyor-General's office is pretty clearly established by the Bishop's evidence, who went there and saw in what manner the clerk framed the description, in ignorance, apparently, of Colonel Askin's sketch, and of the memorial which accompanied it. Indeed if things had not "been done in a hurry," it is not improbable that the framing the description for patent would have been delayed until Mr. Carroll, who was then making the survey, had been referred to, or until his plan, report and field notes had been regularly returned. The pressing haste to get the patent completed affords no argument against the Crown, if it has not a contrary tendency.

It appears that in fact, on the very day the patent is dated and recorded, this block of land was surveyed, and its boundaries were marked on the ground by Mr. Carroll. If the grant had in express terms referred to the survey then in progress for the limits of the block, such reference would have prevailed, as affording evidence of the intention of the Crown in making the grant, and would, at least so I apprehend, have been sufficient to define what was granted, or to prevent the grant being held void for uncertainty. Or if Mr. Carroll's plan had been returned to the office before the patent was issued, and then the grant had been made in the terms used, there could have been no doubt that the plan could have been referred to in aid of construction of the grant so as to support its validity. It seems to me, that the fact of the block being actually designated on the ground by an officer employed by the government for the purpose of making the survey of which that formed part, may also be referred to as evidence of a third certainty from which the intention of the grant may be ascertained.

It has been objected to this, that the fact was unknown to the Crown when the letters patent issued. That certainly is so, but the objection does not lie in favour of those who set up the fact of the fence then standing on the ground, as evidence that the Crown intended to grant the land so fenced in and occupied by or for the church. For there is no proof whatever that the Crown or any of its officers were aware that the lot was fenced any more than they were that Mr. Carroll had marked the boundaries; while the fencing was a more private act, the survey was an official one, and these parties claiming under the patent have never pretended that the patent covered the land as fenced in at the date, any more than it covered the land represented by Colonel Askin's sketch. As to the former, the fence was removed from north to south to make it correspond with Carroll's line, and as to the latter, among other changes, Mark Lane, instead of being 100 feet wide, was laid out by Mr. Carroll sixty-six feet wide, and the fence on that side corresponds therewith. Moreover, the fences were not begun until after the receipt of this (supposed) copy of an order in council, and could not therefore have influenced the government in framing such order, if it ever existed.

So far as any objection to the validity of the patent on the ground of uncertainty is concerned, I think I am justified in upholding it, on the facts, that the site was fixed by the existence of the church thereon; that the estimated quantity of land corresponds with the actual quantity; and that the limits were marked on the ground by competent authority. I might add, but that is not distinctly proved, that Carroll's survey has ever since its return been recognised and acted upon by the government. Even if the objection of uncertainty were to prevail, I do not see that it would entitle the defendant to a new trial, for establishing