

C. L. Cham.]

THE QUEEN V. PATTEE—WEAVER V. BURGESS ET AL.

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Now, the 29th section of the Act of 1869 does *not*, it seems to me, give the person desiring to impeach a patent the *right* to issue a *scire facias*; it certainly does not do so in terms. It gives him the right to record the patent, "so that a writ of *scire facias* may issue for the repeal of the patent." But on whose authority is it to issue? As the clause does not expressly say that *he* may do it, and it is not only formally but substantially a suit of the Queen, it seems to follow, even without regard to the previous known practice, that it can only be on the authority of the Attorney-General that the writ is to issue. So that I agree with Mr. Richards. Consistent with this is the repealing clause of the act of 1869. It repeals cap. 34 only in so far "as it may be inconsistent with this Act." Now, the provision of sec. 20 of cap. 34, that the proceedings upon the *scire facias* shall be "according to the practice of the Court of Queen's Bench in England," is not inconsistent with the Act of 1869, but in furtherance of it. Therefore, whether Mr. Harrison is right or not in contending that cap. 21, Con. Stat. U. C. is inapplicable to a patent issued under the Act of 1869 because it is not issued under the great seal, I think a fiat was necessary for this writ of *scire facias*.

But whose fiat?

It may provoke a smile that an officer of the court, in deciding a matter of practice, should incidentally consider a question under our constitution, which is of some importance in itself, and is a part of larger questions. It is of little matter, however, where it may begin; it must come to the decision of the court. I was told, when I suggested the question on the argument, that it was very doubtful whether the Minister of Justice or the Attorney-General for Ontario be the proper authority to grant a fiat in such a case. I must therefore suppose it is doubtful, though I myself cannot see the grounds for doubt. I cannot think that *two* authorities exist, *either* of whom may grant it. Some one authority, and one *only*, must answer here the position of the Attorney-General in England in respect of this matter.

The British North America Act, section 92, enacts that, "In each Province the Legislature may exclusively make laws in relation to matters coming within the class of subjects next hereinafter enumerated, that is to say [after twelve other heads], 13, Property and civil rights in the Province; 14, The administration of justice in the Province, including the constitution, maintenance and organization of Provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those Courts."

These sections express the powers of the Legislature of Ontario.

Then as to the Executive, section 135 enacts, "that until the Legislature of Ontario or Quebec otherwise provides, all rights, powers, duties, functions, responsibilities or authorities, at the passing of this Act vested in or imposed on the Attorney-General, Solicitor-General, Secretary and Registrar of the Province of Canada, Minister of Finance, Commissioner of Crown Lands, Commissioner of Public Works, and Minister of Agriculture and Receiver-General, by any law, statute or ordinance of Upper Canada, Lower

Canada, or Canada, and not repugnant to this Act, shall be vested in or imposed on any officer to be appointed by the Lieutenant-Governor for the discharge of the same or any of them." So that, as is consistent and natural, the executive and legislative functions of the Government of Ontario seem to be co-extensive.

The words of this statute have been well weighed. But what definition of "property and civil rights" can exclude the right of enforcing a civil remedy in the courts? To lawyers, that seems the practical proof and test of all right: without it, at any rate, no other right is of any real value. And further, there is attributed to the local jurisdiction, "the administration of justice in the Province," * * * including procedure in civil matters." Then if the legislative and executive powers as to "property and civil rights in this Province," and "the administration of justice," and as to "civil proceedings in the Courts," are in the Government of Ontario, can it be thought that any other authority is for the present purpose indicated, than that of an officer of Ontario responsible to its Legislature? For let it be borne in mind that he who has the discretion to grant has also the discretion to withhold, and that it is only by *scire facias* that a subject in Ontario, aggrieved by a patent wrongly issued, can seek the remedy of its avoidance.

I desire not to amplify; but other reasons, in and out of the Act, point to the conclusion that the Attorney-General of Ontario is the authority that must grant or refuse the fiat which is necessary to the real plaintiff here to pursue this remedy. I shall not be understood as speaking of the case where the crown itself seeks to avoid a patent; I speak only of the present case, where a subject domiciled in Ontario seeks to avail himself of the peculiar privileges of the Crown to assert his own private interests.

I think the proper order is that, upon payment of the costs of this application, and filing a fiat of the Attorney-General of Ontario—which may be done *nunc pro tunc*—this summons be discharged. Upon failure to do this within two calendar months, that the writ and all proceedings be set aside with costs, to be paid by the relator.

Order accordingly.

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Ejectment — Striking out defendant—Terms.

The name of a defendant, who disclaimed all interest in the land, except as dowress, struck out of the proceedings in ejectment.

[Chambers, Feb. 1, 1871—Mr. Dalton.]

A summons was obtained on behalf of Ann McWade, one of the defendants in an action of ejectment, calling on the plaintiff to shew cause why her name should not be struck out of the writ and proceedings in this cause, on the ground that she had no interest in the land in question, except a right to dower, which had not been assigned to her.

O'Brien shewed cause:—

This summons must be discharged: This defendant is in possession, and the writ must therefore be directed to her. There is authority to strike out the name of a defendant who is a tenant, but not that of a dowress; *Kerr v. Waldie*.