Weekly Colonist

FRIDAY, MARCH 8TH, 1889.

A COLLAPSED CASE.

The sudden and complete collapse of the *Times* case was a surprise to the public, and must have filled the hearts of the Government and their supporters with dismay. No one could imagine that the case of the *Times* was built on so unsubstantial a foundation. It was natural to suppose that statements made with such confidence, and which related to subjects of such very great importance, would be based on something stronger and more reliable than the unsupported assertions of traitors and spies, who were known to be doubly foresworn. Who would think that men of business—men who had been entrusted with the direction of a great newspaper which had become a national institution, would be so wanting in ordinary prudence as to risk its reputation and a very great portion of its means on the mere word of men who must have been perjurers and unfaithful to the trust reposed in them when they sold them the information and the documents on which they relied to prove their case. Every one takes the evidence of a traitor and a spy with distrust. Unless it is confirmed by the testimony of honest men whose word cannot be doubted, and by circumstances which cannot lie it is simply worthless. Yet it was on the evidence of men of the worst character and no other that the managers of the *Times* depended to prove the authorship of the letters alleged to have been written at the instance of Mr. Parnell and signed by him. A little enquiry must have shown the managers of the *Times* that Pigott was not a man to be believed on his oath, and that Le Caron had broken so many oaths that he would have no scruple in breaking one more. What any shrewd man might have expected came to pass. The witnesses with such a black record could not stand the test of cross-examination. Their testimony made no impression on the public mind and the witness on whom they placed the most reliance broke completely down. One cannot but feel sympathy with the managers of the *Times*. Their discomfiture is complete and they will have, no doubt, to pay heavily for their rashness and want of discernment. No one but the most unreasoning partisan supposes for a moment that the British Government is responsible for the folly of the *Times*, They will in fact be great sufferers by its failure to prove its case against Parnell and his associates. They will have to suffer severely for having placed confidence in the discretion and judgment of the managers of that paper. But it is useless to speculate on the consequences, near and remote, of this gigantic fiasco of the Thunderer.

A NATION TRANSFORMED.

The people of Japan have shown in the clearest way that they appreciate the advantage of western civilization. A few years ago they appeared to be an ignorant people, scarcely more than half civilized. They were heathens, too, and it seemed that they had a strong antipathy to every form of Christianity. All that is changed now. The Japanese have proved themselves to be the least conservative people in the world. They evidently have no veneration for anything that is old because it is old. When they are convinced that the new is better than the old they adopt the new without a moment's hesitation. The ruling class has studied the civilization of Europe and America. They find that in many respects the institutions, political and social, of those continents are better than their own, and they have transplanted them to Japan wholesale. It is some time since they have, to quite a considerable extent, adopted the costume of the west and the east. Their own flowing garments were more graceful than the tight-fitting, inartistic clothes of the European and the American, but they, without a scruple or a regret, sacrificed grace and beauty to utility. The native dress of the Japanese ladies, particularly, is said to be infinitely more picturesque than the fashionable garb of a Paris belle, and they know how to wear it so as to set off their charms to the greatest advantage, but in the higher circles the more beautiful dress was discarded and clothes which do not suit their style of beauty and which they do not know how to wear, adopted. Visitors to Japan deplore this change and declare that the ladies who retain the native costume are greatly more charming than those who appear in the borrowed plumes of the foreigner. The army of Japan has been organized and drilled after the European model, and so has its navy. The last and greatest change is the re-organization of the government of the country. The Japanese have adopted a ready-made constitution. The whole framework of government has been re-organized. The government provided for them is a constitutional one, that of Germany, it is said, being taken as the pattern. The Mikado is still to be the head of the Government, but he is to be a very different ruler from the Mikado of former times. He is to be assisted in governing the nation, by a House of Peers, some of the members of which are to be nominated and hereditary, while others are to be elected, and a House of Commons of three hundred members. The popular chamber is to be elected by men over twenty-five years old who pay twenty-five dollars in taxes. Religious liberty, freedom of speech, and the right of public meeting are to be secured. This new constitution is principally the work of Count Ito, who has been studying the political institutions of Europe and America for many years past. How far the people of the country approve of the change, or whether or not they are in a position to appreciate and benefit by their new institutions, we have no means of knowing. The political condition into which Japan has, it may be said, leaped with a single bound other nations have arrived at by slow and painful steps. The sages of the west say that the preliminary discipline was necessary in order to teach the people how to use the free institutions which they gained so slowly, and for which many of them paid so high a price in suffering and in blood. It will be interesting to observe what use the Japanese will make of the freedom that has been, so to speak, thrust upon them. They have had no political education. They have not paid the price of freedom. Will they demonstrate to the world that a free nation can be born in a day; that there is a people who can adapt themselves to new political conditions as easily as a man can adapt himself to a new coat or a new pair of pants? The experiment is an interesting one, and it is greatly to be hoped that it will prove a brilliant success.

SOMEWHAT PRESUMPTUOUS.

Mr. H. H. Cook, M. P., is one of our Canadian public men who have so high an opinion of their ability that they think that they can do their own work and after it is done help the legislators of the mother country to do theirs. They consider that they are capable of giving advice to Gladstone or Salisbury or any other statesman who may happen to be at the head of the British Government. They take upon themselves to do this when capable critics in Canada believe that there is a great deal of room for improvement in the way in which they do their own proper work. Mr. Cook is by no means distinguished for ability. He is not to be found in the first or the second or even the third rank of Canadian public men. He is a big man physically, but the size of his intellect is not in proportion to the size of his body. He is a good-natured, bluff person possessed of some natural shrewdness but he is much more at home in a lumberman's shanty than in the Halls of Legislation. His warmest admirers smile at the idea of Mr. Herman H. Cook taking upon himself to offer advice to the Government of Great Britain or to censure its action on what is admitted the most difficult question that British statesmen have ever had to deal with. But this consideration does not deter Mr. Cook. He rushes in where the ablest and most distinguished men in the British Empire fear to tread. He has, cut and dried and ready to produce at any moment, a resolution the subject matter of which is Home Rule for Ireland. He has the modesty to expect that the Parliament of the Dominion will censure the Government of Great Britain for not having extended Home Rule to Ireland, and accused it of having subverted the rights and liberties of Her Majesty's subjects in Ireland. These are his words: "That this House has learned with profound regret that no measure of Home Rule has yet been introduced, but that the rights and liberties of Her Majesty's subjects in Ireland have been subverted by the Coercion Bill of 1887." When the Parliament of the Dominion of Canada, on the motion of Mr. H. H. Cook, undertakes to pass this vote of censure on the Parliament of Great Britain it will be pretty nearly time for Canadians to become independent or to transfer their allegiance to some other country. As a piece of ignorant presumption this resolution of the ponderous Cook is unique, and if there are ten men in the House of Commons so lost to all sense of political decency as to vote for it we would despair of our country. Perhaps Herman H. has never heard of the snub which the Canadian Parliament received at the hands of Mr. Gladstone when it transmitted to the Government of Great Britain a resolution on the Home Rule question not one thousandth part as impudent and as offensive as this which he has placed on the notice paper of the House of Commons. Earl Kimberly's (Mr. Gladstone's secretary for the colonies) despatch acknowledging the receipt of the resolution contained the following paragraph:

"Her Majesty will always be glad to receive the advice of the Parliament of Canada on all matters relating to the Dominion and the administration of its affairs; but with respect to the questions referred to in the Address Her Majesty will, in accordance with the constitution of this country, have regard to the advice of the Imperial Parliament and Ministers to whom all matters relating to the United Kingdom exclusively appertain."

Here the Parliament of Canada is told in official language to mind its own business. The snub was severe and it must be admitted that it was well-deserved. Why should the Parliament of Canada go out of its way to pronounce a sweeping condemnation on the Parliament and the Government of Great Britain. The spectacle is a most unseemly one and it is as futile as it is improper. It is not to be supposed that the Government of Great Britain will change its Irish policy at the bidding of a body which is not responsible for the good government of Ireland, which indeed, has nothing to do directly or indirectly with the management of Irish affairs.

Of course everyone knows what is at the bottom of Mr. Cook's condemnation of the course which the British Parliament has seen fit to pursue towards Ireland. He is fishing for votes and he looks upon this as a cheap way of securing them. If it were not for a desire to catch or to retain the Irish vote Mr Cook would not dream of asking the Dominion Parliament to stultify itself by pronouncing a condemnation of a policy on which honest and patriotic men in Great Britain are divided. Real sympathy with Ireland and intelligent approval of the policy of Home Rule have nothing to do with these resolutions. They are neither more nor less than bids for votes—clumsy attempts to draw the wool over the eyes of Irishmen. Men vote for them who never in their lives gave a cent to further the cause of Home Rule, and if a hundred dollars from one of these gushing sympathisers would complete the sum necessary to set up a parliament in College Green he would keep the money in his pockets. Talk is cheap and they have lots of it, but when it comes to giving substantial aid to the cause of Home Rule, they slink into the background. It requires all the ability which Canadian legislators possess to do well the work which they are elected to perform. If they take the Earl Kimberly's advice and mind their own business no reasonable man will expect them to do more.

COLD COMFORT.

Our neighbors the Americans, since their little misunderstanding with Germany, are turning their attention to their means of defence in case of invasion. Their harbors and sea-board cities would be in immediate danger. What chance would they have of preserving them from destruction? They have in commission the Texas, the Dolphin, the Boston, the Atlanta and the Chicago, fine ships, all of them. Besides these they have five swift 4000 ton steel cruisers of the Charleston type nearly completed. Then there are ten first-class men-of-war, including one armored vessel of 7300 tons and two of 5000 tons in course of construction or actually afloat. They have the monitors too, which they think would be useful for harbor defense. There is also a bill before Congress to add fifteen more fast cruisers to the navy. Then they have sea coast guns which throw a nine foot shell containing 600 pounds of dynamite. If one of these shells should strike an enemy's vessel, let it be ever so big and strong, it would smash it to smithereens. Cataloguing their means of defence in this way only shows how very weak and defenceless they are. The greater and most formidable part of this force would not be immediately available, and the enemy's ships could destroy or very greatly damage every sea-board city without coming within range of these dynamite guns. The truth is that our neighbors have neither ships nor guns that could offer any effective resistance to a first-class naval power. It would suffer dreadfully in the first months of a war with such a power. "The Battle of the Swash," though a fiction, shows forcibly the harm that such an enemy could do with almost perfect impunity. One American journal seeing how weak the United States is, and looking round for some means of meeting Germany if the Samoan difficulty should lead to war, gives it as its conviction that Great Britain would not allow Germany to destroy the American seaboard cities. It calculates that blood being thicker than water, Great Britain, if she saw the United States coast threatened by a formidable German fleet would interpose to prevent the destruction of some of the finest cities in the world, whose inhabitants are mainly of British origin, and who speak the English language. There may be something in this speculation, but the fact that citizens of the United States in view of an invasion by a powerful European power confidently look to Great Britain as an ally, proves that the two kindred nations are not so far apart as one would be apt to consider if he heard nothing but the boasts and threats of the Anti-British faction and the loud but harmless roaring of the tail twisters. But there is no prospect of American means of defence being put to the test. No one is going to war about Samoa.

THE SCHOOL REPORT.

We have received the Seventeenth Annual School Report of the Public Schools of British Columbia, 1887–1888. It is quite a bulky volume and contains much valuable information. It shows that education is in a vigorous condition in the province. The schools are increasing in numbers, and it appears to be the object of the Government to place the means of obtaining a good elementary education within the reach of every child in the province. The total number of pupils enrolled during the year was 6,372, an increase of 1,027, or about 20 per cent. over the number on the roll in 1886. This is a good showing. Twenty per cent. for one year is a very large increase. The daily attendance was 3,093 46, or not quite a half of those enrolled. This does not look well for either teachers or parents, or perhaps both; 48.54 per cent. of those on the rolls is altogether too small a proportion. By a comparative statement we see that last year's daily attendance is lower than it has been for the last sixteen years. The Superintendent accounts for the decrease in the average attendance by "the unusually severe weather during part of the winter session, as well as by the fact that contagious diseases, especially incident to children prevailed in nearly all the districts." But he seems to have a suspicion that there have been other causes at work to keep the children out of school for he says "there are school districts in which there is shown a marked indifference as to the record of the schools in regard to the average daily attendance maintained. It is to be hoped that the current year will show an improvement, for the inhabitants of this province enjoy great educational advantages and it will be a great reproach to them if they do not live up to their pledges. The amount expended on education last year was $113,679, divided as follows: Education proper, $99,902; Land and Works Department, $13,777. This is a very large sum and in proportion to the population we venture to say a larger sum than is paid for the same purpose by any province in the Dominion.

The total number of schools in the province is 99. There are 3 high schools, 9 graded schools, 4 ward schools and 83 common schools. Seven new schools were established in the province last year. The districts were Donald, English, Kensington Mountain, Rocky Point, Tolmie and Victoria West. Five new school houses were erected and additions made to three. The number of teachers on the permanent staff last year was 124. This year there are 133 besides three monitors. The inspector speaks highly of the way in which the schools are conducted. He says, "As a rule the teachers employed in the schools visited were laboring with good results. Many young teachers taking charge of schools for the first time have shown considerable tact and earnestness." He, however, reminds the teachers that they have not stripped the tree of knowledge quite bare and tells them that careful study and intelligent experience will always be found essential to the best teaching. Mr. Wilson's report bears indications that he takes a great interest in his work and that he is competent to perform it thoroughly. Inspection is a very important part of the educational system. No one thing can do so much to advance education as faithful and judicious inspection.

SUPREME COURT OF B. C.

(Before Mr. Justice Gray.)

JUDGMENT, March 2, 1889.—Her Majesty's Attorney General for the Province of British Columbia, Plaintiff *vs.* The Canadian Pacific Railway Company, Donald A. Smith, Wm. C. Van Horne and Sanford Fleming, Defendants:

Mr. Justice Gray.—The importance of the principle involved, the high standing of the litigating parties, and the large pecuniary amount at stake in this cause, render it certain that whatever may be my decision, an appeal will be taken, from court to court to the highest court of the empire. I shall therefore deem it necessary to express my conclusions as briefly as possible, consistently with clearness.

On the 26th November, 1885, the Canadian Pacific Railway Company, with the three defendants as sureties, executed a bond to Her Majesty the Queen for the sum of $250,000. The condition of the bond was that the Company should really and truly perform and observe all and singular the terms and conditions of an agreement made on the 23rd of February, 1885, between the Queen as represented by the Chief Commissioner of Lands and Works of the Province of British Columbia of the one part, and the said Company of the other. As set out on the pleadings, the agreement is as follows:

This agreement made the 23rd day of February A. D. 1885, between Her Majesty Queen Victoria, represented by the Honorable the Chief Commissioner of Lands and Works of the Province of British Columbia of the one part and the Canadian Pacific Railway Company hereinafter referred to as the said Company of the other part.

"Whereas the Government of the Dominion of Canada have declared and adopted Port Moody as the Western terminus of the Canadian Pacific Railway.

"And Whereas it is in the interest of the Province of British Columbia and of the Company that the main line should be extended westerly from Port Moody to English Bay and Coal Harbor and that the terminus of the said Railway should be at Coal Harbor and English Bay and that the terminal workshops and docks should be erected there.

"And Whereas negotiations relating to such extension have for some time been pending between the said Chief Commissioner and the said Company which have resulted in the agreement hereinafter contained.

"Now THIS AGREEMENT WITNESSETH that for the considerations hereinafter expressed the said Company hereby covenant and agree with Her Majesty her heirs and successors in manner following that is to say:

"1. The said Company shall extend the main line of the Canadian Pacific Railway to Coal Harbor and English Bay and shall forever hereafter maintain and equip such extension as part of the main line of the Canadian Pacific Railway and operate it accordingly.

"2. Such extension shall be fully and completely made on or before the 31st day of December, 1886.

The terminus of the Canadian Pacific Railway shall be established in the immediate vicinity of Coal Harbor and English Bay and upon land which is to be granted in pursuance of this agreement.

"4. The company shall erect and maintain the terminal workshops and the other terminal structures works docks and equipments as are proper and suitable for the western terminus of the Canadian Pacific Railway in the immediate vicinity of Coal Harbor and English Bay and such workshops structures docks and equipments shall be commenced forthwith and prosecuted to completion with reasonable diligence and so as to provide facilities for the opening of traffic on the through line by the 31st day of December, 1886.

"5. The survey of the line of extension shall be undertaken at once and prosecuted by the Company without delay and the Company shall also proceed forthwith to survey the land hereby agreed to be granted and complete the survey with despatch and furnish the Chief Commissioner with a plan of the survey and the field notes, and such survey shall be made by a surveyor approved of by the Chief Commissioner.

"6. In consideration of the premises Her Majesty agrees to grant to such persons as the Company may appoint in trust for the Company the lands in the District of New Westminster delineated on the map or plan hereunto annexed by the colour pink and containing by estimation six thousand acres save and except as is hereinafter mentioned.

"7. There shall be excepted out of such grant two and one-half acres of the land at Granville and two and one-half acres of the land on the south side of False Creek, both plots to be selected by the Chief Commissioner at any time not later than two months after the survey aforesaid shall have been completed and the map or plan and the field notes delivered to the Chief Commissioner.

"8. The grant shall as to the land on the South side of False Creek be subject for its unexpired term to a lease dated the 30th day of November A. D. 1865 and entered into between the Honourable Joseph William Trutch acting on behalf of Her Majesty's Government and the British Columbia and Vancouver Island Spar, Lumber and Saw Mill Company Limited and also to an agreement intended to be entered into by the said Chief Commissioner for the partial renewal of such lease the terms of which are embodied in a letter written by the said Chief Commissioner to Richard Alexander Manager of the Hastings Saw Mill Company and dated the 23rd day of February 1885.

"9. The grant shall also be subject to such rights if any as may legally exist in favour of third parties.

"10. The grant shall be made upon the Company entering into a bond to Her Majesty with three sureties to be approved of by the Chief Commissioner of Lands and Works in the sum of two hundred and fifty thousand dollars at least conditioned for the due performance by the Company of all and singular the terms and conditions herein contained and by the Company agreed to be observed and performed.

"11. And it is agreed as to the mode of operating the said extended line and as to tolls fares and freights the extension shall be considered as an original portion of the Canadian Pacific Railway.

"12. No Chinese shall be employed in the construction of the extension of the main line from Port Moody to English Bay.

"13. And it is lastly agreed that upon the Corporation of the City of New Westminster satisfactorily securing on or before the first day of May 1886 payment to the Company of $37,500 and providing a right of way and depot grounds the Government will on or before such date undertake to pay to the Company the further sum of $37,500 and thereupon the Company shall proceed to construct a branch line of Railway connecting the City of New Westminster with the Canadian Pacific Railway and complete the same on or before the 31st day of December 1886 and shall thereafter operate and maintain the same.

"14. This agreement may be provisionally executed by Henry Beatty on behalf of the Company and shall within sixty days of the date hereof be properly executed by the Company otherwise it shall not be binding upon Her Majesty and upon its execution by the Company it shall be transmitted to the said Chief Commissioner.

"IN WITNESS WHEREOF the parties have hereunto set their seals on the day and year first above written.

Signed Sealed and delivered by the within named Wm. Smithe, in the presence of PAULUS AMILIUS IRVING.

(Signed) WM. SMITHE, (L.S.)
THE CANADIAN PACIFIC RAILWAY CO.,
(Signed) per GEO STEPHENS, *President.*
{C.P.R.R.CO. SEAL.} (Signed) C. DRINKWATER, *Secretary.*

It is then alleged that the grants of land were made by the Government of British Columbia in accordance with the agreement—but that the Company did not carry out its agreement. These allegations and the claim are in the following terms:

4. Grants of land under and in accordance with the said agreement were duly executed and delivered by and on behalf of Her Majesty to the defendant Donald A. Smith and Richard B. Angus persons appointed by the defendant Company in that behalf under the said agreement.

5. The defendant Company did not well and truly perform and observe all and singular the terms and conditions in the said agreement of the 23rd day of February 1885, contained and by the said Company agreed to be observed or performed that is to say:

(a) The said Company did not on or before the 31st day of December, 1886, extend the main line of the Canadian Pacific Railway to Coal Harbour and English Bay and have not maintained and equipped such extension as part of the main line of the Canadian Pacific Railway or operated it in accordance with the terms of the said agreement. And such extension has not yet been made.

(b) The terminus of the Canadian Pacific Railway has not been established in the immediate vicinity of Coal Harbor and English Bay in accordance with the said agreement.

(c) The defendant Company did not and have not erected and maintained the terminal workshops and other terminal structures, works, docks and equipments as are proper and suitable for the Western terminus of the Canadian Pacific Railway in the immediate vicinity of Coal Harbor and English Bay. Such workshops, structures, works, docks and equipments were not commenced forthwith or prosecuted to completion with reasonable diligence and so as to provide facilities for the opening of traffic on the through line by the 31st day of December, 1886.

6. By reason of the premises Her Majesty and the people of the Province of British Columbia have suffered great damage.

THE PLAINTIFF CLAIMS $250,000 (two hundred and fifty thousand dollars).

The defendants in answer after certain statements which may or may not be important in case of a future trial, alleged substantially that they did proceed to perform the agreement in full accord with its terms and conditions, and were successfully carrying on their work, having complied with the requisites required by law to enable them to do so. The 8th, 9th, 10th, 11th and 12th paragraphs of the statement of defence are then particularly set forth as follows:

8. The said line affected 81 owners of land and of that number 65 allowed the defendants possession of the right of way through their lots, and over the land, of this number the defendants let the necessary number of contracts for the clearing and grading the road bed for the said line, all of which contracts were completed in time to enable the defendants to complete the said line by the 31st of December, 1886, in accordance with the terms of the said Agreement, had it not been for the injunction hereinafter mentioned.

9. Certain owners of the said lands refused to permit the said Company to proceed with the said work and the following persons obtained from the Supreme Court of this Province injunctions restraining the prosecution of the said work over their respective lots, to wit:

Plaintiff.	Date of Granting Injunction.
William Johnson	5th June, 1886.
John Albert Webster,	do.
John Ross Foord,	26th July, 1886.
Henry Valentine Edmonds et als,	6th August, 1886.
Charles G. Major,	24th September, 1886.

The said Company on the 6th of August, 1886, gave notice of Appeal to the Divisional Court from the order granted on that day in favor of Henry Valentine Edmonds and others which appeal was on the 10th day of August, 1886, heard by the Divisional Court which took time to consider its judgment.

10. On the 20th day of August, 1886, the said court dismissed the said appeal.

11. Afterwards to wit, on the 7th day of December, 1886, an appeal was brought before the Supreme Court of Canada, in one of the cases mentioned in paragraph 9 hereof wherein Charles C. Major was plaintiff and the said Railway Company were defendants, and the order of the Supreme Court of British Columbia was reversed, and thereupon the defendants applied for and obtained a dissolution of all the aforesaid injunctions.

12. The defendants say that they were prevented from completing the said railway solely by the orders of this honorable court, and were not guilty of any delay or negligence in the performance of the terms of the said agreement and upon the dissolution of the said injunctions proceeded with all reasonable despatch and exercised the utmost diligence to complete the said railway, and the said railway was completed and in operation on the first day of May, 1887.

The plaintiff in reply, after joining issue as to the other paragraphs in the statement of defence—demurs to the 9th, 10th, 11th and 12th upon the grounds

"That non-performance of a contract, or delay in performing a contract, cannot be excused or defended by setting up the order or injunction of a Court of Justice.

"And on other grounds sufficient in law to sustain this demurrer."

It is contended by the defendants that time is not of the essence of the contract, but whether it be so or not is not now a matter of discussion. Nor are any of the other questions that might arise as to breaches of the terms and conditions of the contract. The whole enquiry now before us is limited to the single point set forth in the demurrer.

If the language of the demurrer be construed literally, we have the question broadly brought up—Whether the order of a court of competent jurisdiction over the persons and subject matter under consideration is to be obeyed or not, and shall the party obeying suffer for his obedience. However it is just to Mr. Wilson, the learned counsel for the Crown, to say that he disavows so strict a construction. He admits the order must be obeyed, but contends the contracting party must pay the damage resulting from his obedience in consequence of not having in his contract guarded against the contingency which prevented its performance. Practically as applied to the facts in this case, as set forth and admitted in the pleadings and by the demurrer, it is this: Was the Canadian Pacific Railway Company, in their agreement with the Government of British Columbia bound to guard against errors or misinterpretations by the highest British Columbia court in applying the law to the road under construction, and to stipulate that they would perform their contract, unless the court erroneously and in violation of law interfered with them.

The defendants may strictly contend that a pleader must be bound by the language he deliberately puts on record in a cause, but in a matter of this gravity, I shall treat the question in its broadest aspect. Take it:

1st.—As to the necessity of obedience.

2nd.—As to such obedience operating as a protection.

It is stated on the pleadings and admitted by the demurrer, that the restraining orders and injunctions issued by this court and served upon the Company, were the sole and only cause which prevented the Company completing their contract within the specified time agreed upon. And it is equally stated and admitted that these orders were reversed by the Supreme Court of Canada, that the injunctions were consequently dissolved and the contract then forthwith completed. No other question arises, and view it in any light in which it may be regarded it comes back plainly and simply to the point—Does not that obedience and the subsequent performance protect the Company?

To clear the ground, it is this:

The defendants for a good consideration on the 23rd of February, 1885, contracted with the Government of British Columbia to complete the extension of the C. P. R. from Port Moody to Coal Harbor and English Bay, and establish the terminus upon the land granted by the Government "on or before the 31st of December, 1886."

During the progress of the work, in the months of June, July, August and September, 1886, sundry owners of land on the line of route, obtained from the Supreme Court of British Columbia injunctions forbiding the Company going on with the work over their lands on the ground that they had no legal right so to do. Appeals were taken from these injunctions to the proper tribunal in the Province to have them set aside, but were dismissed by a majority of the Judges and the injunctions confirmed.

From this dismissal appeal was then taken to the Supreme Court of Canada, and on the 7th December, 1886, that court decided that the injunctions had been erroneously issued, that the defendants had a legal right to go on, and had been illegally prevented going on with their work, and the restraining orders must be at once set aside. The defendants then immediately applied and had them set aside and proceeded with the work, and had the whole completed by the 1st of May, 1887, and further say that it would have been done by the 31st Denember, 1886, if the Supreme Court of the province had not interfered and forbidden their going on with the work.

It cannot for a moment be said that there was any delay in the effort to set aside these orders, or that the work would not have been completed by the 31st of December, 1886, if the company had been allowed to go on. The demurrer itself admits these facts. The pleadings show the first injunction was obtained on the 5th of June, 1886, and the remaining four between that date and the 24th of September; that on the 7th of December the whole of them were set aside—a period of six months. After the rescinding (from the 7th of December to the 1st of May, 1887, five months) the work was completed.

The plaintiffs, the Government of British Columbia, say to defendants: You undertook to complete the work by the 31st of December, 1886. Your being prevented by the courts of British Columbia is nothing to us; we did not ask the courts to stop you: therefore you must pay us the penalty agreed upon—$250,000.

The grounds of the restraining orders are, that in law the company had no right to go on with the work. That they were not clothed with the proper powers, or in a position to construct the road on the proposed route. On the appeal to the Supreme Court of Canada, it was decided that the court in British Columbia was wrong; that the Company at the time they were stopped by the injunctions had a perfect right to go on with the work, and had been clothed by Parliament with all the powers necessary for that purpose.

The Company says whether the British Columbia court was wrong or not is not the question. In British Columbia the order of the court must be obeyed until it is shown to be wrong, and we did obey it.

If obedience does not protect, what is the use of obedience?

"Obedience to the law in its executive capacity will not work a wrong." This is one of the oldest principles known for guidance in the administration of justice, for, as remarked by the whole court in the Countess of Rutland's case (6 Rep. 53) nearly three centuries ago, otherwise "by color of law and justice, they thereby do against law and justice, and so make law and justice the author and cause of wrong and injustice." And in 12 C. B. 415, speaking of the maxim, "An act of the court shall prejudice no man," Creswell, J., observes: "It is founded upon justice and good sense and affords a safe and certain guide for the administration of the law." By way of illustration, the court orders a man *not to do* a thing, punishes him by fine and imprisonment if he does it or attempts to do it, *and then if he obeys the order and does not do it, adjudges him liable to a heavy penalty for failing to do it.* To common sense that appears queer; yet, that is exactly this case: The Supreme Court of British Columbia by a majority of its judges, ordered the Company under pain of fine and imprisonment not to go on with the work of extending that road to Coal Harbour and English Bay, and now the same court is asked to adjudge a heavy penalty against the Company because they did not go on. The proposition is so startling on the face of it that the learned counsel for the plaintiffs evades it and says: "You ought to have provided against such a contingency by a stipulation in your contract." A stipulation against a misinterpretation of the law by the highest judicial department to which the administration of the law in the country is committed, and erect the contractor interested into a tribunal to override all law; because under the constitution what that judicial department adjudges to be law must be regarded as law and obeyed until it is reversed by a higher constitutional authority.

It is somewhat singular that since law has been known in England no instance of such a stipulation can be found. In the countless courts of the United States and the British colonies throughout the world where the principles of English law govern the administration of justice, no case has been cited where such a stipulation was ever made, nor has a case been cited where it was even deemed necessary that a prudent man in forming a contract should so protect himself.

The necessity of obedience is admitted. In all the cases cited by Mr. Wilson, and he has been unequalled in his search, not one case as already has been observed can be found where such a stipulation as above mentioned was included.

The plaintiff's strong position is, that their rights under an agreement made between themselves and the Company are affected by a judicial mistake in proceedings to which they were no party. That is simply one of the incidents which must happen in all countries where law is declared by the authorities appointed for that purpose, when the adjudication operates in *rem* as well as in *personam.* Here tho' the proceedings were between other parties, the order operated in *rem*, which was the subject matter of the contract between the plaintiff and the company, because it stopped the construction of the road; and under the constitution and in accordance with public policy there is no remedy against a court or judge who conscientiously discharging a duty takes an erroneous view of law. Had any other than a court of competent jurisdiction interfered and stopped the work, then such stoppage would not have relieved the defendants of their liability to the plaintiffs, for the defendants would have their remedy over against the wrong doers who prevented their carrying out their contract with the plaintiffs, but where the order stopping the work comes from a court of competent jurisdiction, it cannot be held in law to do a wrong to any one. Every one must obey the law and for such obedience will be protected.

The cases cited by Mr. Wilson (given below) may be divided into two classes. 1st. Where the validity of the agreement to be performed comes in question; 2ndly where a matter of foreign law arises.

On the 1st, the case on which he mainly relies, is Wade *vs.* the Corporation of Brantford, 19 UC. Q. B., 207. That case is simply this: The Corporation of Brantford being the trustees of certain lands, made a lease of a lot in the town to the plaintiff for 10 years with a covenant for renewal at the expiration of that time for another 10 years, and imposed upon the lessee the condition of building a house of certain dimensions on the lot within the first year. The lessee went on and built the house, paid the rent and at the expiration of the term asked for his renewal. In the meantime the inhabitants of the town, finding that the lot in question had been granted and dedicated for a market place, applied to the court to prevent any renewal and to have the buildings removed. The court made the order forbidding the renewal. The corporation refused to renew and the buildings were taken down. The plaintiff then sued upon the covenant in the lease for renewal and for damages. The corporation set up the orders of the court forbidding the renewal. It was held that was no answer. The corporation in the first instance did that which it had no right to do and which it ought to have known it had no right to do, that is, lease to a private individual land dedicated for a market place and a public purpose, and to give a renewal of that lease for ten years longer, therefore, it must pay damages for breach of contract.

The first thing to be noted here is that the corporation from the very first had no right to make any such agreement or give any such lease, and still less could they then have any power to renew it. It was not the order of the court which prevented them but the absence of any inherent power to make the lease in the first instance, much less to renew it. Therefore to attempt to justify their refusal to renew by saying the order of the court prevented them was a positive untruth, and was not the cause of the breach of contract.

As to the application of that authority to the present case, observe:—

1st. On the 23d February, 1885, when the contract to extend the road to Coal Harbour and English Bay was made between the Province of British Columbia and the Canadian Pacific Railway Company, that company had full and ample right to build and complete that extension, and had been clothed by the Parliament of Canada with every power necessary to that end. This is not a mere assertion; it has been and is the solemn adjudication of the highest court of the Dominion on that very point being brought before it—the Supreme Court of Canada. And at the time the bond was given to the British Columbia Government to complete the road by the specified time—31st December, 1886—that power was in full force and unimpaired, and it is stated in the pleadings and not denied that the Company were carrying on the works and would have completed them by that time but for the injunctions and orders of the Supreme Court of British Columbia. Thus, at the very outset, there is this most radical difference between these two cases: In the first there was no power to do what was undertaken; in the second there was ample power. In the first, (Wade against the Corporation of Brantford) as just shown it was not the order of the court which prevented the corporation from renewing the lease, but the fact that they had no power to make such a lease at all.

In the second or present case the Court of British Columbia by a majority, stopped the Company from going on with the performance of their contract when it had full and ample power and and was carrying out their contract. It is conclusive that the company had that power, because the injunctions were set aside on on the very ground that they had, and the work thereupon was resumed and was completed. Criticism as to whether the Court of British Columbia was in error or not is idle. The constitutional tribunal to settle that point has decided that the British Columbia Court was in error, and that decision has been acquiesced in.

The Brantford case, therefore, has very little bearing and is of no authority whatever to show that obedience to the order of a court of competent jurisdiction is not a justification.

The case of Marcus & Co. vs. The Credit Lyonnaise London Agency, A. D. 1884, Vol. I, 50 Law Times, 194, brings up the question whether what foreign law recognizes as a "*vis majore*" is to be incorporated into an English contract so as to relieve from performance, but is applicable in the present case only as citing an observation of Lord Ellenborough where he says the rule laid down in Paradene *vs.* Jane has often been recognized in courts of law as a sound one—i. e., "that when the party by his own contract creates a duty or charge upon himself he is bound to make it good, *if he may*, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract."

Kirk vs. Gibbs et al., 1st Hurst & Norman, 810; Spence et al. vs Chadwick, 16 L. R. N. S., 2., B., 213; Barker vs. Hodgson, 3 Mare & S., 267, are simply as to the effect of *foreign* law and *foreign* operations excusing or not excusing non-performance of a contract made in England, unless properly guarded against in the contract.

In all these cases ordinary prudence could have foreseen or provided against the contingencies, which prevented the performance of the contracts made, and therefore might have been in general terms stipulated against, because they were more or less incident to the business, the subject matter of the contract; but no one entering into a contract in this country is bound to anticipate that the highest court in the province will make an erroneous decision in law and stipulate against it. Such a thing never was heard of. And, singular to say, in one of the cases cited by the learned counsel Mr. Wilson—Baillie *vs.* De Crespigney, 38 L. J., N.S., Q.B. 98—this view is most happily expressed.

It was a case where the owner of land had contracted with his lessee for himself and his assigns, that he would not erect during the term buildings in front of the demised premises. A railway company, under compulsory powers of their special act, took possession of the land in front, and put up buildings most objectionable to the lessee. The lessee, therefore, sued the lessor upon the covenant he had made for himself and his assigns, "Held that the defendant was not liable as the Railway Company could not be taken to be assigns within the contemplation of the parties to the covenant, and it made no difference whether the Company were required or empowered to take the land. The plaintiff therefore was one of a class of persons injured by the construction of the railway for whom the Legislature had provided no compensation."

In delivering the judgment of the court Mr. Justice Hannen says: "We have first to consider what is the covenant the parties have entered into. There can be no doubt that a man may by an absolute contract bind himself to perform things which subsequently become impossible, or to pay damages for their nonperformance, and this construction is to be put upon an unqualified undertaking, *where the event which caused the impossibility has or might have been anticipated and guarded against in the contract*, or where the impossibility arises from the act or default of the promissor. But when the event is of such a character that it *cannot reasonably be supposed to have been in the contemplation of the contracting parties* when the contract was made, they will not be held bound by general words, which though large enough to include, were not used with reference to the *possibility of the particular contingency* which afterwards happened. It is on this principle that the act of God is in some cases said to excuse the breach of a contract. That is, in fact, an inaccurate expression, because where it is an answer to a complaint of an alleged breach of contract that the wrong done or left undone was so by the act of God. What is meant is, that it was not within the contract."

Parsons on Contracts, 672 expresses the same idea in fewer words—"If the performance of a contract becomes impossible by the act of God—*that is by a cause which could not possibly be attributed to the promiser*—and this impossibility was not among the probable contingencies *which a prudent man should have foreseen and provided for*, it should seem that this should be a sufficient defence.

Again at 674. "The illegality of the contract is a perfect defence. It may indeed be regarded as *an impossibility by act of Law*, and it is put on the same footing as an *impossibility by act of God*, because it would be absurd for the law to punish *a man for not doing that which it forbids his doing.*"

Then applying the language of this distinguished judge and the citations from Parsons to the present case, can it be reasonably supposed that the circumstance of an erroneous judgment and order being made by the Supreme Court of the province was in the contemplation of the parties at the time this contract was made or that it was a contingency that a prudent man should have foreseen and guarded against? Most unquestionably not. Such a thing never was heard of before or such a stipulation ever made. Then it was not a contingency to be guarded against or an incident as connected with the subject matter of the contract that could reasonably be expected.

Moreover, when a court of competent jurisdiction decides an act to be illegal, it must be taken and considered to be illegal until the decision is reversed, and the quotation from Parsons at 674 applies. No man in the community could possibly be safe otherwise. But above all this, over-riding all this, there is an element absent in all the cases cited, which predominantly stands out in this, that is the element of public policy, recognized by the constitution, namely, the enforcement of obedience to the constituted authorities. If courts do not give protection they will not be obeyed. They will simply become ornamental surplusages of society and "law and order" be figurative expressions.

"*Actus curiæ neminem gravabit*," says Broom. "The general doctrine which is equally founded on common sense and on authority that *the act of a court of law* shall prejudice no man" has been established by numerous cases. It is not simply when right in law, but even when erroneous. The effect of the injunctions in this case was when the Supreme Court of Canada decided that they were erroneously ordered—simply a forced suspension of work under the contract during the period from their issue to their removal—and both law and justice required that the Company should have a period of equal duration to the time so eliminated to complete their contract, or even a reasonable time further, if the delay so improperly caused rendered that further time necessary. The doctrine of "*nunc pro tunc*" comes in, and what might and ought to have been *done then* can be done *now.*

It is impossible to conceive anything more disastrous to a country than to establish the doctrine that a man may be punished by fine and imprisonment if he does not obey and then afterwards by a heavy penalty because he does obey the order of the highest court of justice in the Province. It would be better that courts should be done away with and government by representative institutions in the country abolished.

The proposition that in a contract a man must protect himself by stipulations against the errors of such a court is equally unfounded in law and unsustained by authority. Such a proposition as applicable to such a court never was heard of before, and the more important does the necessity of giving weight to the principle that *protection follows obedience* to the order of such a court become, from the fact that no remedy ever, lies against the party who obtained the order, if *fairly* obtained in furtherance of what he conceived his legal rights. "*Nullus videtur dolo facere qui jure suo utitur.*" The whole difficulty arises from the misconstruction of the court on a point of law, and for that no man is punishable—certainly not the judge, for public policy does not hold him to be infallible, or require him to become an insurer; certainly not the party, who obeys, because he has done what the law requires him to do. The plaintiffs in this particular instance, perhaps, belong to that class referred to in Baker *vs.* De Crespigney, for whom the legislature has not deemed it necessary to provide any particular compensation.

There is yet another point on which I am called upon to express an opinion. The demurrer is to the 9th, 10th, 11th and 12th paragraphs of the statement of defense. The three first state the facts that certain injunctions or restraining orders were obtained from the courts in B. C., forbidding the defendants to proceed with the work of construction; that they appealed to the Supreme Court of Canada, which reversed the said orders, and thereupon defendants applied and obtained a dissolution of the injunctions; and the 12th states that the defendants were prevented solely by those orders from completing the work in accordance with their agreement.

The demurrer as stated is to the whole four, and simply asserts that "non performance of a contract cannot be excused or defended by setting up the order or injunction of a court of justice." Strictly speaking that would be limited to the 12th, but the plaintiffs counsel contends that on the paragraph in the demurrer "and on other grounds sufficient under the law to sustain the demurrer," and on the authority of rule 183, viz: "It (the demurrer) shall state some grounds in law for the demurrer, but the party demurring shall not on the argument of the demurrer be limited to the ground so stated," he is now at liberty to take the objection, that the four paragraphs demurred to do not state that the restraining orders or injunctions there mentioned were obtained without any collusion of the defendants with the plaintiffs in those proceedings, which was necessary to have been stated.

Notwithstanding the plain language of that rule 183, I have grave doubts whether its true construction was intended to sanction so dangerous a laxity in pleading; and on the argument I expressed myself strongly to that effect. I do not, however, deem it necessary to refuse his raising the point, for several reasons.

1st.—If it was necessary to have raised that point the plaintiff himself should have brought it up by replying that those orders were obtained by collusion, and offered the defendant an opportunity of taking issue on the fact.

2nd.—A collusion between two parties to obtain from a court an order which would release one of them from the fulfillment of an obligation, or the payment of a sum of money to a third party which one of the two had agreed to pay, and which without such order he would be bound to pay, is of itself a criminal offence, and a grave contempt of court, punishable by both fine and imprisonment, and no party in a civil action defending his rights is bound to allege that he has not been been guilty of a crime. It must be charged against him before he is called upon to deny it.

According to our code of pleading, a defendant is only bound to deny the facts alleged against him. Collusion is a fact, and was not alleged against him. A crime cannot be inferred, it must be charged.

3rdly. The facts stated in the 9th, 10th and 11th paragraphs show there was no collusion, because the efforts of the defendants to get rid of the restraining orders and injunctions and their success in so doing would neutralize the very object for which such a collusion would be entered into, namely, to obtain relief from discharging the obligation they owed to the plaintiffs, and without such object the allegation of collusion is inapplicable.

If, therefore, it be permissible to the plaintiffs at this stage of the case to raise that point, I decide at once that it is not sustainable.

I have confined myself solely to the points raised by the demurrer and the facts of the case necessary to its understanding *as set out in the pleadings.* As far as I am able to form or express an opinion, I consider the demurrer bad in law, and that the defendants are entitled to judgment thereon, with costs.

Chas. Wilson, Esq., for the plaintiffs; M. W. T. Drake, Q. C., for defendants.