RETURN

To an Address of the Legislative Assembly for copies of all correspondence between the Attorney-General and the Dominion Government and the Judges of the Supreme Court, relating to the appointment of a Judge of the Supreme Court to reside within the District of New Westminster.

By Command.

T. B. HUMPHREYS,
Provincial Secretary.

Provincial Secretary's Office,
13th March, 1882.

OTTAWA, 19TH JULY, 1881.

SIR,—I have the honour to inform you that His Excellency the Governor-General has had under his consideration in Council the Act of the Legislature of the Province of British Columbia, passed on the 25th March last, entitled "An Act to carry out the objects of the 'Better Administration of Justice Act, 1878,' and the 'Judicial District Act, 1879.'"

I have now to state for the information of your Government that His Excellency has been pleased in terms of the 7th Section of the above cited Act, to direct by Order in Council as follows, viz :

That Mr. Justice McCreight be directed to reside, and usually discharge his duties as Judge of the Supreme Court of British Columbia, in the Cariboo Judicial District, as defined by the "Judicial District Act, 1879."

That Mr. Justice Robertson be directed to reside, and usually discharge his duties as Judge of the Supreme Court of British Columbia, in the Clinton Judicial District, as defined by the said Act.

That the Chief Justice, Sir Matthew B. Begbie, and the Senior Puisne Justice, the Honourable H. P. Pellew Crease, be directed respectively to reside, and usually discharge their duties as Chief Justice and Judge respectively of the Supreme Court of British Columbia, in the Victoria Judicial District, as defined by the said Act; and that Mr. Justice Gray be directed to reside, and usually discharge his duties as Judge of the Supreme Court of British Columbia, in the Westminster Judicial District, as defined by the said Act.

I have, &c.,
(Signed) J. A. MOUSSEAU,
Secretary of State.

His Honour,
The Lieutenant-Governor of British Columbia.

OTTAWA, 9TH SEPTEMBER, 1881.

SIR,—I have the honour to transmit to you, for the information of your Government, a copy of a letter from the Honourable Mr. Justice Gray, protesting against the provisions of the Order of the Governor-General in Council, of the 12th July last, the substance of which was communicated to you in my letter of the 18th of that month, whereby he is directed to reside, and usually discharge his duties as Judge of the Supreme Court of British Columbia, in the Westminster Judicial District.

I have also to enclose a copy of a report of the Honourable the Minister of Justice upon Judge Gray's letter, and to state that the learned Judge has been informed that, for the reasons mentioned in that report, His Excellency the Governor-General cannot be advised to cancel the Order in Council of the 12th July last.

I have, &c.,
(Signed) J. A. MOUSSEAU,
Secretary of State.

His Honour,
The Lieutenant-Governor of British Columbia.

SAN FRANCISCO,
LICK HOUSE, August 17th, 1881.

SIR,—I have the honour to acknowledge (transmitted to me by the Registrar of the Superior Court, at Victoria, B.C.) your despatch of the 18th July, referring to an Act of the Legislature of British Columbia, entitled "An Act to carry out the objects of the 'Better Administration of Justice Act, 1879,' and the 'Judicial District Act, 1879,'" and stating that His Excellency the Governor General had been pleased to direct that "I "should reside, and usually discharge my duties as a Judge of the Supreme Court of "British Columbia, in the Westminster Judicial District, as defined by the 'Judicial "District Act, 1879.'"

On learning a few weeks since that this Act had been put in force in British Columbia by Proclamation, I immediately addressed (from this place where I am now staying for the health of myself and family, under the advice of Dr. Hannington, my family physician, duly forwarded to the late Minister of Justice, in December last), a letter to the present Minister of Justice, protesting against the application of that Act to myself, but which could not have reached Ottawa at the date of your despatch. I have now to request that you will lay before His Excellency the Governor-General my reasons for that protest:

1st. At the time of my appointment in 1872, I took up my residence in Victoria as by law I was entitled to do, and in accordance with existing practice.

Neither in the "British North America Act, 1867," nor in the Dominion Statutes, or the local Acts of the Province at that time, was there any limitation or any authority given anywhere to limit the residence of the Judge to any particular spot in the Province, and my Commission, referring to the Act under which I was appointed, after designating that my office (except as to salary) was upon the same terms and conditions, and with the same powers and privileges as possessed and enjoyed by the then Puisne Judge, proceeded to appoint me a Judge "to have, hold, exercise, and enjoy, the said office of a "Judge of the Supreme Court of British Columbia aforesaid, *during your good behaviour*, "*and your residence within the Province*, together with all and singular the rights, profits, "privileges and emoluments to the said office belonging, in the most full and ample manner."

My residence at Victoria was in strict compliance with the law and my Commission. A removal, therefore, against my will, and to my injury, is contrary to the conditions set out in my Commission.

Non hæc in fœdera beni.

2ndly. My tenure is during *good behaviour*. A removal of this kind, entailing personal and pecuniary loss and inconvenience, though not a removal from office, is a violation of the principle of the Constitution securing the independence of the Judges, because it is a direct personal punishment without personal cause.

It is true a section of the local Act of 1881 *professed* to clothe the Governor-General with power to make a direction involving such a removal, but it is respectfully submitted that a local Legislature cannot authorize an infringement of the Constitution or of private rights, contrary to the provisions of an Imperial Act, and a Commission issued by the Dominion Government under authority of law.

The tenure of the Judicial office is defined by the 99th Section of the "British North America Act, 1867," and the right is defined and conferred in the present instance in and by the Commission appointing to that office.

The imposition of personal and pecuniary loss, the rupture of social relations and valued associations, the enforcement of new obligations, against the will of a Judge, and contrary to the conditions of his appointment, when the Judge himself has done no wrong, and in no way departed from his duty, is a punishment, and if it can be sustained,

must destroy the independence of the Judges, for no Judge can impartially discharge his duty in a case where the local Government, or even the Dominion Government, is a party, if the consequence of an adverse decision against that Government may be the infliction of loss, removal, or exile.

A Dominion Statute *within the scope of the "British North America Act*, 1867," may be passed, varying in the future in particular respects the tenure of the Judicial office, but no such Act has yet been passed; and a local Legislature, it is submitted, cannot delegate an authority to do with Dominion Judges that which the Dominion Parliament, which has the power, has not itself deemed proper to authorize—*a fortiori* it cannot be with reference to *an old appointment*, under existing laws (Imperial and Dominion), where the Dominion Government having acted has defined and by commission designated the conditions on which the tenure is held.

Ex post facto legislation is not the normal characteristic of British law.

These principles apply to my position, and, I apprehend, are sound and constitutional, and would have to be acted upon in a Court of Justice.

Both Mr. McCreight and Mr. Robertson soon accepted their offices after the passage of these local Acts, with a full knowledge of what their enforcement would entail. At the time of my appointment, nine years ago, such legislation could not have been conceived. I do not wish at present to enlarge on the subject, nor am I called upon to show that the changes brought about by these local Acts have been most disastrous to the Administration of Justice in British Columbia, that at this moment, though applied for, there can be no hearing of an appeal from a decision of a single Judge, and that two cases involving large amounts—one, of the American ship Thrasher, $100,000, the other the Bank of British North America, over $5,000—tried in June and July last are now standing paralyzed because there is no legal mode of bringing the ruling of one Judge at *nisi prius* before the full Court in British Columbia, or the Supreme Court of Canada, a *status of circumstances that never existed before.*

All that I have to do is to bring to the knowledge of His Excellency the Governor-General that the direction conveyed in your despatch works a personal injury to myself, and that, therefore, as a British subject, I desire to avail myself of the law of the land for my protection.

I have reason to believe that the Chief Justice, Sir M. B. Begbie, considers the provisions referred to unconstitutional, and has so expressed himself to the Minister of Justice. Its application to Mr Crease affects no change of residence; were it otherwise, I have no doubt his protest would have been transmitted to His Excellency.

As a Judge of the Supreme Court in British Columbia, I am ready to discharge the duty of that office according to law, whenever and wherever it may be legally required, but after thirty years' unbroken public service (for I have to call to your attention that I was a member of the Legislature and Executive Council of New Brunswick, in 1851, with twenty-two years continuous service from that time in Parliament, and nine years' since as a Judge, having during that period been Attorney-General, Speaker, Umpire under the Treaty of Washington between Great Britain and the United States, and Arbitrator in Canada), it seems an exceptional course to be told, without being heard, to sever my connections, sacrifice my property, and embark in new undertakings, the very provisions of the local Act under which this step is presumed to be required being not only unconstitutional, but working so disastrously for the Administration of Justice, that it will probably have to be repealed or amended at the next sitting of the local Legislature.

I have to urge, therefore, that you will place my views before His Excellency the Governor-General, with a request for their favourable consideration and the cancellation of the direction conveyed in your despatch, and I trust he will see that in pressing them I am only acting from a conscientious discharge of duty and the desire to maintain for myself the rights which, as a Judge, I would have to give to others.

I have, &c.,

(Signed) J. H. GRAY.

Judge Supreme Court of B. C.

The Honourable the Secretary of State, Ottawa.

I would add, that Mr. Richards, the Lieutenant-Governor of British Columbia, has just returned to Brockville, or his place of residence in the vicinity, in Canada, and is well informed on the laws to which in British Columbia the changes referred to are due.

DEPARTMENT OF JUSTICE,
OTTAWA, 30th August, 1881.

To His Excellency the Governor-General in Council:

I have the honour to report upon the reference from the Secretary of State for Canada, of the letter of Mr. Justice Gray, of the Supreme Court, British Columbia, dated 17th inst., protesting against the provisions of the Order in Council of the 12th July last, whereby he is directed to reside, and usually discharge his duties as Judge of the Supreme Court, British Columbia, in the Westminster Judicial District, as defined by the "Judicial District Act, 1879," passed by the Legislature of the Province of British Columbia, and urging that the direction in the Order in Council referred to may be cancelled, for the reasons stated in his letter. Those reasons are in effect, that at the time of his appointment as Judge, in 1872, he took up his residence at Victoria, as by law he was then entitled to do, and in accordance with the existing practice; but neither in the "British North America Act, 1867," nor in the Dominion Statutes, nor in the local Acts of the Province at that time, was there any limitation or any authority given anywhere to limit the residence of a Judge to any particular spot in the Province, and that his Commission appointed him a Judge to hold office during good behaviour and his residence within the Province.

That his residence in Victoria was in strict compliance with the law and with his Commission, and that a removal against his will and to his injury is contrary to the conditions set out in his Commission.

That his tenure of office being "good behaviour," the removal from Victoria to New Westminster, entailing personal and pecuniary loss and inconvenience, though not a removal from office, is a violation of the principle securing the independence of the Judges. That the Provincial Act, which professes to clothe the Governor-General with power to make a direction involving such a removal, is *ultra vires* of the Provincial Legislature.

The Statute under which the Order in Council of the 12th July last was passed is set out in my report to Council of the 29th June last, upon which the Order referred to was passed.

The provisions of that Statute are similar to the provisions of the Statute of Quebec, 36 Vic., (1872) chap. x., sec. 3, under which upon many occasions Orders in Council have been passed assigning certain districts and residences to Judges of the Superior Court of that Province.

The constitutionality of that Statute has not, so far as I am aware, hitherto been questioned. It does not appear to me that the Order in Council directing Mr. Justice Gray to reside, and usually discharge his duties as a Judge in some place in the Province other than that where he has hitherto resided, is an infringement of his rights under his Commission, or in any way interferes with his independence as a Judge within the meaning of that phrase as applied to the Bench.

By the "British North America Act, 1867," the Administration of Justice in the Province, including the constitution, organization and maintenance of Provincial Courts, is within the exclusive legislative authority of the Provincial Legislatures. The Legislature of the Province of British Columbia having deemed it expedient to make certain changes with respect to the Administration of Justice in the Province, and to the constitution of the Provincial Supreme Court, passed an Act for that purpose, being 42 Vic., (1878) chap. 20.

This Act provided for the appointment of two additional Judges of the Supreme Court.

The Parliament of Canada made provision for the payment of the salaries of the two new Judges, who were afterwards duly appointed to carry out the changes contemplated by the Act of 1878. Another Statute was passed by the Legislature of British Columbia, called the "Judicial District Act, 1879," whereby the Province was divided into certain Judicial Districts, and in 1880 the Act was passed under which the Order in Council, against which Mr. Justice Gray protests, was made. Your Excellency the Governor-General was not advised to disallow any of those Acts. I think, therefore, that it devolved upon the Government of Canada to do what was necessary to complete the changes in the Administration of Justice in British Columbia, provided for by the Acts alluded to.

The Order in Council of the 12th July last was necessary, for the reasons set out in my report of the 29th June. A selection had to be made for the Westminster Judicial District, of one of the three Judges residing in Victoria, after the appointment of Mr. Justice McCreight to Cariboo, and Mr. Justice Robertson to Clinton. Mr. Justice Gray was selected, he being the Junior Puisne Judge remaining.

I recommend—

1. That Mr. Justice Gray be informed that his letter of the 17th August has been considered, and that for the reasons above mentioned His Excellency the Governor-General cannot be advised to cancel the Order in Council of the 12th July last.

2. That a copy of this report, and of my report of the 29th June, be sent to Mr. Justice Gray.

3. That a copy of Mr. Justice Gray's letter, and of this report, be sent to the Lieutenant-Governor of British Columbia for the information of his Government.

I have, &c.,
(Signed) A. CAMPBELL,
Minister of Justice.

OTTAWA, 31st December, 1881.

SIR,—I have the honour to transmit to you herewith a copy of a letter addressed to the Honourable the Minister of Justice by Mr. T. R. McInnes, M.P., complaining of the want of a resident Judge at New Westminster, British Columbia.

I have to request that you will communicate to this Government any information you may have with respect to the intention of Mr. Justice Gray to comply with the directions of the Order in Council whereby he was directed to reside in New Westminster, and any other information on the subject which your Government may have.

I have, &c.,
(Signed) J. A. MOUSSEAU.

His Honour the Lieutenant-Governor.

OTTAWA, December 16th, 1881.

SIR,—Although nearly two years have elapsed since the appointment of two additional Supreme Court Judges and the division of the Province of British Columbia into four Judicial Districts, yet New Westminster is still without a resident Judge. All the other Districts have been supplied with a resident Judge nearly a year ago. Three still reside in Victoria. Now I submit, that in consequence of having no resident Judge, litigants and others are often put to considerable inconvenience and expense by being compelled to go to Victoria to attend to business that could and ought to be transacted in their own town or district. I therefore respectfully ask you to take, at as early a date as possible, the necessary means to compel one of the Judges to reside in New Westminster.

I have, &c.,
(Signed) T. R. McINNES.

Sir Alexander Campbell,
Minister of Justice,
Ottawa.

[TELEGRAM.]

VICTORIA, 13th February, 1882.

The Hon. the Minister of Justice, Ottawa.

Judge Gray disregarded Order of Governor-General in Council by refusing to reside at New Westminster or within his Judicial District. Judge Crease disregarded same Order by lately holding Court, at needless expense to the Dominion, at New Westminster, which is beyond his Judicial District. The Chief Justice and above Judges decided in a private suit, on 10th inst., that British Columbia Supreme Court is a Dominion and not Provincial Court, and that local legislation, since Union, relating to Procedure of Supreme Court was therefore void, as Local Legislature could not deal with the Court in any way. By Section 5, Terms of Union, and Sections 96 and 100 of Organic Act, Dominion agrees to provide and pay Judges of our local Superior Courts. If Supreme Court is not a local Superior Court as held by Judges, Provincial Legislature should constitute one this Session, and request you to appoint and pay Judges. I respectfully differ from Judges' decisions. Immediate action should be taken at Ottawa and here. Districting the above Judges has also been decided in same suit to be unconstitutional, as they held Commissions prior to Administration of Justice Act of last year. Judge McCreight not present, and Judge Robertson dead. Be good enough to place this matter before Privy Council immediately, and advise me of their decision by telegram.

(Signed) GEO. A. WALKEM.

A similar telegram was sent to the Honourable Mr. DeCosmos, with a request that he would see the Minister of Justice, and get a reply:—

[TELEGRAM.]

OTTAWA, February, 21st 1882.

Hon. G. A. Walkem.

Minister of Justice wrote to me after consulting with Privy Council yesterday: "We do not see what action can be taken until we know what the law really is, and whether the Judges in British Columbia are right or not in their conclusions." Copy of judgment of Court, he says, is expected next week.

(Signed) A. DECOSMOS.