RETURN

To an Order of the Legislative Assembly for copies of all letters, papers and documents whatsoever relating to the "steps that have been taken against the sureties of the Canadian Pacific Railway Company for failure to fulfil the agreement for extension of the Railway to Coal Harbour and English Bay," with the names of Counsel retained in the case for the Government.

THEODORE DAVIE,
Minister supervising the Attorney-General's Department.

Attorney-General's Office,
21st February, 1888.

IN THE SUPREME COURT OF BRITISH COLUMBIA.

BETWEEN

HER MAJESTY'S ATTORNEY-GENERAL FOR THE PROVINCE OF BRITISH COLUMBIA, Plaintiff,

AND

THE CANADIAN PACIFIC RAILWAY COMPANY, DONALD A. SMITH, WILLIAM C. VAN HORNE, AND SANDFORD FLEMING, Defendants.

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland, QUEEN, Defender of the Faith.

To the Canadian Pacific Railway Company, Donald A. Smith, of Montreal; William C. Van Horne, of Montreal; and Sandford Fleming, of Ottawa.

WE command you that within eight days after the service of this Writ on you, inclusive of the day of such service, you cause an appearance to be entered for you in an action at the suit of Her Majesty's Attorney-General for the Province of British Columbia.

And take notice that in default of your so doing the Plaintiff may proceed therein and judgment may be given in your absence.

[L.S.] WITNESS, SIR MATTHEW BAILLIE BEGBIE, Knight, Chief Justice, the 15th day of February, 1887.

The defendant may appear hereto by entering an appearance either personally or by Solicitor at the office of the Registrar of the Court at Victoria.

N. B.—This Writ is to be served within twelve calendar months from the date thereof, or if renewed, within six calendar months from the date of such last renewal, including the day of such date, and not afterwards.

The plaintiff's claim is for two hundred and fifty thousand dollars, due upon a bond.

The following are the particulars:—Bond, dated 26th day of November, 1885, entered into and executed by the defendants in favour of Her Majesty for the above sum.

The plaintiff also claims interest at the rate of 6 per cent. per annum on $250,000 of the above sum from the date of the writ until judgment, and the sum of $20 (or such sum as may be allowed on taxation) for costs. If the amount be paid to the plaintiff or his solicitor or agent within four days from the service hereof, further proceedings will be stayed.

I accept service of copy of this writ, and undertake to enter an appearance for the C. P. Rly. Company.

(Signed) M. W. T. DRAKE.

IN THE SUPREME COURT OF BRITISH COLUMBIA.

BETWEEN

HER MAJESTY'S ATTORNEY-GENERAL FOR THE PROVINCE OF BRITISH COLUMBIA, Plaintiff,

AND

THE CANADIAN PACIFIC RAILWAY COMPANY, DONALD A. SMITH, WILLIAM C. VAN HORNE, AND SANDFORD FLEMING, Defendants.

WRIT ISSUED THE 15TH DAY OF FEBRUARY, 1887.

STATEMENT OF CLAIM.

1. The plaintiff is Her Majesty's Attorney-General for the Province of British Columbia, and sues herein on behalf of Her Majesty. The defendants, The Canadian Pacific Railway Company, are a Company incorporated under an Act of the Parliament of Canada, and own and operate the trans-continental railway known as the Canadian Pacific Railway; the defendant, Donald A. Smith, is a merchant of Montreal, in the Province of Quebec; the defendant, William C. Van Horne, is a gentleman residing at Montreal, in the Province of Quebec; and the defendant, Sandford Fleming, is a gentleman residing in the City of Ottawa, in the Province of Ontario.

2. The defendant Company, under their corporate seal, and the other defendants, under their several and respective seals, duly entered into and executed in favour of Her Majesty the bond of which the following is a copy:—

"Know all men by these presents that we, the Canadian Pacific Railway Company, and "Donald A. Smith, of Montreal, and William C. Van Horne, of Montreal, and Sandford "Fleming, of Ottawa, sureties, are held and firmly bound to Her Majesty Queen Victoria in "the sum of two hundred and fifty thousand dollars of lawful money, to be paid to Her "Majesty, her heirs or successors, for which payment to be well and faithfully made the said "Company binds itself, and we, the said sureties, bind ourselves, and each and any two of us, "one and each, and any two of our heirs, executors and administrators, firmly by these "presents, sealed with the seal of the said Company, and with the seals of us, the said "sureties.

"Dated this twenty-sixth day of November, A. D. 1885.

"Whereas by an agreement made the twenty-third day of February, A. D. 1885, between "Her Majesty Queen Victoria, represented by the Honourable the Chief Commissioner of "Lands and Works of the Province of British Columbia, of the one part, and the Canadian "Pacific Railway Company, of the other part, it was agreed, amongst other things, that the "said Company should extend the main line of the Canadian Pacific Railway to Coal Harbour "and English Bay, and should forever thereafter maintain and operate such extension as part "of the main line of the Canadian Pacific Railway, and that Her Majesty should grant to such "persons as the said Company should appoint, in trust for the Company, certain lands in New "Westminster District therein referred to, and that the Crown grant should be made upon the "Company entering into a bond in the sum of $250,000, conditioned to be void as hereinafter "mentioned.

"Now, the condition of the above-written bond or obligation is such, that the above "bounden Company shall 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 and performed, then the above-written bond or obliga-"tion shall be void, otherwise shall remain in full force and effect.

"Signed, sealed, and delivered by the above-named.

"THE CANADIAN PACIFIC RAILWAY COMPANY,

[C. P. R. Co 's SEAL] (Signed) *per* "W. C. VAN HORNE, Vice-President,

" "C. DRINKWATER, Secretary.

In presence of

(Signed) "C. DRINKWATER, " "DONALD A. SMITH, [L.S.]

" "C. DRINKWATER, " "W. C. VAN HORNE, [L.S.]

" "A. J. FLEMING. " "SANDFORD FLEMING." [L.S.]

3. The agreement in the said bond referred to is in the words and figures following:—

"This agreement, made the 23rd day of February, 1885, between Her Majesty Queen "Victoria, represented by the Honourable 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 Com-"pany, that the main line should be extended westerly, from Port Moody to English Bay and "Coal Harbour, and that the terminus of the said railway should be at Coal Harbour and "English Bay, and that 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 Harbour and English Bay, and shall for ever 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.

"3. The terminus of the Canadian Pacific Railway shall be established in the immediate "vicinity of Coal Harbour 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 ter-"minal 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 Harbour 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 facilitation 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 dis-"patch, 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 "un-expired 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 that 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 1st day of May, 1886, payment to the "Company of $37,500, and providing a right of way and depôt 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 from 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 Com-"missioner.

"In witness whereof the parties hereto have hereunto set their hands "and seals on the day and year first above-written.

"Signed, sealed, and delivered by the within-"named William Smithe, in the presence of "PAULUS ÆMILIUS IRVING. (Signed) "WM. SMITHE. [L.S.]

C. P. R. CO. SEAL.

"THE CANADIAN PACIFIC RAILWAY CO.,
(Signed) *per* "GEORGE STEPHEN, *President.*

(Signed) "C. DRINKWATER, *Secretary.*

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 defendants 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 Harbour 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 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 Harbour 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 $250,000.00.

Delivered this 14th day of June, 1887, by Charles Wilson, of Broughton Street, Victoria, Solicitor for Her Majesty's Attorney-General.

To Messrs. Drake, Jackson and Helmcken,
Solicitors for the Defendants.

IN THE SUPREME COURT OF BRITISH COLUMBIA.

BETWEEN

HER MAJESTY'S ATTORNEY-GENERAL FOR THE PROVINCE OF BRITISH COLUMBIA, Plaintiff,

AND

THE CANADIAN PACIFIC RAILWAY COMPANY, DONALD A. SMITH, WILLIAM C. VAN HORNE, AND SANDFORD FLEMING, Defendants.

STATEMENT OF DEFENCE.

1. The defendants admit paragraphs 2 and 3 of the plaintiff's statement of claim, but for greater certainty the defendants crave leave, on the trial of this action, to refer to the original of the said bond and agreement in the said paragraphs respectively referred to. The defendants do not admit the construction of the said agreement as alleged in the said statement of claim. The defendants also admit paragraph 4.

2. The defendants do not admit paragraph 5 of the said statement of claim, or any of the allegations therein contained.

3. The defendants say, that in the agreement in the 3rd paragraph of the statement of claim set out time is not expressed to be of the essence of the contract.

4. That the defendants deposited, in pursuance of section 18 of Dominion Act, 44th Victoria, Chapter 1, a map or plan and book of reference in the office of the Minister of Railways and of the Deputy Registrar-General of Titles, at the City of New Westminster and Province of British Columbia.

5. The defendants say, in answer to the whole of the plaintiff's claim, that in pursuance of the said agreement, and in pursuance of the 14th section of the schedule attached to Chapter 1 of the Acts of the Dominion Parliament, 1881, they had commenced to construct the line of their railway from Port Moody to Vancouver, but from the month of June, 1886, up to and long after the 31st of December, 1886, the defendants, their agents, servants, contractors, and workmen were prevented from prosecuting the construction of the line of railway from Port Moody to Coal Harbour and English Bay, by reason of divers orders to that effect made by this Honourable Court.

6. That until the said orders were set aside the defendants could not lawfully complete the said railroad in the pleadings mentioned.

7. That upon the said orders being set aside and injunctions dissolved, the defendants proceeded with all reasonable dispatch, and exercised the utmost diligence to complete the said railroad, and the said line was completed and in operation on the first day of May, A. D. 1887.

8. The defendants do not admit that the plaintiff has suffered any damage, as in the 6th paragraph of the statement is alleged, or any damage whatever.

Delivered this 15th day of August, A. D. 1887, by Robert Edwin Jackson, defendant's Solicitor.

To Charles Wilson, Esq.,
Solicitor for the Plaintiff.

IN THE SUPREME COURT OF BRITISH COLUMBIA.

BETWEEN

HER MAJESTY'S ATTORNEY-GENERAL FOR THE PROVINCE OF BRITISH COLUMBIA, Plaintiff,

AND

THE CANADIAN PACIFIC RAILWAY COMPANY, DONALD A. SMITH, WILLIAM C. VAN HORNE, AND SANDFORD FLEMING, Defendants.

DEMURRER AND JOINDER OF ISSUE.

The plaintiff joins issue with the defendants upon paragraphs 1, 2, 3, 4 and 8 of the statement of defence, saving admissions, and demurs to paragraphs 5, 6 and 7, and says that the same are bad in law, upon the ground—

That delay or non-performance of a contract cannot be excused or defended by setting up the order or injunctions of a Court of Justice; and on other grounds sufficient in law to sustain this demurrer.

Dated this 19th day of October, 1887.

CHARLES WILSON, of Broughton Street, Victoria,
Solicitor for the above-named plaintiff.

To Messrs. Drake, Jackson, and Helmcken,
Solicitors for the above-named defendants.

IN THE SUPREME COURT OF BRITISH COLUMBIA.

BETWEEN

HER MAJESTY'S ATTORNEY-GENERAL FOR THE PROVINCE OF BRITISH COLUMBIA, Plaintiff,

AND

THE CANADIAN PACIFIC RAILWAY COMPANY, DONALD A. SMITH, WILLIAM C. VAN HORNE, AND SANDFORD FLEMING, Defendants.

BEFORE THE CHIEF JUSTICE.

MONDAY, THE 9TH DAY OF JANUARY, A. D. 1888.

The demurrer delivered by the plaintiff to the fifth, sixth, and seventh paragraphs of the defendants' statement of defence, coming on the 25th day of October, A. D. 1887, to be argued before this Court in the presence of Mr. Wilson, of Counsel for the plaintiff, and of Mr. Drake, Q. C., of Counsel for defendants. Upon opening and debate of the matter, and upon hearing what was alleged by Counsel aforesaid, this Court did order that this matter should stand for judgment; and this matter coming on this day for judgment, this Court doth hold the said demurrer to be good and sufficient, and doth therefore order that the same do stand and be allowed. And this Court doth further order that the defendants do pay to the plaintiff his costs of the said demurrer to be taxed, and that judgment be entered accordingly.

By the Court.

[L.S.] JAMES C. PREVOST, *R.*

JUDGMENT OF THE CHIEF JUSTICE.

This is an action against the defendants for the penalties of a bond dated the 26th November, 1885; the condition being broken. That condition was that the defendant company should carry out and perform all the terms in an agreement of the 23rd February, 1885. One of those terms was that the Company were to complete the extension of their main line as therein mentioned beyond their western terminus (stated to be then fixed at Port Moody), and that such "extention should be fully and completely made on or before the 31st December, 1886." The plaintiff alleges in his statement of claim that this agreement has been broken in several particulars; in particular that the extension was not completed on the 31st December, 1886. The defendants in their statement of defence say they do not admit the accuracy of the plaintiff's allegations of breaches; but in paragraph 5 of the statement of defence they state "in answer to the whole of the plaintiff's claim, that in pursuance of the said agreement, and "of section 14 of their Act of Parliament, they had commenced to construct the line from Port Moody to Vancouver, but that from the month of June, 1886, up to and long after the 31st "December, 1886, they were prevented from prosecuting such construction by the orders of "this Court," and (par. 6) that "until such orders were set aside they could not lawfully com-"plete the said railroad."

The plea does not allege that defendants commenced operations under their agreement with due diligence, or with any diligence, nor that they took any steps whatever to get themselves relieved from the orders to which they refer (which were in fact interlocutory injunctions of the British Columbia Court) by appealing to Ottawa. This alone would make the plea quite valueless as a defence according to the principle of one of the cases cited by Mr. Drake (Dorland v. Bunter 5, U. C. Q. B., 583). There the defendant, having contracted to tow a scow from A to K, alleged that before the day of performance had arrived his steamer was immoveably frozen in at B. But as he did not allege or show that he was necessarily at B with his tug when the frost came, the plea was disallowed on demurrer. And this principle is as old as the case cited, Bac. Abr. Condition Q., citing case from Cro. Eliz. 694.

However, as Mr. Drake's argument certainly deserved consideration, and as the case will probably be carried to appeal, I shall state what appears to me to be the rule applicable to such cases.

Mr. Drake's argument was shortly this, *nemo tenetur ad impossibile.* It is impossible for man to contend against the act of God, as meteorological and other natural phenomena are called—it is contrary to the highest social duty to rebel against the act of the law. Where either of these interferes with the performance of a condition, the obligor is excused. And so, it may be, he is excused from the specific performance of the condition; but he is in a great many cases held still liable in damages, liquidated or assessable as the case may be, if he has so contracted; as in Wade v. Corporation of Brantford (19 U. C. Q. B., 207) and many similar cases, and accordingly the act of the law which would excuse the non-construction of the line, *i. e.*, be a bar to the specific performance, may not relieve the Company from the penalty of their bond; nay, it may be that the contractor still will be liable in damages where the performance of the condition originally was, and must for ever remain, quite beyond his power; as appears by the diction of Maule, J., in Conkham v. Barry (15 C. B., 619), cited approvingly by Hannen, J., in delivering judgment in banc in Bailey v. Crespigny (4 L. R. Q. B., 185): "A man may by apt words bind himself that it will rain to-morrow or that he will pay damages." Now this was somewhat the position here. Since the passing of the Dominion Act, c. 56, 1887, it can scarcely be denied that the Company were on the 23rd February, 1885, and indeed up to the 23rd June, 1887 (the date of passing of the C. P. R. Amendment Act), utterly incapable of carrying out that which they had agreeed to do, in respect of this extension beyond their Port Moody terminus. The Company have now at last (by c. 56 of 1887, sec. 7) obtained what I in August, 1886, pointed out as absolutely necessary for them to have, viz., a legislative sanction for the construction of this extension, without which it was impossible for them, being a corporation, to hold or acquire the lands at all through which the proposed line would pass, even by the free gift of a willing owner, far less by compulsion. Evidently, the very first thing they ought to have done in order to carry out their agreement of the 23rd February, 1885, was to procure this legislative sanction from the Dominion Parliament. Possibly, in order to clothe themselves with the full ability to perform their agreement, it might have been necessary that they should also have procured the sanction of the Provincial Legislature. That introduces the discussion of the power of eminent or

paramount domain, as to which I say nothing. But clearly, if the Company had procured in 1885 the enactment contained in section 5 of their Act of 1887, no Court in British Columbia would or could have interfered to prevent this extension, for if the paramount domain in the lands in question be vested in the Dominion Parliament, the Company would clearly have been in their right, and if the authority of the Dominion Parliament had been called in question that would be to dispute the constitutionality of the Act, which since 1882 is removed from the jurisdiction of this Court, and reserved to the Exchequer Court.

It therefore appears that the orders of this Court referred to in the fifth paragraph of the statement of defence, created no new disability, but merely declared the disability in which the Company had been from the first, and which no decree of any Court would either create or remove; a disability, which they had taken no steps to remove, although it is now apparent that they might with ease have removed it. And it seems to me that the act of law which is to excuse non-performance of a contract must be strictly an act of law, not a declaration by the Court of what the law is.

Thus in Waugh v. Morris, the act of law alleged as an impediment was an Order in Council under an Act of Parliament. That was relied upon as an impediment, although no Court had ever given or been asked to give any opinion at all upon the construction or force of the order. So in Wade v. East Brantford the real impediment was that the corporation had, as it were, covenanted to grant a lease of land over which they had no power. It was true that had been disputed until that litigation; but the real impediment was not the declaration of the Court but the illegality of dealing with another man's land, as Chief Justice Robinson pointed out. The covenanted lease would equally have been impossible to grant, whether a Court of law had expressed any opinion or not.

Mr Drake relied upon Lord Blackburn's remarks in Waugh v. Morris (p. 208). "We quite agree that where a contract is to do a thing which cannot be done without a violation of the law, it is void whether the parties knew the law or not." To apply this dictum, the Company, the defendants, must admit that on the 23rd February, 1887, it would have been impossible for the Company to have performed this contract or even to commence the performance of it, by any entry on the lands along the proposed line. But the agreement was not to be performed or commenced on that 23rd February; it was to be commenced "forthwith;" which (in the absence of the *mens rea the* "wicked intention to break the law," mentioned by Lord Blackburn immediately after the opinion just quoted) must mean "so soon as the Company can or may." And I think an undertaking to execute "forthwith" certain works which the contractor cannot immediately commence, involves an engagement that the contractor will duly and with proper diligence prepare himself to execute them, viz., in the present case, that he will procure, or at all events promote, the necessary measures in Parliament in time to enable him to perform his part of the contract. Thus the Company covenant that the Company will "operate" the New Westminster line. That includes an undertaking (implied, not at all expressed) to provide proper engines and carriages. So, too, the Company could not survey, nor lay the proposed line, without providing money and materials; neither of which is expressly stipulated for; but, I think, both are impliedly to be provided by the Company. Could the Company have excused itself for non-performance during 1886, by alleging that they had no money, or no proper surveyors, till 1887? How then can they excuse themselves by saying that they did not acquire Parliamentary sanction till 1887?

Nugent v. Smith, I. C. P. D., 423, which was another case relied on by Mr. Drake, is really occupied by discussing the liabilities of carriers by sea in general ships, and in particular ships respectively, where the loss is occasioned by what is called "the act of God." But as to the point on which alone that case is of interest here, Chief Justice Cockburn quotes approvingly (p. 437), and applies the language of Mr. Justice Story: "If the loss occurs by a peril of the sea which might have been avoided by the exercise of reasonable skill or diligence, it is not to be deemed such a loss by perils of the sea as will exempt the carrier from liability, but rather a loss by the gross negligence of the party." Here the whole impediment might have been forestalled, if the Company had done at first what they have found it necessary to do at last; the real impediment being, not the orders of the Court referred to in the statement of defence, but the inherent incapacity of a corporation to hold lands without Parliamentary sanction. And the necessity of such sanction, and the merits of the Company recommending them and deserving such sanction (which were strongly adverted to in the judgment of which the Company now complain), must have been felt to be very urgent; for the Company, before June, 1887, obtained the judgment of two different Courts in favour of their power; but they

decline to rely on these judgments, deeming this Act essential for their extension. And the Legislature also must have been duly impressed; for the Act seems calculated vitally to affect the rights of suitors in an actually pending litigation; a course never adopted by the Legislature, except in very urgent cases, without expressly saving the rights of existing suitors. In the sessions of 1885 and 1886 there was no litigation pending adverse to the Company's extension, nor indeed could there be any; though of course the owners of land round the old terminus might have opposed the Company's bill in Parliament in those years. Still, it would have evidently been a much lighter matter to procure such a measure in the earlier years than now.

Neither do the conclusions laid down in Comyns (Dig; Cond. D. 2) nor in Bacon (abr. Q. 2. 3.) support the defendant's arguments; rather they seem to narrow the cases in which the "act of the law" will excuse the performance of the covenant. Thus if the feoffment be made on a condition precedent, which is impossible or afterwards becomes impossible, "the feoffment," says Comyns (not the undertaking by the proposed feoffee), "shall be void," and so, if the condition be to do a thing contrary to law. I do not see how this assists Mr. Drake; although it might impeach the Company's right to the grant of 6,000 acres. Bacon's proposition may be presumed to apply not only where the condition is contrary to law when entered into, but where it continues to be contrary to law throughout the period, if any, limited for performance. Here the condition might very well have become possible before the date fixed for execution. And in the case cited Bac. (U. S. p. 162) "where the condition has become impossible by reason of the refusal (to marry) of the obligee herself, yet that shall not excuse the obligor from the penalty of the bond unless he alleges in his pleadings that he has done all in his power to induce her to comply," *i. e.*, without such allegation the plea would be demurrable; and the act of the obligee is at least as efficient to excuse the non-performance as the act of the law could be.

The stringency with which any stipulated penalties for non-performance of a contract is generally enforced is well illustrated by the decision in Jones v. St. John's College. There the plaintiff had bound himself to execute certain works for the defendants in a given time, with a penalty of £5 per diem for any delay. It became by reason of the acts of the defendants themselves, as in the case just cited from Bacon, impossible to execute the works in the given time, but the contractor was held bound to allow the penalty to be deducted from the contract price for the works.

For these reasons, irrespective of the technical reasons first adverted to, I think the circumstances mentioned in the paragraph of the statement of defence furnish no defence to the action on the bond, and the demurrer must be allowed with costs.

IN THE SUPREME COURT OF BRITISH COLUMBIA.

BETWEEN

HER MAJESTY'S ATTORNEY-GENERAL FOR THE PROVINCE OF BRITISH COLUMBIA, Plaintiff.

AND

THE CANADIAN PACIFIC RAILWAY COMPANY, DONALD A. SMITH, WILLIAM C. VAN HORNE AND SANDFORD FLEMING, Defendants.

IN CHAMBERS, BEFORE THE HONOURABLE THE CHIEF JUSTICE.

FRIDAY THE 10TH DAY OF FEBRUARY, A. D. 1888.

Upon hearing Mr. Helmcken, of counsel for defendants, upon reading the affidavit of Harry Dallas Helmcken, sworn and filed this day, and upon hearing Mr. Charles Wilson, of counsel for plaintiff, it is ordered that all further proceedings herein on the part of the plaintiff be stayed until the first day of the next session of the Full Court, or as soon thereafter as counsel can be heard, and that the costs of this application be costs in the cause.

MATT. B. BEGBIE, C. J.

Name of counsel retained in the case for the Government: Mr. Charles Wilson.

VICTORIA: Printed by RICHARD WOLFENDEN, Government Printer,
at the Government Printing Office James Bay.