IN THE COURT OF EXCHEQUER CHAMBER AT WESTMINSTER, 6TH AND 7TH FEBRUARY, 1864. REPORT OF THE ARGUMENT

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In the Court of Exchequer Chamber at Westminster, 6th and 7th February, 1864. Report of the Argument by Various

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IN THE COURT OF EXCHEQUER CHAMBER AT WESTMINSTER, 6TH AND 7TH FEBRUARY, 1864. REPORT OF THE ARGUMENT

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Hon: Charles Sumner
with best regards J. B. Moran

IN THE COURT OF EXCHEQUER CHAMBER AT WESTMINSTER,

THE 6TH AND 8TH FEBRUARY 1864.

BEFORE

LORD CHIEF JUSTICE COCKBURN,
LORD CHIEF JUSTICE ERLE,
MR. JUSTICE CROMPTON, | MR. JUSTICE MELLOR,
MR. JUSTICE BLACKBURN, | MR. JUSTICE WILLIAMS,
AND MR. JUSTICE WILLES.

THE ATTORNEY GENERAL v. SILLEM AND OTHERS,

Claiming the Vessel "ALEXANDRA," seized under the Foreign Enlistment Act,

(59 George III. Chapter 69.)

REPORT OF THE ARGUMENT

ON

The preliminary Objection to the Jurisdiction of the Exchequer Chamber, in Appeal under the New Rules of the Court of Exchequer, applying the Common Law Procedure Acts to the Revenue Side of that Court.

TOGETHER WITH

THE JUDGMENT OF THE COURT,

AND ALSO

AN APPENDIX CONTAINING THE RULES AND SECTIONS OF THE STATUTES REFERRED TO, AND AN ABSTRACT OF THE CASE ON APPEAL TO THE EXCHEQUER CHAMBER.

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IN THE COURT OF EXCHEQUER CHAMBER AT WESTMINSTER.

BEFORE

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THE ATTORNEY GENERAL *v.* SILLEM AND OTHERS,

Claiming the Vessel "ALEXANDRA."

ARGUMENT

On the preliminary Objection to the Jurisdiction of the Exchequer Chamber on Appeals under the New Rules* of the Court of Exchequer applying the Common Law Procedure Acts to the Revenue Side of that Court.

Saturday, 6th February 1864.

Argument on objection to new Rules made by Court of Exchequer.

Sir Hugh Cairns.—My Lords, in this case, I have to submit to your Lordships a preliminary objection as to the jurisdiction of this Court to entertain this Appeal, on objection of which we have given notice to the advisers of the Crown, and I will state in as few words as possible the facts of the case which will explain to your Lordships the nature of the objection.

My Lords, the proceeding in this case in the Court of Exchequer originated in the seizure by the Crown of a ship called the "Alexandra." She was seized as forfeited to the Crown; thereupon, my Lords, a claim was made by those whom I represent, some English merchants, to the property of the ship. An information was filed in the usual way by the Attorney General, an information *in rem*, alleging the forfeiture and the cause of forfeiture. The fact of the forfeiture was traversed by the claimants also in the usual way and issue joined. My Lords, the case was tried upon that issue before a jury, and the jury found a verdict against the Crown. Thereupon the *postea* in the usual way was delivered to the claimants. In the beginning of Michaelmas Term the claimants were served with a rule *nisi* for a new trial upon the ground of the verdict being against evidence, against the weight of evidence, and upon the ground of misdirection and non-direction by the learned Judge. My Lords, that rule was argued in the Court of Exchequer. The Court were equally

* *Vide* Appendix, page i.

ARGUMENT.

Sir H. Cairns.

divided in opinion, and an order was made, as is usual under those circumstances, discharging the rule. Thereupon, my Lords, of course, as your Lordships will see, the whole of the proceedings in the Court of Exchequer were at an end. The Court had further merely to perform the ministerial act of entering up whatever may be the proper form of judgment to be entered up in such case. We have since that been served with notice of appeal to the Court of Exchequer Chamber, which brings us before your Lordships this morning; and, my Lords, the question which we ask under those circumstances is, under what authority is that appeal brought?

My Lords, before the Common Law Procedure Act, I need not mention what is obvious, there could have been no such appeal. Under those Acts there could be no such appeal, for, as is well known to your Lordships, those Acts apply to personal actions commencing by writ of summons, and to those only. But, my Lords, we understand that it is said that a rule has been made by the Court of Exchequer which gives an Appeal in the present case, and we are told that that rule is a general rule, or Order of Court, dated the 4th of November of last year. My Lords, we understand,—I know not whether it is correct information, for we have it only from the ordinary sources of information,—that this rule was made by the Court on an application by the advisers of the Crown in the present case, before the rule *nisi* to which I have referred, was obtained from the Court. My Lords, I am sure that if that is so, and our information is correct, the very learned and eminent Judges who made the rule proceeded upon considerations of the highest policy and fitness in their own minds; but, at the same time, one cannot help thinking that the course of making a rule, apparently general in its terms and applying to all cases, upon the application of a party to one particular case, and to meet that particular case, in a course which may be attended in some cases by danger and by inconvenience.

However, my Lords, the rule is this:—It professes to be made in pursuance of an Act of Parliament to which I will in a moment refer; but I would first take leave to read the rule to the Court. It is headed "Court of Exchequer, Revenue side. In pursuance "of the provisions contained in the 26th section of the 22nd and "23rd of Victoria, chapter 21, entituled 'An Act to regulate the "office of Queen's Remembrancer, and to amend the practice and "procedure on the Revenue side of the Court of Exchequer,' "it is ordered that the following provisions of the Common Law "Procedure Act, 1854, be extended, applied, and adapted to the "Revenue side of the Court of Exchequer, and also that the fol-"lowing rules as to giving bail in cases of appeal shall be in force "on the Revenue side of the Court of Exchequer." The first rule, my Lords, is this: "In all cases of rules to enter a erdict or non-"suit, upon a point reserved at the trial, if the rule to show cause "be refused or granted, and then discharged or made absolute, the "party decided against may appeal." Secondly, "In all cases of "motions for a new trial upon the ground that the Judge has not

" ruled according to law, if the rule to show cause be refused, or, " if granted, be then discharged or made absolute, the party " decided against may appeal, provided any one of the Judges " dissent from the rule being refused, or when granted being " discharged or made absolute, as the case may be, or provided " the Court in its discretion think fit that an appeal should be " allowed, provided that where the application for a new trial is " upon matter of discretion only, as on the ground that the " verdict was against the weight of evidence, or otherwise, no " such appeal shall be allowed." Thirdly, " The Court of Error, " the Exchequer Chamber, and the House of Lords shall be " Courts of Appeal for this purpose." My Lords, I might pause for a moment to observe there an inaccuracy in this rule, although it is not a serious objection of course to the rule, but it shows what one has reason to regret, that a little more consideration had not been bestowed upon the rules. It is obvious that there has been an entire overlooking of what the meaning of the term " Court of Error," in the Common Law Procedure Act is. The Common Law Procedure Act, in the section which is supposed to be analogous to that which I have read, is this: " The Court of " Error, the Exchequer Chamber, and the House of Lords shall " be Courts of Appeal for the purposes of this Act." The rule says, " The Court of Error, the Exchequer Chamber, and the " House of Lords shall be Courts of Appeal for this purpose."

Lord Chief Justice Cockburn.—Which section are you referring to?

Sir Hugh Cairns.—It is the Act of 1854, section 36. The Common Law Procedure Act said, " For the purposes of this " Act." The rule says, " for this purpose," namely, for the purpose of the appeal before mentioned. The clause is utterly unmeaning so applied. I mean that that part of the clause which contains the term " the Court of Error," in the Common Law Procedure Act, has a meaning quite different from the term " Exchequer Chamber," and a most intelligible and necessary meaning,—for the Common Law Procedure Act applied not merely to the Superior Courts at Westminster, but to the Court of Lancaster and to the Court of Durham, and it might be made applicable by order of Her Majesty in Council to other inferior Courts of Record. As to those inferior Courts of Record, the Court of Queen's Bench was the Court of Error, and therefore said, and rightly said, the Common Law Procedure Act, " the Court of Error, the Exchequer Chamber, and the House " of Lords, as the case may be, for the purposes of this Act," which in all those various purposes, shall be the Court of Appeal; but in this rule it is for the appeal mentioned in the clause immediately before. " The Court of Error " could have no meaning, introduced as it is into this 3rd rule; but that, my Lord, is a digression and not a serious objection to the rules.

The fourth rule is, no appeal shall be allowed unless notice thereof be given in writing to the opposite party or his attorney, and to the Queen's Remembrancer within four days after the decision complained of, or such further time as may be allowed