

1880.
June 3.
—
Van Blommestein vs. Van Blommestein.

that the defendant has all the joint estate in his own hands. The writ must be discharged, but the question of costs will be reserved.

Upington, A.G., then applied for an order for the attachment of defendant's person in default of his giving security to abide the result of the action being brought against him by plaintiff.

DE VILLIERS, C.J.:—The order of the Court is, that the defendant do show cause, if any, to this Court to-morrow, why he shall not give security to abide the judgment of this Court in the said action for the dissolution of his marriage with the plaintiff, and, failing such security, why he shall not be arrested on the ground of his meditated flight from the Colony, and that he do further show cause why he shall not contribute the sum of £150 to assist the plaintiff in the prosecution of the said case.

DWYER and SMITH, JJ., concurred.

[Applicant's Attorney, J. C. DE KORTÉ.
Respondent's Attorneys, REDELINGHUY & WESSELS.]

FAURÉ vs. THE COLONIAL SECRETARY.

Governor's Commission.—*Letters Patent of August 20, 1872.*—*Letters Patent of February 26, 1877.*—*Interpreter of Supreme Court.*

As between the Governor and a subject, the Governor of a Colony has not a delegation of the whole Royal authority, his powers being limited by the express terms of his Commission.

It is usual for the Governor of this Colony to be entrusted by his Commission with the full power of removal of public servants which the Queen herself possesses, which power authorizes him summarily to dismiss any public servant who holds during the pleasure of the Crown, even though such servant

have not been appointed under Royal Warrant or Commission.

The Interpreter of the Supreme Court is an officer of that Court, and therefore holds office during the pleasure of the Crown.

This was an argument on exceptions. The plaintiff's declaration set forth (*inter alia*):—

That, on the 30th of July, 1873, plaintiff was duly appointed to the permanent situation of interpreter of the Supreme Court, on the conditions,

(1.) That the appointment should not admit him into the ordinary Civil Service of the Colony ;

(2.) That he should receive an allowance of £400 *per annum*, including allowance for travelling expenses (which salary was subsequently raised to the sum of £550 *per annum*), in consideration of which he was to interpret from English into Dutch, and *vice versa* in all civil and criminal cases coming before the Supreme Court and the Circuit Court of the Western districts of the Colony, in which the services of an interpreter might be required ;

(3.) That the said appointment should take effect from the 1st of January, 1873.

That, in consideration of the plaintiff continuing to perform the said duties, the Government promised to retain him in the said permanent situation on the conditions aforesaid.

That plaintiff performed the said duties of interpreter until the breach by the Government of the above-mentioned promise, the plaintiff being entitled to be retained by the Government in the capacity, and on the terms aforesaid, and being ready and willing to continue to perform the said duties.

Yet the Government on the 31st of January, 1880, wrongfully dismissed the plaintiff from the said permanent situation, thereby causing him damages to the amount of £5000, which the defendant in his capacity of Colonial Secretary neglects and refuses to pay.

The defendant raised several pleas in defence, the most important being the second, which in its original form, merely alleged that plaintiff had been both appointed, and dismissed by the Governor with the advice of the

1880.
May 27.
" 28.
June 4.
" 8.
Fauré vs.
The Colonial
Secretary.

1880.
May 27.
„ 28.
June 4.
„ 8.
Fauré vs.
The Colonial
Secretary.

Executive Council, and that therefore no action had accrued to plaintiff against defendant. The plaintiff excepted to this plea, and the exception was allowed with costs, leave being given to the defendant to amend his plea. Defendant then filed an amended second plea, of which the substance was as follows :—

(a.) The appointment of plaintiff to the office of interpreter was made by Sir Henry Barkly, then Governor of this Colony, with the advice of the Executive Council thereof, under and by virtue of the powers conferred upon him by the Queen set forth in the Letters Patent passed under the Great Seal of the United Kingdom, on the 20th day of August, 1872, which authorized the said Governor to appoint in Her Majesty's name and on her behalf all necessary officers of this Colony, and to suspend or dismiss them upon sufficient cause to him appearing.

That the said Governor was by his Instructions enjoined to grant, during pleasure only, all Commissions to such offices as aforesaid, unless it was otherwise provided by law.

That it was not, and is not provided by law, that the said office of interpreter should be held otherwise than during pleasure.

That the plaintiff held and exercised the said office until the 31st day of January, 1880, when he was removed from it by the present Governor of this Colony, with the advice of the Executive Council thereof, and under and by virtue of Letters Patent passed under the Great Seal of the United Kingdom on the 26th day of February, 1877, and Instructions passed under the Royal sign manual and signet, on the same day, which Letters Patent and Instructions respectively contain the same provisions, with reference to the matters above-mentioned, as the first-mentioned Letters Patent and Instructions respectively.

The Letters Patent alluded to in the amended plea empowered the Governor summarily to suspend or dismiss any person holding any office or place under or by virtue of any Commission or Warrant granted by Her Majesty or under her authority.

The plaintiff excepted to the amended plea on the grounds that the facts therein stated, even if true, would not afford a valid defence; and that the plea was vague, uncertain, insufficient, and embarrassing to plaintiff.

1880.
May 27.
" 28.
June 4.
" 8.
Fauré vs.
The Colonial
Secretary.

Jones (with him *W. H. Solomon*), for plaintiff. The whole pith of the plea, as now filed, is that by virtue of a certain Commission and certain Instructions alleged to have been granted by Her Majesty, the Governor has certain powers of appointing and removing officers. The powers granted by these commissions do not apply to all officers, but only to certain officers, and the terms of the Commission in question are not binding on plaintiff. The plaintiff is not in the same position, for instance, as a volunteer officer holding a commission in Her Majesty's name. The Commission does not apply to a case like that of plaintiff, where a person has been engaged by Government for the rendering of a certain service. A porter in a railway station, or a schoolmistress in the service of the Government, is not in the same position as those who hold offices under Government by virtue of a commission or warrant. The authority of a Governor depends entirely upon his Commission. When he chooses to exercise a certain function, he must say it was exercised by virtue of his Commission.

[*DE VILLIERS, C.J.*:—The sole question here is: Does the Queen's Commission give the Governor those powers which the defendant claims it does? Because there is no doubt that the Queen can delegate her powers to a representative. When this Colony became subject to the British Crown, did not the Crown *ipso facto* obtain all those prerogatives here which it enjoyed in England before, and do not these prerogatives overrule the Common Law of the Colony?]

I should regret to admit such a doctrine. Then every prerogative exercised by the Queen in England could be exercised here. Had the Governor of this Colony at any time the power of taking possession of the property of a person who was sentenced to death, as the Queen might have done in England at the date of the settlement? It must be shown in the first place that the plaintiff held his office by virtue of some commission or warrant. Unless it be proved that plaintiff comes under the terms of the Commission, the action which has been brought must fall under the Common Law. The appointment of the plaintiff as interpreter of the Supreme Court did not admit him into the Civil Service of the Colony. The Attorney-General's letter, though signed

1880.
May 27.
" 28.
June 4.
" 8.
Fauré vs.
The Colonial
Secretary.

on behalf of the Government, did not render the appointment one under the Governor's Commission. The Commission can only apply to some person appointed under the seal of the country. These Instructions have never become part of the law of the country, and therefore cannot bind those who are perfectly ignorant of them, as plaintiff was. See *Hill vs. Bigge* (3 Moore's Priv. Coun. Reps., p. 465), and *Act 22, George III. c. 75*.

[DE VILLIERS, C.J.:—If you rely upon *Act 22, George III.*, as extended by *Act 54, George III.*, c. 61, plaintiff will have no remedy in this country, but will be driven to the Privy Council.]

The case ought not to be decided merely on the presumption that the prerogative of Her Majesty the Queen enables the Governor to dismiss without notice. It must be shown clearly that the plaintiff was appointed under the Instructions which have been referred to.

Solomon, on the same side. The case for the plaintiff is supported by *Sande* (Decis. Frisic. lib. 5, tit. 10, def. 2), and *Groenewegen* (de Legibus Abrogatis, ad Cod., lib. 7, tit. 65, l. 3), who show that under the Roman-Dutch law when a man in the position of the plaintiff is dismissed, a cause must be alleged, and proof of it must be given in Court.

Leonard, for defendant. If it be argued that the Governor has only power to remove officers appointed by commission or warrant, the absurdity is involved that all the higher and more important officers can be removed at pleasure, while the inferior ones cannot be removed at all. The Sovereign in England has the sole power of removing all public officers with the consent of her ministers. The word "commission" means an instrument delegating certain functions. There is no rule obliging the Governor to seal commissions with the seal of the country. It has not been shown that in this case the words "warrant" and "commission" should not be used in their ordinary signification. It is clear that the Governor appointed the plaintiff merely during pleasure. The appointment must necessarily have been subject to the Governor's Instructions and Commission, therefore the Governor has the right of dismissing plaintiff. There is no definition of the word "officer" which would

exclude the plaintiff. If he were an officer it is plain that he was a public officer. If the Queen were in this country she would be personally invested with the whole of her prerogatives, but instead of coming here she delegated her prerogatives to a representative. The passage of *Sande*, which has been quoted, does not upset these arguments.

1880.
May 27.
" 28.
June 4.
" 8.
Fauré vs.
The Colonial
Secretary.

Cur. adv. vult.

Postea (June 8),—

DE VILLIERS, C.J.:—When this case was argued upon the first exceptions to the defendant's plea, it was pointed out by the Court that if the defendant relied upon the right of the Crown summarily to dismiss the plaintiff from the office of interpreter of the Supreme Court, he was bound to go further and show that the right of the Crown in this respect had been delegated to the Governor of the Colony. The Court then entertained as little doubt as it now does in regard to the powers which had been delegated to the Governor by his Commission and Instructions, but in order to remove any doubt as to the right of the defendant to rely on the terms of the Governor's Commission at the trial, the exceptions were allowed with the consent of the defendant's counsel, but leave was given to the defendant to amend his plea. The principle is clearly established that, as between him and a subject, the Governor of a Colony has not a delegation of the whole Royal authority, and that his powers are limited by the express terms of his Commission. "If," said LORD BROUGHAM, in the case of *Hill vs. Bigge* (3 Moore, P.C., p. 476), "it be said that the Governor of a Colony is *quasi* sovereign, the answer is, that he does not even represent the Sovereign generally, having only the function delegated to him by the terms of his Commission, and being only the officer to execute the specific powers with which that Commission clothes him." It is clear, therefore, that where any act of the Governor is justified as having been done by virtue of any portion of the Royal authority vested in him, the terms of his Commission and Instructions must be referred to in order to ascertain whether and to what extent they justify the act. In the present case the defendant, by his amended plea, justifies the dis-

1880.
 May 27.
 „ 28.
 June 4.
 „ 8.
 Fauré vs.
 The Colonial
 Secretary.

missal of the plaintiff under the following clause of the Governor's Commission:—"We do hereby authorize and empower you, so far as we lawfully may, upon sufficient cause to you appearing, to remove from his office, or to suspend from the exercise of the same, any person exercising any office or place within our said Colony, under or by virtue of any commission or warrant granted, or which may be granted by us in our name or under our authority." The plaintiff excepts to this amended plea, and contends that the Governor's power of removal is confined to those officers who have been appointed under Royal Warrant or Commission. I am of opinion, however, that if all the clauses of the Commission and Instructions recited in the plea are read together, the intention may clearly be inferred to confer on the Governor the full powers of removal which the Queen herself possesses. This view is strengthened by reference to the Rules and Regulations for Her Majesty's Colonial service, which have been compiled by the directions of the Secretary of State for the Colonies, and printed for the information of Colonial officers. The 22nd Rule states that "The powers of every officer, administering a Colonial Government, are conferred, and his duties for the most part defined in Her Majesty's Commission and the Instructions with which he is furnished;" and the 30th Rule mentions as one of the powers conferred on Governors in Colonies possessing responsible government, "the entire power with his Council of suspending or dismissing public servants who hold during pleasure." The only question, therefore, which remains to be decided in this case is whether or not the office, from which the plaintiff has been removed, was held by him during the pleasure of the Crown. To decide this question, it will be unnecessary to consider the general rights of the Crown in respect of its public servants, or to enquire to what extent those rights are modified by the Common Law of this Colony. It is sufficient to say that the plaintiff upon his appointment as interpreter of this Court became an officer of the Supreme Court, and as such held his office during the pleasure of the Crown. The 16th section of the *Charter of Justice* is conclusive on this point. "We do further direct and appoint that the several officers of the said Court, other than and except the Chief Justice and Puisne Judges thereof, shall hold their respective offices therein during the pleasure of us, our heirs

and our successors.” From the time when this Court first came into existence up to the present, the office of interpreter from English into Dutch, and *vice versa*, has always been deemed indispensable for the proper administration of justice, and the holders of the office have always been treated as officers of this Court. This *status* the plaintiff obtained upon his acceptance of the permanent as distinguished from a merely acting appointment, and he was not deprived of this *status* by the mere fact that his letter of appointment provided that he should not be thereby admitted into the ordinary Civil Service of the Colony. The result is that, in my opinion, the plea in question, if substantiated, will constitute a solid defence to the action, and the plaintiff’s exceptions must accordingly be overruled with costs.

1880.
May 27.
28.
June 4.
8.
—
Fauré vs.
The Colonial
Secretary.

DWYER and SMITH, JJ., concurred.

[Plaintiff’s Attorney, J. C. WESSELS.
Defendant’s Attorneys, J. & H. REID & NEPHEW.]

VAN SCHALKWYK vs. HUGO AND ANOTHER.

Act 6, of 1861, § 7.—Act No. 7, of 1865.—*Prescription.*

*Where a person wishes to put an end to prescriptive occupation
he must bring an action for that purpose against the person
who is in such occupation.*

This was an action instituted by Willem Jacobus Dirkse van Schalkwyk, of French Hoek, against Jacobus Philippus Hugo and Andries Hendrik le Roux, for a declaration of rights, recovery of damages for trespass, and an interdict. The plaintiff was owner of certain land at French Hoek, which was in several lots. Defendants were owners of an adjoining farm called “La Provence.” The French Hoek river flowed between these properties. Plaintiff contended that this river was originally intended to be the boundary between his land and the land of the defendants, or that, at

1880.
June 8.
9.
10.
11.
—
Van Schalkwyk
vs. Hugo &
Another.