New Zealand Lost Cases Project

Graham v Tye

7, 10 February; 16 February 1848

Supreme Court, Auckland, Martin CJ

Keywords: Public law; Constitutional law; supervision of inferior courts; mandamus; Court of Requests; ministerial functions; jurisdiction; English precedents; reception of English laws; practice; prerogative; Resident Magistrates Court

Main Source: *New Zealander,* 19 February 1848

Additional Sources: *Southern Cross*, 19 February 1848

Significance: This case illustrates the centrality of the governor to colonial constitutional law and practice. It illustrates Martin CJ's reluctance to intervene in gubernatorial decisions over the administration of the justice. It illustrates the use of English precedents in the colonial environment, and shows the importance of distinctions between classes of officials and functions in the availability of prerogative writs.

Governor Grey had indicated to officials that he wanted settlers to use the Resident Magistrates Court rather than the Court of Requests. This was possibly in reaction to an employment dispute that had potentially highlighted contentious land title issues. Grey was also concerned that the Court of Requests was not functioning as a "court of equity and good conscience" and that the less technical resident magistrates jurisdiction was better suited to colonial circumstances. The court was closed by officials, and litigants directed to the Resident Magistrates Court.

The Grahams' suit was designed to test the legality of the suspension of the court. Robert Graham was a member of the Auckland "Senate", a group of merchants and lawyers who lobbied for free trade in Maori land and greater self-government for the colony. While the sudden closure of the court posed commercial issues for such men, Graham and his supporters saw the case in constitutional terms; whether the Governor had the authority to simply order a court to be closed. However, the common law did not allow such a claim to be pursued directly against the Governor; hence the application was brought in relation to Tye's duties as Court clerk.

A similar case was heard in Nelson, *White v Richmond*, *Nelson Examiner* 18 April 1848. In that case, Chapman J declined applications designed to reopen the Court of Requests in Nelson.

Further Information: The background to the case, and its constitutional context, is discussed in Damen Ward, "Civil jurisdiction, settler politics and the colonial constitution, c. 1840-1858", (2008) 39 *Victoria University of Wellington Law Review* 497.

Counsel: For the applicant, T.H. Bartley & F.W. Merriman, barristers. Mr Conry, solicitor.[1] No Crown appearance.

Cases referred to: King v. Bristow (6 T. R. 168; 101 ER 492); King v. Jeyes (3 Ad. & Ell. 416; 111 ER 47); R v Justices of Derbyshire (SC 4 Burr 1991; 96 ER 352);

Texts referred to: Matthew Bacon, *A new abridgement of the law* (7th ed, A. Strahan, London, 1832). (8 volumes).

Transcript of the Decision
This version taken from the *New Zealander,* 19 February 1848. (Note that the exchanges between bench and bar in the course of argument were reported in *New Zealander*, 9 and 12 February 1848 and (more fully) in *Southern Cross,* 12 February 1848, which included a full copy of Conry's affidavit).

SUPREME COURT. Wednesday, February 16, 1848.

His Honor the Chief Justice entered the Court this morning at a few minutes to 10 o'clock, and proceeded to pronounce his decision in the matter of the application of Counsel in behalf of Mesrrs. R. & D. Graham[2], for a writ of Mandamus directing Mr. W. Tye[3] as Clerk of the Court of Requests[4], to issue a summons for alleged debt against a certain defendant at their suit.

The arguments raised by Mr. Bartley on the 7th and 10th instant in this case, may be gathered from our previous numbers of the 9th and 12th of the present month.[5]

After a few prefatory remarks, His Honor went on to say .—

The only point to be considered is, whether this Court ought, on this day, to grant a Writ of Mandamus. Whether a Summons ought to have been issued by Tye on the 6th of January, is quite a different question, and one with which we have nothing to do.

To the granting of the Writ, there are obvious objections.

In the first place, it does not appear to be the practice of the Court of Queen's bench to direct such a Writ to any ministerial officer of an inferior Court of Law. The reason is given in "Bacon's Abridg. (Mandamus D.) in these words : — for the Superior Court to interpose in obliging such inferior officer would be to usurp the authority of the Court, which has a proper jurisdiction over its own officer, and which alone is answerable to the superior Court for the execution of such authority." This rule was acted on in the King v. Bristow (6 T. R. 168.) In a more recent case, King v. Jeyes (3 Ad. & Ell. 416) a rule was obtained against the Town-treasurer of Northampton, calling upon him to shew cause, why a Mandamus should not issue to command him to pay the expenses of a prosecution, in obedience to an order made by a Judge of Assize under Stat. 7, Geo. 4, c. 04. The Statement contained a special direction to the officer to pay. Lord Denman said — "As to the propriety of a Mandamus, the first question is whether this Court should interfere by that process in the case of an inferior officer amenable to others. We are not to carry the remedy by Mandamus so far as to issue the Writ wherever any officer has

neglected his duty; this Court ought not to be called upon in every case of that kind. " And Mr. Justice Patterson referring to the case just cited, satd, "In King v. Bristow, the Court decided against granting the Writ, on the broad ground that the patty applied against was a ministerial officer." The rule was discharged accordingly. The only appearance of authority the other way is found in certain cases, referred to in Bacon's Abridg. (Mandamus D. 271.) in which it was held that a Mandamus would lie to the Registrar of a Bishop or the Justices at Sessions, to register the certificate of a place of meeting for Protestant Dissenters according to the act of Toleration. The Act to be done was, certainly in one sense, ministerial. It was so with reference to the Act of Parliament. It was an Act [sic] preemptorily required by a Statute ; and as to the doing of which no discretion was left to the persons required to do it — But it was not ministerial in the sense in which the word is used in the rule we are considering. It was not an act forming part of the procedure in any action, or suit ; it was no part of any legal proceeding at all. In this sense it would have been absurd to speak of the Justices, who are the Judges of their own Court, as acting ministerially. The context fully explains the meaning : "The Court was of opinion [sic], that, in registering and recording the certificate, the Justices were merely ministerial ; and that after a meeting -house had been duly registered, still, if the persons resorting to it did not bring themselves within the Act of Tolerations, such registering would not protect them from the penalties of the law." (King v. Justices of Derbyshire.) I find therefore nothing to justify me in departing from what appears to be the English rule. — Much indeed has been said, in the course of the argument, respecting the colonial enactment by which the Clerk of the Court of Requests is made removeable, not by the Commissioner, but by the Governor alone. I refer to those remarks, not that I deem them material to the matter before us: but simply to say, that I do not assent to them. I see nothing extraordinary in that provision. In the Courts recently constituted throughout England for the recovery of sums not exceeding £20, notwithstanding the superior qualifications, of the Judges, the Clerks of the Courts are not removable by the Judges alone. They are not removable without the approval of the Lord Chancellor. I take the opportunity of saying that for my own part and as far as I am concerned, I greatly prefer such an arrangement as that. There are doubtless some duties of which the performance may need to be enforced by a power of summary dismissal. But the duty of issuing the process and recording the proceedings of a Court of Justice, is so serious and responsible that it appears to me very reasonable that the Officer entrusted with the performance of that duty should not be wholly dependent even upon the Judge of the Court. It seems to me that the Legislature gives to such an officer no extravagant amount of protection, when it says that he shall not be removed by the Judge singly [sic], but that the consent of the Governor shall be necessary.

It cannot be presumed that any improper person will be retained in such an office, after his unfitness shall have been shown. On the other hand, I cannot brings myself to think that any Officer of an English Court of Justice will be one whit the less inclined to comply with all lawful directions of the Judge of the Court, for the mere reason that it may not be in the power of that judge to oust him summarily from his office.— Certainly the facts of this particular case furnish no ground for such an apprehension. For how does this case stand? Mr. Corny says in his affidavit, " that the said Wm. Tye stated he would not issue the required summons, and, on being questioned the reason of his refusal, the said Wm. Tye stated that he had been verbally directed bv Percival Berry, Esq., the Commissioner of the said Court, not to issue any more summonses." This was on the 6th of January. It was on the 2nd February, that the deponent again applied to Tye, and then for the first lime we hear of Tye referring to the Government notice. So that the

Charge against Tye comes to this :— that this Officer (whose rebellious tendencies have been somewhat strongly represented by the learned Counsel) chose to disobey the Ordinance in order that he might obey the Commissioner; and I am asked to presume that the very same man would turn around and disobey the Commissioner, in case the requirement of the Commissioner should happen to coincide with that of the ordinance. The question to which I have thus far adverted, relates chiefly to the procedure of the Court : but over and above this, there is a difficulty which lies in the very substance of the application. Though the affidavits do not disclose as fully as might be desired, the circumstances under which the issue of process out of the Court of Requests came to be discontinued— yet they contain enough, to make it clear that a Mandamus cannot be properly granted. Mr. Berry has ceased to act as Commissioner, and the Government notice very distinctly implied that no new Commissioner will be appointed. Now, this Court cannot forbid the Commissioner to retire from his office— nor can it require the appointment of a successor. The Mandamus, then, would be of no use to the parties who ask for it, and according to the well-known rule, where it is seen before-hand, that the act of the Court could not be followed by any result, it is the duty of the Court not to act at all. On this ground, then, independently of the former, the Mandamus must be refused- The Court of Requests being no longer in operation, there are open to Messrs. Graham legal means of recovering what ever may be due to them upon their demand. If the modes of proceeding which now remain, are found less convenient than that which was afforded by the Court of Requests, the remedy must be sought elsewhere. It is the right and the duty of this Court to superintend all other Courts of Law, so long as they are in operation: but it cannot go further. It cannot, directly, or indirectly, assume to itself a function which belongs to the Government of the country.

Mandamus refused.

---

[1] Thomas Haughton Bartley (1798-1878) emigrated to Adelaide in 1839, and arrived in Auckland via Sydney around 1841. He was a prominent Auckland lawyer, and was connected with the Auckland "Senate". He was later Speaker of the Legislative Council, and a member of the first "responsible" Ministry. Frederick Ward Merriman was later the MHR for Auckland Suburbs (1852-60) and a member of the Auckland Provincial Council. The *Southern Cross*, 19 February 1848, lists Conry as solicitor. Conry also filed an affidavit in the proceedings.

[2] The Graham brothers were prominent Auckland merchants. Robert Graham was later superintendent of Auckland Province (1862-65), a Member of the Provincial Council (1855-57, 1865-69), and a Member of the House of Representatives (Southern Division, Auckland 1855-67, Franklin, 1865-69). He was involved (not without controversy) in the promotion of tourism and the purchase of Maori land in the Rotorua and Taupo districts. Douglas Graham, "Graham, Robert" in W.H. Oliver (ed), *Dictionary of New Zealand Biography (Volume One, 1769-1869)* (Allen & Unwin, Wellington, 1990).

[3] William Tye emigrated to South Australia in 1840, and arrived in New Zealand from there in 1842. His diary is held at the Alexander Turnbull Library.

[4] Court of Requests Ordinance 1844 7 Vict 8.

[5] The *Southern Cross* 12 February 1848 reported that "... the Court was well filled with a respectable audience, amongst whom we noticed many of the influential merchants and leading men of the settlement."

For further details please contact Damen Ward