Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Direct United States' Cable Company (Limited), Appellants, v. The Anglo-American Telegraph Company (Limited), and The New York, Newfoundland, and London Telegraph Company, consolidated and merged into the said Anglo-American Telegraph Company (Limited), Respondents, from the Supreme Court of Newfoundland; delivered 14th February, 1877.

Present:

LORD BLACKBURN.
SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

THIS is an Appeal from the Supreme Court of Newfoundland against an order confirming an injunction granted against the Appellants, to prevent their infringing the rights originally granted by an Act of the Legislature of Newfoundland, 17 Vict. cap. 2, to a Company incorporated by the name of "The New York, Newfoundland, and London Telegraph Company."

By a subsequent Act of the Legislature of Newfoundland, 20 Vict cap. 1, the New York, Newfoundland, and London Telegraph Company were authorised to effect a consolidation of that Company with the Atlantic Telegraph Company Limited, on such terms and under such corporate name as might be agreed upon between the Companies; and upon such consolidation the Consolidated Company were to have all the rights

which the New York, Newfoundland, and London Telegraph Company had under its Charter or Acts of Incorporation.

The Respondents claim on the ground that the New York, Newfoundland, and London Telegraph Company has been consolidated with them. One ground of appeal was that the consolidation was not shown to have been duly effected. During the argument this was disposed of. It is not now necessary to say more on this point than that, in the opinion of their Lordships, the Respondent Company has the same rights as the New York, Newfoundland, and London Company would, but for that consolidation have had.

The injunction granted prevents the Appellants from using, for the purpose of telegraphic communication, either the dry land of the Island of Newfoundland, or a cable already moored to a buoy in a portion of Conception Bay, where the soil is permanently under water, and which buoy was more than three miles from the dry land which forms the shore of that bay. More will be said afterwards as to the local situation and configuration of this bay. According to the argument of the Respondents and the Judgment of the Court below, this portion of the bay is as much part of the Island as if it were dry land. The injunction is not confined to prohibiting telegraphic communication conveying messages to or from persons in Newfoundland itself to places out of Newfoundland, but extends and is meant to extend to prohibiting the Appellant Company from using any portion of the Island or the cable already moored in the spot in the Bay which is treated as part of the Island, for the purpose of telegraphic communication between two termini that are wholly out of the Island, though the message is not repeated within the Island; so that two main questions are raised:

1. Whether the rights vested in the Respondents by the Legislature of Newfoundland are such as to entitle them to an injunction preventing any other person from laying a telegraphic wire across a portion of the Island of Newfoundland between two termini out of the Island, and then using that wire for the conveyance of messages from the one terminus to the other, so that the magnetic current passes through a portion of wire laid in the Island,

though no messages are delivered thereby in Newfoundland, and the messages sent across it from the one foreign terminus to the other are not repeated in the island. This is what the Appellants wish to do. As it was expressed during the argument, they wish to use the Island as a stepping stone to facilitate telegraphic communication between Ireland and America.

The second question, which does not arise unless the first is decided in favour of the Respondents, is whether they are entitled to an injunction to prevent the use of the spot in Conception Bay, to the same extent as if it were a spot on the dry land of the Island of Newfoundland.

Some minor points were raised on the argument which will be mentioned hereafter, but it is convenient to dispose of these two main points before dealing with any others.

The first question as to the extent of the rights given on what is not disputed to be the Island depends entirely on the construction of the Act of the Legislature of Newfoundland 17 Vict. c. 1, for there can be no doubt that the Legislature had full power to grant such a right as is claimed, and what has to be determined is whether an intention to grant such a right is sufficiently expressed in the Act.

The tribunal that has to construe an Act of a Legislature, or indeed any other document, has to determine the intention as expressed by the words used. And in order to understand those words it is material to inquire what is the subject matter with respect to which they are used, and the object in view.

It was said in the argument that inasmuch as the Act gave the Respondents a monopoly, and infringed on the rights of the subject, it ought to be construed strictly. This is true, but that maxim is explained very well by Bramwell B. in Foley *v.* Fletcher (3 H. & N., 769-781).

In the present case the promoters of the Act had in view the making of a telegraphic communication between America and Europe by way of Newfoundland. The use of Newfoundland for this purpose would give them the benefit of laying one submarine cable from Ireland to Newfoundland, and another from Newfoundland across Prince Edward Island, or otherwise, to the continent of

America. These two lines of submarine cable would each of them be shorter than a cable by any line avoiding the territory of Newfoundland; and it was reasonable to suppose that the cable might with less difficulty be laid for a short distance than for a long one. When the cables were laid down and connected, a message might be transmitted direct from the terminus in Europe to that in America, using the portion of the wire in Newfoundland merely as a vehicle for transmitting the galvanic current as the submarine portion of the wire does; but it might also be transmitted to Newfoundland, and there be repeated and sent on afresh to America, with less expenditure of electro-motive power than would be required for the transmission of the message the whole way at once.

It was suggested in the argument that at the time when this Act was passed it was supposed that a message could not be sent the whole way, and that a repetition at Newfoundland would be absolutely necessary. If such a supposition was entertained it was an erroneous one; and certainly there is nothing in the language of the Act to show that the Legislature expected or required that messages should be repeated within their territory, which would not, in fact, be any benefit to Newfoundland. The laying down of the cables would, however, facilitate the sending of messages from Newfoundland to Europe and America respectively, which would be a benefit to the Island.

The promoters of this enterprise come to the Legislature, who agree to empower them to use the territory, on terms supposed to be beneficial to the Island, and to encourage them to execute their scheme, grant some privileges to the Company. The scheme of the promoters made it necessary to use part of the territory of Newfoundland, where its Legislature could grant a monopoly and put upon others any restrictions which the Legislature pleased; and also to make use of places out of the territory such as Ireland, the bed of the Ocean, and the land of America, where the Legislature of Newfoundland could grant no monopoly and impose no restrictions on others.

Such being the general object, let us examine the language of the Act to see what intention is expressed.

It begins by a preamble: "Whereas it is deemed advisable to establish a line of telegraphic communication between America and Europe by way of Newfoundland."

It then incorporates the Promoters, and by Section 6 requires the Company to form certain lines in Newfoundland, and enables, but does not require, them to form any other lines from any point in Newfoundland to any other point in Newfoundland "or elsewhere." These lines would be for the benefit of the Island of Newfoundland, as they would carry messages in the Island, and from the Island to and from places elsewhere; and this seems to be the main consideration from the promoters to Newfoundland for the privileges afterwards conferred on them. The making of those lines would also facilitate the main scheme of the promoters by enabling them to convey messages from America to Europe, either by a direct message or by repeating it, but in neither way would that confer any benefit on the Island.

Section 8 enacts that the Governments of Great Britain, of the United States, and of Newfoundland shall repectively, at all times, have a preference over all persons of conveying messages upon the said lines of telegraph relating to the public service of those Governments respectively. The Legislature of Newfoundland must have contemplated that the Governments of Great Britain and the United States would send messages to and from Europe, from and to America, using the Island merely as a stepping stone, and this obligation to give priority is imposed on the Company without any reference to whether these messages were repeated in the Island, or the line within their territory was used merely as a means of conveying the electric current from Europe to America. The 13th Section frees from duty all materials, and this again applies equally to materials for lines made for communication within the Island, and for lines used merely as means of transit for termini outside the Island.

Then comes Section 14, on the construction of which this point mainly depends. The earlier part of the Section gives in affirmative words to the Company a monopoly for fifty years between any points in the Island. If the Act had stopped

there a rival Company might have made and worked a communication from Newfoundland to the Continent of America in the very way mentioned in the proviso at the end of the Section.

The prohibition which immediately follows is more extensive. It is that no other person shall during the fifty years be permitted to make any lines on the Island, "or to extend to, enter upon, or touch any part of this Island or the coast thereof, or of the islands and places within the jurisdiction of the Government of this colony with any telegraphic cable wire or other means of telegraphic communication from any other island, country, or place whatsoever." This must have been intended for the benefit of the Company, and was necessary to protect them in a monopoly of the traffic from America on the lines which, by the proviso, they must make in the five years as a condition to their monopoly. The words in their literal and grammatical sense include a touching on the island for telegraphic communication across the island, or part of it, from a terminus outside the territory to a terminus outside the territory. If the sole object of the legislature had appeared to be to encourage the making of lines of telegraph for the benefit of the people of the territory there would have been force in the argument that those large and general words were to be cut down by interpolating at the end some such phrase as "for the purpose of communicating with the island," so as to make the restriction no more extensive than the object. Whether we should have been justified in making such an interpolation it is not necessary to decide, for the intention of the Legislature was to encourage a company whose main object was, as is recited, to make a telegraphic communication between America and Europe by way of Newfoundland, for which purpose they must use the territory of this colony. In order to obtain power to do so they consent to be bound to make internal lines of telegraphic communication. The words used, taken in their literal sense, impose a restriction which would be for the benefit of the Company if they should make the communication from America to Europe by way of Newfoundland, and which is not more extensive than was requisite to encourage a Company for the first time to make such a communication without the danger of others

using the island as a stepping stone as soon as it had been shown to be practicable.

No doubt this might have been more artificially expressed. Had the affirmative terms in which the monopoly is granted been so worded as expressly to include telegraphic communication to or from foreign termini across the island, there would have been no room for argument. They are not so worded, and consequently different minds may put a different construction on the subsequent prohibitive words; but, on the whole, their Lordships think that the intention of the Legislature was for the benefit of the Company to prohibit the use of any part of the territory of Newfoundland by any other person for telegraphic communication, whether with the island, or as a mere means of transit between places outside the territory.

Before proceeding to discuss the second question, it is desirable to state the facts which raise it.

Conception Bay lies on the eastern side of Newfoundland, between two promontories, the southern ending at Cape St. Francis, and the northern promontory at Split Point. No evidence has been given, nor was any required, as to the configuration and dimensions of the bay, as that was a matter of which the Court could take judicial notice.

On inspection of the Admiralty chart, the following statement, though not precisely accurate, seems to their Lordships sufficiently so to enable them to decide the question :—

The bay is a well-marked bay, the distance from the head of the bay to Cape St. Francis being about forty miles, and the distance from the head of the bay to Split Point being about fifty miles. The average width of the bay is about fifteen miles, but the distance from Cape St. Francis to Split Point is rather more than twenty miles.

The Appellants have brought and laid a telegraph cable to a buoy more than thirty miles within this bay. The buoy is more than three miles from the shore of the bay, and in laying the cable, care has been taken not at any point to come within three miles of the shore, so as to avoid raising any question as to the territorial dominion over the ocean within three miles of the shore. Their Lordships therefore are not called upon to express any opinion on the questions which were recently so

much discussed in the case of the Queen *v.* Keyn (the "Franconia" case).

The question raised in this case, and to which their Lordships confine their judgment, is as to the territorial dominion over a bay of configuration and dimensions such as those of Conception Bay above described.

The few English common law authorities on this point relate to the question as to where the boundary of counties ends, and the exclusive jurisdiction at common law of the Court of Admiralty begins, which is not precisely the same question as that under consideration; but this much is obvious, that, when it is decided that any bay or estuary of any particular dimensions is or may be a part of an English county, and so completely within the realm of England, it is decided that a similar bay or estuary is or may be part of the territorial dominions of the country possessing the adjacent shore.

The earliest authority on the subject is to be found in the grand abridgment of Fitzherbert "Corone, 399," whence it appears that in the 8 Edward II, in a case in Chancery (the nature and subject matter of which does not appear), Staunton Justice expressed an opinion on the subject. There are one or two words in the common printed edition of Fitzherbert which it is not easy to decipher or translate, but subject to that remark this is a translation of the passage: "Nota per Staunton Justice, that that is not [sañce which Lord Coke translates 'part'] of the sea where a man can see what is done from one part of the water and the other, so as to see from one land to the other; that the coroner shall come in such case and perform his office, as well as coming and going in an arm of the sea, there where a man can see from one part to the other of the [a word not deciphered], that in such a place the country can have conusance, &c."

This is by no means definite, but it is clear Staunton thought some portions of the sea might be in a county, and within the jurisdiction of the jury of that county, and at that early time, before cannon were in use, he can have had in his mind no reference to cannon shot.

Lord Coke recognizes this authority, 4 Institute, 140, and so does Lord Hale. The latter, in his

Treatise, "De Jure Maris," part 1, cap. 4, uses this language: "That arm or branch of the sea which lies within the 'fauces terræ,' where a man may reasonably discerne between shore and shore, is, or at least may be, within the body of a county, and therefore within the jurisdiction of the sheriff or coroner. Edward II, Corone, 399."

Neither of these great authorities had occasion to apply this doctrine to any particular place, nor to define what was meant by seeing or discerning. If it means to see what men are doing, so, for instance, that eye-witnesses on shore could say who was to blame in a fray on the waters resulting in death, the distance would be very limited; if to discern what great ships were about, so as to be able to see their manœuvres, it would be very much more extensive; in either sense it is indefinite. But in Regina *v.* Cunningham (Bells C. C. 86) it did become necessary to determine whether a particular spot in the Bristol Channel, on which three foreigners on board a foreign ship had committed a crime, was within the county of Glamorgan, the indictment having, whether necessarily or not, charged the offence as having been committed in that county.

The Bristol Channel, it is to be remembered, is an arm of the sea dividing England from Wales. Into the upper end of this arm of the sea the River Severn flows. Then the arm of the sea lies between Somersetshire and Glamorganshire, and afterwards between Devonshire and the counties of Glamorgan, Carmarthen, and Pembroke. It widens as it descends, and between Port Eynon Head, the lowest point of Glamorganshire, and the opposite shore of Devon it is wider than Conception Bay; between Hartland Point in Devonshire and Pembrokeshire it is much wider. The case reserved was carefully prepared. It describes the spot where the crime was committed as being in the Bristol Channel between the Glamorganshire and Somersetshire coasts, and about ten miles or more from that of Somerset. It negatived the spot being in the River Severn, the mouth of which, it is stated, was proved to be at King's Road, higher up the Channel, and that was to be taken as the finding of the jury. It also shewed that the spot in question was outside Penarth Head, and could not therefore be treated as

within the smaller Bay formed by Penarth Head and Lavernock Point. And it set out what evidence was given to prove that the spot had been treated as part of the county of Glamorgan, and the question was stated to be whether the prisoners were properly convicted of an offence within the county of Glamorgan. The case was much considered, being twice argued, and Chief Justice Cockburn delivered judgment, saying "The only question with which it becomes necessary for us to deal is whether the part of the sea on which the vessel was at the time when the offence was committed, forms part of the body of the county of Glamorgan, and we are of opinion that it does. The sea in question is part of the Bristol Channel, both shores of which form part of England and Wales, of the county of Somerset on the one side and the county of Glamorgan on the other. We are of opinion that looking at the local situation of this sea it must be taken to belong to the counties respectively by the shores of which it is bounded; and the fact of the Holms between which and the shore of the county of Glamorgan the place in question is situated, having always been treated as part of the parish of Cardiff and as part of the county of Glamorgan, is a strong illustration of the principle on which we proceed, namely, that the whole of this inland sea between the counties of Somerset and Glamorgan, is to be considered as within the counties by the shores of which its several parts are respectively bounded. We are therefore of opinion that the place in question is within the body of the county of Glamorgan." The case reserved in Cunningham's case incidentally states that it was about ninety miles from Penarth Roads (where the crime was committed) to the mouth of the Channel, which points to the headlands in Pembroke, and Hartland Point in Devonshire, as being the fauces of that arm of the sea. It was not, however, necessary for the decision of Cunningham's case to determine what was the entrance of the Bristol Channel, further than that it was below the place where the crime was committed, and though the language used in the Judgment is such as to show that the impression of the Court was that at least the whole of that part of the Channel between the counties of Somerset and Glamorgan

was within those counties perhaps that was not determined. But this much was determined, that a place in the sea, out of any river, and where the sea was more than ten miles wide, was within the county of Glamorgan, and consequently, in every sense of the words, within the territory of Great Britain. It also shows that usage and the manner in which that portion of the sea had been treated as being part of the county was material, and this was clearly Lord Hales's opinion as, he says not that a bay is part of the county, but only that it may be.

Passing from the common law of England to the general law of nations, as indicated by the text writers on international jurisprudence, we find an universal agreement that harbours, estuaries, and bays landlocked belong to the territory of the nation which possesses the shores round them, but no agreement as to what is the rule to determine what is "bay" for this purpose.

It seems generally agreed that where the configuration and dimensions of the bay are such as to show that the nation occupying the adjoining coasts also occupies the bay it is part of the territory; and with this idea most of the writers on the subject refer to defensibility from the shore as the test of occupation; some suggesting, therefore, a width of one cannon shot from shore to shore, or three miles; some a cannon shot from each shore, or six miles; some an arbitrary distance of ten miles. All of these are rules which, if adopted, would exclude Conception Bay from the territory of Newfoundland, but also would have excluded from the territory of Great Britain that part of the Bristol Channel which in Regina *v.* Cunningham was decided to be in the county of Glamorgan. On the other hand, the diplomatists of the United States in 1793 claimed a territorial jurisdiction over much more extensive bays, and Chancellor Kent in his commentaries, though by no means giving the weight of his authority to this claim, gives some reasons for not considering it altogether unreasonable.

It does not appear to their Lordships that jurists and text writers are agreed what are the rules as to dimensions and configuration, which, apart from other considerations, would lead to the conclusion that a bay is or is not a part of the

territory of the State possessing the adjoining coasts; and it has never, that they can find, been made the ground of any judicial determination. If it were necessary in this case to lay down a rule, the difficulty of the task would not deter their Lordships from attempting to fulfil it. But in their opinion it is not necessary so to do. It seems to them that, in point of fact, the British Government has for a long period exercised dominion over this bay, and that their claim has been acquiesced in by other nations, so as to show that the bay has been for a long time occupied exclusively by Great Britain, a circumstance which in the tribunals of any country would be very important. And, moreover (which in a British tribunal is conclusive), the British Legislature has by Acts of Parliament declared it to be part of the British territory, and part of the country made subject to the Legislature of Newfoundland.

To establish this proposition, it is not necessary to go further back than to the 59 Geo. III, c. 38, passed in 1819, now nearly sixty years ago.

There was a Convention made in 1818 between the United States and Great Britain relating to the fisheries of Labrador, Newfoundland, and His Majesty's other possessions in North America, by which it was agreed that the fishermen of the United States should have the right to fish on part of the coasts (not including the part of the Island of Newfoundland on which Conception Bay lies), and should not enter any "bays" in any other part of the coast except for the purposes of shelter and repairing damages, and purchasing wood, and obtaining water, and no other purposes whatever. It seems impossible to doubt that this Convention applied to all bays, whether large or small, on that coast, and consequently to Conception Bay. It is true that the Convention would only bind the two nations who were parties to it, and, consequently, that though a strong assertion of ownership on the part of Great Britain acquiesced in by so powerful a State as the United States, the Convention though weighty is not decisive. But the Act already referred to, 59 Geo. III, c. 38, though passed chiefly for the purpose of giving effect to the Convention of 1818, goes further.

It enacts not merely that subjects of the United

States shall observe the restrictions agreed on by the Convention, but that all persons, not being natural born subjects of the King of Great Britain shall observe them under penalties. And in particular, by Section 4, enacts that if "any person" upon being required by the Governor or any officer acting under such Governor in the execution of any order or instructions from His Majesty in Council shall *inter alia* refuse to depart from such bays, he shall be subject to a penalty of 200*l*.

No stronger assertion of exclusive dominion over these bays could well be framed. As has been already observed, Conception Bay is in every sense of the words a bay within Newfoundland, though of considerable width; and as there is nothing to justify a construction of the Act limiting it to bays not exceeding any particular width, this is an unequivocal assertion of the British Legislature of exclusive dominion over this bay as part of the British territory. And as this assertion of dominion has not been questioned by any nation from 1819 down to 1872, when a fresh Convention was made, this would be very strong in the tribunals of any nation to show that this bay is by prescription part of the exclusive territory of Great Britain. As already observed, in a British tribunal it is decisive.

By the Treaty of Washington it was agreed by the XXXIInd Article that certain provisions should extend to "the Colony of Newfoundland so far as they are applicable. But if the Imperial Parliament, the Legislature of Newfoundland, or the Congress of the United States should not embrace Newfoundland in their laws for carrying the foregoing Articles into effect, then this Article shall be of no effect."

The Act 35 and 36 Victoria, c. 45, of the Imperial Legislature, suspended all Acts of Parliament which operated to prevent the carrying the Articles into effect, and by Section 2 enacted that so soon as the necessary laws had been passed by the Legislature of Newfoundland that Act should extend to Newfoundland.

The Act 59, George III, c. 38, is one of the Acts which would operate to prevent the carrying of Articles into effect. In the opinion of their Lordships the above Treaty and Act are sufficient

to show that, in the opinion both of the Executive and of the Legislature, the right to legislate over the bays of Newfoundland, to which that Act applied, of which Conception Bay is one, had been conferred on the Legislature of Newfoundland.

There remain two minor points to be disposed of.

It was argued that the terms of the Act of the Legislature of Newfoundland might enable the Attorney-General to obtain such an injunction as this, but that the respondents, private persons, could not. To this it is a sufficient answer that, in the opinion of their Lordships already expressed, the Legislature, though they might have expressed their meaning more artificially, have sufficiently shown that their intention was to impose the restrictions in order to protect the rights granted to the Newfoundland Company, which the respondents represent.

The other was that, so far as the use of the cable in the bay was concerned, it was not shown that the respondents would sustain any damage, or, at least, any damage of sufficient extent to justify the interference of a Court of Equity. The injunction, however, is only till the hearing, and as no explanation has been given as to any other object for which the cable is brought into the bay, unless it be for the purpose of competing with the respondents by the use of this portion of the territory of Newfoundland, this is enough to justify the interim injunction.

Nothing now said is intended to prejudge, either one way or the other, any defence on this last point which may be raised on evidence or at the hearing.

Their Lordships, therefore, will humbly recommend to Her Majesty that the Order of the Supreme Court of Newfoundland be affirmed and that this Appeal be dismissed with costs.

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