

AN UNAUTHORIZED ADMIRALTY COURT IN BRITISH COLUMBIA

The first Court of Vice-Admiralty to be set up in British Columbia was in existence for nine months before it was aware that the authority under which it was instituted and held pleas was illegal. Its story is part of the history of Vancouver's Island and illustrates once more how the resourceful Douglas was equal to a situation when it arose even if the remedy was extra-constitutional.

When in January, 1854, Governor Douglas received a request for an enquiry into the circumstances which led to the death of the master of the brig *William*, he immediately set up an admiralty court by appointing the Chief Justice, David Cameron, as Judge of the Vice-Admiralty Court.¹ There are several reasons which might have led Douglas to presume that he had authority to institute such a court. In the first place he had received about three years previously a commission under the seal of the High Court of Admiralty appointing him to be Vice-Admiral of the Island and its dependencies.² It was natural for him to assume that this conferred upon him the necessary authority, for such an assumption had been acted upon elsewhere by colonial governors of other days, although it must be admitted not without some misgivings at times.³ Although Douglas probably knew nothing of these precedents, he was at least aware of no disability such as the first Governor of New Brunswick had in assuming office, when he learned from his commission that:⁴

“ . . . nothing herein contained shall be construed to the enabling you or any by your Authority to hold plea or have any Jurisdiction of any Offence, Cause, Matter or Thing committed or done upon the High Seas . . . ”

That the authorities in England might have inferred that Douglas would have established such a court would appear from a despatch in which Douglas requests,⁵

“ . . . a selection of legal works containing the Forms of Process observed in the Vice-Admiralty Courts and developing the principles on which these decisions are founded.”

1 Colledge to Swanston, Jan. 26, 1854, Vancouver Island Miscellaneous Letters, 1850-1859. (Unless otherwise indicated letters and despatches cited here are to be found in the Archives of British Columbia.)

2 *Vide*: An acknowledgement in a despatch Douglas to Gray, Oct. 31, 1851. Vancouver Island Despatches, 1851-1855.

3 *Cf.*, The action of D'Oyley, the Commander in Chief of Jamaica in the middle of the seventeenth century who had an admiralty court functioning which was not established by the Admiralty Commissioners, and of the legality of which court he could get no opinion from England although he repeatedly requested it. *Vide*, Cal. State Papers, Col., Am. & W.I., Addenda, 1574-1674, No. 232.

4 The Commission of Thomas Carleton, Public Archives of New Brunswick.

5 Douglas to Packington, Mar. 7, 1853, Vancouver Island Despatches, 1851-1855.

However, the duties of "Mr. Mother-Country," that obscure clerk in the colonial office, did not embrace inferential prognostications. Indeed it is not apparent that there was a very clear idea on the question for on the 31st of December, 1853, there was issued to Douglas copies of "Her Majesty's Proclamation establishing Regulations for the Distribution of Naval Prize money," etc.⁶ In acknowledgment, Douglas stated:⁷

"... the same shall be carried into effect in the Vice-Admiralty Courts in this colony."

It is small wonder, then, that Douglas presumed that his commission clothed him with power to establish such a maritime court. Certainly the condemnation and distribution of prize envisaged an admiralty court.

The original cause which led up to the institution of this unauthorized court, can best be followed in Douglas' own words, as given in the following despatch:⁸

"My Lord Duke,

... I would not have troubled your Grace with any remarks in this case at present had it not been for the extraordinary conduct of Mr. Robert Swanston, the Consignee of the brig *William* who showed a disposition to set Her Majesty's authorities at nought, and to treat the Vice Admiralty Court of this Colony with contempt, as I will proceed to show.

On the wreck of the brig *William* the crew travelled under the direction of the natives toward this place and after much privation and hardship arrived here in a state of great distress.

I relieved their immediate wants and addressed a note to Mr. Swanston on behalf of the crew, advising that payment of the wages due, for the time they had served on board the *William* should be made to them, on the part of the owners. That note produced no effect, as he refused to pay the wages due, and there being no proof that he was a party interested in the ownership of the vessel, I could not advise the seamen to have recourse to legal proceedings for the recovery of their claims.

On the 23rd of January I received a letter from Mr. Swanston applying for an enquiry into the causes which led to the wreck of the *William*, and to the death of Captain McIntosh, and the reason given as the grounds of the application was to use his own words as he had heard rumours which led him 'to imagine that there may have

6 As stated in Douglas' acknowledgement, Douglas to Osborne, March 20, 1854. Vancouver Island Miscellaneous Letters, 1850-1859.

7 *Ibid.* An acknowledgement of a subsequent issue of this proclamation appears in similar terms in a despatch, Douglas to Osborne, July 20, 1854. Vancouver Island Miscellaneous Letters, 1850-1859.

8 Douglas to Newcastle, Mar. 13, 1854, Vancouver Island Despatches, 1851-1855.

been foul play,' and moreover mentioning that the crew of the *William* were on the point of leaving the Colony.

I immediately thereupon proceeded to organize a Vice Admiralty Court and appointed David Carmeron Acting Judge and two Master Mariners, William H. McNeill and Charles Dodd, acting Members of the Court. Mr. Swanston was informed of those arrangements, through my private secretary, Mr. Gollidge, on the 25th of January, and that the Court would proceed with the proposed investigation as soon as he produced the information referred to in his letter.

A note in reply was received from Mr. Swanston declining to appear unless I addressed him under my own signature, and not through a secretary.

The court nevertheless opened on the 26th of January last, as before appointed and proceeded to examine the mate and seamen of the brig *William* as hereinbefore mentioned in the commencement of this letter. Mr. Swanston did not appear when called upon for his evidence; a Writ was therefore issued on the same day requiring his appearance before the Court.

He still failing to appear I caused a writ of attachment to issue, on the 28th of January, and he was taken into custody on the 30th and committed to Jail, until the Court met in the afternoon of the same day, when he was found in contempt and sentenced to pay a fine of £50 with costs, or in default of payment to be imprisoned as the Law directs. The fine was immediately paid, and the young man was discharged from custody, on easier terms than I should think it proper to grant, on any similar occasion hereafter, when parties either through folly or disaffection attempt to oppose the executive authorities in the lawful discharge of their duties.

At the close of the proceedings, Mr. Swanston entered a *viva voce* protest against them, in presence of the Court, which I should probably have considered, and treated as a fresh contempt, but not being quite certain about the propriety of that course, I took no further proceedings, and adjourned the Court.

This I am happy to say is the only instance wherein the authority of Her Majesty's Government, has been openly resisted since the Colony was founded.

I have the honor to be Your Grace's most obedient Humble Servant,

James Douglas.
Governor of Vancouver's Island.

His Grace the Right Honbl.
The Duke of Newcastle
Her Majesty's Principal Secretary of State
For the Colonial Departmt.

It is rather interesting to note that in this case although Douglas had appointed Cameron to be the Judge yet Douglas writes, "*I* caused a writ of attachment to issue," and concerning the *viva voce*

protest he remarks, "which I should probably have considered, and treated as a fresh contempt, but not being quite certain about the propriety of that course, I took no further proceedings and adjourned the Court."

There is no doubt from the possessive "I" as to whose court this was. This is further illustrated by the fact that although Cameron was apparently also "Acting Registrar of the Vice Admiralty Court"⁹ as well as being its judge, yet when Swanston received his bill of costs in the case, it came from Golledge, the Governor's Private Secretary, who writes:¹⁰

"I am directed by the Governor to inform you . . . etc. . . and to transmit the Bill of Costs which you requested and the same is accordingly herewith enclosed."

The following was the Bill of Costs:

"BILL OF COSTS AGAINST ROBT. SWANSTON Committed for contempt.		
Judge's Fees estimated at.....	£5.0.0.	
Registrar's Do " ".....	£5.0.0.	10.0.0
Attendance of two Members of Court		6.0.0
Marshall's Fees for arrest of R. Swanston....	1.0.0.	
for release of R. Swanston from arrest.	7.6.	
for attendance in Court when sentence was pronounced	13.4.	
For taking R. Swanston in Execution after sentence	2.0.0.	4.1.10
		£20.1.10.

This Bill being incomplete the Admiralty Court will in its discretion hereafter order payment of the costs still due on this case.

Rich^d Golledge,
Private Secretary.

Victoria, 9th March, 1854.

This case was tried in January, 1854. In the following September Douglas received from Grey an acknowledgment of the receipt of Douglas' letter of March 13, quoted above. In his reply¹¹ Grey commends Douglas for his investigation into the causes of the wreck of the *William* "which you appear to have conducted with a readiness and vigilance very advantageous to the public service." These steps, he continues, would "seem to have been substantially

⁹ Golledge to Swanston, Feb. 18, 1854. Vancouver Island Miscellaneous 1850-1856.
¹⁰ Golledge to Swanston, March 9, 1854. *Ibid.*
¹¹ Grey to Douglas, June 19, 1854, Correspondence, Colonial Office, F.3 (1853-1855). Archives of B. C.

justified by the clause in your Commission as Vice Admiral, giving you cognizance of the view of bodies of persons who came to their deaths in the sea or public streams." However, he adds:

"But I fear that to organize a Vice Admiralty Court is, strictly speaking, beyond your power either as Vice Admiral or under your Commission as Governor. A special authority from the Lords of the A(d)miralty is required for that purpose. And no such Court has, as yet, been established by their Lordships in Vancouver's Island, in consequence, partly of the difficulty arising from there being no professional lawyer to whom a Commission as Judge could issue."

This he trusts will be remedied, "but," he continues, "I fear that it will not be easy to secure you the services of a properly qualified person." In the meantime, he assures Douglas, that, by the provisions of 12 & 13 Vic. c. 96, offenses committed on the sea could be tried in the ordinary courts of the colony. Summarizing the act he writes:

"It appears to me, therefore, that you are fully empowered, without constituting any Admiralty Court, to enquire into all cases of suspected homicide or personal injury committed on the sea, if the persons under suspicion are within the Colony and to bring them to trial if any ground for such proceeding be established, precisely in the same way as if such offense were alleged to have been committed on land within the Colony."

This letter is endorsed as having been "recd. 28 Sept.," "ansd. 6 Oct.," but it is not until October 26 that Douglas gives a complete reply to Grey's letter.¹² After noting with satisfaction that approval with which his investigation was regarded and acknowledging his want of authority to organize an admiralty court he assures Grey that

"The temporary appointments for the Vice Admiralty Court, made by me in this Colony will therefore be immediately suspended and no further measures taken in reference to the organization of a Vice Admiralty Court without instructions from the Lords of Admiralty."

It appears that only one other case had come before the court, namely a claim for wages by the officers and seamen, and a claim for non-delivery of cargo asserted against the British ship *Colinda*. These claims having been settled out of court, further prosecution was apparently dropped.

¹² Douglas to Grey, Oct. 26, 1854, Vancouver Island Despatches, 1851-1855.

And so was brought to a close this first unauthorized admiralty court of which Governor Douglas in passing writes :

“These proceedings will I trust be found strictly in accordance with right and justice, and though a question will arise as to the authority of the Court granting the Process, there can be no question in regard to their justice and propriety.”

Strange to say that it would almost appear that Grey still considered that some sort of an admiralty court was still in existence in the colony for in acknowledging the receipt of this despatch from Douglas, he writes :¹³

“For the purpose therefore of adding powers of a Court of Prize to those already conferred as a Court of Instance it is now proposed to appoint a Judge Registrar, Advocate and Marshall, and I have to instruct you to transmit to me the names and designation of those persons in the settlement who are in your judgment best qualified to fill the above offices.”

To complete the record it might be of interest to add here that so far as the newly created colony of British Columbia was concerned, it received its court of vice-admiralty almost at the outset, for in the same despatch¹⁴ in which Douglas is sent his commission as Vice-Admiral of the mainland colony, there is enclosed Her Majesty's Commission to Mr. Matthew Baillie Begbie, as Judge of the Court of Vice-Admiralty for the Colony of British Columbia—a court which the Queen has been pleased to institute. A closing note to this despatch is a request to Douglas to collect seven pounds, eight shillings and four pence from Judge Begbie, being the fees demanded by the High Court of Admiralty for the execution of his commission.

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¹³ Grey to Douglas, April 3, 1855, Correspondence, Colonial Office, F.3 (1853-1855), Archives of B. C.

¹⁴ Lytton to Douglas, Jan. 6, 1859, Correspondence, Colonial Office, F.11 (1859), Archives of B. C.