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LEX LOCI.

Lex Loci—Action in England for wrongs committed in a Colony
—Act of Indemnity by Colonial Legislature—Repugnancy
to English Law—11 & 12 Will 3, c 12, 28 & 29 Vict
c 63, s 2

An Act passed by a Colonial Legislature indemnifying persons against the consequences of anything done in the suppression of a rebellion in the Colony may be pleaded in bar to civil proceedings in this country, as such a statute is neither contrary to any positive law of this country, nor to the principles of natural justice

The validity of such a statute is not affected by the fact that the Governor of the Colony, who necessarily joined in passing it, was thereby enabled to indemnify himself from the consequences of illegal acts committed by him

A confirmed Act of the local Legislature lawfully constituted, whether in a settled or conquered Colony, has as to matters within the competence and the limits of its jurisdiction, the operation and force of sovereign legislation, though subject to be controlled by the Imperial Parliament

The judgment of the Court was (on June 23rd) delivered as follows by Willes, J —

This is an action complaining of false imprisonment and other injuries to the plaintiff by the defendant in the Island of Jamaica

The plea states in effect that the defendant was Governor of the Island, that a rebellion broke out there which the Governor and others acting under his authority had arrested by force of arms, that an Act was afterwards duly passed by the Legislature of the Island and received the Royal assent, by which, after reciting the rebellion, a proclamation of martial law within certain local limits by the Governor, with the advice of a council of war, that the rebellion had been suppressed, and imminent general sacrifice of life thereby averted, that the military, naval, or civil authorities may, according to the law of ordinary peace, be responsible in person or purse for acts done in good faith for the purpose of restoring public peace and quelling the rebellion, and that all persons who in good faith and loyal resolve had acted for the crushing of the rebellious outbreak ought to be indemnified and kept harmless for such then acts of loyalty, it was enacted by the Governor, Legislative Council and Assembly of the Island, amongst other things, that the defendant and all officers and other persons who had acted under his authority, or had acted *bonâ fide* for the purpose and during the existence of martial law, whether done in any district in which martial law was proclaimed or not, were thereby indemnified in respect of all acts, matters and things done in order to put an end to the rebellion, and all such acts were "thereby made and declared lawful, and were confirmed." The plea further states that the grievances complained of in this action were measures used in the suppression of the rebellion, and were reasonably and in good faith considered by the defendant to be proper for the purpose of putting an end to, and *bonâ fide* done in order to put an end to the rebellion, and so were included in the indemnity. To this plea the plaintiff demurred, and also replied that the defendant, as Governor, was by the law of Jamaica a necessary party to the making of the Act. The defendant demurred to that replication, and issues in law were raised upon the validity of the plea and replication, upon which issues the Court of Queen's Bench gave judgment for the defendant, whereupon the plaintiff has assigned error. The case was very fully argued at the sittings after Hilary term by Mr. Quain for the plaintiff, and Mr. Mellish for the defendant, when we took time to consider.

It was agreed at the Bar that for the purpose of this argument the decision ought to turn upon the Colonial Act, and numerous objections were urged against its validity and effect. Before discussing these objections in detail, it may be convenient to consider generally the condition of the Governor of a Colony, and other subjects of Her Majesty there, in case of open rebellion. To a certain extent then duty is clear—to do then best and utmost in suppressing the rebellion. Even as to tumultuous assemblies and riots of a dangerous character, though not approaching to

actual rebellion, Tindal, C J, in his charge to the Bristol grand jury on the special commission upon the occasions of the riots in 1832 (*Rex v Pinney* (1832), 5 C & P 262), thus in accordance with many authorities, stated the law as to private citizens 'In the first place, by the common law every private individual may lawfully endeavour of his own authority and without any warrant or sanction of the magistrate to suppress a riot by every means in his power. He may disperse, or assist in dispersing, those who are assembled, he may stay those who are engaged in it from executing their purpose, he may stop and prevent others whom he may see coming up from joining the rest, and not only has he the authority, but it is his bounden duty, as a good subject of the King, to perform this to the utmost of his ability. If the riot be general and dangerous, he may arm himself against the evildoers to keep peace. Such was the opinion of all the judges in the reign of Queen Elizabeth in a case called the Case of Arms (see *R v Inhabitants of Wigan* (1749), 1 W Bl 47), although the judges add that it would be more discreet for every one in such a case to attend and be assistant to the justices, sheriffs, or other ministers of the King in doing this. It would undoubtedly be more advisable so to do, for the presence and authority of the magistrate would restrain the proceeding to such extremities until the danger was sufficiently immediate, or until some felony was committed or could not be prevented without recourse to arms, and, at all events, the assistance given by men who act in subordination and concert with the civil magistrate will be more effectual to attain the object proposed than any efforts however well intended, of separated and disunited individuals. But if the occasion demands immediate action, and no opportunity is given for procuring the advice or sanction of the magistrate, it is the duty of every subject to act for himself and upon his own responsibility in suppressing a riotous and tumultuous assembly, and he may be assured that whatever is honestly done by him in the execution of that object will be supported and justified by the common law. This perilous duty, shared by the Governor with all the Queen's subjects whether civil or military, is in an especial degree incumbent upon him as being entrusted with the powers of Government for preserving the lives and property of the people, and the authority of the Crown. And if such duty exist as to tumultuous assemblies of a dangerous character the duty and responsibility in case of open rebellion are heightened by the consideration that the existence of law itself is threatened by force of arms and a state of war against the Crown established for the time. To act under such circumstances within the precise limits of the law of ordinary peace is a difficult, and may be an impossible task, and to hesitate or temporise may entail disastrous consequences. Whether the proper as distinguished from the legal course has been pursued by the Governor in so great a crisis it is not within

the province of a Court of law to pronounce, nor are we called upon to offer any judicial opinion as to the lawfulness or propriety of what was done in the present case, apart from the validity and legalising effect of the Colonial Act. It is manifest, however, that there may be occasions in which the necessity of the case demands prompt and speedy action for the maintenance of law and order at whatever risk, and where the Governor may be compelled, unless he shrinks from the discharge of paramount duty, to exercise *de facto* powers which the Legislature would assuredly have confided to him if the emergency could have been foreseen, trusting that whatever he has honestly done for the safety of the State will be ratified by an Act of Indemnity and oblivion. There may not be time to appeal to the Legislature for special powers. The Governor may have upon his own responsibility, acting upon the best advice and information he can procure at the moment, to arm loyal subjects, to seize or secure arms, to intercept munitions of war, to cut off communications between the disaffected, to detain suspected persons, and even to meet armed force by armed force in the open field. If he hesitates the opportunity may be lost of checking the first outbreak of insurrection, whilst by vigorous action the consequences of allowing the insurgents to take the field in force may be averted. In resorting to strong measures he may have saved life and property out of all proportion to the mistakes he may honestly commit, under information which turns out to have been erroneous or treacherous. The very efficiency of his measures may diminish the estimate of the danger with which he had to cope, and the danger once past every measure he has adopted may be challenged as violent and oppressive, and everyone who advised him or acted under his authority may be called upon in actions at the suit of individuals dissatisfied with his conduct, to establish the necessity or regularity of every act in detail by evidence which it may be against public policy to disclose. (See the recitals of the Indemnity Act, 41 Geo 3, c 66.) The bare litigation to which he and those who acted under his authority may be exposed, even if defeated by proving the lawfulness of what was done, may be harassing and ruinous. Under these and like circumstances, it seems to be plainly within the competence of the Legislature, which could have authorised by antecedent legislation the acts done as necessary or proper for preserving the public peace, upon a due consideration of the circumstances to adopt and ratify like acts when done, or in the language of the law under consideration, to enact that they shall be "made and declared lawful and confirmed." Such is the effect of the Act of Indemnity in question, which follows the example of similar legislation in the Mother Country, and other Dominions and Colonies of the Crown. In England upon numerous occasions, from the fourteenth century downwards, similar laws have been passed after great troubles with the view of indemnifying

those who took arms to maintain the authority of the Crown, and of putting an end to occasions of discord even by way of a general Act of oblivion, prohibiting civil suits and criminal prosecutions in respect of acts done in the course of a rebellion. Amongst these are 1 Edw 3 st 1, c 1, and st 2 c 3, 14 Edw 3, c 2, and c 3 5 Rich 2, st 1, c 6 11 Rich 2, c 1, 21 Rich 2, c 14 7 Hen 4, c 18, 1 Hen 5, c 6, 1 Hen 7, c 6, 12 Car 2, c 11 (after the Great Rebellion), 1 Will & M st 2, c 8, 2 Will & M st 2, c 13 4 & 5 Will & M c 19 (after the revolution), 1 Geo 1, st 2, c 39 (after the rising of 1715), 19 Geo 2, c 20, and c 39, s 18 (after the rising of 1745), reciting as the gist of the matter that it was "reasonable that acts done for the public service, though not justifiable by the strict forms of law, should be justified by Act of Parliament." The principle of these enactments is indemnity for what was done in zeal for the public service, and a politic oblivion of the troubles and dissensions of the past, so that, to use the language of the Act of "grace and general pardon, indemnity, and oblivion," passed at the Restoration, "no mention be made thereof in time to come in judgment or judicial proceeding."

In like manner an Act of Indemnity was passed by the Irish Parliament after the rebellion of 1798, 39 Geo 3, c 3, amended by 39 Geo 3, c 50, and further enforced by 40 Geo 3, c 89. The earlier Act of the Irish Parliament, 3 Geo 3, c 19, is an instance, though but slight, of the same kind. And similar legislation appears to have taken place in the Colonies—for instance, at the Cape in 1836, 1847, and 1853, in Canada in 1838, in Ceylon in 1848, in St Vincent in 1862, and in New Zealand in 1865, 1866, and 1867. In 1866 the New Zealand Act was disallowed by the Crown, and all such legislation is subject to the same control. This series of precedents was acknowledged to exist, but it was contended that they were misleading, and that the Colonial Act was, notwithstanding, either altogether unauthorised and futile, or at least unavailing as regarded the defendant, or that, if valid, its operation was restricted to the limits of the Island, and ineffectual to bar an action in any other part of Her Majesty's Dominions. We proceed to consider these various objections.

Doubts were suggested in this Court upon what was taken for granted in the argument and judgment in the Court below, namely, the power of the Crown to create a legislative assembly in a settled Colony. Assuming, but by no means affirming (see the judgment of *Beaumont v Barrett* (1836), 1 Moo P C 59, not overruled upon this point 6 State Trials, 1,349, 20 State Trials, 301) that, as contended for by counsel for the plaintiff, the Colony in question though originally conquered from the Spaniards, is now to be deemed a settled, as distinguished from a conquered or ceded one, we consider these doubts as to the power of the Crown and of the local Legislature to be unfounded. There is even greater

reason for holding sacred the prerogative of the Crown to constitute a local Legislature in the case of a settled Colony, where the inhabitants are entitled to be governed by English law, than in that of a conquered Colony, where it is only by grace of the Crown that the privilege of self-government is allowed, though where once allowed it cannot be recalled. In Colonies distant from the Mother Country, to which writs to return members to the Imperial Parliament do not run, it is essential, both for the due government of the country in dealing with matters best understood upon the spot, and with emergencies which do not admit of delay, and also for giving subjects there resident the benefit of a voice by their representatives in the councils by which they are taxed and governed, that the Crown should have the power of creating a local parliament. Accordingly, it is certain that the Crown has in numerous instances granted charters under which houses of assembly and legislative councils have been established for the government of Colonies, whether conquered or settled, and that such councils and assemblies have from time to time made laws suited to the "emergencies of the Colony," which, of course, include all measures necessary for the conservation of peace, order, and allegiance therein. In effect, the inhabitants have been allowed to reserve the power of self-government through their representatives in the Colony, subject to the approval of the Crown and the control of the Imperial Legislature. *Beckford v Wade* (1805), 17 Ves 87, in which the Limitation Act of Jamaica was held to bar the title and not merely the remedy, is one of many instances in which the force of such legislation has been recognised here. And its lawfulness was taken for granted by Lord Wensleydale, in the leading case of *Kiellley v Carson*, in a judgment of the weightiest authority, delivered after two arguments, the second of which took place before eleven members of the Judicial Committee, comprising, besides Lord Wensleydale himself, Lord Lyndhurst, Lord Brougham, Lord Cottenham, Lord Campbell, Tindal C J, and Dr Lushington. In that judgment Lord Wensleydale, after observing that Newfoundland was a settled, not a conquered, colony, added "To such a Colony there is no doubt that the settlers from the Mother Country carried with them such portion of its common and statute law as was applicable to their new situation, and also the rights and immunities of British subjects. Their descendants have, on the one hand, the same law and the same rights, unless they have been altered by Parliament, and, on the other hand, the Crown possesses the same prerogative and the same powers of government that it does over its other subjects, nor has it been disputed in the argument before us, and therefore we consider it as conceded, that the Sovereign had not merely the right of appointing such magistrates and establishing such corporations and Courts of justice as he might do by the common law at home, but also that of creating a local legislative assembly,

with authority subordinate, indeed, to that of Parliament, but supreme within the limits of the Colony for the government of its inhabitants

This opinion was reflected upon in the argument, but it is in accordance with just principles of government, with the law laid down by the text writers, including Blackstone, J , 1 Com 107, 108 and it has now been drawn into doubt for the first time. We are satisfied that it is sound law, and that a confirmed Act of the local Legislature, lawfully constituted, whether in a settled or conquered Colony, has, as to matters within its competence and the limits of its jurisdiction, the operation and force of sovereign legislation, though subject to be controlled by the Imperial Parliament. The authorities cited for holding void certain acts of Colonial assemblies ordering imprisonment for contempt are inapplicable, being either cases in which there was no legislation, or cases in which the only question was whether the local legislation fulfilled the conditions assumed to be imposed by a governing Act of the Imperial Parliament, and those conditions were held to have been fulfilled. It was further argued that the Act in question was contrary to the principles of English law, and therefore void. This is a vague expression, and must mean either contrary to some positive law of England, or to some principle of natural justice, the violation of which would induce the Court to decline giving effect even to the law of a foreign sovereign State. In the former point of view, it is clear that the repugnancy to English law, which avoids a Colonial Act, means repugnancy to an Imperial statute, or order made by authority of such statute, applicable to the Colony by express words or necessary intendment, and that so far as such repugnancy extends and no further, the Colonial Act is void. The 28 & 29 Vict c 63, s 2, enacts that "Any Colonial Law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the Colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the Colony the form and effect of such Act, shall be read subject to such Act, order or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative. And to remove all doubt, s 3 of the same Act affirmatively enacts that "No Colonial Law shall be or be deemed to have been void or inoperative on the ground of repugnancy to the law of England, unless the same shall be repugnant to the provisions of some such Act of Parliament, order, or regulation as aforesaid." To what Act, or order, or regulation then is the Jamaica Act of indemnity and oblivion repugnant? It was argued to be repugnant to the Governors Act 11 & 12 Will 3 c 12, by which any Governor who shall be guilty of oppressing any of Her Majesty's subjects within his Government, or of any

other crime or offence, "may be tried and punished by indictment before the Court of King's Bench, or a special commission appointed by the Crown, and, further, remedy is provided in such a case by 42 Geo 3, c 85. The argument therefore is, that because the Imperial Legislature has provided that for oppression, crime, or offence of a Governor, he shall be criminally answerable in this country, therefore, it ought to be held incompetent for the local Legislature to protect him by an Act of indemnity or oblivion against the civil consequences of excessive zeal, however sincere, or mistaken exertions, however honest, in the suppression of a rebellion. In dealing with this argument, it should be borne in mind that upon an indictment against a Governor for conduct alleged to be oppressive and criminal circumstances, and, above all, motives may be taken into account which would be excluded in deciding the dry question of civil liability, and that the proceedings upon such indictment, as in all other criminal cases, would be subject to the control and restraint of the Crown. Whether the assent of the Crown had *pro tanto*, the effect of an amnesty, might be a point worth siding if necessary. Supposing that it had not, the proper course to test the alleged criminal responsibility is not by civil action with a suggestion of a possible indictment, but by actual indictment presented, if the facts warrant such a proceeding. If that course cannot be successfully resorted to, the objection of its possibility is a phantom, and if it can, the restraint of a civil action cannot affect its success. In this point of view therefore the operation of the Colonial Acts upon the present action is not "repugnant to the law of England. Another objection affecting the defendant personally was, that he was a necessary party to the passing of the Act, and therefore could take no benefit thereunder. This objection is founded upon a supposed analogy between legislative and judicial proceedings. In the latter as a rule, the judgment of an interested judge is avoidable and liable to be set aside by prohibition, error, or appeal, as the case may be, but it is not absolutely void, and persons acting under the authority of such a judgment before it is set aside by competent authority, would not be liable to be treated as trespassers. This was the opinion of the judges, acted upon by the House of Lords in *Dimes v The Grand Junction Canal Company* (1852) 3 H L Cas 786 and in case of necessity, as where all the judges of a Court, having exclusive jurisdiction over the subject matter, happen to be interested, the objection cannot prevail (*Ibid* and per Lord Cranworth, in *Ranger v Great Western Railway Company* (1854), 5 H L Cas 88. The supposed analogy between judicial and legislative proceedings is, moreover, imperfect. The Governor is no more a party to the Colonial Act than the Legislative Council or the House of Assembly, or, in legal theory, every inhabitant of the Island represented therein. If the objection were just in the case of

the Governor, then, by like reasoning, the Crown could derive no benefit from any Act of Parliament, a result alike contrary to experience and reason. The further objection to that section of the Colonial Act which empowers the Governor for the time being to decide whether any particular Act falls within its provisions does not arise. That section (which follows former precedents) does not appear to have been acted upon, and is not relied upon in the plea. Whether it be valid in this country may depend upon the further question whether it only affects procedure and evidence, or authorises a judgment *in rem* as to the character of particular Acts. It is further objected that the Colonial Law was contrary to natural justice, as being retrospective in its character and taking away a right of action once vested, and that for this reason, like a foreign law against natural justice, it could have no extra-territorial force. Retrospective laws are, no doubt, *prima facie* of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future Acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law. “*Leges et constitutiones futuris certum est dare formam negotiis, non ad facta præterita revocari, nisi nominatim et de præterito tempore et adhuc pendentibus negotiis cautum sit*.” Accordingly, the Courts will not ascribe retrospective force to new laws affecting rights, unless by express words or necessary implication it appears that such was the intention of the Legislature. But to affirm that it is naturally or necessarily unjust to take away a vested right of action by Act subsequent, is inconsistent both with the common law of England and the constant practice of legislation. If (for instance, from the common law) a mere stranger acting without authority at the time takes upon him to do an act of trespass in the name and for the benefit of an absent person, such professed agent becomes liable for his unauthorised act, and a right of action is acquired by the person against whom the wrong was committed, and yet the general rule of the common law, borrowed from the civil law, is that the person in whose name the act was done may, if he thinks fit, afterwards ratify and adopt it. Such ratification has the effect of a prior authority, and the result is that if the prior authority of the principal would not have justified the act, both the agent and the principal may be sued as trespassers, and that if such authority would have justified the act, that is if the principal could lawfully have authorised it beforehand, then the agent is also justified by matter *ex post facto*, and the vested right of action is extinguished. Nor is this principle applied exclusively to private transactions in which, if the act be unlawful in itself, ratification does not free the agent from responsibility. It has been equally applied to the exercise

of sovereign authority whereby the act of the agent, though originally unlawful, becomes by after ratification an act of State, the original right of action is divested, and all civil liability extinguished. A remarkable instance of this occurred in 1841, when Captain Denman, being sent by the Governor of Sierra Leone upon an expedition to the Gallinas to recover two British subjects supposed to be kept in slavery by a native chieftain, took upon him, quite apart from the specific object of the expedition, and without orders at the time, to liberate 300 slaves, and to destroy very large quantities of merchandise collected in slave dealing establishments belonging to foreigners, who afterwards brought actions in this country, which actions, as to the goods at least, would, but for the course afterwards taken, have undoubtedly been maintainable. The Queen's Government, however, upon receiving the despatches, ratified and confirmed what had been done, and that ratification was rightly held by the Court of Exchequer, upon a trial at Bar, to have the effect of exempting Captain Denman from all responsibility. The same law had, in effect, been acted upon by Lord Stowell, in *Sir Home Popham's Case*, as to a blockade established without orders and subsequently ratified (*The Rolla* (1807), 6 Rob Adm 364). The parties in these latter cases were foreigners, but that circumstance only touches the power of the Crown, and does not affect the question under consideration, whether it be against natural justice, which is due to all mankind alike, native or foreign, that a right of action should be divested by subsequent confirmation of competent authority, and it is clear that the common law of England does not so regard it. Turning to legislation, the same principle becomes more manifest from the multitude of instances in which it has been applied. The statute book of every Parliament in this century (beginning with 41 Geo 3, c 66, for indemnifying against actions for the arrest of persons suspected of treason) contains an Act or Acts of indemnity, or otherwise retrospective, by which numerous rights of action have been swept away. One instance of retrospective legislation, obviously just, to render valid the acts of persons who had fallen honestly into error, and by which infinite actions were killed in embryo, may suffice. When the result of the judgment, finally affirmed by the House of Lords (*The Queen v. Millis* (1844), 10 Cl & F 534), was to declare null and void numerous marriages celebrated in Ireland by Presbyterian ministers and others not episcopally ordained, one effect of the decision was to disclose, by the new lights thrown upon the relations of families, previously supposed to be legitimate, a prospect of vast and interminable litigation, springing from a host of vested rights of action of every description. This result was averted (in so far as it was possible, without making persons liable to prosecution who were not so liable before) by the Acts 5 & 6 Vict c 113, 6 & 7 Vict c 39 and 7 & 8 Vict c 81, s 83.

By these beneficial and just statutes the past marriages were ratified and confirmed as from the beginning, for it was in terms enacted that they should "be adjudged and taken to have been and to be" of the same force and effect as if canonically had and solemnized. A more general Act was afterwards passed to render valid certain marriages celebrated abroad, upon which doubt had been thrown by the same decision (12 & 13 Vict c 68, s 20). Indeed, it would fill a long chapter in history to enumerate all the instances of retrospective legislation. The retrospective Attainder Acts of earlier times, when the principles of law were not so well understood or so closely regarded as in the present day, and which are now looked upon as barbarous, and loosely spoken of as *ex post facto* laws, were of a substantially different character. They did not confirm irregular acts, but voided and punished what had been lawful when done. Blackstone, J, 1 Com 46, describes laws *ex post facto* of this objectionable class as those by which, "after an action indifferent in itself is committed, the Legislature then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it. Here it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law, he had therefore no cause to abstain from it, and all punishment for not abstaining must, of consequence, be cruel and unjust." The same distinction was elaborately pointed out in the judgment of the Supreme Court of the United States, cited as an authority for the plaintiff. In that case (*Calder v Bull* (1798), 3 Dal 389), it was held that an Act of the State of Connecticut passed to set aside a decree of a Court of Probate and grant a new hearing was valid, though the effect was ultimately to deprive the party in whose favour the first decision was made of the benefit of the decree. The case is chiefly valuable for the opinions expressed by the judges upon the construction of an express prohibition in the Federal Constitution, viz, "that no State shall pass any *ex post facto* law." The opinion of the Supreme Court is summarised in the following passage of the judgment of Chase, J, at p 391 —

Every *ex post facto* law must necessarily be retrospective, but every retrospective law is not an *ex post facto* law. The former only are prohibited. Every law that takes away or impairs rights vested agreeably to existing laws is retrospective and is generally unjust, and may be oppressive, and it is a good general rule that a law should have no retrospect, but there are cases in which laws may justly, and for the benefit of the community, and also for individuals, relate to a time antecedent to their commencement, as statutes of oblivion or of pardon. They are certainly retrospective, and literally both concerning and after the facts committed. But I do not consider any law

ex post facto within the prohibition that mollifies the rigour of the criminal law, but only those that create or aggravate the crime, or increase the punishment, or change the rules of evidence for the purpose of conviction. Every law that is to have an operation before the making thereof, or to commence at an antecedent time, as to save time from the Statute of Limitations, or to excuse acts which were unlawful before committed and the like, is retrospective. But such laws may be proper or necessary, as the case may be. There is a great and apparent difference between making an unlawful act lawful, and the making an innocent act criminal and punishing it as a crime.' And he adds, at p. 393 "I admit an act unlawful in the beginning may in some cases become lawful by matter of after fact." Besides this leading case of *Calder v Bull* (1798), 3 Dal 389, there are many decisions in the Supreme Court upon the same subject, the result of which is that a State law may be retrospective in its character, and may divest vested rights, and yet not violate the constitution of the United States, unless it also impairs the obligation of contracts, this being in terms thereby prohibited. (*The Charles River Bridge v The Warren Bridge* (1837), 11 Peters, 423.) The authority of the Supreme Court of the United States, so much relied upon for the plaintiff as illustrating the general principles of law upon which the decision of this question depends, thus turns out upon examination to be so far favourable to the validity of the Colonial Act. In fine, allowing the general inexpediency of retrospective legislation, it cannot be pronounced naturally or necessarily unjust. There may be occasions and circumstances involving the safety of the State, or even the conduct of individual subjects, the justice of which prospective laws made for ordinary occasions and the usual exigencies of society for want of prevision fail to meet, and in which the execution of the law as it stood at the time may involve practical public inconvenience and wrong—*summum jus summa injuria*. Whether the circumstances of the particular case are such as to call for special and exceptional remedy is a question which must in each case involve matter of policy and discretion fit for debate and decision in the Parliament which would have had jurisdiction to deal with the subject-matter by preliminary legislation, and as to which a Court of ordinary municipal law is not commissioned to inquire or adjudicate. As for the authorities referred to in illustration of this objection, *Folliott v Ogden* (1789), 1 H Bl 124, S C, 3 T R 726, was the case of an Act of attainder of a royalist by the New Jersey Legislature after the declaration and before the recognition of independence, and was decided partly on the ground that New Jersey was not a sovereign State at the time, and partly on the ground that the penal laws of one country are not taken notice of in another. *Wolff v Orholm*

(1817), 6 M & S 92, was the case of an act of confiscation, as prize, of a debt by a foreign Government contrary to the law of nations. Another instance might be given of foreign law not regarded elsewhere, viz, revenue laws relating to the customs, which, for some reasons not very obvious, have been put out of consideration, except in instances where they affected the essential form of contract. These cases are all, for obvious reasons, exceptional. The last objection to the plea of the Colonial Act was of a more technical character, that assuming the Colonial Act to be valid in Jamaica and a defence there, it could not have the extra-territorial effect of taking away the right of action in an English Court. This objection is founded upon a misconception of the true character of a civil or legal obligation and the corresponding right of action. The obligation is the principal, to which a right of action in whatever Court is only an accessory, and such accessory, according to the maxim of law, follows the principal, and must stand or fall therewith. *Quæ accessorium locum obtinent extinguuntur cum principales res preempta sunt*. A right of action, whether it arise from contract governed by the law of the place, or wrong, is equally the creature of the law of the place, and subordinate thereto. The terms of the contract or the character of the subject matter may show that the parties intended their bargain to be governed by some other law, but, *primâ facie*, it falls under the law of the place where it was made. And in like manner the civil liability arising out of a wrong derives its birth from the law of the place, and its character is determined by that law. Therefore an act committed abroad, if valid and unquestionable by the law of the country where it is done, cannot so far as civil liability is concerned be drawn in question elsewhere, unless it is by force of some distinct independent legislation, superadding a liability other than and besides that incident to the act itself. In this respect no sound distinction can be suggested between the civil liability in respect of a contract governed by the law of the place and a wrong.

The Courts of this country are said to be more open to admit actions founded upon foreign transactions than those of an European country, but there are restrictions in respect of locality which exclude some foreign causes of action altogether, namely, those which would be local if they arose in England, such as trespass to land (*Doulson v Mathews* (1792), 4 T R 503), and even with respect to those not falling within that description our Courts do not undertake universal jurisdiction. As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First the wrong must be of such a character that it would have been actionable if committed in England, therefore in *The Halley*

(1868), 5 Moo P C (N S) 262, the Judicial Committee pronounced against a suit in the Admiralty founded upon a liability by the law of Belgium for collision caused by the act of a pilot whom the shipowner was by that law compelled to employ, and for whom, therefore, as not being his agent, he was not responsible by English law. Secondly, the act must not have been justifiable by the law of the place where it was done. Therefore in *Blad's Case* and *Blad v Bamfield* (1673), 3 Swanst 603, Lord Nottingham held that a seizure in Iceland authorised by the Danish Government, and valid by the law of the place, could not be questioned by civil action in England, although the plaintiff, an Englishman, insisted that the seizure was in violation of a treaty between this country and Denmark—a matter proper for remonstrance, not litigation. And in *Dobree v Napier* (1836), 2 Bing N C 781, Admiral Napier having, when in the service of the Queen of Portugal, captured in Portuguese waters an English ship breaking blockade, was held by the Court of Common Pleas to be justified by the law of Portugal and of nations, though his serving under a foreign prince was contrary to English law, and subjected him to penalties under the Foreign Enlistment Act. And in *The Queen v Lesley* (1860), 29 L J M C 97, an imprisonment in Chili on board a British ship, lawful there, was held by Erie, C J, and the Court for Crown Cases Reserved, to be no ground for an indictment here, there being no independent law of this country making the act wrongful or criminal. As to foreign laws affecting the liability of parties in respect of bygone transactions, the law is clear that if the foreign law touches only the remedy or procedure for enforcing the obligations, as in the case of an ordinary statute of limitations, such law is no bar to an action in this country, but if the foreign law extinguishes the right, it is a bar in this country equally as if the extinguishment had been by a release of the party or an Act of our own Legislature. This distinction is well illustrated on the one hand by *Huber v Steine* (1835), 2 Bing N C 202, where the French law of five years' prescription was held by the Court of Common Pleas to be no answer in this country to an action upon a French promissory note, because that law dealt only with procedure and the time and manner of suit (*tempus et modum actionis institutendæ*), and did not affect the obligation of the contract (*valorem contractus*) and on the other hand, by *Potter v Brown* (1804), 5 East, 124, where the drawer of a bill at Baltimore upon England was held discharged from his liability for the non-acceptance of a bill here by a certificate in bankruptcy under the law of the United States of America the Court of Queen's Bench adopting the general rule laid down by Lord Mansfield in *Balantyne v Golding* (1784), Cooke's Bank Law, 487, and ever since recognised, that "what is a discharge

of a debt in the country where it is contracted is a discharge of it everywhere.' So that where an obligation by contract to pay a debt or damages is discharged and avoided by the law of the place where it was made, the accessory right of action in every Court open to the creditor unquestionably falls to the ground. And by strict parity of reasoning, where an obligation *ex delicto* to pay damages is discharged and avoided cases may possibly arise in which distinct and independent right, or liabilities, or defences are created by positive and specific laws of this country in respect of foreign transactions, but there is no such law (unless it be the Governors Act, already discussed and disposed of) applicable to the present case. It may be proper to remark, before quitting this part of the subject, that the Colonial Act could not be overruled upon either of these two latter grounds of objection without laying down that no foreign legislation could avail to take away civil liability here in respect of acts done abroad, so that for instance, if a foreign country after a great rebellion or civil war were to pass a general Act of oblivion or indemnity burying in one grave all legal memory alike of the hostilities, and even the private retaliations which are the sure results of anarchy and violence, it would, if the argument of the plaintiff prevailed, be competent for a municipal Court of any other country to condemn and disregard as naturally unjust or technically in effectual the law of a sovereign State disposing upon the same constitutional principles as have actuated our own Legislature of matters arising within its territory—a course which to adopt would be an unprecedented and mischievous violation of the comity of nations.

We have thus discussed the validity of the defence upon the only question argued by counsel touching the effect of the Colonial Act, but we are not to be understood as thereby intimating any opinion that the plea might not be sustained upon more general grounds, as showing that the acts complained of were incident to the enforcement of martial law. It is, however, unnecessary to discuss this further question, because we are of opinion with the Court below that the Colonial Act of Indemnity even upon the assumption that the acts complained of were originally objectionable, furnishes an answer to the action. The judgment of the Court of Queen's Bench for the defendant was right, and is affirmed.

(*Phillips v. Eyre* (1870), 40 L. J. Q. B. 28, Kelly, C. B. Martin, B., Willes, J., Channell, B., Pigott, B., Brett, J., and Cleasby, B., Exchequer Chamber.)
