

1878.

NEW ZEALAND.

“NEW ZEALAND JURIST” REPORT ON CASES OF SPENCE V. PEARSON, AND GILLON V. MACDONALD

(LETTER FROM MR. JUSTICE RICHMOND RELATIVE TO).

Laid on the Table by the Hon. Mr. Sheehan with the leave of the House.

Mr. Justice RICHMOND to the Hon. the COLONIAL SECRETARY.

SIR,—

Judges' Chambers, Wellington, 3rd October, 1878.

In the recent debate on the Judicial Commission Bill, several members of the House of Representatives appear to have founded their opinions upon a report, contained in the *New Zealand Jurist* for February last, of the cases of *Spence v. Pearson* and others, and *Gillon v. Macdonald* and others (3 *N.Z. Jurist*, N.S., 25). This has for the first time called my attention to the report in question, and I feel it to be my duty to point out to the Government certain misstatements therein which materially affect the merits of Mr. G. E. Barton's case.

1. It is made to appear that in the case of *Spence v. Pearson* the Judges declined to inform Mr. Barton on what ground they were refusing leave to appeal to the Privy Council. This is contrary to fact. The Chief Justice and myself, sitting in the Court of Appeal, distinctly decided that we had no power under the Order in Council of 16th May, 1871, either to grant or refuse an appeal. Our reason was clearly stated—namely, that the case in question was one *removed* for argument from the Supreme Court into the Court of Appeal, under section 19 of “The Court of Appeal Act, 1862,” and that the Order in Council applies only to cases in which the Supreme Court has given a decision, and there has been an appeal from that decision. There was no possibility of mistake upon this point. The whole argument turned upon the terms of the Order in Council, and the decision was expressly based upon the authority of a prior decision of the Court of Appeal, which was cited (*Brogden v. Miller*). Just before the application in *Spence v. Pearson*, Mr. Gordon Allan had applied for leave to appeal in a case similarly situated—namely, that of *Calder v. Duff*. The Court had given leave to appeal; but when Mr. Bell, who was opposed to Mr. Barton, raised the objection that the Court of Appeal had no jurisdiction, and cited the prior decision of the full Court of Appeal, the Judges revoked their determination in *Calder v. Duff*, and told Mr. Gordon Allan that his leave to appeal must depend upon the decision in *Spence v. Pearson*. It is therefore absolutely untrue that the Judges declined to say whether their refusal of Mr. Barton's application was on the ground of want of jurisdiction. It was fully allowed that both cases were proper cases to take to the Privy Council, and the only question was as to the power of the Court of Appeal.

2. The offensive language used by Mr. Barton during the morning sitting of the 30th January was in reference to a different matter. After the Court had intimated that it had no power to allow an appeal, Mr. Barton applied, in the same case of *Spence v. Pearson*, for leave to plead. Here again the same difficulty occurred, arising out of the peculiar provisions of the Court of Appeal Act in reference to cases removed from the Supreme Court under sections 18, 19, and 20 of the Act. It appeared that the Registrar of the Court of Appeal had already remitted the pleadings to the Supreme Court, along with a note of the decision of the Court of Appeal. The Chief Justice intimated a doubt whether the matter was not now out of the hands of the Court of Appeal, and whether the application ought not therefore to be made to the Supreme Court at Dunedin. I remarked that we must, if possible, avoid the inconvenience to the applicants of being bandied about between the two Courts; because it seemed possible that the Supreme Court at Dunedin might also doubt its power to give leave to plead after a decision of the Court of Appeal. Therefore the Judges informed Mr. Barton that he might take an order for leave to plead on the usual terms, for what it was worth; leaving him to make a similar application to the Supreme Court at Dunedin, but securing his clients, so far as we could, against the consequences of a refusal of jurisdiction by the Court at Dunedin. Our purpose was to secure the leave to plead *quodcumque viâ datâ*. It was upon this that Mr. Barton demanded from the Court an absolute decision whether they had, or had not, power to grant the leave to plead. Of this demand we took no further notice than to say that he might take or leave the order we had given him as he pleased. The particular case was fully provided for by the order we had made. On the general question it would have been inexpedient to give a decision, as the Chief Justice and myself were merely sitting to dispose of the residuary formal business of the Court of Appeal.