

*Sir R. Stout*: I would first repeat what I have submitted; and if one comes to look at what the Executive action has been, it will be seen that, in the payment of salaries and retiring-allowances, it seems to me that the Executive actually paid salary and retiring-allowance after the resignation had been gazetted, and that could not make Mr. Chapman still remain a Judge.

*Mr. Justice Williams*: Possibly there may be an explanation of the payment of salary to Mr. Chapman, and it is this: After he retired he was appointed temporary Judge for certain purposes, and he took sittings at Invercargill, and had a special Commission for the purpose. It may have been that there was an arrangement by which he was allowed to draw half-salary. However, the subsequent drawing of half-salary cannot affect the question. The point is whether the drawing from the 3rd of March to the 1st of April affects the case.

*Mr. Justice Denniston*: Your argument is that there is no power of appointment unless there is a vacancy. Making the assumption in favour of the Executive acting legally, would not the mere gazetting of another officer to the place imply the vacancy?

*Sir R. Stout*: The other side may say that not till gazetting does a vacancy take place. If that is so, the two things would be in conflict: the appointment of Mr. Justice Williams and of the late Mr. Justice Gillies before the resignation of Mr. Justice Chapman and Mr. Justice Gresson were gazetted. However, if any question arises upon that I will meet it hereafter. I may mention that Mr. Justice Gillies and Mr. Justice Williams were sworn in—the one on the 8th, and the other on the 14th of March. Possibly that may have been held as the acceptance of office.

*Mr. Justice Williams*: What are the dates?

*Sir R. Stout*: One on the 8th, and the other on the 14th—I think, your Honour, on the 14th.

*Mr. Justice Williams*: I think I was sworn in on the 8th.

*Sir R. Stout*: So the law, I now submit, remained till 1882, and that Act came into force on the 1st January, 1883. That Act—"The Supreme Court Act, 1882"—made certain provisions dealing with the appointment of Judges and the payment of their salaries. I intend to deal with the interpretation of the Act afterwards—I am just running through what may be termed the history of the matter. The Act has a general clause, section 5, appointing Judges, and it has an important proviso, "Provided that the Chief Justice and the Judges of the Supreme Court in office at the time of the commencement of this Act shall be the Chief Justice and Judges of the said Court, as if their appointments had been made under this Act; but their existing seniority shall be retained." It seems to me that this proviso must have been put in for some purpose, and I submit it may have been put in to cure any question that may have been raised about the appointment of Judges that were then on the Bench.

*Mr. Justice Denniston*: If it had not been in, there would have been no Bench. It is the only thing that preserves the existing Commissions, and that is quite sufficient reason for its going in, without curing anything.

*Mr. Justice Conolly*: It was singular that by inadvertence the Legislature forgot to make a similar proviso with regard to Registrars and other officers, and they had to be reappointed at the end of the year.

*Sir R. Stout*: I do not know that the Court would have held that the Commissions of the Judges existing then were impliedly repealed. I doubt that. However, this was put in to remove all doubts about it, because there was no doubt who the acting *de facto* Judges were at the time the Act came into force. There was a Commission issued dealing with the constitution and practice and procedure of the Supreme Court, and other things. The Commission is set out at length in the Appendix to the Journals of the House of Representatives, 1882, Vol. i, A.-3. That is the Commission: "Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith. To our trusty and loving subjects James Prendergast, Esquire, Chief Justice of the Supreme Court of our Colony of New Zealand, Alexander James Johnston, Esquire, Christopher William Richmond, Esquire, Thomas Ballantyne Gillies, Esquire, and Joshua Strange Williams, Esquire, all being Judges of the said Court." I submit there is a recognition of the Judges *de facto* under the seal of the colony, and I submit that, reading the Act—

*The Chief Justice*: That was before the Act.

*Sir R. Stout*: I submit that was a recognition under seal by Her Majesty of the Judges therein named being Judges *de facto* of the Supreme Court, and that, coupled with the proviso of the Act of 1882, section 5, cured, if there was need to cure, any invalidity in the appointment of the Judges then on the bench.

*The Chief Justice*: Was that Commission in His Excellency's own name.

*Sir R. Stout*: No, it was in the name of the Queen.

*Justice Denniston*: It is so far in favour of your contention that the proviso of the Act of 1858 did not use the same words, "in office," but "Chief Justice and Judges."

*Sir R. Stout*: If necessary, I can refer to American and other cases, and I intend to cite English cases. Unfortunately, I see that the American reports I wish to refer to are not in the library; but I can give the references. The cases will show that if the Judge was acting *de facto* that is sufficient; whether he was legally or illegally appointed is of no moment under this section 5 if he was *de facto* acting as Judge. Then, the Act of 1882, under section 11, provides that the salary of a Judge shall not be diminished during the continuance of the Commission. Under section 12 it is provided that the Governor may appoint Judges to act temporarily. Section 13 deals with the superannuation allowance, and section 14 that this superannuation allowance shall be paid monthly out of the general revenue of the colony; and so, in fact, there is an appropriation of the superannuation allowance without any further appropriation by Parliament. "The Civil List Act, 1873," was still remaining, and still remains, in force. I wish to refer very briefly to what was the law in England with reference to the appointment of Judges. I think it is necessary to do that, because I shall submit hereafter that it will help to the interpretation of the statute of 1882.