SESS. II.—1891.
NEW ZEALAND.

MR. W. B. EDWARDS

(PAPERS RELATING TO THE APPOINTMENT OF).

Presented to both Houses of the General Assembly by Command of His Excellency.

No. 1*.

W. B. EDWARDS, Esq., to the Hon. E. MITCHELSON.

DEAR SIR,— Wellington, 6th November, 1889.

Since my last communication with you on the subject of the proposed Commissionership I have had the opportunity of considering the matter more fully, and of conferring confidentially with one or two friends from different parts of the colony, who are leaders of the Bar.

The result is that I have come to the conclusion that the acceptance of this office would practically result in my retirement from the practice of my profession.

I could not accept a brief from or give an opinion to a solicitor who was concerned or might afterwards be concerned in any business before the Commission in any matter whatever, without being exposed to the imputation of being indirectly bribed.

In the public interest it would be improper that there should be any business relations whatever between the Commissioner and any one interested whether as party or solicitor in any matter which could come before him.

On the other hand it would be impossible for me to give up my practice at the Bar, which is not inconsiderable, for an appointment of quite an uncertain duration.

I have therefore come to the conclusion that I must decline the office of Commissioner even though you should be willing to fix the salary and allowances as those of a Supreme Court Judge.

In so doing allow me to thank you sincerely for the mark of confidence in me which is involved in the offer of the appointment.

The office is no doubt a high one, and the powers conferred upon the Commissioner exceed those now possessed by the highest Judge in the land.

I have been exceedingly anxious to accept the office if I could see my way to doing so without a ruinous loss, but to do so would, I am convinced upon mature reflection, result in the complete destruction of my present business connection both as a solicitor and at the Bar, and I am not in a position to hazard that.

If you will allow me to make a suggestion, it is that the only way in which you are likely to be able to obtain a leading member of the Bar for the office is by first creating him a Judge of the Supreme Court.

The work of the Commissioner could then be assigned to him, and he could without any material interference with his duties as Commissioner also undertake the circuit sittings of the Supreme Court at Gisborne and Napier.

This would be a great relief to the Judges of the Wellington and Auckland Judicial Districts, and would enable the business of the Supreme Court in the principal centres to be disposed of much more speedily and satisfactorily than is at present possible.

In the opinion of many laymen, as well as the leading members of the Bar, the appointment of an additional Judge cannot in any case be long delayed, and if the work of the Commission is likely to last, as you anticipate, for five years, and the fees are made (as they can be and in my opinion ought to be) sufficiently large to cover the cost of the Commission, the country would get the advantage of some judicial work without any extra cost; and those who are interested in matters coming before the Commission would have the satisfaction of knowing that their interests were dealt with by a judicial officer of the highest standing, who could have no interest, direct or indirect, to serve in connection with matters which came before him as Commissioner.

I am, &c.,

The Hon. E. Mitchelson, Wellington. W. B. EDWARDS.

* The original of this letter cannot be traced in the Native Office, and has therefore not been recorded with the other papers on the subject; but, as it has been included in the statement of defence in the case the Attorney-General and Mr. Edwards, recently before the Court of Appeal, it is inserted here. See page 46.

No. 2.

The Hon. E. MITCHELSON to W. B. EDWARDS, Esq.

DEAR SIR,— Wellington, 7th November, 1889.

I am in receipt of your letter of the 6th instant, and, in reply, while regretting that you have considered it necessary to decline the appointment which the Government sought to confer upon you, yet I cannot but admit that there is a good deal of reason shown in your letter for such refusal.

The question raised in the latter portion of your letter is of such importance that I shall submit it for the consideration of Cabinet, upon the return of the Premier to Wellington.

Yours, &c.,

W. B. Edwards, Esq., Solicitor, Brandon Street, Wellington. E. MITCHELSON.

No. 3.*

The Hon. the PREMIER to W. B. EDWARDS, Esq.

SIR,— Wellington, 1st March, 1890.

In reference to the conversation I had with you on the subject of the appointment of a Commissioner under section 20 of "The Native Land Court Acts Amendment Act, 1889," I have now the honour to inform you that His Excellency the Governor has been pleased to approve of your appointment to that office. It has appeared to the Government, and such appears to be the general feeling, that, for an office of such importance, involving such large interests, the Commissioner should have the status of a Judge of the Supreme Court, and therefore you will be appointed to that office also.

As you are aware, the demands on the time of the present Judges of the Supreme Court cause inconvenient but unavoidable delay in the despatch of business, and the leave of absence granted to Mr. Justice Richmond will aggravate the evil unless some provision is now made to meet it. The Government is averse to the appointment of a temporary Judge if it can be avoided, and they hope that the arrangement by which you will afford occasional assistance in the Supreme Court work will temporarily meet the requirements.

Your salary will be £1,500 per annum, the same as the present Puisne Judges.

Your commissions to the above offices will be at once forwarded to you.

I have, &c.,

W. B. Edwards, Esq., Wellington. H. A. ATKINSON.

No. 4.

W. B. EDWARDS, Esq., to the Hon. the PREMIER.

SIR,— Wellington, 5th March, 1890.

I have the honour to acknowledge the receipt of your letter of the 1st March, and to say that I accept the appointments therein named upon the terms therein mentioned.

I have, &c.,

The Hon. the Premier, Wellington. W. B. EDWARDS.

No. 5.

The Hon. W. R. RUSSELL to His Honour Mr. Justice EDWARDS.

SIR,— New Zealand, Department of Justice, Wellington, 6th March, 1890.

I have the honour to transmit to you the accompanying commission, under the hand of His Excellency the Governor and the seal of the colony, appointing you to be a Judge of the Supreme Court of New Zealand.

I also enclose a commission assigning you to hold the office of a Judge in bankruptcy.

It will be necessary for you to take the customary oaths before his Honour the Chief Justice, who has been authorised to administer them to you. I have, &c.,

His Honour Mr. Justice Edwards, Wellington. W. R. RUSSELL.

No. 6.

The Hon. W. R. RUSSELL to His Honour the CHIEF JUSTICE.

SIR,— New Zealand, Department of Justice, Wellington, 6th March, 1890.

I have the honour to transmit to you herewith an instrument under the hand of His Excellency the Governor and the seal of the colony authorising you to administer the oaths of office and allegiance to his Honour Mr. Justice Edwards.

Forms of oath are also enclosed. When duly signed I shall be obliged by your returning them to this office for record. I have, &c.,

His Honour the Chief Justice, Wellington. W. R. RUSSELL.

---

*Nos. 3, 4, 5, 6 and 7 were laid before Parliament in 1890. See correspondence relating to the appointment of Mr. Edwards (H.-24, 1890).

No. 7.

The Hon. E. MITCHELSON to W. B. EDWARDS, Esq.

SIR,— Native Office, Wellington, 6th March, 1890.

I have the honour to inform you that His Excellency the Governor in Council has been pleased to appoint you and Mr. John Ormsby, of Kopua, Waikato, to be Commissioners under section 20 of "The Native Land Court Acts Amendment Act, 1889," and enclose herewith the Order in Council of appointment.

I have communicated with Mr. Ormsby on the subject, and have forwarded him a copy of the appointment.

I have, &c.,

W. B. Edwards, Esq., Barrister, Wellington. E. MITCHELSON.

ONSLOW, Governor.

ORDER IN COUNCIL.

At the Government Buildings, at Wellington, this twenty-seventh day of February, one thousand eight hundred and ninety.

Present: The Honourable the PREMIER presiding in Council.

WHEREAS by section twenty of "The Native Land Court Acts Amendment Act, 1889," it is, among other things, enacted that it shall be lawful for the Governor, by Order in Council, to appoint two or more persons, of whom at least one shall be a Native, to be Commissioners for the purposes hereafter mentioned:

Now, therefore, His Excellency the Governor of the Colony of New Zealand, in exercise and pursuance of the power conferred upon him by the hereinbefore in part recited Act, and by and with the advice and consent of the Executive Council of the said colony, doth hereby appoint

WORLEY BASSETT EDWARDS, Esquire, of Wellington, Barrister, and

JOHN ORMSBY, of Kopua, Waikato (being a Native within the meaning of the said Act),

to be the Commissioners for the purposes mentioned in the said Act.

ALEX. WILLIS,
Clerk of the Executive Council.

NOTE.—His Honour the Chief Justice entertained doubts as to the Governor's power to appoint more than four Puisne Judges of the Supreme Court, except during pleasure, and, in consequence, Mr. Edwards informed the Government that, in deference to the Chief Justice's doubts, he (Mr. Edwards) would perform no judicial act as a Supreme Court Judge until after the meeting of the next session of Parliament. Subsequently, after a consultation with the Attorney-General, the Chief Justice, finding that Judges of the Supreme Court had on several occasions been appointed before vacancies had actually taken place, or a salary provided, felt it no longer necessary to press his doubts to the extent of standing in the way of Mr. Edwards acting as a Puisne Judge of the Supreme Court.

No. 8.

His Honour the CHIEF JUSTICE to the Hon. the PREMIER.

DEAR SIR HARRY,— Wellington, 10th March, 1890.

Is there any necessity for Mr. Edwards being sworn at present? As I understand, the arrangement you have made is that he is not to be occupied with judicial work till next circuits. If this is so, they either do not fall, or may be made not to fall, till July, by which time you may have obtained the sanction of the Legislature to the arrangement. I have not spoken with Mr. Edwards.

Yours, &c.,

JAMES PRENDERGAST.

No. 9.

The Hon. H. A. ATKINSON to the SOLICITOR-GENERAL.

Memorandum for the Solicitor-General.

Mr. W. B. EDWARDS has been appointed a Commissioner under "The Native Land Court Acts Amendment Act, 1889." The salary and allowances are those of a Puisne Judge of the Supreme Court. He has also been appointed a Puisne Judge of the Supreme Court, the object being to give his Court more dignity and independence, and that he may assist in the ordinary circuit work of the Supreme Court, the due performance of which in the Wellington District takes up so much of the time of the resident Judges that other legal work has often to stand over an undue time; and also especially to assist in this way during the absence on leave of Mr. Justice Richmond. These two appointments have been duly made under the hand of his Excellency, and gazetted.

The Chief Justice has been directed by the Governor, under the Promissory Oaths Act, to administer the judicial oath to Mr. Edwards. On Saturday, upon receipt of this direction from the Governor, the Chief Justice called upon me and informed me that in his opinion the appointment of Mr. Edwards as a Puisne Judge of the Supreme Court was illegal, and that he was afraid that he could not see his way to administer the judicial oath to Mr. Edwards, as by so doing he would compromise himself in an illegal appointment. The Chief Justice holds (as I understand him) that "The Supreme Court Act, 1882," must be read and interpreted with "The Civil List Act, 1873," and that, as this Act only provides the salaries for one Chief Justice and four Puisne Judges, there is no power to appoint more than that number, notwithstanding "The Supreme Court Act, 1882."

The opinion of the Solicitor-General is requested on the following questions: (1.) Is there legal authority for the appointment of Mr. Edwards to the offices above mentioned, and has he been duly appointed to them? (2.) Does the Chief Justice in any way commit himself to the question of the legality of the appointment of Mr. Edwards by administering the judicial oath under the Promissory Oaths Act? (3.) Can Mr. Edwards enter upon his judicial duties before he has taken the oaths under the Promissory Oaths Act, he being willing at any time to take such oaths?

H. A. ATKINSON.

Wellington, 11th March, 1890.

No. 10.

The SOLICITOR-GENERAL to the Hon. the PREMIER.

The Hon. the Premier.

MY answers to the several questions put are as follows:—

1. I think there is legal authority for the appointment of Mr. Edwards to the offices mentioned, and I do not think the power conferred by "The Supreme Court Act, 1882," is controlled by "The Civil List Act, 1873." I regard the latter merely as an Appropriation Act, setting apart certain funds for specific purposes. I may remark, too, there are former cases in point which are against the contention of the Chief Justice. The Civil List Act of 1858 provided for the salary of a Chief Justice and those of two Puisne Judges. In September, 1862, the Civil List Act of that year provided a lump sum of £6,200 for "Judges," and the Act was reserved for the Royal assent. In October, 1862, Mr. Richmond was appointed a Judge of the Supreme Court under an Act the terms of which are identical with that now in force. Again, in 1863, the Civil List Act of that year provided a lump sum of £7,700 for "Judges," which Act was reserved as before; and in March, 1864, Mr. Justice Chapman was appointed. In neither of these cases could the Acts in question have received the Royal assent before the appointments were made.

2. I do not think he does. He is called upon only to perform a ministerial duty pursuant to the direction of the Governor.

3. I think Mr. Edwards is required to take the oaths prescribed by "The Promissory Oaths Act, 1873," and that he ought not to enter upon the duties of his office without doing so.

11th March, 1890.

W. S. REID.

No. 11.

His Honour the CHIEF JUSTICE to the Hon. the PREMIER.

DEAR SIR HARRY,—

I do not think I can see you before to-morrow morning; but in meantime send enclosed for your perusal. I am not sure that I have abandoned my intentions expressed this morning; but you see I am not unreasonable in my doubts and fears.

Yours, &c.,

J. PRENDERGAST.

No. 12.

His Honour the CHIEF JUSTICE to His Honour Mr. Justice DENNISTON.

(Urgent telegram.)

His Honour Mr. Justice Denniston, Supreme Court, Christchurch. Wellington.

WHAT appears to me a serious question has arisen. I have received a Governor's authority or appointment, under "The Promissory Oaths Act, 1873," to swear in Mr. Edwards. I am informed by the Prime Minister that Mr. Edwards is appointed a Judge of the Supreme Court *quamdiu*, and not under the 12th section of the Supreme Court Act. The Government are advised, I understand, that they can, under section 5, appoint any number of Judges during good behaviour, notwithstanding "The Civil List Act, 1873." I have privately informed the Prime Minister that I seriously doubt the authority to appoint more than those four for whom salaries are provided. I do not raise here the constitutional questions involved, but the legal question only.

Will you advise—(1.) In your opinion, is the power to appoint limited in law to the four for whom salaries are provided? (2.) If your opinion is that the power is limited in law, shall I not be compromised as Judge by administering the oath? (3.) Whichever way your opinion is, say whether I may make it known to the Government, and, if so, whether only expressly unofficially or unreservedly, as it is intended that Mr. Edwards shall not perform judicial functions except during Richmond, J.'s, absence, and during that time circuit work only, commencing in July next, but be employed as Commissioner under "The Native Land Act, 1889," and paid as such. I have suggested that I, at any rate, ought not to be asked to administer the oaths till after Parliament has met; but I may be pressed to administer the oath at once.

J. PRENDERGAST.

No. 13.

Mr. Justice DENNISTON to His Honour the CHIEF JUSTICE.

(Urgent telegram.)

His Honour the Chief Justice, Wellington. Christchurch, 12th March, 1891.

I THINK it very doubtful if section 5 authorises appointment Judges beyond four. The words "such other Judges as Governor may appoint" may be read "as may lawfully appoint." Sections 11, 12, and 13 seem to assume every Judge fixed annual salary (see especially 12). Section 2, Civil List Act, speaks of "the" Judge, and temporary appointments provided by 13, Supreme Court Act.

(2.) Am satisfied you not justified administering judicial oath to person not in your opinion coming within first schedule. (3.) This expression of opinion is at your disposal unreservedly. If Judge appointed under section 5, cannot see how his right and duty to perform all judicial duties, including Court of Appeal, can be limited. J. E. DENNISTON,
Judge of Supreme Court.

No. 14.

Mr. Justice RICHMOND to His Honour the CHIEF JUSTICE.

(Urgent telegram.)
His Honour the Chief Justice, Wellington. Blenheim, 12th March, 1890.
(1.) I AM of opinion that the power is not limited in law to the four for whom salaries are provided. (3.) I have no objection to the Chief Justice, in communication with the Government, making any use of my opinion which he thinks proper. I consider the appointment without previous permanent provision for the salary is open to objection on constitutional grounds. If the Chief Justice continues to entertain doubt as to the legality of the appointment, he should certainly not be asked to swear in Mr. Edwards. C. W. RICHMOND.

No. 15.

Mr. Justice WILLIAMS to His Honour the CHIEF JUSTICE.

(Urgent telegram.)
His Honour the Chief Justice, Wellington. Dunedin, 12th March, 1890.
I AGREE with you in seriously doubting authority. If appointment is not justified by law you could no doubt compromise yourself by administering oath. Constitutional question cannot be entirely severed from legal question, because in a question of construction presumption would be that Legislature did not intend to override recognised constitutional principles. I think, at any rate, you should have the fullest opportunity of discussing the matter with the other Judges before being called upon to administer the oath, and also that you should hear what the Attorney-General has to urge. If appointment is within the law, then, however contrary to constitutional practice you might consider it, of course you are bound to administer the oath. What judicial functions is it intended that Mr. Edwards is to perform is quite beside the question, as the duties of a Judge are fixed by statute. You can show this to Government, either unofficially or otherwise, as you think desirable. JOSHUA S. WILLIAMS.

No. 16.

Mr. Justice CONOLLY to His Honour the CHIEF JUSTICE.

(Urgent telegram.)
His Honour the Chief Justice, Wellington. Auckland, 12th March, 1890.
SECTION 5 of Supreme Court Act would appear on first view to give the Governor power to appoint an unlimited number of Judges during good behaviour; but, taking into account the limitation of salaries to four, in addition to the Chief Justice, by the Civil List Act, and also that section 12 of the Supreme Court Act provides for the appointment and payment of acting or temporary Judges, I am of opinion (1) that the power to appoint permanent Judges is limited to those for whom salaries are provided by the Civil List Act, as otherwise Mr. Edwards would remain a Judge for life or during good behaviour, although without salary or any future claim for pension, despite the return to work of Justice Richmond; (2) that you would be justified in declining to administer the oath for an office which cannot be made; (3) that if you hold, as I do, that an increase in the number of permanent Judges can only be made by Act of Parliament, you may at least decline to administer the oath until Parliament has passed either an amending or a Declaratory Act; (4) you may make my opinion known to the Government in any manner that you may think fit.
EDW. T. CONOLLY,
Judge of Supreme Court.

No. 17.

The Hon. Sir F. WHITAKER to the Hon. the PREMIER.

(Confidential telegram. Take precedence.)
The Hon. Sir H. A. Atkinson, Wellington. Auckland, 11th March, 1890.
I AM of opinion that the Governor, under "The Supreme Court Act, 1882," has full power to appoint Mr. Edwards as a Judge of the Supreme Court, either under clause 5 or clause 12 of the Act. The advantage of an appointment under the latter clause is that it contains an appropriation of salary. "The Civil List Act, 1873," is merely an Appropriation Act, and was not intended to limit, and does not limit, the power of appointment conferred by "The Supreme Court Act, 1882." The swearing-in is a purely ministerial Act, involving no responsibility, constitutionally or otherwise, on the part of the administrator of the oath, who has no constitutional ground, that I can see, on which to base a refusal to act. In fact, I fail to see any constitutional question involved. There may be a question as to the propriety of the appointment, and an appropriation for salary, if asked for, may be refused; but this is a matter exclusively between the Assembly and the Executive Government. If the Chief Justice has scruples about the administering the oath, the only alternative I see is the substitution of some one else to do so. FRED. WHITAKER.

No. 18.

W. B. Edwards, Esq., to the Under-Secretary, Native Department.

Sir,— Wellington, 26th March, 1890.

I have the honour to inform you that I have appointed Mr. Frank E. Wilson my Associate, and Secretary to the Commissioners appointed under the 20th section of "The Native Land Court Acts Amendment Act, 1889," and that Mr. Wilson has entered upon the performance of his duties.

I have, &c.,

The Under-Secretary for Native Affairs, Wellington. W. B. Edwards.

No. 19.

The Hon. the Minister of Justice to the Hon. the Colonial Treasurer.

(Memorandum.) Department of Justice, Wellington, 1st April, 1890.

It has been decided that the salary to be paid to Mr. Justice Edwards shall attach to the office of Judge of the Supreme Court, and not to the office of Native Commissioner; but, as the Civil List provides for four Puisne Judges only, it will be necessary for the present to charge Mr. Justice Edwards's salary of £1,500 a year to "Unauthorised expenditure." Will you be so good as to sanction this charge. W. R. Russell.

Approved.—T. W. Hislop.—10th April, 1890.

No. 20.

The Under-Secretary, Native Department, to W. B. Edwards, Esq.

Sir,— Native Office, Wellington, 2nd April, 1890.

I have the honour to acknowledge the receipt of your letter of the 26th ultimo, in which you state that you have appointed Mr. Frank E. Wilson your Associate and Secretary, and, in reply, am directed by the Hon. Mr. Hislop—in the absence of the Hon. the Native Minister—to inform you that your action has been approved. Your Associate has been authorised to receive an allowance at the rate of 17s. 6d. a day, exclusive of Sundays, when acting as secretary to the Commission, but no salary as Associate will be paid. The rate of pay which has been authorised is to cover all travelling-expenses excepting cost of transit.

I have, &c.,

W. J. Morpeth,

(For Under-Secretary.)

Mr. Commissioner Edwards, Government Buildings, Wellington.

No. 21.

The Under-Secretary for Justice to the Hon. the Minister of Justice.

Hon. Minister of Justice.

Is a Bill to be prepared to amend the Civil List Act to allow of the appointment of one or more additional Judges of the Supreme Court? If so, should not instructions on the subject be now given? C. J. A. Haselden.

24th April, 1890.

A Bill has been prepared, and is now in the hands of Captain Russell to introduce.—Fred. Whitaker.—June, 1890.

No. 21A.

SUPREME COURT.

ANALYSIS.

A Bill intituled

An Act to amend "The Supreme Court Act, 1882," and to provide for the Payment of an Additional Judge.

Whereas doubts have been raised as to the validity of the appointments of some of the Judges of the Supreme Court, and it is essential that all such doubts should be set at rest: And whereas it is desirable that the number of Judges who may be appointed by His Excellency the Governor in the name and on behalf of Her Majesty should be limited to the number for whom salaries are provided by the General Assembly:

Be it therefore enacted by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:—

1. The Short Title of this Act is "The Supreme Court Act, 1890."

2. Every appointment of a Judge of the Supreme Court heretofore made by the Governor for the time being of the Colony of New Zealand is hereby declared to be and to have been valid and effectual to all intents and purposes whatsoever from the date of every such appointment.

3. It shall not be lawful for the Governor, under section five of "The Supreme Court Act, 1882," to appoint more Judges of the Supreme Court than the number for whom salaries are provided by Act of the General Assembly.

4. In addition to the sum of seven thousand seven hundred pounds payable to Her Majesty by "The Civil List Act, 1863," for defraying the expenses of the salaries of the Judges of the Supreme Court, there shall be payable to Her Majesty every year, commencing with the second day of March last, the further sum of one thousand five hundred pounds, to be applied in paying the salary of an additional Puisne Judge of the said Court.

No. 22.

The Hon. E. MITCHELSON to Mr. Commissioner EDWARDS.

SIR,— Native Office, Wellington, 14th May, 1890.

Ministers have had under their consideration in Cabinet the question of fees to be charged in respect of matters brought before Commissioners under "The Native Land Court Acts Amendment Act, 1889," and are of opinion that amendments and reductions in the following items might be desirable.

The third item on the schedule: Ministers consider that the last clause in the column under "Amount of Fees and Mode of Calculation" should be amended by the omission of the words "but in no case to be less than £20." In the fourth item, the amount should be reduced from £5 to £2, and the word "three" struck out from the paragraph in the first column. In the fifth item, the amount to be reduced from 10s. to 5s. In the sixth item, the words "in no case to be less than £5" to be struck out. In the last item, it is not clear whether the fee of 10s. includes summons to witness: if so, it is considered too much, unless the document may include more than one. It is desirable that you should cause a notification to be issued at your earliest convenience, giving the schedule of fees, with amendments as I have indicated.

As regards fixing your place of residence, the Government have not yet been able to come to a decision in the matter; in the meantime you may consider Wellington your head-quarters, and you will be entitled to draw your travelling-allowance at the authorised scale when absent on duty elsewhere. It is the intention of the Government to introduce legislation during the coming session to amend the Civil List Act so as to provide for the payment of six Judges instead of five, the sixth Judge being yourself.

Referring to our conversation respecting the remuneration of your Associate, who is acting-secretary to the Commission, I have to inform you that the amount of 17s. 6d. per diem, which he receives while so employed, is to cover all expenses except transit. In fixing this amount the Government have regard to the pay of Clerks of the Native Land Court, who perform responsible duties, and who receive when employed away from their places of residence 15s. per diem, and 10s. per diem when at their places of residence. Many of these gentlemen are experienced and capable clerks. The Government are therefore unable to increase the amount paid to your secretary.

I have, &c.,

His Honour Mr. Commissioner Edwards, Wellington. E. MITCHELSON.

No. 23.

His Honour the CHIEF JUSTICE to the Hon. the PREMIER.

MY DEAR SIR HARRY ATKINSON,— Wellington, 10th June, 1890.

I am not sure that you know that there is now and is likely to be a very considerable pressure of judicial business in the Wellington District. I have adjourned Napier sittings to the 21st July, thinking that that would give ample time for the passing of any measure you propose to submit. It is intended to ask Mr. Justice Conolly to take these sittings, and Mr. Justice Edwards to take his place at Auckland while at Napier: this is necessitated by the fact that Mr. Justice Edwards has been engaged on several of the cases. The work at Napier is likely to take four or five weeks. There is a good deal of work in Wellington itself.

My object in writing is that you should know that the services of Mr. Justice Edwards in the Supreme Court are urgently required.

Yours, &c.,

JAMES PRENDERGAST.

No. 24.

Mr. Commissioner EDWARDS to the Hon. the NATIVE MINISTER.

SIR,— Nelson, 3rd July, 1890.

As I perceive from the report of the proceedings in Parliament that it has been stated by Mr. Ballance that I have been so connected with Native matters as to render my appointment to the office of Commissioner under the Native Lands Act of 1889 improper, I desire to say most emphatically that this statement is in every particular untrue.

Two cases appear to have been referred to in support of this statement, both of which are reported in the New Zealand Law Reports—viz., Seymour *v.* Macdonald, 5 N.Z.R., C.A., 167 (April and June, 1887), and *In re* the Koterapaia Block, 3 N.Z.L.R., C., 54. Both of these cases are upon pure matters of law, the first simply to determine the question as to whether under certain circumstances it was the duty of the Chief Judge of the Native Land Court to make the inquiries directed by section 24 of "The Native Land Administration Act, 1886," and the second to determine the procedure of the Native Land Court under certain circumstances. A reference to the reports will

show fully the questions raised and argued. In neither case was there or could there be any question as to the merits, and in both cases I acted merely as counsel, and never saw or knew the parties.

The question of the *bona fides* of Mr. Seymour's transactions was in the year 1888 the subject of a judicial investigation in the Supreme Court and the Court of Appeal (see Seymour *v.* Apiata, 6 N.Z.L.R., 331); but in this case I was not retained by Mr. Seymour. The practical commentary upon the charge against me with respect to Seymour's application is, that this case has now been inquired into by the Commissioners to the complete satisfaction of the Natives who are alleged to have been wronged; an agreement has been come to between the parties in open Court; and a report, which was approved by counsel for all persons interested in the block, has been made by the Commissioners. With regard to the Koterapaia case, I am not aware whether it is to come before the Commissioners. If so, a reference to the report will show that it was, at all events, impossible that I could foresee this, as his Honour Mr. Justice Richmond decided upon the facts stated by the Native Land Court that a good title could, under the circumstances, be made; and such reference will further show that, even if the block does come before the Commission for inquiry, it is quite impossible that my judgment can be biassed by the fact that I argued a bare point of law, which was, as it happens, decided in favour of the person for whom I appeared as counsel.

The fact that these two cases are relied upon to show my unfitness for the office shows clearly how industriously the matter has been inquired into to find matter to allege against me, and how absolutely groundless are the charges that have been made. It shows further that Mr. Ballance has been prompted by some person resident in Gisborne who probably has a personal object to serve, as no other person could know whether or not the Koterapaia Block is likely to be the subject of an inquiry before the Commission.

I have, &c.,

The Hon. the Minister for Native Affairs, Wellington. W. B. EDWARDS.

No. 25.

The Hon. the NATIVE MINISTER to Mr. Commissioner EDWARDS.

SIR,— Native Office, Wellington, 10th July, 1890.

I have the honour to acknowledge the receipt of your letter of the 3rd instant, in which you deny the accuracy of the statement made in Parliament by the Hon. Mr. Ballance to the effect that you have been so connected with Native matters as to render your appointment to the office of Commissioner improper.

I have, &c.,

Mr. Justice Edwards, Native Lands Commissioner, Blenheim. E. MITCHELSON.

No. 26.

Mr. Commissioner EDWARDS to the UNDER-SECRETARY, Native Department.

SIR,— Judge s Chambers, Wellington, 11th August, 1890.

I have the honour to inform you that Mr. Frank E. Wilson has resigned his appointment as secretary to the Native Land Commission.

I have, &c.,

The Under-Secretary, Native Department, Wellington. W. B. EDWARDS.

No. 27.

Mr. Justice EDWARDS to the UNDER-SECRETARY for JUSTICE.

SIR,— Judge's Chambers, Wellington, 11th August, 1890.

I have the honour to inform you that I have appointed Mr. Edmond T. Sayers my secretary in the place of Mr. Frank E. Wilson, who has resigned his appointment.

I have, &c.,

The Under-Secretary, Department of Justice, Wellington. W. B. EDWARDS.

No. 28.

The UNDER-SECRETARY, Native Department, to Mr. Justice EDWARDS.

SIR,— Native Office, Wellington, 15th August, 1890.

I have the honour to acknowledge the receipt of your letter of the 11th instant, in which you state that Mr. Frank E. Wilson has resigned his appointment as secretary to the Native Land Commission, and, in reply, to inform you that the Hon. the Native Minister has accepted Mr. Wilson's resignation.

I have, &c.,

T. W. LEWIS.

Mr. Justice Edwards, Native Lands Commissioner, Judge's Chambers, Wellington.

No. 29.

Mr. Commissioner EDWARDS to the Hon. the NATIVE MINISTER.

SIR,— Judge's Chambers, Wellington, 20th September, 1890.

I have the honour to call your attention to the necessity of making immediate provision for the appointment of a secretary to the Native Land Commission.

Since the retirement of Mr. Wilson there has not, until recently, been much to do; but a large number of applications have now been lodged, and it is necessary that a secretary should at once be appointed.

With a view to curtailing as much as possible the expense of the Commission, I am willing that my secretary should act also as Secretary to the Commission; but he must, of course, receive some extra remuneration for so doing. I would suggest to you that a very moderate remuneration, considering the importance and responsibility of the duties, would be £2 10s. per week, in addition to his salary of £2 per week as my secretary. This, of course, is in addition to the travelling-allowances to which, in any case, he is entitled as my secretary when travelling in attendance on me.

It is not practicable to divide the time occupied by Supreme Court work from that occupied by the duties of the Commission. There is always something to be done with regard to the Commission. At the present time there is a great deal to be done; yet the work of the Supreme Court must go on as usual. It is therefore necessary that the salary should be paid continuously.

I have, &c.,

The Hon. the Minister of Native Affairs, Wellington. W. B. Edwards.

No. 30.

The Hon. the Native Minister to Mr. Commissioner Edwards.

Sir,— Native Office, Wellington, 22nd September, 1890.

I have the honour to acknowledge the receipt of your letter of the 20th instant, in which you call my attention to the necessity for making immediate provision for the appointment of a secretary to the Native Land Commission, and suggest that your secretary should act as secretary to the Commission at an extra remuneration of £2 10s. per week to be paid continuously.

In reply I have to inform you that, as it is necessary to keep down the expenditure as much as possible, I will arrange that one of the permanent clerks of this office can act as clerk to the Commission, and, on receipt of your reply, will give directions for him to wait upon you, and receive your instructions.

I have, &c.,

His Honour Mr. Commissioner Edwards, Wellington. E. Mitchelson.

No. 31.

Mr. Commissioner Edwards to the Hon. the Native Minister.

Sir,— Judge's Chambers, Wellington, 20th September, 1890.

I have the honour to inform you that among other applications for inquiry made to the Native Land Commissioners there are several from the Auckland District, some relating to land in the Waikato district and some to land in the Tauranga district.

When Mr. Commissioner Ormsby was appointed I was informed that it was not contemplated that he should sit for the consideration of any claims in the Auckland District. I am not aware whether this extends to lands at Tauranga, or whether it is limited to lands in the district in which Mr. Commissioner Ormsby resides. It will be necessary to make provision for hearing claims which are not to be dealt with by Mr. Commissioner Ormsby.

I shall probably be able to make arrangements to deal with the Tauranga and Waikato claims during the ensuing long vacation. If this is not done, it may probably be difficult for me to hear these claims for a very considerable time, owing to my duties in the Supreme Court here. I cannot, however, fix any time for hearing these claims until I have learned from you what arrangements are contemplated with respect to the Native Commissioner.

I have, &c.,

The Hon. the Minister of Native Affairs, Wellington. W. B. Edwards.

No. 32.

The Hon. the Native Minister to Mr. Commissioner Edwards.

Sir,— Native Office, Wellington, 22nd September, 1890.

Referring to your letter of the 20th instant, I have the honour to request you will be good enough to inform me of the respective localities of the land in the Waikato district, in respect of which you have received applications for inquiry. Upon this information being supplied I shall ascertain whether there will be any objection to Mr. Commissioner Ormsby dealing with the cases in question.

I have, &c.,

His Honour Mr. Commissioner Edwards, Wellington. E. Mitchelson.

No. 33.

The Hon. E. Mitchelson to Mr. Commissioner Edwards.

Sir,— Native Office, Wellington, 22nd September, 1890.

Referring again to your letter of the 20th instant, with reference to your making arrangements to deal with the Tauranga and Waikato claims during the ensuing long vacation, I notice that you remark that if this is not done it may probably be difficult for you to hear these claims for a very considerable time, owing to your duties in the Supreme Court in Wellington.

I desire to remark that it was understood by the Government that your appointment as a Judge of the Supreme Court was for the purpose of giving you proper status as Commissioner, and that such appointment was to be subsidiary to that of Commissioner, and that the work of the Commissioner's Court was not to be in any way subject to or superseded by Supreme Court duties.

The Government wish to bring this matter under your notice, because it would appear, from the paragraph of your letter above quoted, that you regard your Supreme Court duties as taking precedence of the work for which you were specially appointed, and which the Government consider it is of the greatest importance should be proceeded with without any delay or hindrance whatsoever.

I have, &c.,

His Honour Mr. Commissioner Edwards, Wellington. E. MITCHELSON.

No. 34.

The Hon. E. MITCHELSON to Mr. Commissioner EDWARDS.

SIR,— Native Office, Wellington, 20th September, 1890.

I should feel obliged by your informing me when you propose to resume the work of the Commission. My present object in making this inquiry is to be able to inform Lieut.-Colonel Porter, who has been temporarily employed during the interval on land-purchase duty. Colonel Porter's work in this capacity will remain for the present in abeyance, and he will therefore be off pay until you are in a position to employ him. I may add that Colonel Porter's remuneration as interpreter can only be allowed while he is actually engaged in the work of the Commission.

I have, &c.,

His Honour Mr. Commissioner Edwards, &c., Wellington. E. MITCHELSON.

No. 35.

Mr. Commissioner EDWARDS to the Hon. the NATIVE MINISTER.

SIR,— Judge's Chambers, Wellington, 23rd September, 1890.

In reply to your letter of the 20th September, No. 982, I have the honour to inform you that I propose at once to take the necessary steps to have the applications for inquiry already lodged gazetted for hearing, but that it will not be possible for me to sit to take any claims (save any that may be properly heard in Wellington, if there should be any such) until after the termination of the Nelson and Blenheim circuit sittings of the Supreme Court in November next.

I anticipate that I shall be able to hold a Commission Court early in December; and my present intention is (although I do not consider myself in any respect bound to do so) to sit thence continuously throughout the long vacation in the Supreme Court, which lasts from the 20th December to the 31st January.

The sittings of the Supreme Court for 1891 have not yet been fixed, and will not be fixed until the next sitting of the Court of Appeal; but I have little doubt that I shall be able to so arrange as to be able to give the whole of February also to the Commission Court. I anticipate, therefore, that I shall be able to give three months continuously to the Commission Court, beginning early in December next. During that time, if the parties have properly prepared their cases, it will, I believe, be possible to dispose of all the applications at present lodged and any others which may then be ripe for hearing. There will be some work for the interpreter as soon as the secretary is appointed and the necessary notices are prepared.

I have, &c.,

The Hon. the Minister of Native Affairs, Wellington. W. B. EDWARDS.

No. 36.

Mr. Commissioner EDWARDS to the Hon. Mr. MITCHELSON.

DEAR MR. MITCHELSON— Wellington, 23rd September, 1890.

I have received your official reply as to the appointment of a secretary to the Native Land Commission, and before replying officially to it I think it as well to write you informally to call your attention to the matter in a way which I cannot so well do officially.

It appears to me that, in proposing that an ordinary clerk of the Native Department shall act as secretary to the Commission, you must be unaware that the secretary has to perform substantially the same duties as a Registrar of a Court, as well as to attend to correspondence, &c. It is quite impossible that any person who has not already had experience of Courts can satisfactorily discharge these duties without an amount of tuition and supervision which I have neither the leisure nor the inclination to give him.

In dealing with this matter I must necessarily also refer to the second letter of this date with respect to my own status, and, in doing so, I desire first of all to say that I object to the tone of that communication, as seeming to imply that my position is that of a Commissioner with the status of a Judge. That is not, and never has been, my understanding of the matter, and I would not have accepted the office on those terms. My position is that of a Judge, with the special duties of Commissioner added to the higher office.

You cannot have forgotten that shortly after my appointment—I believe, in fact, before any formal appointment was made, but after it had been determined upon and announced—a statement appeared in the *New Zealand Times* that I was not to sit in the Court of Appeal; and that

immediately thereafter I saw you and told you that I could not consent to any such arrangement, and that it was not my understanding of the arrangement which had been made between Sir Harry Atkinson and myself. That arrangement to which I referred in my interview with you was, in brief, that if any vacancy occurred in the existing number of Judges before the work of the Commission was finished, I should not, without the concurrence of the Ministry, claim to throw up the work of the Commission and to fill that vacancy. There never was any arrangement, agreement, or understanding of any kind whatever that I would not sit in the Court of Appeal; and with this, at the interview to which I have referred, you completely agreed. I then stated that I intended to sit in the Court of Appeal, and that to abstain from doing so would, in my opinion, impair my status and my usefulness to the public service.

I see no reason whatever to alter my opinion upon this point; indeed, in view of the very gross abuse and slander which I have had to endure daily, without being able in any way to vindicate myself, I see the very strongest additional reason for declining to consent to any course which would amount to an admission that my status is inferior to that of any other Judge upon the bench.

With regard to the Supreme Court duties, also, the arrangement, so far as there is any arrangement, is by no means what is inferred in your letter of yesterday's date. It is stated in Sir Harry Atkinson's letter to me of the 1st March last that it was intended that I should render occasional assistance in the Supreme Court work during the absence on leave of His Honour Mr. Justice Richmond; and since then His Honour the Chief Justice has pointed out to the Premier that it is impossible that the work of the Supreme Court could be got through unless assistance were forthcoming, and he has been told that I was to render that assistance. Since that I have rendered the requisite assistance, without, of course, any interference with the Commission, as there has been no work for the Commission to do.

If I correctly understand your letter, the position the Ministry take is this: That, now that applications have been lodged with the Commissioners, I must at once drop the Supreme Court work, and proceed with the inquiries before the Commission. It is a matter of indifference to me whether I am doing one duty or the other; in fact, so far as my personal preference goes I would rather at present be employed out of Wellington. I would very much have preferred to be so employed during the late sitting of Parliament; but my personal preferences have nothing to do with the matter; and, so far as I understand the present arrangements, they are that I shall render such assistance in the work of the Supreme Court as shall enable it to be carried on during the absence of His Honour Mr. Justice Richmond.

I have not been able to speak to His Honour the Chief Justice upon the matter, as he is now absent from Wellington, but I am very sure that is his understanding of the present arrangements for carrying on the business of the Supreme Court.

In pursuance of these arrangements it will be necessary for me to take the Nelson and Blenheim Circuit sittings of the Supreme Court in November next, which are held at the same time that the Circuit sittings are going on here. If the Ministry wish that instead of taking these sittings I should devote the short time which they will occupy—probably not more than a fortnight—to the Commission it will, so far as I can at present see, be a matter of indifference to me. But in that case it would be necessary to make other arrangements for Blenheim and Nelson, and this can only be done by appointing a temporary Judge of the Supreme Court—the course which in Sir Harry Atkinson's letter to me of the 1st March it was stated that the Government is averse to taking, and which it was deemed would be rendered unnecessary by my appointment.

A consideration of these facts and of the letter to which I have referred must, I think, satisfy you that the statement in your official letter of yesterday's date "that it was understood by the Government that your appointment as a Judge of the Supreme Court was for the purpose of giving you proper status as Commissioner, and that such appointment was to be subsidiary to that of a Commissioner, and that the work of the Commission Court was not to be in any way subject to or superseded by Supreme Court duties," is inaccurate, and that it was perfectly well understood from the beginning that during the absence of his Honour Mr. Justice Richmond I should render the necessary assistance in the circuit work of the Supreme Court. Whatever may be thought upon this point, however, I certainly do object to the adoption of a tone in official correspondence with me which would not be adopted to any other Judge. It will not be found that I am anxious to shirk my duties, or to devote unnecessary time to the Supreme Court which ought properly to be given to the more important, if less dignified, labours of the Commission. Indeed, as you have already been made aware by my official letter of this date, I proposed, in order to push on the work, to sacrifice the whole of my vacation to it, and to endeavour to make arrangements to give further time to it, which would enable all the applications in hand to be disposed of at a very early date.

The law requires, as you are aware, that thirty days' notice shall be gazetted before any application can be dealt with by the Commissioners. In practice we have found that this period is insufficient to enable the Natives interested to be served, and there ought to be at least two months' notice given in each case. If this is done, I shall have finished my work in the Court of Appeal and at Nelson and Blenheim in time to take up the work of the Commission; and then I propose, as already indicated, to give two, and almost certainly three, months to the Commission.

In my opinion this time ought to be ample to dispose of the applications already lodged; and, as the time has been extended, I do not believe that it is at all probable that many, if any, further applications will be lodged before the 20th March, to which date the time for receiving applications has been extended.

If this proves to be the case it will be found that my work in the Supreme Court will clash little, if at all, with the work of the Commission, as the applications lodged towards the end of

March could in no case be properly dealt with at a period much anterior to the expiry of the leave of absence granted to his Honour Mr. Justice Richmond.

I have felt it necessary to deal with this matter somewhat fully before reverting to the minor subject of the appointment of a secretary to the Commission. It must be apparent to you that, if I am to do the Supreme Court work as well as the work of the Commission, the placing at my disposal the services of a clerk in your department as secretary to the Commission will be quite useless alike to the public and to myself. To exemplify this, if any one who wishes to make an inquiry (of which there are a great many) has to apply in the first place to a clerk in your department, who has to apply to my secretary to make an appointment to see me, and who, after obtaining such an appointment, has again to see the person making the inquiry, it is plain that a great loss of time and much vexation will be occasioned to the public.

With regard to myself, this will not only cause me loss of time and annoyance, but it will expose me to constant personal applications which ought to be made to the secretary, but which, in the absence of a secretary at hand, will certainly be made to me. To enable the secretary to be of the slightest use either to the public or myself he must be constantly at my elbow, able from his position as my secretary to refer to me at any moment, and ready to do what he is told either by day or by night, and he must understand my ways and the work he is about. He must be as available when I am on circuit or attending the Court of Appeal as when I am actually engaged in hearing cases in the Commission Court. The necessary clerical work, so far as I am concerned, must be done at odd moments not employed in Court work or at night, and it will principally have to be done at night. If my secretary is appointed his services will be available at any moment, either during the day-time or at night, and I will be personally answerable for the due performance of his duties; but I cannot undertake this responsibility for any one else, nor do I think it reasonable that I should either undertake to instruct a novice or to practically perform his duties myself.

Apart from the fact that the public service will suffer from the proposed arrangement, I think it is highly undesirable that the Commission Court should be made to appear a branch of your department instead of an independent tribunal. Lastly, it is plain that the proposed arrangement, which will entail the payment of a double set of travelling-expenses for my secretary and for the secretary of the Commission, will, so far from resulting in a saving, result in a loss to the country.

I am, &c.,
W. B. Edwards.

No. 37.

Letter addressed by the Hon. the Native Minister to Mr. Edwards but not despatched.

Dear Mr. Edwards,— Wellington, 25th September, 1890.

I have received your letter of the 23rd instant, respecting the appointment of a secretary to the Native Land Commission, in which you also refer at length to the question of your own appointment as Judge of the Supreme Court and Commissioner.

The recollection of the Premier and myself does not correspond with your view of the circumstances and surroundings of your appointment.

In the mind of the Government, the Commission was of paramount importance, it being urgently necessary that the large number of persons who were said to have acquired lands equitably from the Natives, but whose titles could not be registered, should obtain relief, and, when you were selected for and accepted the appointment of Commissioner, the Government acquiesced in your appointment as a Judge of the Supreme Court in order that you should have the proper status.

Your appointment of Commissioner, and the work of the Commission, whereby it was hoped the vexed question of the titles would be investigated with due diligence and set at rest, was, and is, in the mind of the Government, the matter of paramount importance in connection with your appointment.

With reference to your secretary also acting as secretary to the Commission, the Government have no objection to his receiving the appointment; and he can be paid at the rate of 10s. a day for each day he is engaged upon the work of the Commission. This, of course, is understood to mean not continuous pay, but the rate of remuneration when the Commission is sitting continuously, or when the work of the Commission absorbs a considerable portion of his time, and entails upon him, as stated in your letter, work outside the ordinary office-hours.

I may add that in fixing this amount it has been necessary to regard the amount received by permanent and temporary officers of the Government who are engaged in the performance of arduous and responsible duties, in many cases at a low rate of salary, which, owing to the need for retrenchment, cannot now be increased.

I remain, &c.,
E. Mitchelson.

No. 38.

Mr. Commissioner Edwards to the Hon. the Native Minister.

(Telegram.) Wellington, 29th September, 1890.

I am awaiting your reply to my last letter as to the appointment of secretary. In my opinion it will be a very grave mistake, on public grounds, to cause the Commission to appear to be any way subject to the control of or connected with the Native Department; and, moreover, the arrangement proposed is absolutely unworkable. Colonel Porter, who has been trying to see me for over a week, has only succeeded in catching me twice at the luncheon adjournment. I must carry on the

Supreme Court work until the cases before the Commission can be heard, and the only person who can obtain the necessary access to me is my secretary. I am awaiting your reply before taking any steps to have applications already lodged gazetted for hearing.

The Hon. E. Mitchelson, Auckland. W. B. Edwards.

No. 39.

The Hon. the Native Minister to Mr. Justice Edwards.

Mr. Justice Edwards, Wellington. Auckland, 29th September, 1890.

I signed letter† agreeing to your wishes regarding appointment of secretary before I left Wellington. You should have received it before now. E. Mitchelson.

No. 40.

Mr. Commissioner Edwards to the Hon. the Premier.

Dear Sir,— Hill Street, Wellington, 9th October, 1890.

The matter of the appointment of a secretary to the Native Land Commission appears to have slipped your memory. It is of some importance that the secretary should be appointed at once, as the claims lodged ought to be gazetted for hearing. I see no reason to alter the opinion expressed by me to the Hon. Mr. Mitchelson that my secretary is the only person who can render any real service, and that his appointment would also save considerable cost to the colony.

I have, &c.,

The Hon. Sir Harry Atkinson, &c., Wellington. W. B. Edwards.

No. 41.

The Hon. H. A. Atkinson to Mr. Justice Edwards.

Sir,— Native Office, Wellington, 10th October, 1890.

Referring to previous correspondence with regard to the clerical work of the Native Land Commission, I have the honour to inform you that the suggestion you have made that your Associate should also act as secretary to the Commission has been approved, and that Mr. Sayers will be allowed remuneration at the rate of £125 a year while acting as secretary to the Commission, exclusive of his salary as Judge's Associate.

I have, &c.,

H. A. Atkinson,

His Honour Mr. Justice Edwards, Wellington. (For the Native Minister.)

No. 42.

The Hon. the Native Minister to Mr. Commissioner Edwards.

(Telegram. Forward if left.) Wellington, 4th February, 1891.

The brief session just closed having afforded no opportunity for legislation in connection with your Commission, or the defective titles which have been or might be brought before it, the question has been pressed upon the Government as to the possibility of affording sufficient and equitable protection pending legislation. The Government do not, of course, wish to interfere in the slightest degree with the proceedings of the Commission, or make any reference to individual cases; but the general question is of great importance, and I shall be obliged by your favouring me with any information and suggestions on the subject you may feel at liberty to offer.

His Honour Mr. Commissioner Edwards, Auckland. A. J. Cadman.

No. 43.

Mr. Commissioner Edwards to the Hon. the Native Minister.

(Telegram.) Auckland, 5th February, 1891.

The report recently forwarded as to the Gisborne sitting shows generally the position. I am not aware that any general protection can be given save by legislation, but any person having a doubtful title can obtain interim protection by lodging, before the middle of March, an application with the Commissioners under existing legislation and rules.

Many persons interested would object to the expense, but the Government can, if you think proper, reduce or abolish the fee payable on lodging applications. The Commissioners would not, under the circumstances, proceed to dispose of any application before next session of Parliament, unless requested so to do by the applicant. This would afford the required protection, which I believe can be obtained in no other way.

I shall reach Wellington about Wednesday next, and shall be glad to confer with you upon the matter if you desire it.

The Hon. the Native Minister, Wellington. W. B. Edwards.

† This is letter No. 37 in the preceding page, and which was not despatched to Mr. Edwards.

No. 44.

The Solicitor-General to the Hon. the Minister of Justice.

Crown Law Offices, 17th February, 1891.

Case of Mr. Justice Edwards: Referring to the conversation I recently had with you herein, I have considered the point connected with the appointment of this gentleman to the office of a Judge of the Supreme Court. I understand this point to be, that such appointment is illegal, because at the time it was made there was no vacancy on the Supreme Court Bench, and no provision had been made by law in respect of this office.

The appointment was made in March, 1890, under "The Supreme Court Act, 1882," section 5 of which empowers the Governor to appoint a Chief Justice, "and such other Judges of the said Court as His Excellency the Governor, in the name and behalf of Her Majesty, shall from time to time appoint." Nothing is said as to the number of such Judges, nor is provision made as to salaries; but section 11 contains a declaration that the salary of a Judge is not to be diminished during the continuance of his commission. By the existing Civil List Act of 1873 salaries are provided for a Chief Justice and four Puisne Judges, the amount of salary in each case being stated. Mr. Edwards has under this appointment performed, and still does perform, the duties of a Judge of the Supreme Court, although no special provision has been made for his salary in that capacity.

Upon consideration of the enactments above referred to, I am of opinion that the appointment of Mr. Edwards was legal, although at the date thereof no provision had been made by law for the payment of a salary. I do not think it is within my province to express an opinion as to the propriety of the late Government having made this appointment before provision had been made for the salary of the office. That is a matter of constitutional usage and practice, which, I think, is quite distinct from the legal position, and I confine myself entirely to the latter.

I do not think the English legislation affecting the tenure of office of Judges—such as the Act of Settlement (12 and 13 Will. III., cap. 2), or the 1 Geo. III., cap. 23—applies in this colony; because both in this and other colonies the earlier appointments to judicial office were made under different authority and in a different manner to such offices in England. As a rule, Judges held office only at pleasure of the Crown; and, if it became necessary to remove them from office, it was done by the Governor in Council under powers conferred by special Acts of the Imperial Parliament. In New Zealand, the Supreme Court Ordinance of 1844 expressly declared that Judges should hold office during Her Majesty's pleasure; and this law was in force till 1858, when the Supreme Court Judges Act of that year put the law on a footing to that now in force.

It may assist consideration of the matter if I call attention to some incidents connected with former appointments of Judges in this colony. (1.) The Constitution Act provided for the salaries of a Chief Justice and *one* Puisne Judge, and mentioned the salaries payable. (2.) On the 8th December, 1857, Mr. Justice Gresson was appointed a Puisne Judge; and on the 3rd November, 1858, Mr. Justice Johnston was appointed to a like office. There were then a Chief Justice and *two* Puisne Judges; but the Civil List Act of 1858 had provided for the salaries of these. The Act was reserved 21st August, 1858; assent of the Crown notified 22nd July, 1859. (3.) On the 20th October, 1862, Mr. Justice Richmond was appointed a Puisne Judge. The Civil List Act of 1862 had provided a lump sum of £6,200 for "Judges," without apportioning it in any way. This Act was reserved on the 15th September, 1862, and the Royal assent notified 11th July, 1863. (4.) Lastly, Mr. Justice Chapman was appointed a Puisne Judge in March, 1864. The Civil List Act of 1863 had made provision by a lump sum of £7,700, but not apportioning salaries. The Act was reserved on the 14th December, 1863, and the Royal assent notified 24th July, 1864.

As by the Constitution Act reserved Acts do not come into force until the Royal assent is notified in the colony, and as, I understand, each of the gentlemen above mentioned entered on their duties immediately on appointment, it follows that, if the contention be good that such appointments are not legal because salaries have not been legally provided at the time they are made, then there was a defect in each of the appointments above set out.

The Hon. the Minister of Justice. W. S. Reid.

No. 45.

His Honour the Chief Justice to the Hon. the Premier.

Sir,— Judge's Chambers, Wellington, 17th February, 1891.

I have the honour to request that His Excellency may be advised to approve of the appointment of Mr. Edwards as Deputy Judge of the Vice-Admiralty Court. Mr. Edwards is to take the Napier sittings of the Supreme Court early in March, and a case in the Vice-Admiralty Court is set down for hearing there; hence the necessity for this appointment, for I shall be in Wellington holding the sittings here. I have, &c.,

The Hon. the Premier, Wellington. James Prendergast, Chief Justice.

No. 46.

The Hon. the Premier to His Honour the Chief Justice.

Sir,— Premier's Office, Wellington, 18th February, 1891.

I have the honour to acknowledge the receipt of your letter of the 17th instant requesting that His Excellency may be advised to approve of the appointment of Mr. Edwards as Deputy Judge of the Vice-Admiralty Court.

In reply, I have to state that the Government declines to recommend His Excellency as requested, as it is not prepared to recognise Mr. Edwards as a Judge of the Supreme Court, legally and constitutionally appointed to the position. I have, &c.,

His Honour the Chief Justice, Wellington. J. Ballance, Premier.

[Warrant returned herewith.]

No. 47.

His Honour the Chief Justice to the Hon. the Premier.

Sir,— Judge's Chambers, Wellington, 20th February, 1891.

I have the honour to acknowledge the receipt of your letter of the number and date in the margin (18th February, 1890), with the enclosure.

As I am in doubt whether or not you may be acting on a supposition that the Vice-Admiralty Act of 1867 authorises the appointment of only Puisne Judges as Deputy Judges, I have thought it better to mention that that is not so. It is true that Lord Knutsford, in his despatch of the 20th September, 1890, paragraph 6, writes as if this were so; but there is no such limitation in the Act of 1867, or elsewhere, that I am aware of.

I have, &c.,

The Hon. the Premier, Wellington. James Prendergast, Chief Justice.

No. 48.

The Hon. the Premier to His Honour the Chief Justice.

Sir,— Premier's Office, Wellington, 21st February, 1891.

I have the honour to acknowledge the receipt of your letter of the 20th instant, stating that you are in doubt whether or not I may be acting on a supposition that the Vice-Admiralty Act of 1867 authorises the appointment of only Puisne Judges as Deputy Judges, and that you had thought it better to mention that that is not so.

In reply, I beg to inform you that when I addressed you on the 18th in reference to Mr. Edwards's appointment as a Deputy Judge of the Vice-Admiralty Court, I was not acting on such a supposition.

His Honour the Chief Justice, Wellington. J. Ballance, Premier.

No. 49.

Memorandum from the Hon. P. A. Buckley to the Hon. the Premier.

I have perused the correspondence sent to me from the Justice Department, as well as that bearing upon this subject forwarded from the Native Office, and am inclined to think that, through some oversight, the papers do not contain the whole of the correspondence in reference to the position of the above-named gentleman.

I find a letter dated the 1st March, 1890,* addressed by the late Premier to W. B. Edwards, Esquire, Wellington, in which he informs that gentleman that His Excellency the Governor had been pleased to appoint him to the office of Commissioner under "The Native Land Court Acts Amendment Act, 1889," and stating, among other things, that it had appeared to the Government, and such appeared to be the general feeling, that for an office of such importance, involving such large interests, the Commissioner should have the status of a Judge of the Supreme Court, and therefore he would be appointed to that office also. He also informed Mr. Edwards that the Government were adverse to the appointment of a temporary Judge if it could be avoided. I cannot gather from the correspondence any reason for this, inasmuch as the Supreme Court Act of 1882, to which I will subsequently refer, makes special provision for the temporary appointment of Judges, under which Act I understand Mr. Edwards claims to be legally appointed a Judge of the Supreme Court. This letter seems to me to be the result of some previous conversation or correspondence which I do not find attached to the papers, and am therefore unable to say what previous negotiations may have taken place in regard to this appointment. It is of very little consequence, however, so far as the question submitted to me is concerned. At any rate, I am satisfied that during the discussion of the Native Land Act above referred to, the Legislature never had it in contemplation that the Commissioner such as the Act provided for should have the status of a Judge of the Supreme Court, or it would have expressly provided for such an appointment. That, however, is also a matter beside the present question.

On the 5th March Mr. Edwards, in a letter† addressed to the Premier, accepted the appointment in the terms of the said letter. You will remember that the Legislative Council ordered the production of correspondence and papers relating to the appointment of Mr. Edwards as Commissioner under the Native Land Court Act and as Judge of the Supreme Court on the 26th June, 1890. That correspondence was printed and circulated, and I find a memorandum in the handwriting, I believe, of the late Attorney-General, but with no signature or date, with a side-note in the following words: "To be added at the end of letter.—F. W." The memorandum is as follows: "Memo. The Chief Justice entertains doubts as to the Governor's power to appoint more than four Puisne Judges of the Supreme Court, except during pleasure, and, in consequence, Mr. Edwards informed the Government that, in deference to the Chief Justice's doubts, he, Mr.

* See No. 3, page 2. † See No. 4, page 2.

Edwards, would perform no judicial act as a Supreme Court Judge until after the next session of Parliament. Subsequently, after a consultation with the Attorney-General, the Chief Justice finding that the Supreme Court Judges had on several occasions been appointed before vacancies had actually taken place or a salary provided, felt it no longer necessary to press his doubts to the extent of standing in the way of Mr. Edwards acting as Puisne Judge of the Supreme Court."

I find upon the face of this memorandum pencil writing between the words "the" and "next"—"meeting of the"—so that it would read as follows: "until after the meeting of the next session of Parliament." How far Mr. Edwards has carried out that promise is a matter of notoriety, he having, I believe, in the time between his appointment as Commissioner and the meeting of Parliament exercised judicial functions in Nelson and Blenheim. I find also among the papers the following memorandum: "Hon. Minister of Justice.—Mr. Edwards was written to on March 1st with offer of appointment. He replied on March 5th. His Commission was, however, signed on March 2nd. He was sworn in on March 14th. He claims salary from February 27. From what date is it to be paid? Mr. Justice Conolly was paid from date of Commission.—C. J. A. HASELDEN.—12/4/90."

I cannot find in the papers any other correspondence in reference to this matter, and assume, therefore, that the whole correspondence has not been submitted to me by the Justice Department, otherwise why should Mr. Edwards claim salary from February?

I have approached this subject with some diffidence, seeing the importance of the question involved, and, after exhausting the authorities at my disposal, I can find no case on all fours with the present position, and am, therefore, obliged to construe the language of the Acts to which I will refer unaided by any precedent.

I have also carefully perused the opinion of the Solicitor-General* upon this subject given to the Minister of Justice, in which he holds the view that the appointment of Mr. Edwards as a Judge of the Supreme Court was legal, although at the date thereof no provision had been made by law for the payment of his salary. I regret to differ from the opinion of so careful an authority, and feel that in doing so I am taking a course for which I must give such reasons as weigh with me in coming to a different conclusion. The Solicitor-General thinks that the English legislation affecting the tenure of office of Judges, such as the Act of Settlement, does not apply to this colony, because in this and other colonies the earlier appointments to judical office were made under different authorities and in a different manner to appointments to such offices in England. It may be correct to say that the Acts referred to by him do not apply to the present position of the colony; but in the construction of the statutes to which I will refer I am bound to allude to first principles, and from these to draw my deduction as to what, in my opinion, is the law bearing on the subject.

I would like specially to call your attention to one or two paragraphs in the opinion of the Solicitor-General, in which he says, "It may assist the consideration of the matter if I call attention to some incidents connected with former appointments of Judges in this colony. (1.) The Constitution Act provided for the salaries of a Chief Justice and one Puisne Judge, and mentioned the salaries payable. (2.) On the 8th December, 1857, Mr. Justice Gresson was appointed a Puisne Judge, and on the 3rd November, 1858, Mr Justice Johnston was appointed to a like office. There were then a Chief Justice and two Puisne Judges, but the Civil List Act of 1858 had provided for the salaries of these. The Act was reserved 21st August, 1858. Assent of the Crown was notified 22nd July, 1859. (3.) On the 20th October, 1862, Mr. Justice Richmond was appointed a Puisne Judge. The Civil List Act of 1862 had provided a lump sum of £6,200 for Judges, without apportioning it in any way. This Act was reserved on the 15th September, 1862, and the Royal assent notified 11th July, 1863. (4.) Lastly, Mr. Justice Chapman was appointed a Puisne Judge in March, 1864. The Civil List Act of 1863 had made provision by a lump sum of £7,700, but not apportioning salaries. The Act was reserved on the 14th December, 1863, and the Royal assent notified on the 24th July, 1864."

It appears that each of the gentlemen above-named entered on his duties immediately on appointment, and the Solicitor-General contends that, if such appointments were not legal because salaries were not legally provided at the time they were made, there was a defect in each of the appointments above set out.

I am prepared to admit that there was in each of the cases a defect at the time, and that the authorities, relying on the constitutional principle, made provision for validating any defect in the appointments so made. Assuming that the appointments at the time they were made were not valid because there was no appropriation, the error should not be perpetuated in the present, or in any other case. It appears to me that from the first, as I read the correspondence, doubts were entertained by the late Attorney-General, the Chief Justice, and Mr. Edwards himself, as to the validity of the appointment, and that it was intended to validate the same by a Bill, which was the subject of a debate in Parliament during the session of 1890, to which I wish to refer you. That Bill was never allowed to become law, and if the doubt existed then the position is not altered. I need scarcely remind you of the views expressed in the House of Representatives during the passing of the estimates, in which you will remember that the word "Judge" was struck out and the salary voted to Mr. Commissioner Edwards until the expiry of the present financial year. I merely mention this, not with the view of aiding in the construction of statutes, because the expression of opinion of individual members of Parliament is no indication of the intention of the Legislature. There are other well-established canons of construction of the statute law.

On reference to "The Civil List Act, 1873," clause 2 enacts as follows: "The sum of seven thousand seven hundred pounds granted to Her Majesty by 'The Civil List Act, 1863' (hereinafter called 'the said Act'), for defraying the expenses of the salaries of the Judges of the Supreme Court, shall be applied in paying to the Judges of the said Court respectively the annual salaries specified in the First Schedule hereto." This is a clear departure from the original mode of ap-

* See No. 44, page 14.

propriation in a lump sum, in the manner referred to in the opinion of the Solicitor-General, and the schedule is clear as to the mode of appropriation. Schedule: "Annual salary of the Chief Justice of the Supreme Court, £1,700. Annual salary of four Puisne Judges of the Supreme Court, each £1,500."

Now, on reference to the Act of Settlement (12 and 13 William III., chap. 2), I find the following language in subsection (7) of clause 3: "That, after the said limitation shall take effec as aforesaid, Judges' Commissions be made *quamdiu se bene gesserint*, and their salaries ascertained and established, but upon an address of both Houses of Parliament it may be lawful to remove them." This important provision was enacted for the express purpose of establishing the independence of the Judicial Bench. Now, it is clear to me that the appointment of a Judge goes hand-in-hand with the appropriation by Parliament of his salary. No such condition appears to exist in the present case. The Supreme Court Act of 1882, upon which the Solicitor-General seems to rely for establishing the validity of the appointment, contains two clauses which appear to me to be inconsistent so far as the validity of the present appointment is concerned. Clause 5 is as follows: "The said Court shall consist of one Judge, to be appointed by His Excellency the Governor, in the name and on behalf of Her Majesty, who shall be called the Chief Justice of the said Court, and of such other Judges of the said Court as His Excellency the Governor, in the name and on behalf of Her Majesty, shall from time to time appoint." This is doing nothing more than re-enacting, almost in the same words, clause 2 of "The Supreme Court Judges Act, 1858," which Act also provided for the temporary appointment of Judges of the Supreme Court. If it could be contended that the Governor had the power, in Her Majesty's name, to appoint an unlimited number of Judges, which I am not prepared to admit, why the necessity for clause 12 of the Act, which is as follows: "It shall be lawful for the Governor in Council, in the name and behalf of Her Majesty, at any time during the illness or absence of any Judge of the Court, or for any other temporary purpose, to appoint a Judge or Judges of the Court, to hold office during His Excellency's pleasure, and every such Judge shall be paid such salary, not exceeding the amount payable by law to the Judge of the said Court other than the Chief Justice, as the Governor in Council may think fit to direct." Now, it appears clear to me that the language of clause 12 governs clause 5, and that the Supreme Court Act of 1882 must be read in conjunction with "The Civil List Act, 1873." Fortunately I have authority for this contention. I find in Hardcastle's "Statutory Law" language which must bring conviction to the mind of any person of ordinary intelligence that "The Supreme Court Act, 1882," and "The Civil List Act, 1873," being *in pari materiâ*, must be construed together. He says, "The rule as to Acts of Parliament which are *in pari materiâ* was laid down by the twelve Judges in Palmer's case (Vol. i., Leach, C.C., ed. 4, p. 355) to be that such Acts are to be taken together as forming one system, and as interpreting and enforcing each other." The same author also points out the well-established rule that, "if two enacting clauses are repugnant, the known rule," said Keating, Judge, in Wood *v.* Riley (L.R. 3, C.P., p. 27), "is that the last must prevail." The same authority lays down the well-defined principle of law as follows: "The general rules which are applicable to particular and general enactments in statutes, if they are repugnant, are very clear; the only difficulty is in their application. The rule is that whenever there is a particular enactment and a general enactment in the same statute, and the latter taken in its most comprehensive sense would overrule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other part of the statute to which it may properly apply." I am, therefore, led to the conclusion that if the Legislature intended that the Governor had the power to appoint an unlimited number of Judges, irrespective of any provision for salary, it would have expressly so stated it, and there would have been no necessity for the controlling provision of clause 12. The temporary appointment of a Judge of the Supreme Court to act during the absence of Mr. Justice Richmond, who appears at this time to have obtained leave of absence, would have met the difficulty which then arose.

With regard to the present position of Mr. Edwards, holding, as I do, that his appointment as Judge of the Supreme Court is warranted by no authority, I am in difficulty as to the action to be taken by the Executive in his regard. To obtain a resolution of both Houses of the General Assembly would assume the validity of his appointment, which, of course, I am not prepared to admit. As I said before, the case is a somewhat peculiar one, and even if the validity of his appointment was not in dispute, an address for his amotion in the matter indicated would necessitate reasons which do not exist in the present case. I believe it will be found that, although Her Majesty may, upon the address of both Houses, remove a Judge from his position, the practice has been that the Secretary of State would, before advising Her Majesty to take such a course, fortify himself with reasons which would warrant his giving such advice. However, as this course is not likely to be taken, I need not refer to it further. I have gone as exhaustively into the subject as the means at my disposal would permit, and I have come to the conclusion that, construing the Supreme Court Act of 1882 with the Civil List Act of 1873, which makes no provision for the salary of more than four Judges and that of the Chief Justice, the appointment of Mr. Edwards to the position of a Judge of the Supreme Court is not warranted by law.

You will observe that I have guardedly abstained from offering any remarks as to the fitness of Mr. Edwards for the appointment. The position taken up by him, in my opinion, assails the independence of the Supreme Court Bench, which ought to be sacred and inviolate. I would suggest, if you think it desirable to do so, that he should be invited, under the peculiar circumstances, to consent to a statement of a case being submitted for the opinion of the Judicial Committee of the Privy Council—that the Secretary of State be requested to bring under the notice of that tribunal a question affecting so largely the position and independence of the Judicial Bench in this colony—that every facility be afforded to Mr. Edwards to have his case fully represented before that tribunal, and that in the meantime he be requested to abstain from exercising any judicial functions until a decision has been obtained.

I would like to call your attention to the case of Sir Robert Collier, reported in the parliamentary *Hansard* debates, House of Lords, Vol. ccix., which, although not in point, has some bearing upon a question of such importance as the present. The correspondence on the subject of his appointment to the Judicial Committee of the Privy Council between Lord Cockburn and Mr. Gladstone will be found published *in extenso* in the *Times* of the 5th December, 1871. The tenor of the debate in the House of Lords shows how keenly was resented even an irregularity in making an appointment of so high a judicial character. The debate and correspondence are worthy of perusal, as showing the great importance which the noble Lords who took part in the consideration of the subject attached to the question.

21st February, 1891. P. A. Buckley, Attorney-General.

No. 50.

Memorandum from the Hon. P. A. Buckley to the Hon. the Premier.

The Hon. the Premier.

After the receipt of his Honour the Chief Justice's letter of the 17th February, with reference to the appointment of Mr. Edwards as Deputy-Judge of the Vice-Admiralty Court, I had an interview with the Chief Justice as to the position generally.

Among other things, his Honour informed me that several telegraphic communications between the other Judges and himself, bearing on the question of Mr. Edwards's appointment, were forwarded by him to the Government about March last. I find no trace of these with the papers submitted to me. I think inquiry should be made as to these telegrams. They have an important bearing on this question. You will observe that in my memorandum to you of the 21st February, I refer to the fact that, in my opinion, the papers did not contain the whole of the correspondence. This is borne out by the Chief Justice's remark, as I have stated.

24th February, 1891. P. A. Buckley.

No. 51.

The Hon. the Premier to his Honour the Chief Justice.

Sir,— Premier's Office, Wellington, 23rd February, 1891.

I noticed in your letter of 17th inst. you stated that "Mr. Edwards is to take the Napier sittings of the Supreme Court early in March," and in view of that contingency I would respectfully direct your attention to the following:—

That in a note attached to the papers relating to the appointment of Mr. Edwards, presented to Parliament by the late Government in return to an order of the House of Representatives, it is stated that "His Honour the Chief Justice entertained doubts as to the Governor's power to appoint more than four Puisne Judges of the Supreme Court except during pleasure, and in consequence Mr. Edwards informed the Government that in deference to the Chief Justice's doubts he (Mr. Edwards) would perform no judicial act as a Supreme Court Judge until after the meeting of the next session of Parliament. Subsequently, after a consultation with the Attorney-General, the Chief Justice, finding that Judges of the Supreme Court had on several occasions been appointed before vacancies had actually taken place or a salary provided, felt it no longer necessary to press his doubts to the extent of standing in the way of Mr. Edwards acting as a Puisne Judge of the Supreme Court."

That when Parliament met last year a Bill was introduced to "amend 'The Supreme Court Act, 1882,' and to provide for the payment of an additional Judge," which was intended to validate Mr. Edwards's appointment; but it was not even read, and the House, although asked to do so, did not request the Crown to make provision for the salary.

That an item was subsequently placed on the supplementary estimates for "Salary of Commissioner and Judge Edwards," but that by message from the Governor the word "Judge" was struck out.

That, Parliament not having validated the appointment of Mr. Edwards, and refusing to make any provision for him as a Judge, the Government do not think Mr. Edwards should exercise any judicial functions until Parliament has made provision for his salary and had the opportunity of reviewing his position, and I may add that it is not the intention of the Government to propose to Parliament to make any provision for Mr. Edwards as a Judge of the Supreme Court.

The Government, therefore, respectfully submits these facts to enable you to take such steps as you may think proper, to avoid any consequences that might ensue from the exercise by Mr. Edwards of judicial functions under the circumstances.

I have, &c.,

His Honour the Chief Justice. J. Ballance.

No. 52.

His Honour the Chief Justice to the Hon. the Premier.

Sir,— Judge's Chambers, Wellington, 24th February, 1891.

I have the honour to acknowledge the receipt of your letter of the number and date in the margin (23rd February, 1891), and, in reference to the concluding part of that letter, to state that, having communicated it to Mr. Justice Edwards, and he having informed me that he is not at present

prepared to say what course, under the circumstances, he will feel it his duty to take, I do not see what steps I can take in the direction referred to in the letter until he has intimated to me that he intends not to sit.

I have, &c.,
JAMES PRENDERGAST, Chief Justice.

The Hon. the Premier, Wellington.

No. 53.

The Hon. the NATIVE MINISTER to Mr. Commissioner EDWARDS.

SIR,— Native Office, Wellington, 18th February, 1891.

I have the honour to forward herewith a memorandum by the Mayor of Gisborne, dated the 13th instant, with reference to the rules of the Native Land Commissioners' Court, for your perusal, and for any remarks you may wish to make thereon.

I have, &c.,
A. J. CADMAN,
Native Minister.

His Honour Mr. Commissioner Edwards, Wellington.

No. 54.

Mr. Commissioner EDWARDS to the Hon. the NATIVE MINISTER.

SIR,— Wellington, 23rd February, 1891.

I have the honour to acknowledge the receipt of your letter, No. 189, of 18th February, covering a memorandum from the Mayor of Gisborne as to the rules of the Native Land Commissioners' Court.

In reply I have to say that the question of service of notice upon the Natives interested has been frequently under the consideration of the Commissioners, and that while the power of making rules was vested in the Commissioners it was felt by them to be impossible to abolish that notice, although the Commissioners fully recognise the inconvenience and expense attending service, and the fact that if it could properly be dispensed with the popularity and usefulness of the Commission would be largely increased.

I am assured by Mr. Commissioner Ormsby, who is necessarily better able than myself to judge, that *Gazette* notices such as are used according to the practice of the Native Land Court could not be relied upon to give notice to the Natives interested.

During the recent sitting at Gisborne it was found that many of the Natives whose interests were claimed resided in very remote parts of the colony, where there is little postal communication, and I should think it in the highest degree improbable that *Gazette* notices would have reached them.

A certificate of the Commissioners has the effect of divesting lands at present vested in the Native owners, and it is contrary to the spirit of the English law that persons should be divested of their property without notice, and without reasonable opportunity of being heard.

On framing the rules, the Commissioners, upon whom the responsibility then lay, had also to take into consideration the probability that if notice to the Natives were dispensed with there would sooner or later be a crop of claims for compensation by Natives who had been divested of their lands without a hearing.

I regret, therefore, that I cannot take the responsibility of recommending that personal service of notice upon the Natives should be dispensed with.

With regard to the question of advertisement, I think that the notice at present required to be inserted by applicants in the *Gazette* and *Kahiti* might be dispensed with, but I think that the notice required to be inserted in the local papers is necessary to give notice to possible counter-claimants.

I do not understand why it is suggested that this notice is not sufficient for that purpose.

The question of fees is a matter of finance, upon which I do not feel qualified to express an opinion.

I may, however, point out that the fees have been greatly overestimated in the letter of the Mayor of Gisborne.

It is quite impossible that the inquiry into the alienation by ten Natives of their interests in any block can properly occupy more than three days.

The estimate of the cost of inquiry into five blocks exceeds in this item alone the probable cost by £65.

Further, no objection is made by the Commissioners to including the notice referring to several blocks claimed by the same applicant in one advertisement, and the cost of advertising five blocks need not therefore be anything like five times the cost of advertising one.

Speaking roughly, I should say that the cost of dealing with five blocks of the value of £1,000 each has been overestimated by the Mayor of Gisborne by at the least one-third.

I agree with the Mayor of Gisborne that the number of persons who are interested in this question is very large.

I also agree with him that the powers at present given to the Commissioners are quite inadequate to enable the difficulties which at present exist to be settled.

The inadequacy of the present legislation was pointed out by me in correspondence with your predecessor very soon after my appointment, and during the last session of Parliament I prepared and forwarded to your predecessor the draft of certain clauses which would, I believe, enable the Commissioners to finally settle all disputes as to title, at the same time doing no injustice to the Native vendors, with notes explaining the meaning and object of each clause.

I return the memorandum enclosed in your letter.

I have, &c.,
W. B. EDWARDS.

The Hon. the Native Minister, Wellington.

No. 55.

Mr. Justice EDWARDS to the Hon. the PREMIER.

SIR,— Judge's Chambers, Wellington, 26th February, 1891.

I have the honour to inform you that your letter of the 23rd February, addressed to his Honour the Chief Justice, upon the subject of my appointment as a Judge of the Supreme Court of New Zealand, has been officially communicated to me by him.

As doubts have now been expressed by the Government of the colony as to the validity of my appointment, and as I myself entertain no such doubts, and I believe that a great deal of misapprehension exists as to the matter, I have felt it to be my duty to prepare, and I now have the honour to forward to you for your information, a memorandum showing the position, as I understand it, from a legal and constitutional aspect.

Further, inasmuch as, although my position and appointment have been frequently under discussion, no statement has, so far as I am aware, ever been made as to the circumstances which led to that appointment, I have deemed it also to be my duty to prepare, and I now have the honour also to forward to you herewith, a memorandum thereof.

With reference to that part of your letter which appears to infer that the doubts which have been raised affect the validity of my appointment only, I have the honour to call your particular attention to the first-mentioned memorandum herewith enclosed, from which you will see that the doubts so raised affect the validity of other appointments besides my own, including that of a Judge who is still exercising his functions.

In this connection I have the honour to add that I believe that it is erroneous to suppose that the Bill to amend "The Supreme Court Act, 1882," and to provide for the payment of an additional Judge, which was introduced in the session of 1890, was intended to validate my appointment alone, and that it will be found that that Bill was, so far as the removal of doubts was concerned, intended to be a general measure, removing all doubts as to the validity of any Commission theretofore granted by His Excellency the Governor in the name and on behalf of Her Majesty to any Judge.

With reference to that part of your letter which states that the Government do not think that I should exercise any judicial functions until Parliament has provided for my salary and has had the opportunity of reviewing my position, I have the honour to say that, as the question of the validity of my appointment is a question of law alone, I conceive, with the greatest respect for Parliament, that Parliament is not the proper tribunal to review my position, at all events so far as the validity of my appointment is concerned; and that, if I were to accede to your proposition in this respect, I should be demonstrating by example that it is within the power of the Government to interfere with the independence of the Judicial Bench.

Referring, however, to the interview of the Hon. the Attorney-General with his Honour the Chief Justice upon this subject, and to the suggestion made by the Hon. the Attorney-General that it would be in the public interest that I should not exercise judicial functions until some reliable opinion had been obtained as to the validity of my appointment, and that with that end it would be desirable to obtain the opinion of the Attorney-General and Solicitor-General of England, I have the honour to say that if the Government are of opinion that it is in the public interest that I should cease to exercise judicial functions for the period necessary to enable such opinion to be procured, if possible, from the Privy Council, and, if not, then from Her Majesty's Attorney-General and Solicitor-General for England upon a case containing all facts which the Government and myself think essential to enable a proper opinion to be obtained, as well as a statement of all arguments which the Government and myself shall wish to be submitted for consideration, then I am prepared, under proper conditions, to accede to that proposition.

The Supreme Court sittings at Napier commence upon Monday next, and I fear that it will not be possible at this late stage to make any other than the existing arrangement for the despatch of the business there, though, if any such arrangement as is suggested is to be made, I personally should prefer that it should be concluded at once. I have, &c.,

The Hon. the Premier. W. B. EDWARDS.

Enclosure 1 in No. 55.

MEMORANDUM of Mr. Justice EDWARDS as to the Validity of his Appointment as a Judge of the Supreme Court of New Zealand.

1. IT has been alleged that my appointment as a Judge of the Supreme Court of New Zealand is "unconstitutional and illegal," upon the grounds that there was at the time no appropriation upon the Civil List for the purpose of paying my salary. I therefore deem it expedient to state shortly the grounds upon which I conceive it to be both legal and constitutional.

2. I propose to deal with the matter from its constitutional aspect first, as apart from this question it has never been pretended that my appointment is not strictly warranted by the law.

3. The word "unconstitutional" is frequently very loosely used, but it must, I apprehend, be used by those who challenge my appointment upon this ground as meaning something which is so contrary to the spirit of the Constitution of this colony as to render it illegal.

4. Representative government was first granted to this colony by 15 and 16 Vict., c. 72, of the Imperial Parliament, commonly called the Constitution Act.

5. The law which then regulated the appointments of Judges in this colony was the Ordinance No. 1 of the third session of the Governor and late Legislative Council, passed in the year 1844. This ordinance provided that the Supreme Court should consist of one Judge, to be called the Chief Justice, and of such other Judges as Her Majesty should from time to time be pleased to appoint:

provided that it should be lawful for the Governor to appoint such Judges provisionally until Her Majesty's pleasure should be known. It was expressly provided that the Judges should hold office during Her Majesty's pleasure.

6. The ordinance mentioned in the last paragraph contained no provision against diminishing the Judges' salaries, nor for fixing the amounts or providing for payment thereof, and there was, of course, no Civil List Act at this time.

7. The Constitution Act, 15 and 16 Vict., c. 72, of the Imperial Parliament, provided that certain sums should be payable to Her Majesty for the purposes mentioned in the schedule. Amongst the sums are—Chief Justice, £1,000; Puisne Judge, £800. Section 65 forbade the diminution by the Colonial Legislature of the salary of any person holding office as a Judge at the time of the passing of the Act, but otherwise authorised the Colonial Legislature to deal with the salaries of the Judges as it might think fit.

8. The Constitution Act did not repeal or abrogate the ordinance mentioned in the 5th and 6th paragraphs, and the Judges then holding office continued to hold office at Her Majesty's pleasure.

9. It is plain, therefore, that it is idle to contend that my appointment is unconstitutional, as being contrary to the spirit of the Constitution Act, as that Act left all the Judges holding office at pleasure, and (except as to the Judges then actually holding office) liable to have their salaries reduced. All the safeguards which are considered necessary to secure the independence of the Judges were thus wanting.

10. Then, is it contrary to the spirit of any subsequent legislation?

11. "The Supreme Court Judges Act, 1858," came into force on the 3rd July, 1858, and remained in operation until the 1st day of January, 1883, when it was repealed by "The Supreme Court Act, 1882," under which my appointment was made.

12. The Act of 1858 provided (section 2) that the Supreme Court should consist of one Judge, to be called the Chief Justice, and of such other Judges as His Excellency the Governor, in the name and behalf of Her Majesty, should from time to time appoint. Section 3 provided that the Judge's commission should continue in force during good behaviour, and section 5 provided against the diminution of any Judge's salary.

13. The power of appointment contained in the Act of 1858 is similar to that contained in the Ordinance No. 1 of Session 3 (see paragraph 5), which cannot upon any principle be contended to have been limited.

14. By what, then, is the power given by the Act of 1858 limited? Certainly not by the Constitution Act, for the reasons stated in paragraph 9, and for the further reason that if the Act of 1858 were limited by the Constitution Act it must be so limited that not more than two Judges could hold office at the same time—a contention which would be fatal to the validity of the commission of probably every Judge who has ever been appointed in the colony, except perhaps the Chief Justice.

15. If, then, the power given by the Act of 1858 is limited in principle it must be limited by the several Acts (passed subsequently to the appointments increasing from time to time the number of Judges) by which the salaries of such Judges have been removed from the necessity of being provided by an annual vote.

16. These Acts are referred to in paragraphs 30, 32, 35, and 37 hereof. I make bold to say no such intention can be deduced from them, and on principle it is plain that no such construction can be given to them. To give such a construction to the first of these Acts amending the Civil List would have the remarkable effect of invalidating the appointment of the very Judge for whose benefit the provision was made.

17. According to the contention which has been raised, "The Supreme Court Judges Act, 1858," must be read as though the power of appointment had been qualified by the addition of the following or some similar words: "not exceeding in number those whose salaries are permanently appropriated by the Civil List Act for the time being in force." What authority is there for the interpolation of any such words? and how can it be pretended that they were in the contemplation of the Legislature, seeing that there was then no Civil List Act in existence?

18. Then, has there grown up any usage with respect to the appointments of additional Judges which has been infringed by my appointment? The number of Judges has been increased three times (by the appointments mentioned in paragraphs 29, 31, and 34 hereof) since the passing of the Constitution Act, and on each separate occasion the additional Judge has been appointed and has acted before his salary has been provided for by any alteration of the Civil List. On a fourth occasion, referred to in paragraphs 38 and 39 hereof, although no permanent addition to the Bench was made, two Judges were appointed for a month before their predecessors resigned office, so that for a limited period there were actually seven Judges holding commissions and drawing salaries in the colony. My appointment is therefore strictly in accordance with every precedent in this colony.

19. For the reasons already stated, the word "unconstitutional," as applied to my appointment, must, if it means anything, mean something contrary to the spirit of the laws of this colony; and I have sufficiently shown that it is not unconstitutional in that sense. Further, I venture to say that it is strictly constitutional according to the doctrines laid down in the greatest writers on constitutional history.

20. Hallam, at page 192, Vol. iii., of the eighth edition of his work on the "Constitutional History of England," says, "The commissions, however, of William's Judges ran *quamdiu se bene gesserint*. But the King gave an unfortunate instance of his very injudicious tenacity of bad prerogatives in refusing his assent, in 1692, to a Bill that had passed both Houses for establishing this independence of the Judges by law, and confirming their salaries. We owe this important provision to the Act of Settlement, not, as ignorance and adulation have perpetually asserted, to His late Majesty George III. No Judge can be dismissed from office except in consequence of a conviction

for some offence, or the address of both Houses of Parliament, which is tantamount to an Act of the Legislature."

21. Turning to the Act of Settlement (12 and 13 Will. III., c. 2), referred to by Hallam in the passage quoted in the last paragraph, it will be found that the only provision relating to the Judges is that contained in section 3: "That, after the said limitations shall take effect as aforesaid, Judges' commissions be made *quamdiu se bene gesserint*, and their salaries ascertained and established; but upon the address of both Houses of Parliament it may be lawful to remove them."

22. The provision in this statute that the salaries of the Judges shall be ascertained and established must mean "ascertained and established" by the terms of their appointments, not by Act of Parliament, as one Parliament cannot bind another; and, if further legislation had been required to make the statute effective, obviously it would have been of no utility. It is to be observed that the emoluments of the Judges were originally derived from fees and from the sale of offices, and that, so far, at all events, as the Lord Chief Justice of England and the Lord Chief Justice of the Court of Common Pleas were concerned, this continued until 6 Geo. IV. See 6, Geo. IV., c. 82 and 83, which abolish this for the future, and provide fixed salaries. There is not one word in the Act of Settlement charging the salaries of the Judges upon any revenue or fund whatever.

23. That provision first appears in 1 Geo. III., c. 23, the Act which is mentioned by Hallam with such contempt; yet it is the absence of this provision, and of this provision alone, which is said to render my appointment illegal and unconstitutional.

24. My salary is ascertained and established by my contract with Her Majesty. By section 8 of "The Supreme Court Act, 1882," under which I have been appointed, my commission continues in force during good behaviour, and by section 11 of the same Act my salary cannot be diminished during the continuance of my commission. In what respect, then, is my position wanting in the safeguards for independence referred to by Hallam?

25. It is to be observed that from the year 1863 to 1873 no one of the Judges could have established what his salary was without resorting to his contract with the Crown, as during that period the Civil List Act appropriated gross sums for the Judges, without showing in what proportion these sums were payable. (See paragraphs 32 and 35 hereof.)

26. Turning now to the point of legality, apart from the constitutional question, I propose to show that, if the point raised is good, then there was, at the time of my appointment, an existing vacancy upon the bench, to which I have been lawfully appointed. To do this it is necessary to trace the history of the appointments of the Judges since the passing of the Constitution Act.

27. The first Judge appointed after the passing of the Constitution Act was Chief Justice Arney, who was appointed under the provisions of the ordinance of 1844, with the benefit of the appropriation made by the Constitution Act (see paragraphs 5, 6, 7, and 8 hereof) on 1st March, 1858, and who held office until 1st April, 1875, when he resigned.

28. Mr. Justice Gresson received, on the 8th December, 1857, a temporary appointment from the Governor, under the special power given to him. He appears to have been permanently appointed after the coming into operation of "The Supreme Court Judges Act, 1858" (see paragraphs 11 and 12 hereof). He held office until 1st April, 1875, when he resigned.

29. Mr. Justice Johnston was appointed on the 3rd November, 1858, under the provisions of "The Supreme Court Judges Act, 1858" (see paragraphs 11 and 12 hereof), and he held office until his death in 1888.

30. "The Civil List Act, 1858," which was, on the 1st August, 1858, reserved for signification of Her Majesty's pleasure, was assented to, and came into force on the 25th July, 1859. This Act provided for—"Chief Justice, £1,400; first Puisne Judge, £1,000; second Puisne Judge, £1,000." By section 2, "This Act shall be deemed to take effect on and after the first day of July, one thousand eight hundred and fifty-eight."

31. Mr. Justice Richmond was appointed on the 20th October, 1862, and still holds office.

32. "The Civil List Act, 1862," reserved for the signification of Her Majesty's pleasure, was assented to, and came into force on the 11th July, 1863. This Act provided (*inter alia*)—"Judges, £6,200." The amount is not allocated. Section 3 provided—"This Act shall be deemed to take effect on and after 1st July, one thousand eight hundred and sixty-two."

33. It is conceded, I believe, on all sides that the effect of the retrospective clauses in the statutes mentioned in paragraphs 30 and 32 must be to remove all doubts as to the validity of the appointments of Mr. Justice Johnston and Mr. Justice Richmond, but whether this is so or not does not affect the ultimate result, or the consequence hereinafter referred to.

34. Mr. Justice Chapman was appointed on the 23rd March, 1864, and held office until the 1st April, 1875.

35. "The Civil List Act, 1863," reserved for signification of Her Majesty's pleasure, provided for "Judges, £7,700," without allocating the amount. This Act was assented to, and came into force on the 27th July, 1864. It has no clauses giving it any retrospective operation.

36. The result is that, if the objections raised to my appointment are good, Mr. Justice Chapman was never lawfully appointed a Judge, and all his acts during the time when he sat upon the bench, from the 23rd March, 1864, to the 1st April, 1875, are void.

37. "The Civil List Act 1863 Amendment Act, 1873," came into force on the 2nd October, 1873. This Act provided (section 2)—"The sum of £7,700 granted to Her Majesty by 'The Civil List Act, 1863,' for defraying the expenses of the salaries of the Judges of the Supreme Court, shall be applied in paying to the Judges of the said Court respectively the annual salaries specified in the First Schedule hereto: Annual salary of the Chief Justice of the Supreme Court, £1,700; annual salaries of four Puisne Judges of the Supreme Court—each £1,500—£6,000."

38. Mr. Justice Gillies was appointed on the 3rd March, 1875, and he held office until his death in 1889.

39. On the same day Mr. Justice Williams was appointed, and he still holds office.

40. Mr. Justice Gillies took precedence as the senior Judge.

41. If the point now raised against the validity of my appointment be good, there was at the time of the appointment of Mr. Justice Gillies one vacancy on the Supreme Court Bench, owing to the invalidity of the appointment of Mr. Justice Chapman (see paragraph 36 hereof).

42. Mr. Justice Gresson and Mr. Justice Chapman resigned office on the 1st April, 1875.

43. For the period between the 3rd March, 1875, and the 1st April, 1875, there were therefore seven Judges holding commissions and drawing salaries—namely, Sir George Arney, C.J., Mr. Justice Johnston, Mr. Justice Gresson, Mr. Justice Richmond, Mr. Justice Chapman, Mr. Justice Gillies, and Mr. Justice Williams.

44. The result is, that, if the point raised against my appointment is good, then the appointment of Mr. Justice Williams was "unconstitutional and illegal;" there was at the time of my appointment a vacancy existing upon the Supreme Court Bench, and my appointment is valid.

45. Lastly, I have to say that "The Supreme Court Act, 1882," in clear terms warrants my appointment. It is a statute later in date than any of the Acts which have been supposed to control it, and it cannot therefore be controlled by them; it in no respect clashes with the principles of the Constitution Act; and, whether it was or was not a desirable measure, it regulates my rights and status, which I conceive to be unimpeachable.

Judge's Chambers, Wellington, 26th February, 1891. W. B. Edwards.

Enclosure 2 in No. 55.

Memorandum of Mr. Justice Edwards as to the Circumstances connected with his Appointment as a Judge of the Supreme Court of New Zealand.

1. Soon after the termination of the session of Parliament of 1889, Mr. T. W. Lewis, Under-Secretary for Native Affairs, waited upon me at my office in Wellington and informed me that he was commissioned by the Hon. the Minister for Native Affairs then holding office to ascertain whether I would accept the position of Commissioner under the Native Land Act of 1889.

2. Mr. Lewis then informed me that the Hon. the Minister for Native Affairs considered that the Commissioner should receive the same salary and allowances as the Chief Judge of the Native Land Court, and, further, that if I accepted the appointment I should be at liberty to continue the practice of my profession as a barrister and solicitor.

3. I was at that time unaware that the Act had been passed, or, indeed, that any such provision was contemplated, and of this I informed Mr. Lewis.

4. Mr. Lewis explained to me the nature of the proposed appointment, and at his request I accompanied him to his office in the Government Buildings, and he then gave me a copy of the Act.

5. I informed Mr. Lewis that I thought that it was improbable that I could accept the office of Commissioner at less salary and allowances than those of a Supreme Court Judge, but that I would consider the matter, and let him know shortly my determination upon it.

6. At the same time I informed Mr. Lewis—as the fact was—that I had in the preceding month of May had a careful balance of my books made for partnership purposes for the four years which had elapsed since the death of a former partner, and that the result showed that I was making a net income of £2,250 per annum.

7. Shortly after this interview I again saw Mr. Lewis, and I intimated to him that I had determined to adhere to my first impression, and that I would not accept the office unless I received as Commissioner the same salary and allowances as those of a Judge of the Supreme Court, and unless I was also at liberty to carry on the practice of my profession so far as it was possible to do so. I heard nothing further about the matter for some time, and I considered that the negotiation was at an end.

8. On the 15th October, 1889, however, I received a message from the Hon. the Native Minister requesting me to call upon him at the Government Buildings.

9. I did so, and the Hon. the Native Minister formally offered me the appointment of Commissioner, at a salary of £1,200 a year and £1 1s. per day travelling-allowance, with the liberty of private practice. The Hon. the Native Minister also informed me that it was estimated that the work would last from five to ten years.

10. I then informed the Hon. the Native Minister that since Mr. Lewis had spoken to me upon the matter, a change had taken place in my business arrangements, and that it was hardly likely that I could accept the appointment, and that if I did so I did not think that I could accept less than I had already stated—namely, the salary and allowances of a Judge of the Supreme Court, with liberty of private practice. I also informed the Hon. the Native Minister that my books had been balanced and my income from my practice had been found to be as previously stated.

11. I may here say that I had never met the Hon. the Native Minister before this occasion, and that I did not even know him by sight. I had had no communication whatever except with Mr. Lewis and with the Hon. the Native Minister.

12. After some consideration I determined to accept the appointment, provided I received the salary and allowances of a Judge of the Supreme Court, and I had a guarantee of a three years' engagement, but not otherwise; and I intimated this determination to the Hon. the Native Minister.

13. I received no further communication from the Hon. the Native Minister for some time, and I understood that he had left Wellington shortly after my decision was communicated to him.

14. In the meantime I had an opportunity of considering the matter and of conferring confidentially with one or two friends from different parts of the colony, who are leaders of the Bar,

and the result was that I came to the conclusion that my acceptance of the office would practically result in my retirement from the practice of my profession, and also that it was improper upon public grounds that the office of Commissioner should be held by a barrister in practice; and on 6th November, 1889, I wrote to the Hon. the Native Minister informing him that I must decline the office, even though the Government should be willing to fix the salary and allowances at those of a Judge of the Supreme Court.

15. In the same letter I suggested to the Hon. the Native Minister that the only way in which the Ministry was likely to be able to obtain a leading member of the Bar for the office was by first creating him a Judge of the Supreme Court.

16. A copy of this letter is hereunto annexed.*

17. In reply, I received on the 7th November, 1889, from the Hon. the Native Minister a letter†, a copy of which is also hereto annexed, in which it was intimated that the suggestion which I had made as to the propriety of appointing an additional Judge of the Supreme Court to whom the work of the Commission should be assigned was of such importance that he had determined to submit it for the consideration of the Cabinet upon the return of the Premier to Wellington.

18. I heard nothing further of a formal character upon the matter for a very considerable period.

19. I saw the Hon. the Native Minister once or twice, and I had some conversation with him upon one or two points connected with the subject, particularly with reference to the case of Poaka *v.* Ward, which was then under appeal to the Court of Appeal, but the Hon. the Native Minister said nothing to commit the Ministry in any way either to adopt the course I had suggested or to confer any appointments upon me if they saw fit to adopt my suggestion.

20. At some considerable time after these interviews with the Hon. the Native Minister, it came to my knowledge that the Ministry had determined to appoint an additional Judge and to assign the work of the Commission to him, and it also came to my knowledge that the offices so to be created had been offered to another member of the Bar, who was my informant, and who after considering the matter had declined, for reasons personal to himself, to accept them.

21. After this a considerable time—I should think three or four weeks—elapsed before I again heard anything about the matter. At some time towards the end of February—I should think about the 20th February—I received a message from the Hon. the Premier requesting me to call upon him at his office, and upon my doing so he offered me the offices in question, and I accepted them.

22. Later I received from the Hon. the Premier a letter dated the 1st of March, 1890, which, with my reply thereto, was laid upon the table of the House of Representatives during the session of Parliament of 1890.

23. I venture to say that a just consideration of these facts, all of which can readily be proved, can lead to no other conclusion than that my selection for the office originally offered to me was entirely unsolicited by me; that the offices which I hold were conferred upon me by the late Ministry only after a protracted negotiation, and then only after they had been declined by another member of the Bar; that I have given up a large and lucrative practice to accept high office under the Crown; that (as is shown by my memorandum of this date upon the legal aspect of the matter) my appointment as a Judge of the Supreme Court was strictly in accordance with every existing precedent in the colony, and that, even if it should prove (as, for the reasons mentioned in my last-mentioned memorandum, I am confident it cannot) that my Commission could be avoided upon technical grounds, the public faith of the colony requires that the terms of the contract entered into with me by the late Premier of the colony should be strictly adhered to.

Judge's Chambers, Wellington, 26th February, 1891. W. B. Edwards.

No. 56.

The Hon. the Premier to Mr. Justice Edwards.

Sir,— Premier's Office, Wellington, 27th February, 1891.

I have the honour to acknowledge the receipt of your letter of the 26th instant, with its enclosures, a copy of which letter I have forwarded to his Honour the Chief Justice.

I have, &c.,

His Honour Judge Edwards. J. Ballance.

No. 57.

The Hon. the Premier to His Honour the Chief Justice.

Sir,— Premier's Office, Wellington, 27th February, 1891.

I have the honour to forward for your information copy of a letter which I have this day received from Mr. Justice Edwards relative to his appointment.

Referring to the two last paragraphs of that letter, I have the honour to state that the Government is not prepared to make any conditions as to Mr. Edwards presiding at the Napier sitting of the Supreme Court, and the Government has already expressed its opinion that Mr. Edwards should not exercise judicial functions pending the decision of Parliament.

The proposal to submit the matter to the Privy Council or Law Officers of the Crown in England requires mature deliberation, and I understand that, though the Attorney-General mentioned the Privy Council to your Honour, he did so as one of several courses that might be adopted, and it seems to the Government that any proposal of this kind must depend on whether the parties could

* See No. 1, page 1. † See No. 2, page 2.

agree upon a statement of a case which might be submitted to that tribunal. The Government therefore must ask that some arrangement may be made by which Mr. Edwards shall cease to exercise judicial functions. I have, &c.,

His Honour the Chief Justice. J. Ballance, Premier.

No. 58.

His Honour the Chief Justice to the Hon. the Premier.

Sir,— Judge's Chambers, Wellington, 28th February, 1891.

I have the honour to acknowledge the receipt, last evening, of your letter of yesterday's date, and the enclosure therewith.

Immediately upon receipt of that letter I communicated it to Mr. Edwards, and stated that if he informed me that it was his intention not to sit at Napier I would arrange for the adjournment of the sittings, and for the holding such adjourned sittings. Mr. Edwards has not informed me to that effect, but I am told that he has proceeded this morning to Napier, and no doubt intended me to understand that he would sit there. In my letter to Mr. Edwards I stated that I had not intended to convey to him that the idea or suggestion of obtaining a decision of the Privy Council, or an opinion from the Law Officers in England, as to the validity of his appointment, had come from the Attorney-General, but that I believed I stated that the idea was mine, and that, as to the Privy Council, the Attorney-General had doubted whether there was any precedent under which such a matter could be referred to the Privy Council.

In my letter to Mr. Edwards I also stated that my conversation with the Attorney-General was quite unofficial, and that what I had communicated to Mr. Edwards of it had not been intended to form the basis of any official communication from Mr. Edwards, or to be referred to in any such communication.

I must express my regret that I had not made this clear to Mr. Edwards. However, as you no doubt must be aware, such misunderstandings are very likely to arise from verbal communications.

As Mr. Edwards has not informed me that he does not intend to sit at Napier, I can only repeat what I stated in my former letter to you, that I do not see what steps I can take in the matter of the sittings appointed to be held at Napier. I have, &c.,

The Hon. the Premier, Wellington. James Prendergast, Chief Justice.

No. 59.

Memorandum for the Hon. the Premier, in reply to the Memorandum* of W. B. Edwards, Esq., in which he defends the Validity of his Appointment as a Judge of the Supreme Court.

1. It is, I think, to be regretted, for the sake of the Supreme Court Bench, that any appointment should have been made about which any doubts as to its validity could have been raised. Such a proceeding must tend to weaken the influence of the Bench. And that an appointment should have been made for which no salary has been appropriated by Parliament is much to be deplored.

2. I regret also that it should be incumbent on me to make any remarks on Mr. Edwards's memorandum on the validity of his appointment. It contains, however, many statements which should not be allowed to go without reply, as they show, in my opinion, an entire misapprehension of the position of those who question the validity of the appointment.

3. The second and third paragraphs of Mr. Edwards's memorandum are as follows: "(2.) I propose to deal with the matter from its constitutional aspect first, as apart from this question it has never been pretended that my appointment is not strictly warranted by the law. (3.) The word 'unconstitutional' is frequently very loosely used; but it must, I apprehend, be used by those who challenge my appointment upon this ground as meaning something which is so contrary to the spirit of the Constitution of this colony as to render it illegal."

4. In reply to this, it may at once be said that it is contended that his appointment is "not strictly warranted by the law." Surely he has not been left unaware that at least two of the Judges of the Supreme Court have urged this contention; and the letter of the Premier, speaking on behalf of the Government, gave utterance to the same view. I shall state further what the arguments are of those who, like myself, declare that his appointment was "not strictly warranted by the law."

5. Perhaps the most extraordinary thing in his memorandum, however, is the 3rd paragraph quoted above. It is an entire misapprehension of the meaning of the term "constitutional" to assume that it has reference to the New Zealand Constitution Act. It is not to be supposed that the words "constitutional" or "unconstitutional," as applied to the act of the members of an Executive Government, are not understood, not only by lawyers, but by laymen. What is understood by the term is pointed out in Mr. Dicey's book, "Lectures Introductory to the Study of the Law of the Constitution." There is such a thing as the "Law of the Constitution"—that is, "rules expressed or recognised by the Courts." And there is also the "conventions of the Constitution," which consists of certain practices, maxims, or precepts which are not expressed or recognised by the Courts, but which make "up a body, not of laws, but of constitutional or political ethics." And Mr. Dicey says, "A lawyer cannot master even the legal side of the English Constitution without paying some attention to the nature of these constitutional understandings which necessarily engross the attention of historians or of statesmen. He ought to ascertain, at any rate,

* See Enclosure 1 in No. 55, page 20

how, if at all, the law of the Constitution is connected with the conventions of the Constitution." A passage from Freeman's "Growth of the English Constitution," quoted by Dicey, is worth reproducing here. "When an Englishman [Mr. Freeman says] speaks of the conduct of a public man being constitutional or unconstitutional he means something wholly different from what he means by conduct being legal or illegal," and illustrations are given. When the word "constitutional" is used no one thinks of referring to the written law of a Constitution Act. It must refer to those conventions which every one recognises, and regarding which there is no trace in any positive law of the Empire. Those "conventions" may, I submit, however, help us to interpret statutes regarding important Executive acts. I propose, after I have dealt with the legal aspect of the appointment, to refer to its constitutional point of view also.

6. Regarding the legal position, I notice that Mr. Edwards has made no distinction between the ordinances of the colony and its Acts. He has overlooked this important distinction: that so long as New Zealand was a Crown colony, its Government rested with the authorities in England. If, for example, a Judge was appointed, the appointment was made in England, and he was deemed an officer of the Colonial Department of the Empire. This practice still continues in Crown colonies, and hence we see Judges sent from one colony to another, and paid and pensioned as officers of the Empire—their time for a pension counting in whatever colony they may have served. What was done in New Zealand, therefore, before the Constitution Act gives little aid in determining the true interpretation of "The Supreme Court Act, 1882." And it is an extraordinary contention to make that his appointment is valid because in 1844, and down to 1858, the independence of the Bench had not been properly secured. I may, however, notice that the first ordinance creating a Supreme Court was passed in 1841. It provided that the appointment of Judges was to be by Her Majesty or the Governor. The 1844 ordinance expressly declared the appointment to be by Her Majesty alone. The usual safeguards as to Judges did not, of course, appear in these ordinances for the reason I have given, that they were not, in effect, servants of the colony, but officers of the Empire, perhaps only temporarily located in the colony.

7. The Constitution Act (15 and 16 Vict., c. 72) gave power to the General Assembly to provide for the establishment of Courts of Judicature. And it expressly provided for the allocation to Her Majesty of "£1,000 for a Chief Justice, and £800 for a Puisne Judge" (section 64). It gave power to alter the salaries by Act or Acts, and, until alteration, the salaries mentioned were to be the salaries of the Judges, and it said (section 65), "It shall not be lawful for the General Assembly by any such Act as aforesaid to make any diminution in the salary of any Judge to take effect during the continuance in office of any person being such Judge at the time of the passing of such Act."

8. The Constitution Act therefore provided for the permanent appropriation of Supreme Court Judges' salaries, and it laid down the principle that a salary once fixed could not be diminished.

9. The Constitution Act was amended by the 20 and 21 Vict., c. 53, and in this Act it is expressly declared that, so far as sections 64 and 65 are amended, it should not be lawful to repeal them.

10. No legislation affecting the Supreme Court was enacted till 1858. It was, however, apparently seen then that there was need of placing the Judges in a different position. I find from *Hansard* that Mr. Richmond, now Mr. Justice Richmond, is reported to have said, "The present Ministry could not expect, in the ordinary course of things, to remain in office any length of time, but they wished, while they did hold power, to lay the foundation of sound and liberal institutions in this country, and, where beneficial results could accrue from it, to divest themselves as much as possible of executive power" (*Hansard*, 1856–1858, p. 441).

11. The first statute passed by the New Zealand Parliament under Responsible Government dealing with Judges enacted:—"III. The Commission of the present Chief Justice, and of every Chief Justice and other Judge of the said Court to be hereafter appointed (except as hereinafter provided), shall be and continue in full force during their good behaviour, notwithstanding the demise of Her Majesty, any law, usage, or practice, to the contrary notwithstanding. IV. Provided always that it shall be lawful for the Governor of New Zealand, at his discretion, in the name and on behalf of Her Majesty, upon the address of both Houses of the General Assembly, to remove any such Judge from his office, and to revoke his patent or commission."

12. In the same year a Civil List Act was passed providing for the salaries of three Judges—a Chief Justice at £1,400; a First Puisne Judge, £1,000; a Second Puisne Judge, £1,000.

13. So that in 1858 the old tenure of Judges that had existed when they were Imperial officers was changed. They became, under the Act of 1858, Judges of New Zealand, and their power of removal was limited, their salaries fixed and determined, and made independent of the yearly vote of the Parliament. In effect, the position of the Judges was made like to the Judges in England and in other colonies where representative government had been established. To argue, therefore, as Mr. Edwards does in paragraph 9, that his appointment is constitutional because the old system of Judges continued till 1858, seems certainly an "idle contention."

14. There were, immediately after 1858, three Judges in New Zealand—Sir George Alfred Arney, Mr. Justice Johnston, and Mr. Justice Gresson.

15. The next Act dealing with Supreme Court Judges was passed in 1862. It repealed section 4 of the 1858 Act, and enacted in lieu of it the following: "IV. It shall be lawful for Her Majesty, upon the address of both Houses of the General Assembly, to remove any Judge of the Supreme Court from his office, and to revoke his patent or commission, and for the Governor to suspend any such Judge upon a like address."

16. A Civil List Act was passed in the same year, and it provided a lump sum of £6,200 for Judges. It did not specify the salary to each, but the salaries of Puisne Judges were raised from £1,000 to £1,200. It was expressly declared that the Act was to be deemed to take effect on and after the 1st day of July, 1862; and I see no legal objection to that provision being recognised as law. Acts are often made retroactive. The Act was reserved for Her Majesty's pleasure. Mr. Justice Richmond was appointed Judge on the 20th October, 1862.

17. In 1863 another Civil List Act was passed allocating £7,700 to Judges, but not specifying the number or salaries; and Mr. Justice Chapman was appointed a Judge on the 23rd March, 1864, before the assent of the Queen to this Civil List Act was gazetted in the colony.

18. In 1873 a Civil List Act was passed, and it provided: "2. The sum of seven thousand seven hundred pounds, granted to Her Majesty by 'The Civil List Act, 1863' (hereinafter called 'the said Act'), for defraying the expenses of the salaries of the Judges of the Supreme Court, shall be applied in paying to the Judges of the said Court respectively the annual salaries specified in the First Schedule hereto." Schedule: "Annual salary of the Chief Justice of the Supreme Court, £1,700. Annual salaries of four Puisne Judges of the Supreme Court, each £1,500: £6,000."

19. This Act was still in existence when the late Mr. Justice Gillies and Mr. Justice Williams were appointed.

20. Before the appointment of the last-named Judges, both Mr. Justice Gresson and Mr. Justice Chapman had resigned their offices, but their resignations were not gazetted till the 1st April, 1875.

21. Such is a sketch of the Acts dealing with the Supreme Court Judges and their salaries till 1882, when the Supreme Court Act was passed, coming into operation on the 1st January, 1883.

22. The question is, Was Mr. Edwards properly appointed? I am of opinion that the question is not whether Mr. Chapman, or Mr. Williams, or Mr. Gillies was properly appointed. If there were a flaw in any of these appointments it was abundantly cured by the proviso in section 5 of the 1882 Act, so far as the Judges existing at the time of the passing of that Act were concerned. The proviso is: "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." And it should be remembered that the Queen had, under the seal of the colony, recognised these gentlemen as Judges *de facto* when the Commission to report on the Supreme Court rules and procedure was issued. (See Appendix to Journals House of Representatives, Vol. i., A.–3, 1882.) Mr. Edwards's contention, therefore, that his appointment is valid because that of Mr. Williams was invalid is an admission that the interpretation put on the Act by me is right, but save as such admission it is not of much force. As I have pointed out, the Act of 1882 validated everything invalid in previous appointments of existing Judges.

23. In interpreting "The Supreme Court Act, 1882," the Civil List Act of 1873 must be read along with it. They are measures dealing with the same subject-matter, and "The Supreme Court Act, 1882," must be construed as if section 2 of the 1873 Act, and the part of the schedule referring to Judges, were re-enacted in the Supreme Court Act of 1882. Reading them together, it is clear that the wide words of section 5, on which Mr. Edwards relies, must be controlled by the Civil List Act, and that no more than four Puisne Judges can be appointed. If sections 11 and 12 are looked at, it will be seen that it is assumed that there is a salary payable by law for a Judge other than the Chief Justice. What is that salary? The Civil List Act must answer, but it merely fixes salaries for four Judges. There is no salary fixed for a fifth Judge, and there is therefore no power to appoint such, for otherwise the words of the 11th section, and the words referred to in the 12th section, become meaningless. The maxim "*Ut res magis valeat quam pereat*" applies. Read the Act as limited to four Judges, and every word of the statute has a meaning. Assume that five, six, seven, or even twelve Puisne Judges may be appointed and the 11th section and the 12th are unmeaning. And so read, it would appear that for a temporary Judge there is a permanent salary independent of the Parliament, but not for a permanent Judge. My contention is, that the appointment of Mr. Edwards as Judge is illegal, and not merely unconstitutional.

24. In construing the Supreme Court Act even from a legal point of view, "conventions of the Constitution" should have some weight. Is it then unconstitutional to appoint a Supreme Court Judge for whom no salary has been permanently appropriated? It is clear that it was thought a necessary precaution in our own Constitution Act. In it the salaries of the then existing Judges were fixed and determined, and not left to the annual vote of the Parliament—the Parliament, perhaps, refusing to vote the salary and leaving the Judge without one—and thus tending to destroy his independence. It is true that the two subsequent Civil List Acts (the Acts of 1862 and 1863) did not particularise the salaries payable to the Judges—the vote was one—and this is sufficient to show the difference between the law existing in 1864, when Mr. Justice Chapman was appointed, from that which now exists. Even in that case, however, the Judge was not appointed till months after the Parliament had passed the Act making permanent provision for the salary, though the Queen's assent to it had not been given. If it had been limited to merely increasing the vote for salaries of Judges, it was not, in my opinion, necessary it should have been reserved for the Queen's pleasure.

25. Now, the positive law, and the constitutional rule, have alike been since the Act of Settlement that the salaries of the Supreme Court Judges should not be made to depend on annual votes of Parliament. I need not stop to point out what that means. If a Judge has to rely on an annual vote for his salary he can hardly be said to have been made independent of Parliament. The Act of Settlement provided the salaries should be "ascertained and established," and though it contained no provision for doing so, still the principle was laid down. By the Act of 1 Geo. III., c. 23, this principle was carried out; and ever since it has been followed in England, and in her colonies that have had representative government. It is said by Mr. Edwards in his memorandum (paragraph 22) that "ascertained and established" must mean "ascertained and established" by their appointments. I am surprised to see such a statement. The defect in the Act of Settlement was that the salaries were not "ascertained and established," and Hearn in his "Government in England," p. 81, 1st ed., says, "This defect was remedied by the Act of Geo. III. The amount of salary attached to each office was specified, and the same was made a permanent charge on the Civil List." Thus the independence of the "Bench was secured as far as the law can secure it."

If Mr. Edwards is right in his contention, the Act of Geo. III. was unnecessary, and the late Professor Hearn was wrong; and Sir George Bowyer, in his "Commentaries on the Constitutional Law of England," when he spoke of the "noble improvements" of the Act of Settlement by the statute 1 Geo. III., c. 23, was mistaken. (See also Stephens's "Commentaries," Vol. ii., p. 492. See also May's "Constitutional History," Vol. iii., p. 391,392.) As for Hallam's statement, it is true the Act of Settlement laid down the principle, but it was this Act of 1 Geo. III. that first carried that out in law, for in 1693 a Bill that passed both Houses of Parliament fixing the salaries as payable out of the Civil List was vetoed by King William. And now, as I have said, no Supreme Court Judge in England, or in the colonies having Responsible Government, has to depend on the annual vote of Parliament. If there be any Judge in such a position, Mr. Edwards is that one.

26. It is said by Mr. Edwards his independence is secured, as he has a contract with the Queen. What is that contract? It is, I assume, the letter from Sir H. A. Atkinson appointing him a Commissioner under "The Native Land Court Acts Amendment Act, 1889." In that letter the salary is mentioned as £1,500 per annum, the same as the present Puisne Judges. This letter assumes that the salary is to be paid to him as Commissioner and not as Judge. Nay, more, it rightly assumes that the appointment of Commissioner precedes that of Judge of the Supreme Court, and that there is no salary by law provided for him as a Judge. It cannot be contended, therefore, that there is a contract to pay Mr. Edwards as Judge of the Supreme Court any salary. It is only as Commissioner he has the salary, and that has to be voted by Parliament, and was partly so voted last year. No salary was properly paid to him as Judge and none was voted for that purpose. There is, therefore, no contract to pay him a salary as Judge.

27. But assume the late Premier or Governor had so agreed, would that be a contract binding the colony? Clearly Mr. Edwards could get no salary if the Parliament voted none. And if there was no express power given by Parliament to bind the Crown to the payment of £1,500 a year to him for life, no Premier or Government could enter into a binding contract to pay him that sum (see Churchward *v.* Reg. L.R. I. 9, B. 173). As Commissioner he has a salary of £1,500, but no term for his appointment or salary has been fixed. The Parliament may discontinue his employment or salary and he is helpless (Shaw *v.* The Queen). It cannot be said his appointment as Judge carries a salary of £1,500 with it, for there is no salary for a fifth Puisne Judge appropriated by Parliament. And like other Government officers, he would have to depend on an annual vote. Independence as a Judge he would have none; and further, he would, as compared with the Chief Justice and four Puisne Judges of the Supreme Court, be placed in such an invidious and improper position that he himself would not, I imagine, care to hold such an office.

28. It is useless to talk of his appointment pledging him a salary or making him independent; and this leads up to the question, Was his appointment constitutional? Clearly it is unconstitutional, and has been so since the George III. statute referred to, to appoint a Supreme Court Judge who has no salary "fixed and ascertained" for him, and who has to trust to the annual vote of Parliament. The independence of the Supreme Court Bench is gone should such a state of things prevail. It is certainly amazing to me to read that, in Mr. Edwards's opinion, an Act of Parliament making provision for a permanent Civil List gives no greater independence to Judges than a "contract" made by the Premier with them. And his arguments seem to me to end in the statement that in New Zealand there is not, and has not been, that constitutional safeguard for the independence of Judges that the Mother-country and other colonies have provided.

29. The appointment was unconstitutional on other grounds. The Parliament had a right to be consulted before the Bench was added to and such a high officer as a Judge appointed. No addition has been made to the number of Judges in New Zealand without Parliament being consulted; and none in either England, or in any of the other colonies having Responsible Government. The Government did not think it proper or right to appoint a Native Commissioner without consulting Parliament and getting its express sanction. And if it were necessary—I do not see the slightest necessity—that the European Commissioner should be a Judge of the Supreme Court, then Parliament should have been asked to sanction such a peculiar arrangement. It was assumed, apparently, that a Native could be found—and one was found, Mr. John Ormsby to wit—who would fulfil the duties of Commissioner without having the honour of a Supreme Court Judge appointment.

30. Parliament is not likely to vote Mr. Edwards's salary as a Judge. If not, is it constitutional for him to act as a Judge without pay? I need not answer such a question; but that is the position in which he has placed himself. He must have considered and known that no salary was "fixed and ascertained" for him as Judge when he accepted the Commission. He is not a layman, who can plead ignorance of the law; and perhaps the most painful thing in the whole of this judicial scandal is that he thinks his independence is secured if he gets, without Parliament's sanction, the promise of a salary from a Premier, and that making a salary permanent and on the Civil List is not securing it so well as a letter from a Premier does.

31. In my opinion, he is not *de jure* a Judge. He has been appointed in violation of all constitutional authority and precedent, and it remains for the Executive to consider what has to be done. To allow this scandal to continue is dishonouring to the Supreme Court Bench, and nothing is so necessary as to make and keep it strong and independent. Parliament is not likely to sanction a sixth Judge. I am assured that there is no necessity for such at present. If Mr. Edwards does not retire from the position he has assumed, and resign his Commission, then the Crown and Parliament have ample power to deal with his case.

3rd March, 1891. P. A. Buckley.

No. 60.

Mr. Justice EDWARDS to the Hon. the PREMIER.

SIR,— Wellington, 12th March, 1891.

My attention has been called to a leader in the Wellington *Evening Post* of the 28th February, in which, amongst many other inaccurate statements, appears this: "Mr. Edwards takes up the position, we understand, that, although he draws a salary as Native Commissioner, and has a staff provided as such, the law as it stands imposes no duty whatever upon him, nor gives him any power, and that, even if it did, he, also holding a Commission as a Judge of the Supreme Court, must determine for himself what proportion of his time he devotes to either position. Ministers, after taking advice on the subject, do not see their way to controvert this position except by removing or suspending Mr. Edwards as a Judge."

In order that it may not hereafter be said that I have assented to this statement of my views, I desire to state emphatically that, although I hold a Commission as a Judge of the Supreme Court, specially conferred upon me both to make me independent and to enable me to render assistance in the Supreme Court work, I always have recognised, and do now recognise, that the work of the Commission must take precedence, and that, if the work of the Supreme Court is found to interfere with it, then the Supreme Court work must, so far as I am concerned, giveplace to the work of the Commission.

I have, &c.,

The Hon. the Premier, Wellington. W. B. EDWARDS.

No. 61.

The Hon. the PREMIER to Mr. Justice EDWARDS.

SIR,— Premier's Office, Wellington, 16th March, 1891.

I have the honour to acknowledge the receipt of your letter of the 12th inst., pointing out that you do not assent to the statement of your views as embodied in a leader in the *Evening Post* of the 28th February relative to your offices as Native Commissioner and Judge of the Supreme Court.

I have, &c.,

W. B. Edwards, Esq., Wellington. J. BALLANCE.

No. 62.

The Hon. J. BALLANCE to Mr. Commissioner EDWARDS.

SIR,— Native Office, Wellington, 14th March, 1891.

I have the honour, in the absence of the Hon. the Native Minister, to inform you that, as Parliament has not made any provision for the expenses of the Commissioner appointed under section 20 of "The Native Land Court Acts Amendment Act, 1889," after the 31st instant, the Government has decided to bring its labours to a close, and that His Excellency the Governor in Council has been advised to revoke the Commission from that date, from which period the offices held by you and Mr. Ormsby under the above-mentioned Act will cease.

At the same time I desire to convey to you the thanks of the Government for the services you have rendered as Commissioner.

I am communicating with Mr. Ormsby on the subject.

I have, &c.,

His Honour Mr. Commissioner Edwards, Wellington. J. BALLANCE.

No. 63.

Mr. Commissioner EDWARDS to the Hon. the PREMIER.

SIR,— Wellington, 16th March, 1891.

I have the honour to acknowledge the receipt of your letter of the 14th March, No. 246.

In reply, I think it my duty to inform you that there are now pending a considerable number of applications to the Commissioners, some of which have been heard, and are, at the request of the parties, now standing over for judgment, in order that it might be ascertained whether the Legislature would authorise the Commissioners to remove certain formal defects mentioned in the report of the Commissioners on the Gisborne sitting, and some of which, at the like request and for the like reason, have been adjourned for hearing.

There are also one or two applications for hearing for which no date has at present been fixed.

Further, it is most probable that a large number of additional applications will be lodged before the 20th of this month, when the time for receiving applications will expire.

I have, &c.,

The Hon. the Premier, Wellington. W. B. EDWARDS.

No. 64.

The Hon. the PREMIER to Mr. Commissioner EDWARDS.

SIR,— Premier's Office, Wellington, 18th March, 1891.

I have the honour to acknowledge the receipt of your letter of the 16th inst., relative to the work now pending before the Commissioners appointed under "The Native Land Courts Act Amendment Act, 1889," which I have forwarded to the Hon. the Native Minister.

I have, &c.,

W. B. Edwards, Esq. J. BALLANCE.

No. 65.

[Extract from *New Zealand Gazette*, No. 19, of the 19th March, 1891.]

COMMISSION UNDER "THE NATIVE LAND COURT ACTS AMENDMENT ACT, 1889," TO CEASE.

Native Office, Wellington, 18th March, 1891.

IT is hereby notified for public information that

WORLEY BASSETT EDWARDS, Esq., and
JOHN ORMSBY, Esq.,

being Commissioners appointed under "The Native Land Court Acts Amendment Act, 1889," will cease to hold office from and after the 31st instant.

W. P. REEVES,
(For the Native Minister.)

No. 66.

His Honour the CHIEF JUSTICE to the Hon. the PREMIER.

SIR,— Judge's Chambers, Wellington, 16th March, 1891.

You are, I believe, aware that, after the appointment of Mr. Edwards had been made, and after I had been appointed to administer the oath to him, I entertained serious doubts as to the power of the Governor to appoint a Judge of the Supreme Court for life beyond the number for whom salaries were provided by law, and whether, therefore, I ought to decline to administer the oath.

You are also, I believe, aware that I on that occasion consulted the other Judges on that question, and that they furnished me by telegraph with their views, and that I, with their sanction, communicated those telegrams to the then Ministry.

Notwithstanding the objection there is to the appearance of obtruding unsought opinions upon you, the circumstances seem to me to require that, as a matter of precaution, I should inform you that I have reason to believe one or more of the Judges, in addition to Mr. Justice Richmond, have, since sending me the telegrams above referred to, come to, or are inclined to, the opinion that the 5th section of "The Supreme Court Act, 1882," does authorise the appointment for life of more Judges than those for whom salaries are provided by law.

As I have mentioned, I write this only as a precaution. I believe, however, that if the Government should think fit to ask the individual Judges for an opinion on the subject they would be willing to furnish it.

I have, &c.,

The Hon. the Premier, Wellington. JAMES PRENDERGAST, Chief Justice.

No. 67.

The Hon. the PREMIER to His Honour the CHIEF JUSTICE.

SIR,— Premier's Office, Wellington, 16th March, 1891.

I have the honour to acknowledge the receipt of your letter of this date, relative to the appointment of Mr. Edwards. I have the telegrams from their Honours the Judges giving their views to which you refer, and I shall be glad to receive any further opinions that, after consideration, they may have formed.

I have, &c.,

His Honour the Chief Justice, Wellington. J. BALLANCE, Premier.

No. 68.

His Honour the CHIEF JUSTICE to the Hon. the PREMIER.

SIR,— Judge's Chambers, Wellington, 17th March, 1891.

I have the honour to acknowledge receipt of your letter of yesterday's date, informing me that you will be glad to receive any further opinion from their Honours the Judges, and to inform you that I have written to each of the Judges, advising them of the contents of your letter.

I have, &c.,

The Hon. the Premier, Wellington. JAMES PRENDERGAST, Chief Justice.

No. 69.

His Honour the CHIEF JUSTICE to the Hon. the PREMIER.

SIR,— Judge's Chambers, Wellington, 10th April, 1891.

I have now the honour to send to you the memoranda by Mr. Justice Richmond, Mr. Justice Williams, and Mr. Justice Denniston upon the subject of the appointment of Mr. Justice Edwards as Judge of the Supreme Court.

Mr. Justice Conolly informs me that he does not propose to make any further communication on the subject, as he has not seen sufficient reason to change the views expressed in the telegram from him. For myself, though I still entertain the doubts I have always felt on the subject, I have not been able at this time to find sufficient leisure to write on the subject, but propose to do so as soon as possible.

I have, &c.,

The Hon. the Prime Minister, Wellington. JAMES PRENDERGAST, Chief Justice.

Enclosure 1 in No. 69.

COPY OF OPINION OF MR. JUSTICE RICHMOND ON APPOINTMENT OF MR. EDWARDS.

IN putting upon paper the grounds of my present opinion regarding the validity of the appointment of Mr. Edwards to be a Judge of the Supreme Court, I desire it to be understood that I must necessarily continue free to modify or reverse that opinion, should I ever be called upon to consider the matter judicially. This, I have no doubt, will be also the position assumed by the other Judges.

Under ordinary circumstances it would be wrong to go even as far as I propose to go. Judges are necessarily in the habit of considering beforehand questions on which they may have to adjudicate, and must often form more or less positive opinions thereon; but they abstain from expressing such opinions otherwise than in discussion with their colleagues. Nor are they likely to forget that conclusions arrived at without argument may have to be abandoned on reconsideration of the subject after all parties have been heard.

The circumstances of the present case are, however, peculiar. At the request of the Chief Justice, the opinions of the Judges have been to a certain extent expressed to him, on a proper occasion, for a practical purpose; and these opinions have become known, more or less accurately, to the Government and to Mr. Edwards himself. There seems to have been misunderstanding in regard to some, at least, of these opinions.

It seems convenient, therefore, that, at the request of those who represent the Crown, and also of Mr. Edwards himself, we should express more fully our present views on the question raised, and the reasons which appear to us to support our provisional conclusions.

As at present advised, I think that the appointment of Mr. W. B. Edwards to be a Puisne Judge of the Supreme Court of this Colony is valid.

Objectors to the appointment take, as I understand, this position: They assert it to be a principle of the Constitution of this colony that every permanent Judge of the Supreme Court shall, from the issue of his commission, have his salary fixed and secured to him during his term of office as a permanent charge on the revenues of the colony; and that, unless such a provision exists, and is available for the salary of the person whom it is proposed to appoint, or until such provision, if it do not already exist, is made, the Governor has no power to appoint to a Judgeship. In other words, it is contended that the prior existence of such a provision is a condition precedent in law to the exercise of the Governor's power of appointment, the number of the Judges being limited by the existing provision for their remuneration.

The objection leads at once to the inquiry, when and how was the supposed condition created? It is not pretended that any such rule was in force prior to the Constitution Act. Under the Charters of 1840 and 1846, and the ordinances establishing a Supreme Court, there was no limit to the number of Puisne Judges. They held office during the pleasure of the Crown, and no provision existed for the security of their salaries. The inquiry suggested may then be limited to the provisions of the Constitution Act and its amendments, and to the Acts of the General Assembly.

The Acts amending the Constitution do not touch the matter; and the only provisions of the Constitution Act itself which in any wise relate to it are sections 64 and 65. Section 64 establishes a Civil List of £16,000 for definite purposes, amongst which are the salaries of a Chief Justice and a Puisne Judge. Section 65 empowers the General Assembly to alter the appropriation of the Civil List; but it is provided that it shall not be lawful by any Act passed in exercise of that power to diminish the salary of any Judge holding office at the passing of the Act. This is the first provision in our laws for securing the salaries of the Judges. The plain terms of the enactment show it to be a limitation by the Imperial Parliament of the powers of the local Legislature, and nothing more. There is no interference with the powers of the Executive Government. At the date of the Constitution Act the Judges' tenure of office remained what it had been since the foundation of the colony. They still held office at the pleasure of the Crown. It is clear, therefore, that the Constitution Act cannot have introduced the supposed condition that no permanent Judge shall be appointed until permanent provision shall have been first made for his salary. Judges whose salaries have been charged on the Civil List are protected against reductions by the Legislature, but there is no limitation, even by implication, of the Governor's then existing power to appoint as many Puisne Judges as he thought proper. The schedule to the Constitution Act, in providing the salary of one Puisne Judge (the words "Puisne Judge" are in the singular), is to be regarded as fixing rather a minimum than a maximum. It says, in effect, the Crown shall have the right, without asking for a vote in supply, to pay £800 a year to a Puisne Judge. It does not bar the appointment of an additional Judge or Judges; simply it leaves their payment unprovided for.

The Judges' tenure of office was first established on its present basis by the Supreme Court Act of 1858, amended in 1862. Subject to the power of making appointments for temporary purposes, it is provided by the Act of 1858 that the Commissions of the Judges shall be in force during their good behaviour; and by section 6 it is enacted that their salaries shall not be reduced. The latter provision, unlike that in the Constitution Act, is a restraint on the Executive Government. As a restraint on the Legislature it would be futile, since a legislative body cannot bind its successors. The provision cannot, therefore, be equivalent to or imply an enactment that the salaries of Judges shall be provided for by permanent appropriations. By section 2 the Governor's power of appointing an unlimited number of Puisne Judges is continued. The words are, "The Supreme Court of New Zealand shall consist of one Judge, to be appointed in the name and on behalf of Her Majesty, who shall be called the Chief Justice, and of such other Judges as His Excellency, in the name and on behalf of Her Majesty, shall from time to time appoint." The language is identically the same, as far as concerns the present question, with that of clause 10 of the ordinance of 1844, which section 2 replaces. It is observable that the Legislature has had distinctly in view the question of number. There is to be only one Chief Justice. This makes the absence of limitation

in the case of the Puisne Judges significant of an actual purpose that their number should be left to the discretion of the Executive, subject, of course, to the same practical control as is exercised by the Legislature with respect to other services. It appears to me impossible to say that section 6 is to be read as impliedly controlling section 2, and restricting the legal power of appointing Judges to the number for whom salaries have been previously provided. Had it been meant to prescribe that the number of permanent Judges should never be increased without the prior sanction of the Legislature, it would have been easy and natural to do so by section 2 itself. It would only have been necessary to state, as a limit, a number corresponding with the then existing provision of the Civil List. It is obvious that the point was never considered by the Legislature.

Perhaps I ought to notice the extraordinary power conferred by section 7, enabling the Governor in Council to appoint a salary to a temporary Judge without an appropriation by the Legislature. It may be adduced to prove that the Legislature never contemplated the appointment of a Judge without legal provision for his salary. I agree that such a thing was never contemplated. The Legislature is simply silent about such a case. The matter is left, as apparently it well might be, to the good sense of the Legislature and Executive. It has not been supposed that the Executive Government would make appointments without sufficient assurance of the subsequent approval of the Legislature, or that the Legislature would capriciously refuse to concur in the action of the Executive.

There is no essential difference between the appointment of a Judge and of any other officer without the previous authority of the Legislature for the payment of his salary. In either case there is the risk of the House refusing to provide a salary. No doubt the previous concurrence of the Legislature is desirable in exact proportion to the importance of the office; and it is especially desirable in the case of a Judge for whom a permanent grant is to be asked. But in every case, great and small, the functions of the Executive and the Legislature are distinct, and not interdependent. The one appoints the officer; the other, if it so pleases, provides his salary: and in the absence of express enactment it cannot be inferred that the exercise of the Crown prerogative of appointment is in law dependent on the assent of the Legislature.

The principle to be safeguarded in the case of the Judges is no doubt of prime importance—I should be sorry to be thought to underrate it; but there is not, and cannot be, any law binding the Legislature to secure the salaries of additional Judges by a permanent grant. Nor is there, so far as I can find, what there well might be, any law prohibiting the Executive Government from appointing a Judge for whose salary such a provision does not yet exist. The present state of things is, without doubt, a constitutional scandal; and the recurrence of such a position ought to be precluded by express enactment.

"The Supreme Court Act, 1882," in nowise alters the aspect of the question. Section 4 re-enacts section 2 of the Act of 1858, making the same distinction between the indefinite number of Puisne Judges and the one Chief Justice. The provision against diminution of salary is repeated in equivalent terms.

It only remains to notice the several Acts which have been passed altering the Civil List in regard to the Judges' salaries. Of these the first is "The Civil List Act, 1858," passed on the occasion of the appointment of Chief Justice Arney and Mr. Justice Johnston. It augments the salary attached to the office of Chief Justice, and provides for two Puisne Judges. It was reserved —apparently without actual necessity—for the Queen's assent. The next alteration was in 1862. This Act increases the Governor's salary and other appropriations, and was necessarily reserved for the Queen's assent. The provision for Judge's salaries is raised to a lump sum of £6,200, with a view to the augmentation of the salaries of the existing Judges, and to my own appointment, which followed soon after the reservation of the Act for Her Majesty's assent.

In the case of Mr. Justice Johnston and in my own case, the Commissions were issued before the notification of Her Majesty's assent to the reserved Acts. But each Act contained a clause giving it effect from the beginning of the current financial year—that is to say, from the previous 1st of July, which was prior to the date of our Commissions. If these two appointments were originally void, as the rigid application of the objection which I am discussing would imply, it is not, perhaps, clear that they would be validated by the retrospective clauses, which appear, from the date selected, to have had only a financial object. The next alteration was in 1863, when, to provide for the salary of Mr. Justice Chapman, the grant for the Judges on the Civil List was increased again in a lump sum from £6,200 to £7,700, at which latter amount it still stands. This Act was reserved apparently without necessity, and the Queen's assent was not given till after the issue of Mr. Justice Chapman's Commission. There was in this Act no provision for retrospective operation.

One more alteration must be noticed. "The Civil List Act 1863 Amendment Act, 1873," after reciting, amongst other things, "that it is expedient that the sum of seven thousand seven hundred pounds granted to Her Majesty by 'The Civil List Act, 1863,' for defraying the salaries and expenses of the Judges of the Supreme Court should be more definitely appropriated to such service," separates that sum into grants of £1,700 for the annual salary of the Chief Justice, and £6,000 for the annual salaries of four Puisne Judges of the Supreme Court—each £1,500—this division corresponding with the actually existing apportionment of the aggregate grant of £7,700.

This series of financial Acts may be cited as showing that it has been the custom to consult the Legislature beforehand as to any proposed augmentation of the strength of the Court. There can be no doubt that it has been so; and the inconvenience of a deviation from this practice has been forcibly illustrated in the present unfortunate dispute. Nevertheless, the existence of the usage is far from proving the proposition of those who object to the validity of the appointment of Mr. Justice Edwards. It is altogether unsound to argue that the Civil List Acts, or any of them, operate to limit the legal number of Puisne Judges. The scope and purpose of these Acts are purely financial. In the case of those Acts of the series which grant lump sums, it is evident that the Committee of Supply has not been attempting to prescribe the number of the Judges who shall

draw salary from the Civil List; much less the number who shall be appointed. Others of the series, especially the Act of 1873, may seem to limit the number of the members of the Court. This is, however, a superficial view of the matter. There was a substantial financial purpose in the specification of the number of Judges and the amount of their respective salaries. Without such a specification the Government might have paid the whole amount of the grant to a smaller number of Judges, and might also have altered the rates of the salaries by augmenting some and reducing others—subject, of course, to the vested interest of existing Judges. The purpose of this Act, like that of the rest of the series, must be considered as purely financial. Had the Legislature meant to alter the Supreme Court Act it must be presumed that it would have done so in the only proper way, by an express amendment of the Act itself. Such a provision has no proper place in a money Bill.

As regards the supposed effect of the Civil List Act of 1873, it is also observable that in "The Supreme Court Act, 1882," there is the same absence of a limit to the number of Puisne Judges as in all the prior legislation respecting the constitution of the Court. It may be said that the omission of a limit was to enable the appointment of temporary Judges as occasion might require; but this matter is necessarily dealt with by a special provision, with which a limit to the number of permanent Judges would not have clashed. In truth, the Act of 1882, which, as posterior to the Civil List Act of 1873, would control it, were there a real variance, does but renew the power of appointing an unlimited number of Judges, which has existed since the first constitution of the Court, when there were no Judges holding office during good behaviour.

On the whole, I conclude that there is nothing on our statute-book to show that, as a matter of law, the appropriation of a salary need, in the case of a Judge, any more than in that of any other officer of State, actually precede the appointment.

It has been noticed in the discussion to which the appointment of Mr. Edwards has given rise that the commissions of Mr. Justice Gillies and Mr. Justice Williams, both bearing date 3rd March, 1875, were issued nearly a month before the resignations of Mr. Justice Gresson and Mr. Justice Chapman. The objection to the appointment of Mr. Edwards seems to lead to the conclusion that after these two new commissions had been issued some of the six persons who then appeared to be simultaneously holding commissions as Puisne Judges were not entitled to the office. The office could not, I assume, be granted in reversion. Unless, therefore, the subsequent action of the Legislature or Executive should be held to amount to a ratification of what was originally voidable, it would be a further inference that at the time of the appointment of Mr. Edwards there was at least one vacancy on the bench, assuming the number of Puisne Judges to be limited to four. The objection, if upheld, would in that case be fatal to the title to office not of Mr. Edwards, but of one of the other persons who have been acting as Judges unchallenged for many years past. In any case, Mr. Edwards is entitled to the benefit of the argument, for what it is worth, that the Executive Government in previous appointments has not formally observed the supposed limit to the number of Judges.

C. W. Richmond.

Enclosure 2 in No. 69.

Memorandum as to the Appointment of Mr. Justice Edwards.

At the time Mr. Justice Edwards was appointed to the Bench I expressed doubt as to the validity of his appointment. I understand that the telegrams in which I expressed doubt are before the present Government. I have since considered the matter, and now think that the appointment is legally valid so as to enable Mr. Justice Edwards to exercise jurisdiction, although no salary has been as yet appropriated to his office. I shall be prepared, if necessary, to give at length reasons for the above conclusion.

I have seen the print of a letter from Mr. Justice Edwards to the Hon. the Premier, dated the 26th February, 1891, and a memorandum of Mr. Justice Edwards as to the validity of his appointment, which accompanied the letter. As I have been made aware that these documents have been placed before the Government, I ought to state that I do not assent to all the arguments used, or the conclusions arrived at in them.

This want of assent is not confined to the references in Mr. Justice Edwards's memorandum to the question of my own appointment. As to this latter, I now mention it simply because it is referred to in Mr. Justice Edwards's memorandum, and is personal to myself. At the time of my appointment, in March, 1875, I was informed that the resignations of the former Judges had been received and recorded prior to my appointment, although they were not gazetted till afterwards. In any case the resignations of the former had been arranged, and there was no intention to permanently appoint an additional Judge. Even, therefore, if Mr. Justice Edwards's appointment be invalid, it may not follow that mine was invalid also. Even if my appointment were originally invalid, the contention that the office, after being held for sixteen years, and after Parliament has legislated on the assumption that it was properly filled, could be treated as vacant, and that the appointment of Mr. Edwards would fill it, is, I think, quite untenable (see R. Grimshaw, 10, 2 B., 747). I confine myself on this latter question, as on the former, to the purely legal aspect of the case.

Dunedin, 25th March, 1891.

Joshua S. Williams.

Enclosure 3 in No. 69.

Memorandum in Reference to the Appointment of Mr. Justice Edwards.

I understand that certain telegrams some time since forwarded by me to the Chief Justice, with reference to the then recent appointment to the Supreme Court Bench, have come under the notice

of the Government, and that Mr. Justice Edwards has expressed a desire that the more decided opinion which subsequent consideration has led me to form on the subject should be submitted in the same quarter. It is of course to be understood that what I now write is extra-judicial, and open, if necessary, to full reconsideration on hearing argument.

The appointment of Judges of the Supreme Court is now regulated by section 5 of "The Supreme Court Act, 1882." That section provides that "the said Court shall consist of one Judge, to be appointed by His Excellency the Governor in the name and behalf of Her Majesty, who shall be called the Chief Justice of the said Court, and of such other Judges of the said Court as His Excellency the Governor, in the name and on behalf of Her Majesty, shall from time to time appoint." There is in these words no limitation in terms of the number of Judges other than the Chief Justice. If such limitation exists it has to be inferred from other parts of the Act, or from legislation, or circumstances outside the Act. Such a method of construction is undoubtedly permissible. The subject has been very fully discussed by the House of Lords in the case of Cox *v.* Hakes, reported in the last Appeal Case Reports (15 App. Cas., 506). The contention that the right of the Governor to appoint is limited to the filling-up of vacancies in the existing Bench is, I understand, founded on two grounds—that a consideration of the whole Act shows that no appointment of a Judge of the Supreme Court is intended to be made without provision for a salary, while there is only provision for salary for the existing number of Judges; and that the power of creating an unlimited number of Judges is one which it cannot be assumed the Legislature intended to give to the Executive for the time being. No doubt the Act assumes throughout that in every case provision is made for a salary (see sections 11 and 13); and it is also undoubted that the idea of a Judge without salary, or whose salary is dependent upon the volition of Parliament for the time being, is repugnant to modern views of the position and independence of Judges: but I do not think that it necessarily follows from these considerations that the absolute power of appointment given by section 5 is to be limited by implication by the precedent condition that Parliament shall have permanently provided a salary. It would have been the simplest thing to have inserted such limitation in section 5. Conditions may well be assumed—such as a sudden increase in population in some part of the colony—in which it might be advisable to increase on short notice the judicial strength of the colony; and it might be convenient—as in the case of several of the Judges previously appointed—to appoint Judges pending the formal resignation of their predecessors. Any abuse of the power might reasonably have been held to be prevented by the extreme improbability of any Government increasing the number of Judges unnecessarily, or without the certainty that its action would be indorsed by Parliament. A consideration of the legislation of the colony will show that the Governor had power to appoint, and did appoint, Judges for whose salaries no permanent provision had been made. I am therefore of opinion that there is no legal restriction on the power of appointment given by section 5, and consequently that the appointment of Mr. Justice Edwards is valid.

I think it right to add a word as to the suggestion as to the possible effect of a contrary view of the statute as to the position of some of the other Judges. Even assuming that in such case the same technical informality is applied to their original appointments, it seems to me open to substantial consideration whether the position of such Judges is not established by the Act of 1882. Section 5 says, "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." The Acts under which the Judges were appointed are repealed by the Act of 1882. It is under that Act that the existing Court is constituted, although the existing status and rights of the Judges are saved by sections 5 and 15. The words, "in office at the time of the commencement of this Act," may, I think, fairly be held to apply to those who were *de facto* Judges at the date of the Act. At that date the latest appointment of a Judge was seven years old, and the Legislature was well aware who were then administering justice in the Supreme Court; and there can be no doubt whose names would have been inserted in the Act as the Judges whose commission it was intended to continue, had such a course been pursued in lieu of using the general words actually employed.

I have in this memorandum confined myself entirely to the legal questions involved in the question of Mr. Justice Edwards's appointment. I have had an opportunity of reading a memorandum on the subject by Mr. Justice Edwards, which I mention only to state that I do not desire to be considered as concurring in all the views there suggested.

J. E. DENNISTON.

No. 70.

Mr. Justice EDWARDS to the Hon. the PREMIER.

SIR,— Wellington, 14th April, 1891.

I have the honour to forward to you herewith copies of a Statement of Claim and other documents served upon me at the suit of John Aldridge, a criminal sentenced by me at the Blenheim sittings of the Supreme Court in November last to five years' penal servitude.

I have the honour to request that you will inform me whether, as the powers and prerogatives of the Crown are directly questioned in the matter, and the action arises out of acts regularly done by me in my official capacity, you will cause the Law Officers of the Crown to be instructed to defend the action.

I have, &c.,

The Hon. the Premier, Wellington. W. B. EDWARDS.

No. 71.

Mr. Justice EDWARDS to the Hon. the PREMIER.

SIR,— Judge's Chambers, Wellington, 17th April, 1891.

I have the honour to refer you to my letter of the 14th April, covering copies of a Statement of Claim and other documents served upon me at the suit of John Aldridge, a criminal, and requesting you to inform me whether, under the circumstances therein mentioned, you will cause the Law Officers of the Crown to be instructed to defend the action.

I have now the honour to call your attention to the immediate necessity, owing to the exceedingly limited time available for defence of the action, for my receiving a reply to this inquiry.

I have, &c.,

The Hon. the Premier, Wellington. W. B. EDWARDS.

No. 72.

The Hon. the PREMIER to Mr. Justice EDWARDS.

SIR,— Premier's Office, Wellington, 17th April, 1891.

I am in receipt of your letter of the 14th instant, in which you forward to me a copy of a Statement of Claim and other documents served upon you at the suit of one John Aldridge, a criminal sentenced by you at the Blenheim session of the Supreme Court in November last; also of your further letter of this date.

In reply I beg to inform you that this Government has never recognised your status as a Judge of the Supreme Court, and is not prepared to instruct the Law Officers of the Crown to defend any action which may be brought against you.

I return the papers which were enclosed in your letter. I have, &c.,

W. B. Edwards, Esq., Wellington. J. BALLANCE.

No. 73.

Mr. Justice EDWARDS to the Hon. the PREMIER.

SIR,— Judge's Chambers, Wellington, 17th April, 1891.

I have the honour to acknowledge the receipt of your letter of this date, and in reply I have to point out to you that you are in error in stating that my status as a Judge of the Supreme Court has never been recognised by the Government, though it may be that it has not been recognised by the Ministry at present holding office.

I hold a commission as a Judge of the Supreme Court, regularly issued by His Excellency the Governor under the seal of the colony, upon the advice of the Responsible Advisers for the time being of the Crown.

The validity of that commission depends upon points of law of which the Judges are the only proper exponents, and it is in no respect affected by recognition or non-recognition by the Ministry of the day.

If it be true, as alleged by you, that my commission is invalid, and that I am consequently improperly usurping the office of a Judge of the Supreme Court, then it is the plain duty of the Ministry for the time being, by appropriate proceedings in the Supreme Court, to cause me to be ousted from the office which I am alleged to be usurping, and not to stand by as indifferent, publicly declaring, however, that my commission (which is regular in form, at all events), is invalid, while that commission is being attacked by a felon regularly imprisoned in the public prison.

I have the honour, therefore, to request that you will cause the Law Officers of the Crown to be forthwith instructed to take the appropriate proceedings to cause me to be ousted from the office which you allege I am usurping.

I have the honour further to request that you will inform me at the earliest possible moment what course you intend to take in this matter, in order that, if proceedings against me are undertaken by the Crown, I may cause counsel to be instructed to apply to the Court to stay the proceedings begun by the felon Aldridge until the proceedings undertaken by the Crown have been disposed of.

I have the honour to add that, upon proceedings being regularly instituted by the Law Officers of the Crown against me, I shall cease to exercise judicial functions until the determination in the Supreme Court of those proceedings. I have, &c.,

The Hon. the Premier, Wellington. W. B. EDWARDS.

No. 74.

The Hon. the PREMIER to Mr. Justice EDWARDS.

SIR,— Premier's Office, Wellington, 18th April, 1891.

I have the honour to acknowledge the receipt of your letter of the 17th instant, and in reply to state that the Government has nothing to add to the decision conveyed to you in my letter of the 17th. I have, &c.,

W. B. Edwards, Esq., Wellington. J. BALLANCE.

No. 75.

The UNDER-SECRETARY, Justice Department, to Mr. E. T. SAYERS.

SIR,— Department of Justice, Wellington, 21st April, 1891.

I have the honour, by direction of the Minister of Justice, to inform you, in reference to the salary abstracts for this month received from you in favour of Mr. Edwards and yourself, that, as no money has been appropriated by Parliament for such salaries, the Government is unable to authorise payment thereof.

I have, &c.,
C. J. A. HASELDEN,
Under-Secretary.

E. T. Sayers, Esq., Supreme Court, Wellington.

No. 76.

Mr. Justice EDWARDS to the Hon. the PREMIER.

SIR,— Judge's Chambers, Wellington, 24th April, 1891.

In reply to a letter, No. 635, dated 21st April, 1891, addressed by the Under-Secretary for the Department of Justice to my Secretary, in which the Under-Secretary states, by direction of the Minister of Justice, that, as no money has been appropriated by Parliament for payment of my salary or my Secretary's, the Government is unable to authorise payment thereof, I have the honour to say that I cannot acquiesce either at the decision at which the Government has arrived in this matter or in the reason given in the letter announcing such decision.

If that reason were good it would apply to all public services throughout the colony, since no money has been appropriated by Parliament for any of them after the 31st March last.

I have, &c.,
W. B. EDWARDS.

The Hon. the Premier, Wellington.

No. 77.

Sir ROBERT STOUT and Mr. H. B. VOGEL to the Hon. the ATTORNEY-GENERAL.

Memorandum for the Attorney-General. In re *Mr. Edwards, and his Status as a Supreme Court Judge, and the Convict John Aldridge.*

No doubt you are aware that proceedings have been commenced by John Aldridge against Mr. Edwards, challenging his right to sit as a Judge of the Supreme Court. John Aldridge was tried before Mr. Edwards charged with forgery, found guilty by a jury, and sentenced to five years' penal servitude.

The proceedings commenced by Aldridge are what is known to the law as *quo warranto*. In considering the case, however, we have come to the conclusion that it would not be safe to continue the proceedings in Aldridge's name, and the question whether or no Mr. Edwards is Judge of the Supreme Court can only be properly decided by having proceedings in the name of the Attorney-General. This would partake of the character, first, of *quo warranto*; second, of *scire facias*—that is, in addition to the statement dealing with the title of Mr. Edwards, relief would be claimed under rule 471 of the Supreme Court rules, for *scire facias*. Mr. Chapman, who acts for Mr. Edwards, would have no objection to the proceedings being so altered as to allow your name as Attorney-General to appear in the place of that of Aldridge. Seeing the great importance of the matter, and that the question should be decided on its merits, free from any technical point about procedure, we trust that you will allow your name to be used as the plaintiff in the action.

We also think that it would be more satisfactory, whatever the decision of the Supreme Court may be, to have the case ultimately brought before the Privy Council. That, however, is a question for future consideration. We may add that the expense need not be large, and, further, that, as the Judges are all here, the case should, if possible, be brought on at once, so that a Bench of four or five Judges should hear and determine it. We may add that we have come to this conclusion after careful consideration of the case and its surroundings, and ask respectfully your favourable consideration for our remarks.

ROBERT STOUT.
H. B. VOGEL.

Wellington, 27th April, 1891.

No. 78.

The Hon. the PREMIER to His Honour the CHIEF JUSTICE.

SIR,— Premier's Office, Wellington, 25th April, 1891.

I have the honour to acknowledge the receipt of your letter of the 10th instant, enclosing memoranda by Mr. Justice Richmond, Mr. Justice Williams, and Mr. Justice Denniston upon the subject of the appointment of Mr. Edwards as a Judge of the Supreme Court, and informing me of Mr. Justice Conolly's views thereon.

I am informed by the Hon. Mr. Buckley that your Honour had intimated to him that at the time of Mr. Edwards's appointment there was no necessity for an addition to the number of Judges provided by the Civil List, and I should be glad to learn if you are still of the opinion, that is, whether the business of the Supreme Court in the Wellington District can be carried on without inconvenience to the public upon Mr. Justice Richmond's return to duty.

I have, &c.,
J. BALLANCE.

His Honour the Chief Justice, Wellington.

No. 79.

His Honour the CHIEF JUSTICE to the Hon. the PREMIER.

SIR,— Judge's Chambers, Wellington, 5th May, 1891.

In reply to your letter of the number and date in the margin, I have the honour to state that there is no doubt that the business of the Supreme Court in the Wellington and in the Nelson and Marlborough Districts can be carried on not only without inconvenience to the public, but with facility to the Judges, by Mr. Justice Richmond and myself. I do not doubt that this would also be the case even if the state of things existing before Mr. Justice Conolly arranged to take the Gisborne sittings were reverted to.

If a comparison is made of the population of these districts with the districts served by the other Judges, the correctness of what I state will be apparent.

Your attention may have been drawn to a letter addressed by me to Sir Harry Atkinson, dated the 10th day of June, 1890. With reference to that letter, I desire to state that it seems to have been misunderstood. At the time when it was written Mr. Justice Richmond was on leave, and it had been arranged that Mr. Justice Edwards should not until after the meeting of Parliament exercise any judicial functions. My object was to point out the necessity for a second Judge here, and not a third; and that, in order to provide for that, there ought to be no delay in bringing the matter of Mr. Justice Edwards's appointment before Parliament, the meeting of which was then approaching.

I have to apologize for the delay in answering your letter.

I have, &c.,

The Hon. the Prime Minister, Wellington. JAMES PRENDERGAST, Chief Justice.

No. 80.

The UNDER-SECRETARY for JUSTICE to the CROWN SOLICITOR, Wellington.

SIR,— Department of Justice, Wellington, 5th May, 1891.

The Government has decided that it is desirable to test in the Supreme Court the validity of the appointment of Mr. W. B. Edwards as a Judge of the Supreme Court, and I am directed by the Minister of Justice to request you to be good enough to take proceedings at once with that object. All necessary documents will be furnished, and any further instructions given to you by the Hon. the Attorney-General.

I have, &c.,

The Crown Solicitor, Wellington. C. J. A. HASELDEN, Under-Secretary.

No. 81.

The CROWN SOLICITOR, Wellington, to the UNDER-SECRETARY for JUSTICE.

SIR,— Wellington, 6th May, 1891.

I have the honour to acknowledge the receipt of your letter of yesterday's date, instructing me to take proceedings in the matter of the appointment of Worley Bassett Edwards, Esquire, to the office of Judge of the Supreme Court. In reply, I beg to report that I have caused the appropriate process to issue in the name of the Hon. the Attorney-General, and that I have reported fully to him on the matter.

I have, &c.,

HUGH GULLY, Crown Solicitor.

The Under-Secretary, Department of Justice, Wellington.

No. 82.

CASE IN THE COURT OF APPEAL BETWEEN THE HONOURABLE THE ATTORNEY-GENERAL AND MR. W. B. EDWARDS.

IN THE

Court of Appeal of New Zealand. } *No.*

Between PATRICK ALPHONSUS BUCKLEY, AS AND BEING THE ATTORNEY-GENERAL OF NEW ZEALAND - - - - *Plaintiff*,

AND

WORLEY BASSETT EDWARDS - - *Defendant*.

Case

ON MOTION REMOVED BY CONSENT FROM THE SUPREME COURT OF NEW ZEALAND.

THE following documents herein have been filed on behalf of the Plaintiff:—

The following documents herein have been filed by the Defendant:—

STATEMENT OF CLAIM.

PATRICK ALPHONSUS BUCKLEY, Attorney-General of our Sovereign Lady the Queen in New Zealand, saith,—

1. There were on the 2nd March, 1890, and there are still, five duly-appointed Judges of the Supreme Court of New Zealand—to wit, one Chief Justice and four Puisne Judges, who were appointed on the dates following—that is to say: His Honour Sir James Prendergast, appointed on the 1st day of April, 1875; His Honour Christopher William Richmond, appointed on the 20th day of October, 1862; His Honour Joshua Strange Williams, appointed on the 3rd day of March, 1875; His Honour John Edward Denniston, appointed on the 11th day of February, 1889; His Honour Edward Tennyson Conolly, appointed on the 19th day of August, 1889.

2. The Acts of the General Assembly of New Zealand dealing with the appointment of Supreme Court Judges now in force in New Zealand are, "The Supreme Court Act, 1882," and "The Civil List Act 1863 Amendment Act, 1873."

3. That the Judges above named have been paid the salaries mentioned in the Civil List Act above-mentioned.

4. That on the 2nd day of March, 1890, His Excellency the Governor of New Zealand, purporting to exercise the powers vested in him by the said "Supreme Court Act, 1882," issued a Commission to Worley Bassett Edwards, Esquire, then of Wellington, in the Colony of New Zealand, a Barrister of the Supreme Court of New Zealand of more than seven years' standing, purporting to appoint him to be a Puisne Judge of the Supreme Court of New Zealand. The Commission is in these words;—

ONSLOW, Governor.

To Worley Bassett Edwards, Esquire, Barrister-at-law: Greeting.

KNOW ye that I, the Governor of the Colony of New Zealand, reposing especial trust and confidence in the integrity, learning, and ability of you, the said Worley Bassett Edwards, do, in the name and on behalf of Her Majesty by these presents, appoint you, the said Worley Bassett Edwards, to be a Puisne Judge of the Supreme Court of New Zealand. To have, hold, exercise, and enjoy the said office and place to you, the said Worley Bassett Edwards, during good behaviour; together with all and singular the rights, privileges, powers, authorities, rank, precedence whatsoever to the office and place belonging or in anywise appertaining.

Given under the hand of His Excellency the Right Honourable William Hillier, Earl of Onslow, of Onslow in the County of Salop; Viscount Cranley, of Cranley in the County of Surrey; Baron Onslow, of Onslow in the County of Salop, and of West Clandon in the County of Surrey; Baron Cranley, of Imbercourt; Baronet; Knight Grand Cross of the Most Distinguished Order of Saint Michael and Saint George; Governor and Commander-in-Chief in and over Her Majesty's Colony of New Zealand and its Dependencies, and Vice-Admiral of the same; and issued under the Seal of the said Colony of New Zealand, at Auckland, this second day of March, in the year of our Lord one thousand eight hundred and ninety.

E. MITCHELSON.

5. That the letter accompanying the said Commission, sent by the then Premier of the colony to the said Defendant, was as follows:—

SIR,— Wellington, 1st March, 1890.

In reference to the conversation I had with you on the subject of the appointment of a Commissioner under section 20 of "The Native Land Court Acts Amendment Act, 1889," I have now the honour to inform you that His Excellency the Governor has been pleased to approve of your appointment to that office. It has appeared to the Government, and such appears to be the general feeling, that, for an office of such importance, involving such large interests, the Commissioner should have the status of a Judge of the Supreme Court, and therefore you will be appointed to that office also.

As you are aware, the demands on the time of the present Judges of the Supreme Court cause inconvenient, but unavoidable, delay in the despatch of business, and the leave of absence granted to Mr. Justice Richmond will aggravate the evil unless some provision is now made to meet it. The Government is averse to the appointment of a temporary Judge if it can be avoided, and they hope that the arrangement, by which you will afford occasional assistance in the Supreme Court work, will temporarily meet the requirements.

Your salary will be £1,500 per annum, the same as the present Puisne Judges.

Your Commissions to the above offices will be at once forwarded to you.

I have, &c.,

W. B. Edwards, Esq., Wellington. H. A. ATKINSON.

6. The Defendant acknowledged the said letter by a letter dated the 5th day of March, 1890, which was as follows:—

SIR,— Wellington, 5th March, 1890.

I have the honour to acknowledge the receipt of your letter of the 1st March, and to say that I accept the appointment therein named, upon the terms therein mentioned.

I have, &c.,

The Hon. the Premier, Wellington. W. B. EDWARDS.

7. That the appointing of the said Worley Bassett Edwards was not by way of substitution for or succession to any of the aforesaid Judges, nor did the Commission purport to be an appointment under section 12 of "The Supreme Court Act, 1882."

8. That no salary for the said Worley Bassett Edwards as such Judge was, prior to such appointment, "ascertained and established," and no salary has yet been ascertained or established for the said Defendant, and the Parliament has refused to vote any salary for the said Defendant as a Judge of the Supreme Court.

9. That the appointment of the said Defendant as a Commissioner under section 20 of "The Native Land Acts Amendment Act, 1889," came to an end on the 31st March, 1891, and the Defendant is not now any longer acting as a Commissioner under the said Act.

10. That the said Defendant claims that he is properly appointed a Judge of the Supreme Court of New Zealand, and claims to exercise, and has exercised, the office of Judge of the Supreme Court by hearing and adjudging civil and criminal causes before the Supreme Court and the Court of Appeal, and he claims to use and exercise all the privileges and perform all the duties belonging and appertaining to the office of a Judge of the Supreme Court.

11. That the Defendant has no legal warrant, authority, or right whatsoever for exercising the office of a Judge of the Supreme Court of New Zealand.

Whereupon the said Attorney-General for Our Sovereign Lady the Queen for New Zealand prays:—

1. The consideration of the Court in the premises.

2. That due process of law may be awarded against him, the said Worley Bassett Edwards, in this behalf, to make him answer to our said Lady the Queen, and show by what authority he claims to have, use, and enjoy the office aforesaid.
3. That this Court may declare that the said Commission ought to be cancelled, vacated, and disallowed.
4. That such relief may be granted as the Court may in the premises deem fit.

AFFIDAVIT OF H. B. VOGEL

(Sworn 6th May, 1891).

I, Harry Benjamin Vogel, of Wellington, in the Colony of New Zealand, barrister and solicitor, make oath and say,—

1. That I have read the statement of claim in this action.

2. That such of the allegations contained therein as are within my own knowledge are true in substance and in fact, and such of the said allegations as are not within my own knowledge I am informed and verily believe to be true.

NOTICE OF MOTION (IN THE SUPREME COURT).

Take notice this Honourable Court will be moved on the 7th day of May, or as soon thereafter as counsel can be heard on behalf of the Plaintiff, to show cause why the Defendant should not show by what warrant and authority he claims to exercise the office of Judge of the Supreme Court of New Zealand, or why his Commission of Judge of the Supreme Court of New Zealand should not be cancelled on the grounds following :—

1. That he has not been legally appointed a Judge of the Supreme Court of New Zealand.

2. On the grounds particularly set forth in the Statement of Claim in this action.

Dated at Wellington this 6th day of May, 1891.

Hugh Gully,
Solicitor for the Plaintiff.

STATEMENT OF DEFENCE.

The Defendant, by Leonard Owen Howard Tripp, his solicitor, says,—

1. That he admits the 1st and 3rd paragraphs of the Statement of Claim.

2. That he denies that "The Civil List Act 1863 Amendment Act, 1873," in any respect dealt with or affected the appointments of Judges of the Supreme Court of New Zealand, as alleged in the 2nd paragraph of the Statement of Claim.

3. That he admits and alleges that on the 2nd day of March, 1890, His Excellency the Governor of New Zealand, by and with the advice and consent of the Executive Council of the said colony, and in the name and on behalf of Her Majesty, appointed him, the Defendant, to be a Puisne Judge of the Supreme Court of New Zealand, and he, the Defendant, further admits and alleges that he was then a barrister of the Supreme Court of New Zealand of more than seven years' standing—to wit, of upwards of fourteen years' standing.

4. The Defendant also admits that the 4th paragraph of the Statement of Claim in this action substantially sets out the Commission whereby he, the Defendant, was so appointed; but the Defendant alleges that the concluding part of the said Commission is not accurately set out in the said Statement of Claim, and that the same is in the words following :—

> Given under the hand of His Excellency the Right Honourable William Hillier, Earl of Onslow, of Onslow in the County of Salop; Viscount Cranley, of Cranley in the County of Surrey; Baron Onslow of Onslow in the County of Salop, and of West Clandon in the County of Surrey; Baron Cranley, of Imbercourt; Baronet; Knight Grand Cross of the Most Distinguished Order of Saint Michael and Saint George; Governor and Commander-in-Chief in and over Her Majesty's Colony of New Zealand and its Dependencies; and issued under the Seal of the said colony, at Auckland, this second day of March, in the year of our Lord one thousand eight hundred and ninety. E. Mitchelson.

5. The Defendant further alleges that the said Commission was given under the hand of His Excellency the Governor, and was sealed with the seal of the Colony of New Zealand, and

that the said Commission was and is in the same form as all other Commissions heretofore issued to Judges of the Supreme Court of New Zealand.

6. Except as is herein expressly admitted, the Defendant denies all the allegations of fact contained in the 4th paragraph of the Statement of Claim in this action.

7. The Defendant denies that the said Commission was issued to him upon the 2nd day of March, 1890; and the Defendant alleges that he was not at any time prior to the 6th day of March, 1890, informed that the said Commission had been signed and sealed.

8. The Defendant denies that the letter set out in the 5th paragraph of the Statement of Claim in this action accompanied the said Commission, as therein alleged.

9. The Defendant alleges that the circumstances under which he was appointed a Judge of the Supreme Court of New Zealand, and the terms upon which he was appointed, are as follows:—

10. In and for many years prior to the years 1889 and 1890 the Defendant was a barrister and solicitor in large practice in the City of Wellington, in New Zealand, and the Defendant was reputed to possess a special knowledge of the laws relating to Native lands and Native titles in New Zealand.

11. In the year 1889 the Parliament of the Colony of New Zealand passed a statute intituled "The Native Land Court Acts Amendment Act, 1889," whereby provision was made for the appointment of a Commission to ascertain and determine claims to Native lands, as upon reference to the said statute will more fully appear.

12. Soon after the termination of the session of Parliament of 1889, the Under-Secretary for Native Affairs, by direction of the Minister for Native Affairs, waited upon the Defendant at his office in Wellington, and informed the Defendant that he, the said Under-Secretary, was directed by the Hon. the Minister for Native Affairs then holding office to ascertain whether the Defendant would accept the position of Commissioner under the statute mentioned in paragraph 11 hereof. At the same time the said Under-Secretary for Native Affairs then informed the Defendant that the Hon. the Minister for Native Affairs considered that the Commissioner should receive the same salary and allowances as the Chief Judge of the Native Land Court—to wit, the sum of £700 per annum and certain travelling-allowances; and that if he, the Defendant, accepted the said appointment he would be at liberty to continue the practice of his profession as a barrister and solicitor.

13. The Defendant thereupon informed the said Under-Secretary—as the fact was—that the Defendant had, in the preceding month of May, had a careful balance of his books made for partnership purposes for the four years which had elapsed since the death of a former partner, and that the result showed that he, the Defendant, was making a net income of £2,250 per annum. The Defendant also informed the said Under-Secretary that it was improbable that he, the Defendant, could accept the said office of Commissioner unless he received the same salary and allowances as a Judge of the Supreme Court, and unless the Defendant was also at liberty to carry on the practice of his profession as a barrister and solicitor; but that he, the Defendant, would consider the matter, and would let the said Under-Secretary know shortly his decision upon it.

14. Shortly after this interview the Defendant again saw the said Under-Secretary, and intimated to him that he, the Defendant, had determined to adhere to his first impression, and that he would not accept the office unless he received as Commissioner the same salary and allowances as those of a Judge of the Supreme Court, and unless he was also at liberty to carry on the practice of his profession, so far as it was possible to do so.

The Defendant heard nothing further about the matter for some time, and he considered that the negotiation was at an end.

15. On the 15th October, 1889, however, the Defendant received a message from the Hon. the Native Minister requesting the Defendant to call upon him at the Government Buildings.

16. The Defendant did so, and the Hon. the Native Minister formally offered the Defendant the appointment of Commissioner at a salary of £1,200 a year, and £1 1s. per day travelling-allowance, with the liberty of private practice. The Hon. the Native Minister also informed the Defendant that it was estimated that the work would last from five to ten years.

17. The Defendant then informed the Hon. the Native Minister that since the said Under-Secretary had spoken to the Defendant upon the matter a change had taken place in his business arrangements, and that it was hardly likely that he could accept the appointment, and that if he did so he did not think that he could accept less than he had already stated —namely, the salary and allowances of a Judge of the Supreme Court, with liberty of private

practice. The Defendant also informed the Hon. the Native Minister that his books had been balanced, and his income from his practice had been found to be as previously stated.

18. After some consideration the Defendant determined to accept the appointment, provided he received the salary and allowances of a Judge of the Supreme Court, and he had a guarantee of a three years' engagement, but not otherwise; and he intimated this determination to the Hon. the Native Minister.

19. The Defendant received no further communication from the Hon. the Native Minister for some time, and he understood that the said Minister had left Wellington shortly after the decision of the Defendant was communicated to him.

20. In the meantime the Defendant had an opportunity of reconsidering the matter, and the result was that the Defendant came to the conclusion that his acceptance of the office would practically result in his retirement from the practice of his profession, and also that it was improper upon public grounds that the office of Commissioner should be held by a barrister in practice, and on the 16th November, 1889, the Defendant wrote to the Hon. the Native Minister informing him that he must decline the office, even though the Government should be willing to fix the salary and allowances at those of a Judge of the Supreme Court.

21. The letter mentioned in the last paragraph was and is in the words and figures following (See No. 1, page 1).

22. In reply to the letter set out in the last paragraph, the defendant received from the Hon. the Native Minister a letter which was and is in the words and figures following (See No. 2, page 2).

23. After the lapse of some time, and on or about the 20th day of February, 1890, the Hon. Sir Harry Atkinson, then Premier of the Colony of New Zealand, sent a message to the Defendant requesting the Defendant to call at the Premier's office, and on the Defendant doing so the said Premier then offered to the Defendant the offices of a Judge of the Supreme Court of New Zealand and of Commissioner under the said statute, at the same salary and allowances as the other Puisne Judges of the said Court, and the Defendant agreed to accept the said offices upon those terms.

24. On or about the 1st day of March, 1890, the Defendant received from the said Premier the letter set out in the 5th paragraph of the Statement of Claim in this action; and on the 5th day of March, 1890, the Defendant wrote and despatched to the said Premier the letter set out in the 6th paragraph of the Statement of Claim in this action.

25. Both the letters mentioned in the last paragraph were written, despatched, and received prior to the delivery to the Defendant of his Commission.

26. On or about, but not before, the 6th day of March, 1890, the Defendant received from the Hon. the Minister of Justice his said Commission, and a letter accompanying the same in the words and figures following (See No. 5, page 2).

27. The appointments conferred upon the Defendant were gazetted on the 6th day of March, 1890, and on that date the Defendant retired from the practice of a barrister and solicitor theretofore carried on by him.

28. The Defendant took the oaths as a Judge of the Supreme Court of New Zealand in due form of law on the 14th day of March, 1890.

29. The Defendant alleges and submits that the negotiations and correspondence hereinbefore set out and referred to constitute a contract binding on the Crown, whereby his salary as a Judge of the Supreme Court of New Zealand was ascertained and established.

30. The Defendant denies, therefore, that no salary was ascertained and established for him as such Judge, as is alleged in the 8th paragraph of the Statement of Claim in this action, and the Defendant denies that it is true, as alleged in the said paragraph, that Parliament has refused to vote any salary for the Defendant as a Judge of the Supreme Court.

31. The Defendant alleges that during the session of the House of Representatives in the year 1890 a minority of the members of the said House threatened to obstruct the business and proceedings of the said House until the said House should come to an end by effluxion of time on the 5th day of October, 1890, to the injury of the public business of the colony, and that in consequence thereof, and not otherwise, and in order to save the great public loss and inconvenience which would have resulted therefrom, the Ministry then in office submitted to recommend His Excellency the Governor to withdraw the word "Judge," which had been inserted in a Message of His Excellency recommending provision to be made for payment of the Defendant's salary, and thereupon the said House passed the sum of £1,400 for payment of the Defendant as Commissioner. At the same time the Minister in charge of the estimates declared in his place upon the Treasury benches in the House of Representatives that the Ministry could not interfere, and would not attempt to interfere,

with the discharge by the Defendant of his duties as a Judge of the Supreme Court, and that the Ministry would pay to the Defendant his full salary of £1,500 per annum.

32. The Defendant has accordingly been duly and regularly paid his full salary as a Judge of the Supreme Court of New Zealand (and not as Commissioner) up to the 31st day of March last.

33. The Defendant's said salary has been paid monthly, and all the payments since the 27th day of January, 1890, have been made by the Ministry whereof the Plaintiff is a member, and the said Ministry have also caused to be paid to the Defendant his travelling-allowances on circuit as a Judge of the Supreme Court of New Zealand.

34. On the 21st day of April, 1891, the Hon. the Minister of Justice caused the Under-Secretary for the Department of Justice to write to the secretary of the Defendant, informing him that, as no money had been appropriated by Parliament for payment of the Defendant's salary, such salary could not be paid for the month of April.

35. The Defendant admits the allegations contained in the 7th and 10th paragraphs of the Statement of Claim in this action.

36. The Defendant denies the allegations contained in the 9th paragraph of the Statement of Claim; and the Defendant alleges that the Ministry whereof the Plaintiff is a member caused him, the Defendant, to be removed from his office of Commissioner as from the 31st day of March last, alleging as the ground thereof that no moneys had been appropriated by Parliament for payment of the expenses of the said Commission after the 31st day of March last, notwithstanding that there were then many matters, several of which had been heard, but not finally adjudicated upon, then depending before the said Commission.

37. No moneys have been appropriated by Parliament for the public services later than the 31st day of March, 1891, and since then the necessary payments for public services have been, and are now being, made under the authority of the 9th section of "The Public Revenues Act, 1882," as amended by the 3rd section of "The Public Revenues Act 1882 Amendment Act, 1883."

38. The said Commission of the Defendant now is of full force and virtue, and has been in no respect impeached, nullified, cancelled, or suspended; and the Defendant submits that he now is a lawfully-appointed Puisne Judge of the Supreme Court of New Zealand, wherefore the Defendant denies the allegation contained in the 11th paragraph of the Statement of Claim in this action.

This Statement of Defence was filed and served by Leonard Owen Howard Tripp, of No. 12, Brandon Street, in the City of Wellington, solicitor for the Defendant, whose address for service is at his office at No. 12, Brandon Street aforesaid.

AFFIDAVIT OF THE DEFENDANT, FILED 8TH MAY, 1891.

I, WORLEY BASSETT EDWARDS, of the City of Wellington, in New Zealand, Esquire, the above-named Defendant, make oath and say,—

1. That I have read the foregoing Statement of Defence.

2. That so much of the allegations in the said Statement of Defence as relates to my own acts and deeds is true, and that so much thereof as relates to the acts and deeds of any other person I believe to be true.

3. In particular, I say that the facts set out in paragraphs 4, 7 to 10, both inclusive, 12 to 27, both inclusive, 32, 33, and 36 of the said Statement of Defence are within my own knowledge, and that the allegations contained in each and every of the said paragraphs are true in every particular. W. B. EDWARDS.

Sworn at the City of Wellington, this 8th day of May, 1891, before me—

A. GRAY,
A Solicitor of the Supreme Court of New Zealand.

AFFIDAVIT OF THE DEFENDANT, FILED 8TH MAY, 1891.

I, WORLEY BASSETT EDWARDS, of the City of Wellington, in New Zealand, Esquire, the above-named Defendant, make oath and say,—

1. Soon after the termination of the session of Parliament of 1889, Mr. T. W. Lewis, Under-Secretary for Native Affairs, waited upon me at my office in Wellington, and informed me that he was commissioned by the Hon. the Minister for Native Affairs then holding office to ascertain whether I would accept the position of Commissioner under "The Native Land Court Acts Amendment Act, 1889."

2. Mr. Lewis then informed me that the Hon. the Minister for Native Affairs considered that the Commissioner should receive the same salary and allowances as the Chief Judge of the Native Land Court, and, further, that if I accepted the appointment I should be at liberty to continue the practice of my profession as a barrister and solicitor.

3. I was at that time unaware that the Act had been passed, or, indeed, that any such provision was contemplated, and of this I informed Mr. Lewis.

4. Mr. Lewis explained to me the nature of the proposed appointment, and at his request I accompanied him to his office in the Government Buildings, and he then gave me a copy of the Act.

5. I informed Mr. Lewis that I thought that it was improbable that I could accept the office of Commissioner at less salary and allowances than those of a Supreme Court Judge, but that I would consider the matter and let him know shortly my determination upon it.

6. At the same time I informed Mr. Lewis—as the fact was—that I had in the preceding month of May had a careful balance of my books made for partnership purposes for the four years which had elapsed since the death of a former partner, and that the result showed that I was making a net income of £2,250 per annum.

7. Shortly after this interview I again saw Mr. Lewis, and I intimated to him that I had determined to adhere to my first impression, and that I would not accept the office unless I received as Commissioner the same salary and allowances as those of a Judge of the Supreme Court, and unless I was also at liberty to carry on the practice of my profession, so far as it was possible to do so.

I heard nothing further about the matter for some time, and I considered that the negotiation was at an end.

8. On the 15th October, 1889, however, I received a message from the Hon. the Native Minister requesting me to call upon him at the Government Buildings.

9. I did so, and the Hon. the Native Minister formally offered me the appointment of Commissioner at a salary of £1,200 a year and £1 1s. per day travelling-allowance, with the liberty of private practice. The Hon. the Native Minister also informed me that it was estimated that the work would last from five to ten years.

10. I then informed the Hon. the Native Minister that since Mr. Lewis had spoken to me upon the matter a change had taken place in my business arrangements, and that it was hardly likely that I could accept the appointment, and that if I did so I did not think that I could accept less than I had already stated—namely, the salary and allowances of a Judge of the Supreme Court, with liberty of private practice. I also informed the Hon. the Native Minister that my books had been balanced, and my income from my practice had been found to be as previously stated.

11. I had never met the Hon. the Native Minister before this occasion, and I did not even know him by sight. I had had no communication whatever with reference to the matter except with Mr. Lewis and with the Hon. the Native Minister.

12. After some consideration I determined to accept the appointment, provided I received the salary and allowances of a Judge of the Supreme Court, and I had a guarantee of a three years' engagement, but not otherwise; and I intimated this determination to the Hon. the Native Minister.

13. I received no further communication from the Hon. the Native Minister for some time, and I understood that he had left Wellington shortly after my decision was communicated to him.

14. In the meantime I had an opportunity of reconsidering the matter, and of conferring confidentially with one or two friends from different parts of the colony who are leaders of the Bar, and the result was that I came to the conclusion that my acceptance of the office would practically result in my retirement from the practice of my profession, and also that it was improper upon public grounds that the office of Commissioner should be held by a barrister in practice; and on the 6th November, 1889, I wrote to the Hon. the Native Minister informing him that I must decline the office, even though the Government should be willing to fix the salary and allowances at those of a Judge of the Supreme Court.

15. In the same letter I suggested to the Hon. the Native Minister that the only way in which the Ministry was likely to be able to obtain a leading member of the Bar for the office was by first creating him a Judge of the Supreme Court.

16. A copy of this letter appears upon pages 6 and 7 of the exhibit marked A hereunto annexed.

17. In reply, I received, on the 7th November, 1889, from the Hon. the Native Minister, a letter, a copy of which also appears on page 7 of the exhibit marked A hereunto annexed, in which it was intimated that the suggestion which I had made as to the propriety of appointing an additional Judge of the Supreme Court, to whom the work of the Commission should be assigned, was of such importance that he had determined to submit it for the consideration of the Cabinet upon the return of the Premier to Wellington.

18. I heard nothing further of a formal character upon the matter for a very considerable period.

19. I saw the Hon. the Native Minister once or twice, and I had some conversation with him upon one or two points connected with the subject, particularly with reference to the case of Poaka *v.* Ward, which was then under appeal to the Court of Appeal; but the Hon. the Native Minister said nothing to commit the Ministry in any way, either to adopt the course I had suggested or to confer any appointments upon me if they saw fit to adopt my suggestion.

20. At some considerable time after these interviews with the Hon. the Native Minister it came to my knowledge that the Ministry had determined to appoint an additional Judge, and to assign the work of the Commission to him, and it also came to my knowledge that the offices so to be created had been offered to another member of the Bar, who was my informant, and who, after considering the matter, had declined, for reasons personal to himself, to accept them.

21. After this a considerable time—I should think three or four weeks—elapsed before I again heard anything about the matter. At some time towards the end of February—I should think about the 20th February, but I have no record of the date—I received a message from the Hon. the Premier requesting me to call upon him at his office; and upon my doing so he offered me the offices in question, and I accepted them.

22. Later I received from the Hon. the Premier a letter dated the 1st March, which with my reply thereto, was laid upon the table of the House of Representatives during the session of Parliament of 1890. Copies of the said letters are set out in the 5th and 6th paragraphs of the Plaintiff's Statement of Claim in this action.

23. At the time of my acceptance of the said appointments I was a barrister and solicitor in large practice in the City of Wellington, and I had carried on the practice in which I was then engaged, either in partnership with other persons or alone, since the 1st day of May in the year 1877.

24. I accepted the said appointments in good faith, believing that the same were made by His Excellency the Governor by the advice of the Responsible Advisers of the Crown for the time being in the colony in the public interest, and believing also that the power of the Governor to make the said appointments was clear and unquestionable.

25. In consequence of my acceptance of the said appointments at such short notice I was compelled to dispose of my practice for what I could get, and I received from the sale thereof the sum of £500, and no more.

26. Since the date of my said appointments, and up to the 31st day of March last, my salary as a Judge of the Supreme Court of New Zealand was duly and regularly paid.

27. The exhibit hereunto annexed, marked A, contains in the twelve pages thereof the complete correspondence up to the present date between the Ministry at present holding office and myself, and between the Ministry aforesaid and his Honour the Chief Justice so far as the same has been officially communicated to me by him, except as hereinafter mentioned.

28. The exception in the last paragraph mentioned is that enclosed with my letter to the Premier of the 26th February, 1891. Appearing on the fourth page of the said Exhibit A was a memorandum setting forth my views upon the validity of my appointment. This memorandum does not appear in the said exhibit, because the facts therein stated have been found in some minor and immaterial particulars to be inaccurate, and because in some respects I have modified my views as to the deductions of law therein set out, although my own view as to the validity of my appointment has been strengthened, and because my arguments of law are properly submitted to this honourable Court by argument in open Court only.

29. There have been no verbal communications between the present Ministry, or any member thereof, and myself.

30. The validity of my appointment as a Judge of the Supreme Court of New Zealand was first questioned by the Government of the Colony, to my knowledge, in the letter of the 23rd February, 1891, from the Hon. the Premier to his Honour the Chief Justice, which appears on page 3 of the said Exhibit A.

31. Ever since the validity of my appointment has been so questioned I have been anxious that the same should be set at rest in the proper manner, as appears from the letters set out in pages 4 and 11 of the said Exhibit A.

32. I have received no other reply to my letter to the Hon. the Premier dated the 26th February, 1891, set out on page 4 of the said Exhibit A, than the letter from the Hon. the Premier to me dated the 27th February, 1891, set out on the eighth page of the said Exhibit A.

33. On the 10th day of April, 1891, one John Aldridge, a felon sentenced by me at the Blenheim circuit sittings of this honourable Court to five years' penal servitude, commenced an action against me in this honourable Court for the purpose of testing the validity of my Commission, which action is still pending, and the correspondence beginning with the letter of the 14th day of April, 1891, from myself to the Hon. the Premier, on page 10 of the said Exhibit A, and ending with the letter of the 18th day of April, 1891, from the Hon. the Premier to myself, on page 12 of the said Exhibit A, took place between myself and the Hon. the Premier with respect to such action.

34. The letter of the 21st April, 1891, appearing on page 12 of the said Exhibit A is a true copy of the letter referred to in paragraph 34 of my Statement of Defence in this action; and the letter of the 24th April, 1891, also appearing on page 12 of the said Exhibit A, is a true copy of a letter addressed by me to the Hon. the Premier in reply thereto.

35. I have received no reply to the said last-mentioned letter.

36. The letter of the 14th March, 1891, from the Hon. the Premier to myself, and the letter of the 16th March, 1891, from myself to the Hon. the Premier, both of which appear on page 9 of the said Exhibit A, and the letter from the Hon. the Premier to myself, dated the 18th March, 1891, which appears on the tenth page of the said Exhibit A, show the circumstances under which I was removed from the Commissionership, mentioned in the Plaintiff's Statement of Claim, and also in my Statement of Defence, in this action.

The said letters, as so appearing in the said Exhibit A, are true copies of the letters whereof they purport to be copies. W. B. EDWARDS.

Sworn at the City of Wellington, this 8th day of May, 1891, before me—

A. GRAY,
A Solicitor of the Supreme Court of New Zealand.

This and the eleven following pages, signed by me, form the Exhibit A referred to in the annexed affidavit of Worley Bassett Edwards.

Sworn before me, this 8th day of May, 1891—

A. GRAY,
A Solicitor of the Supreme Court of New Zealand.

The under-mentioned telegrams and letters contained in Exhibit A will be found in the preceding correspondence as specified hereafter, viz.:—

AFFIDAVIT OF FRANCIS HARRISON, FILED 8TH MAY, 1891.

I, FRANCIS HARRISON, of the City of Wellington, in New Zealand, librarian, make oath and say,—

1. That it appears from the public records and official *Gazettes* of this colony that since the passing of the statute 15 and 16 Vict., c. 72, of the Imperial Parliament, granting a Constitution to this colony, and prior to the 2nd day of March, 1890, the following Judges have been appointed Judges of this honourable Court, and that they have held office as follows: namely,—

Sir George Arney was appointed Chief Justice on the 1st day of March, 1858, and held office until the 1st day of April, 1875, when he resigned office.

Sir James Prendergast was appointed Chief Justice on the 1st day of April, 1875, and still holds office.

Mr. Justice Johnston was appointed a Puisne Judge on the 3rd day of November, 1858, and he held office until his death in 1889.

Mr. Justice Gresson was temporarily appointed a Puisne Judge on the 8th day of December, 1857, and was permanently appointed a Puisne Judge on the 1st day of July, 1862, and he held office until the 1st day of April, 1875, when he resigned office.

Mr. Justice Richmond was appointed a Puisne Judge on the 20th day of October, 1862, and he still holds office.

Mr. Justice Chapman was appointed a Puisne Judge on the 23rd day of March, 1864, and he held office until the 1st day of April, 1875, when he resigned office.

Mr. Justice Gillies was appointed a Puisne Judge on the 3rd day of March, 1875, and he held office until his death in the year 1889.

Mr. Justice Williams was appointed a Puisne Judge on the 3rd day of March, 1875, and he still holds office.

Mr. Justice Denniston was appointed a Puisne Judge on the 11th day of February, 1889, and he still holds office.

Mr. Justice Conolly was appointed a Puisne Judge on the 19th day of August, 1889, and he still holds office.

2. That it appears from the *New Zealand Gazettes* of the undermentioned dates that the assent of Her Majesty was proclaimed to and that the following statutes came into force on the dates undermentioned, namely,—

"The Civil List Act, 1858," on the 25th day of July, 1859; *New Zealand Gazettes* of 1859, page 178.

"The Civil List Act, 1862," on the 11th day of July, 1863; *New Zealand Gazettes* of 1863, page 267.

"The Civil List Act, 1863," on the 27th day of July, 1864; *New Zealand Gazettes* of 1864, page 314.

F. HARRISON.

Sworn at the City of Wellington, this 8th day of May, 1891, before me—

A. A. FINCH,
A Solicitor of the Supreme Court of New Zealand.

AFFIDAVIT OF WILLIAM JOHNSTON MORPETH.

I, WILLIAM JOHNSTON MORPETH, of Wellington, in the Colony of New Zealand, Civil servant, do hereby make oath and say as follows:—

1. That I am an official in the Government service, employed especially in the Native Department.

2. That the exhibit hereunto annexed marked with the letter A contains in the forty-six pages thereof letters forming portion of the correspondence between Worley Bassett Edwards, of Wellington aforesaid, Esquire, and the late Ministry.

3. That the said letters so appearing in the said Exhibit A are true copies of the letters whereof they purport to be copies.

4. That on the 16th day of January, 1891, a report was made by the Commissioners appointed under the 20th section of "The Native Land Court Acts Amendment Act, 1889," extracts whereof are hereunto annexed and marked as an exhibit with the letter B.

W. J. MORPETH.

Sworn at the City of Wellington, this 14th day of May, 1891, before me—

LEONARD G. REID,
A Solicitor of the Supreme Court of New Zealand.

This and the forty-five pages following is the exhibit marked "A" referred to in the annexed affidavit of William Johnston Morpeth, sworn before me this 14th day of May, 1891.

LEONARD G. REID,
A Solicitor of the Supreme Court of New Zealand.

A.

SIR,— Wellington, 14th May, 1890.

With reference to the letter of the 10th March last, addressed by Mr. J. Aitken Connell to you, and referred by you to me, and to my subsequent conversation with you upon this matter, I have to state that, although I do not agree with Mr. Connell's deductions or his recommendations, it is, in my opinion, desirable to amend the powers given to the Commissioners appointed under the 20th section of "The Native Land Court Acts Amendment Act, 1889," in such manner as will render clear the intention of the Legislature with respect to the matters hereinafter mentioned. I agree with Mr. Connell that the wording of the last sentence of section 27 is not very appropriate, and that in many instances it will prove altogether inapplicable.

The only instances which at present occur to me in which instruments which have been validated by certificate of the Commissioners under section 27 may (subject to what is hereinafter mentioned) prove to be registerable under the Land Transfer Act are those in which, after execution of the instruments validated, the interests of the selling Natives have been ascertained by the Native Land Court and a Crown grant or certificate under the Land Transfer Act has been issued to the selling Natives.

The case of Paraone *v.* Matthews (6 N.Z.L.R., 744) is a case of this class, and I understand that there are many other blocks of land in the same position, especially upon the East Coast. To this class of case the whole of section 27 is strictly applicable—and this was probably in the mind of the draftsman who prepared the section.

No doubt there is another large class of cases in which the interests of the selling Natives have not been ascertained by the Native Land Court, and the land still remains under memorial of ownership or certificate of the Native Land Court. In these cases it is clear, as pointed out by Mr. Connell, that the instruments validated (if they can be validated) cannot be registered under the Land Transfer Act.

It does not appear to me, however, that the consequences of this are those anticipated by Mr. Connell, or that, if they are, the remedy suggested by him is the proper one. As at present advised, I see no reason why in such cases the latter part of section 27 should not be rejected as inapplicable, and why those who claim under instruments validated by certificate of the Commissioners under section 27 should not apply to the Native Land Court under the provisions of section 23 and the subsequent sections of "The Native Land Court Act, 1886."

No doubt it would have been better if the draftsman of section 27 had made it clear that this was the proper course to take in all cases in which the concluding part of the section did not apply, and if the Act is to be amended it may be as well to do this in the amending Act.

The clause proposed by Mr. Connell is, however, something very different to this, and would throw upon the Commissioners the duty of measuring the quantum of interest represented by the undivided shares purchased as between the purchasers and the non-selling Natives who would not be represented before the Commission. This is a duty which belongs strictly to the Native Land Court in the ordinary exercise of its jurisdiction. It would be most undesirable to interfere with this; nor is the Commission a tribunal which could satisfactorily exercise such a jurisdiction.

The amendment which I have suggested is all that is desirable to meet the objection raised by Mr. Connell. The substantial matters in which (as I have intimated) amendments should, in my opinion, be made are of a very different character.

Section 27 is (as has been justly pointed out by Mr. Connell) the only part of the enactment from which any substantial relief can be hoped for by those whose cases are apparently intended to be met. But a critical analysis of that section will, I think, show that it is at least doubtful whether the object of the draftsman has been attained. The section in question runs as follows: "If the Commissioners shall find that any intended alienation of land cannot be registered, or is liable to be or has been impeached because such alienation being of land held under memorial of ownership or Native Land Court certificate of title did not include the whole of the signatures of the Natives owning under such memorial of ownership or Native Land Court certificate, or that the completion of such intended alienation was prevented by a subsequent alteration of the law, and that the transaction was entered into in good faith and was not in any way contrary to equity and good conscience, and that the agreed purchase-money has been properly paid, they may sign a certificate to that effect, and thereupon such intended alienation shall be deemed to be valid and effectual from the date of the instrument purporting to effect such alienation, or from such other

date as the Commissioners may determine, and such instrument may thereupon be registered under "The Land Transfer Act, 1885.'"

It is to be noted that the above powers under section 20 extend to alleged alienation prior to the 1st day of July, 1887.

An analysis of section 27 shows that the powers thereby given to the Commissioners are limited to two classes of cases: (*a.*) Intended alienations of land which cannot be registered, or which are liable to be, or have been, impeached because "such alienations being of land under memorial of ownership or Native Land Court certificate, did not include the whole of the signatures of the Natives owning under such memorial of ownership or Native Land Court certificate." (*b.*) "That the completion of such intended alienation was prevented by a subsequent alteration in the law."

The whole of the section is unhappily worded. This portion, so far as it concerns class (*a*), appears to mean only that the Commissioners may make title to the purchasers of undivided shares of Natives in lands held under memorial of ownership or certificate of title of the Native Land Court notwithstanding that the whole of the Natives whose names appears in the memorial of ownership or certificate of title have not joined in the proposed alienation. If this is so, it appears exceedingly doubtful whether section 27 has any remedial operation whatever except to remove doubts in a certain limited class of cases hereinafter referred to. If the draftsman meant to express that in all cases in which purchasers have obtained the signatures of owners of undivided shares to transfers, and have failed to proceed further in completing their titles, the Commissioners can now make titles to such shares, it would seem probable that he has failed in his object.

A transfer of land held under memorial of ownership or certificate of the Native Land Court is "nothing more than proposal for a sale, and is not effective till it has received the approval of the Native Land Court." (Creditor's Trustee of Arekatera te Wera *v.* Walker. N.Z.L.R., 3, C.A., 95.)

The position is, perhaps, best understood by the light of the following passage from the judgment of the Court of Appeal in Seymour *v.* Macdonald (N.Z.L.R., 5, C.A., 174): "Now the 48th and 49th sections of the Act of 1873 impose an absolute restriction against the alienation of land held under memorial of ownership for more than twenty-one years except all the owners concur. The 59th, 60th, and 61st sections of the Act of 1873 prescribe how, when all the owners concur, a sale may be effected. A duty is imposed upon the Native Land Court to inquire into the transaction, to explain it to the intending vendors, and to satisfy itself they understand it; and the Judge has then to certify that the sale is complete. The so-called transfer to the appellant was therefore absolutely ineffectual, not only because it contravened section 48 of the Act of 1873, but because it was not completed in the only way in which a sale could be completed, namely, in the presence and under the supervision of the Native Land Court, as required by sections 59, 60, and 61."

The draftsman of section 27 of the Act of 1889 has provided for cases of non-compliance with section 48, but he appears to have omitted to notice that section 48 merely leads up to sections 59, 60, and 61, and he does not appear to have provided in any way for the non-compliance with the latter sections. It is not necessary to say that the draftsman has failed to effect any object whatever, as there is, as I have already indicated, a limited class of cases to which the wording may apply. These are cases in which the provisions of section 48 have not been complied with, but transfers have been obtained from some of the Natives mentioned in the memorial of ownership or Native Land Court certificate, and after the execution of such transfers subdivisions have been obtained between the Natives executing the transfers and the dissentients, and after such subdivisions the provisions of sections 59, 60, and 61 of the Act of 1873 have been complied with as to the shares of the selling owners.

In *In re* the Katerapaia Block (N.Z.L.R., 3, S.C., 56), Mr. Justice Richmond expressed an opinion that under such circumstances the Native Land Court could, under section 61 of the Act of 1873, grant a valid certificate and declaration in favour of the purchaser; and in Paraone *v.* Matthews (N.Z.L.R., 6, S.C., 749) the Chief Justice, referring to a possible similar state of facts, says, "It may be that the Native Land Court might after subdivision, upon production of this void conveyance and evidence of the still existing assent of the Natives, have declared the purchasers entitled to hold in freehold tenure." The point has, however, always been considered as doubtful, and the opinion expressed by Richmond, J., in *In re* Koterapaia Block, appears to have been qualified by himself. See the argument of respondent's counsel in Seymour *v.* Macdonald (N.Z.L.R., 5, S.C., 172).

Section 27 of the Act of 1889 does appear to enable the Commissioners to make titles in such cases, and it appears very doubtful whether it has any further operation. As to the class of cases referred to in section 27—namely, those in which "the completion of such intended alienation was prevented by a subsequent alteration of the law," it is difficult to see what is referred to.

Probably the draftsman had in his mind the cases in which the passing of "The Native Land Alienation Restriction Act, 1884," and "The Native Land Administration Act, 1886," prevented purchasers from obtaining the signatures of all the Natives interested, and complying with the provisions of the Act of 1873; but, if so, the addition of this class of cases would (upon the view that in dealing with class (*a*) it was intended that the Commissioners should have power to make titles notwithstanding the non-compliance with the provisions of sections 48, 59, 60, and 61 of the Act of 1873) seem to be unnecessary, and upon any other view it would seem to be insensible. These words may perhaps tend to show that the cases in class (*a*) were not intended to embrace anything but the limited class of cases to which I have already referred.

The Court of Appeal, in interpreting (in Paraone *v.* Matthews) section 36 of "The Native Land Court Act, 1886," and (in Poaka *v.* Ward) section 16 of "The Native Land Court Act 1886 Amendment Act, 1888," has shown very clearly that nothing but the most unequivocal expression of the intention of the Legislature to validate past illegal transactions with Native lands will be held sufficient to effect that purpose. It may well be that the same Court will not hold that anything

but the most unequivocal language will justify the Court in holding that the powers which it may be conjectured were intended to be given to the Commissioners by section 27 are well given.

But even if it should be held that under section 27 the Commissioners may make titles notwithstanding the non-compliance with sections 59, 60, and 61 of the Act of 1873, as well as with section 48, there remain other difficulties which may perhaps, to a large extent, render section 27 nugatory.

Some of the more common difficulties in the way of titles acquired from Natives holding under memorial of ownership or certificate of title under the Native Land Acts are as follows: (*a*) Want of compliance with section 48 of the Act of 1873—*i.e.*, want of the signatures of some of the owners; (*b*) want of compliance with sections 59, 60, and 61 of the same Act—*i.e.*, want of the assent of the Native Land Court; (*c*) want of compliance with the Native Lands Frauds Prevention Acts; (*d*) non-payment of portions of the purchase-moneys; (*e*) payment of premiums for leases contrary to the provisions of section 48 of the Act of 1873; (*f*) dealings with lands in defiance of orders of the Native Land Court recommending restrictions on alienation; (*g*) purchases of lands in defiance of "The Native Lands Alienation Restriction Act, 1884," and "The Native Lands Administration Act, 1886."

Assuming that (*a*) and (*b*) are disposed of by the provisions of section 27, there still remains (*c*), (*d*), (*e*), (*f*), and (*g*), and probably other cases which do not for the moment occur to me.

Section 27 does not pretend to give the Commissioners power to validate transactions which are invalid under any of these heads, and it will probably prove that one or other of these questions will constantly arise. This, I believe, will prove to be particularly the case with regard to (*f*) Seymour *v.* Macdonald (N.Z.L.R., 5, C.A., 167), and Ani Waata *v.* Grice (N.Z.L.R., 2, C.A., 95), reported cases, in which this point has already arisen.

It follows, therefore, that even assuming that section 27 gives power to validate transactions which contravene section 48 of the Act of 1873, and with respect to which the provisions of sections 59, 60, and 61 of the same Act have not been complied with, still the remedial powers given by section 27 will have to be exercisable in a comparatively small number of cases only.

With respect to the latter portion of section 27 it is to be observed that the Commissioners can validate transactions only in cases in which they shall find (*a*) that the transaction was entered into in good faith, (*b*) that it was not in any way contrary to equity and good conscience, (*c*) that the agreed purchase-money has been properly paid.

In dealing with this part of the section, (*a*) and (*c*) do not present any difficulty of interpretation, though the requirements of (*c*) are perhaps too stringent. With regard to (*b*), however, this is not the case, as the words used have no definite legal signification.

It certainly should be made plain whether these words are intended to bear the meaning put upon similar words in "The Native Land Frauds Prevention Act, 1881" (as to which see Bond *v.* Coleman, N.Z.L.R., 1, S.C., 172), or whether, in addition, the Commissioners are to inquire into the adequacy of the consideration. If questions as to the adequacy of the consideration are to be entertained by the Commissioners, it would seem expedient and just to give power to validate transactions, notwithstanding the inadequacy of the consideration, upon payment of such further sums as the Commissioners may think just. It would probably be considered unjust that a Native should be allowed to repudiate his sale, and to take back the land, most likely with improvements made by the purchaser, upon the ground of inadequacy of consideration, unless they were so gross as to justify the Commissioners in saying that the transaction was not entered into in good faith. If, on the other hand, it is intended that the Commissioners shall not consider questions of the adequacy of the consideration, unless it should appear to be so grossly inadequate as to infer fraud on the part of the purchaser, this should appear.

With regard to the provision that the Commissioners must be satisfied that the agreed purchase-money has been properly paid, I think it would be proper to enable the Commissioners to validate transactions, notwithstanding that they may find that portions of the purchase-moneys have not been paid, upon payment of such sums as they may think just, if they are satisfied that there has been no fraud or dishonesty on the part of the purchaser in the non-payment. Purchase-moneys for Native lands have ordinarily to be paid through agents, as to whom it is sometimes difficult to ascertain when they are acting for the purchasers or for the Natives; and it would probably be considered unjust to allow non-payment by one of these persons of a part of the purchase-money to invalidate a transaction in which, so far as the purchaser himself knows, the full purchase-money has been paid.

I may remark, in passing, that titles under section 17 of the Act of 1867 are not expressly mentioned in section 27, and that it is desirable to remove any doubt upon this point.

It will be observed that I do not make any recommendation as to whether or not the difficulties to which I have referred as possibly standing in the way of the validation of Native titles in certain cases should be removed. This is purely a question of policy, as to which I expressed no opinion, and with which I have nothing to do. I wish, also, to be clearly understood as expressing no opinion upon the points to which I have referred; I merely call your attention to them as being questions which, if they are left open, will almost certainly be raised, and which will probably cause a good deal of litigation. Sooner or later, no doubt, if these questions are not set at rest by the Legislature, I shall have to deal with them in a judicial capacity. Until hearing argument of counsel upon them it would not be proper for me to come to any definite conclusion, and I have avoided doing so.

I have, &c.,

The Hon. the Native Minister, Wellington. W. B. Edwards.

Sir,— Judge's Chambers, Wellington, 21st July, 1890.

I have the honour to acknowledge receipt of your letter of 16th July, covering a letter from Mr. W. L. Rees, containing certain suggestions with reference to additional powers which he pro-

poses should be given to the Commissioners appointed under the 20th section of "The Native Land Court Acts Amendment Act, 1889."

In reply, I have to say that I think Mr. Rees's suggestions are worthy of consideration, and that it is desirable to enable the Commissioners to make orders validating voluntary arrangements, and to enforce arrangements come to with the assent of a majority of the Native owners if satisfied that such arrangements do not occasion injustice to the dissentients.

The subject must, however, be dealt with as a whole, and Mr. Rees's suggestions, even if adopted, would not obviate the necessity of dealing with the matters to which I have already called your attention. In my opinion no satisfactory legislation is likely to be obtained unless a Bill, embodying such principles as you may deem expedient, is prepared by a barrister who has had considerable actual experience in dealing with these matters, and such Bill is passed through the House unaltered. No Bill which is amended off-hand in Committee is likely to prove satisfactory or to be found workable without litigation in the Supreme Court to discover its meaning. I return the correspondence.

I have, &c.,

The Hon. the Native Minister, Wellington. W. B. EDWARDS.

SIR,— Judge's Chambers, Wellington, 21st August, 1890.

Referring to your recent interview with me with respect to the proposed clause 25A, which is intended to be inserted in the Native Land Bill of this session, and to your enquiry whether, in my opinion, that clause will be sufficient to remove all doubts as to the Commissioners' powers, and to enable the work of the Commission to proceed in a satisfactory manner, I have to say that, in my opinion, the clause is quite inadequate for the above purposes.

I have the honour to refer you to my letters to the Hon. the Native Minister of the 14th May, 30th May, and the 31st July, 1890, and to the judgment of the Commissioners in the matter of the Tokomaru Block, in all of which the matter is exhaustively dealt with; and I have to add that nothing that has occurred since has in any way altered my opinion as to the necessity of legislation for the purposes stated in the letters above referred to.

It is true that since the above dates His Honour the Chief Justice has decided, in the case of Piripi *v.* Smith and Arthur, that the Commissioners have power to validate alienation of land notwithstanding non-compliance with the provisions of sections 59, 60, and 61 of "The Native Land Act, 1873," but it involves no disrespect to His Honour's judgment to say that the point cannot be deemed to have been thereby finally disposed of.

It is certain that sooner or later this point will be the subject of appeal, if it is not sooner disposed of by legislation; and the most cursory reference to the pages of "The New Zealand Law Reports" will show how frequently the decisions of single Judges in Native matters have been reversed by the Court of Appeal. In the meantime the uncertainty which exists in the matter precludes applicants from coming forward, and leaves the proceedings of the Commission at a standstill.

Apart altogether from this question, there are moreover numerous defects in the existing legislation, to which I have already fully called attention, which must go far to render the proceedings before the Commissioners nugatory.

The clause which it is now proposed to enact does not pretend to deal with a single one of the difficulties which I have pointed out, but it is directed altogether to meeting a difficulty which has arisen in the Tokomaru Block with respect to the proceedings in partition, and even for this purpose it is in my opinion unsatisfactory and inadequate.

I have a strong objection to becoming the draftsman of provisions which I shall afterwards have to interpret, but, as it is plain that my suggestions upon the subject have not so far been appreciated, I have thought it a lesser evil to draft the clauses which I conceive to be necessary than to allow the matter to remain in its present position. I have therefore drafted the necessary clauses, to each of which I have added an explanatory note, and I have the honour now to enclose the same for the consideration of the Hon. the Native Minister. I am unable to add anything to these notes and to the letters and judgment to which I have already referred.

I have, &c.,

The Under-Secretary, Native Department. W. B. EDWARDS.

---

1. Section 27 of "The Native Land Courts Acts Amendment Act, 1889," is hereby repealed, and in lieu thereof the following provisions are hereby enacted:—

This section as drafted removes the doubts referred to in the Tokomaru case, and other doubts. This is essential to the success of the Commission, as, although the particular point has been decided in favour of the European claimant in Piripi *v.* Smith and Arthur, the point cannot be said to be settled; and unless this is done by legislation it will most certainly be the subject of appeal, if not in the Tokomaru Block, then in some other.

2. If the Commissioners shall find in any inquiry instituted by them under the provisions of "The Native Land Court Acts Amendment Act, 1889," that *any document or instrument purporting to effect or intended to effect any alienation* of any land held under any memorial of ownership, certificate of title, or other instrument of title issued by the Native Land Court, or of any interest in any such land, has been impeached or questioned, or is liable to be impeached or questioned *for any reason whatever save as hereinafter mentioned,* and the Commissioners shall also find that the transaction or negotiation evidenced or intended to be evidenced by any such document or instrument was entered into in good faith and without fraud, and that it is not in any way contrary to equity and good conscience, and that the consideration purporting to be paid, given, or secured by any such document or instrument, or by any collateral document or instrument, has been duly paid, given, or secured, they may, by any order or certificate under their hands, order, certify, or declare

that any such document or instrument shall, as from the date thereof, or from such other date as the Commissioners shall therein declare, be deemed to be and to have been valid and effectual to effect the alienation which purports to be thereby effected; and from and after the making or signature of any such order or certificate every such document or instrument in respect of which such order or certificate is made shall, notwithstanding any defect therein, or any statute or rule of law to the contrary, be and be deemed to have been valid and effectual accordingly.

The phraseology of section 27 is incorrect. There may be an intention to alienate, but an intended alienation is an absurdity.

There are, as pointed out at length in Mr. Justice Edwards's letter of the 14th May, 1890, to the Native Minister, many cases not provided for by section 27, in which it was certainly intended that the Commissioners should have power to ratify. Some of these cases are specified in the above-mentioned letter. There are probably others which will not be discovered until they arise in actual practice. By far the most satisfactory way is to give the Commissioners general power, specially excluding the cases with which they are not intended to deal.

3. If the Commissioners shall in any such inquiry as aforesaid find as is in the last-preceding section mentioned, save only that they shall find that the consideration or any part of the consideration purporting by any such document or instrument, or by any collateral instrument, to be paid has not been duly paid, they may require the person claiming under any such document or instrument to pay within such time as they shall direct to any Native whose interest in any land is claimed under any such document or instrument, or to his successors, such sum of money as they may find to remain unpaid in respect of the consideration purporting by any such document or instrument, or by any collateral document or instrument, to be paid, together with interest thereon at the rate of 8 per cent. per annum from the date of such document or instrument; and they may also require the person claiming as aforesaid within such time as they shall think proper to enter into such covenants with such persons as they shall deem requisite for the purpose of carrying into effect the intent or meaning of any such document or instrument; and upon the due performance to the satisfaction of the Commissioners of any such requirements as aforesaid the Commissioners may make an order or certificate as is provided by the last-preceding sections, which order or certificate shall have the effect in the last-preceding section mentioned.

This provision is absolutely essential to enable justice to be done, as was pointed out at length in Mr. Justice Edwards's letter above mentioned. Purchases of Native lands have ordinarily to be made through agents, many of whom have, without the knowledge of the European purchaser, deducted sums from the purchase-money for commission or otherwise. In such cases it will be found that the Natives have acknowledged receipt of the full purchase-money, and have made declarations under "The Native Lands Frauds Prevention Act" to the like effect. In a recent case it was said that the European purchaser first heard of this in the shape of an action.

4. Any moneys payable in pursuance of any requirement of the Commissioners may be paid to the Public Trustee, on the account and for the benefit of the person in respect of whose interest the same shall be paid, although he may be dead; but the person paying such moneys shall pay to the account of such person as aforesaid a further sum of £10 per cent. upon the amount of such moneys. Any moneys so paid to the Public Trustee shall be paid out by him to such person or to his successor lawfully appointed. Any covenant entered into in pursuance of any requirement of the Commissioners may be entered into with the person whose interest is claimed, notwithstanding he may be dead, and any such covenant may be enforced by action or suit by the person entitled to the benefit thereof, in the same manner as though the same had been entered into with such last-mentioned person.

This provision is absolutely necessary to meet the cases, which are numerous, in which Natives whose shares are sought to be effected have died, and no successors have been appointed. It is also desirable in the interests of the purchaser in many cases in which the Natives are scattered at long distances, and are difficult of access, and in some cases in which the Natives may decline to receive the moneys. The additional payments provided for in cases in which the claimants avail themselves of this provision are to enable the Natives to receive their moneys from the Public Trustee without costs to themselves.

5. If any land in respect of any shares, in which any order or certificate shall be granted by the said Commissioners under the provisions hereinbefore contained, has heretofore been divided or partitioned by the Native Land Court, and an order made as part of such division or partition purporting to declare the person entitled to the benefit of any such order or certificate to be entitled to a parcel of the said land, as representing all the shares of the Native owners thereof, in respect of which any such order or certificate shall be made, and no other shares, such division or partition order shall be deemed to be a valid order as from the date of the making thereof; and if any such order is incomplete it may be completed accordingly. The Chief Judge shall, upon production of any such order or certificate of the said Commissioners as aforesaid, indorse upon every order validated by this section a certificate of such validation.

The wording of the proposed clause 25A, subsection (1), as printed, has been preserved as far as possible. That clause as drafted is not sufficient, and is inaccurate in its terms. Certificates of the Commissioners are not made in favour of any person, but simply validate the alienation. The person entitled, whoever he may be, gets the benefit of the validation. Before the officials of the Land Transfer Department could act upon any certificate validated by this clause, a certificate of the Native Land Court of the validation would seem to be necessary. Subsection (1) is only applicable in cases in which the partition order of the Native Land Court, and the certificate of the Commissioners, are in respect of the same shares, and no other. It will frequently happen that the partition order covers shares which are not affected by the certificate of the Commissioners. This contingency is not provided for by the proposed clause 25A, but is provided for by the next section.

6. If no such order of the Native Land Court as mentioned in the last paragraph has been made the Native Land Court may, upon the application of the person entitled to the benefit of any such order or certificate as aforesaid, or of any other person interested in the land any share or interest in which is affected by such order or certificate as aforesaid, proceed to partition the said land in accordance with the ordinary procedure and practice for the time being of the said Court, and the production of the document or instrument in respect of which any such order or certificate as aforesaid shall have been made by the said Commissioners under such order or certificate shall be conclusive proof of the matters therein ordered, certified, or declared. Upon any such par-

tition, any prior order of the Native Land Court which, by reason of its having been made in respect of more or less shares than are affected by any such order or certificate of the said Commissioners, is not validated by the last-preceding section shall nevertheless be followed and adopted by the Native Land Court as far as possible.

This section is necessary to cover cases not met by the last section. The phraseology of subsection (2) of section 25 is inaccurate. (See preceding note.)

7. If any certificate of title under "The Land Transfer Act, 1885," or any of the Acts thereby repealed, has heretofore been issued upon any order of the Native Land Court founded upon any partition which is validated by the 5th section hereof, the Chief Judge shall, upon the application of any person interested under any such certificate of title, forward to the District Land Registrar of the registration district within which such land is situate a certificate in writing that the order upon which such certificate of title under the Land Transfer Act is founded has been validated by a certificate or order of the said Commissioners, and the District Land Registrar shall thereupon enter a memorial of the said certificate of the Chief Judge upon such certificate of title and the duplicate thereof, and thereupon such certificate of title shall be and be deemed to have been from the date thereof valid and effectual to and for all intents and purposes.

This section is in lieu of subsection (3) of the proposed clause 25, which would be found not to be workable. A great number of caveats have been lodged by the District Land Registrar at Napier against dealings with lands the titles to which have been acquired as in Paraone *v.* Matthews. In the absence of a certificate from the Native Land Court of the validation, the District Land Registrar could not know which of these titles had been validated, and it would throw upon him an undue responsibility, and might either result in a loss to the assurance fund or in considerable annoyance and expense to the persons whose titles have been validated.

8. The Commissioners shall not grant any certificate under the provisions hereof in any of the following cases:—

(*a.*) Alleged alienations of land or interest in land which at the time of such alleged alienations was subject to any order of the Native Land Court especially recommending restrictions thereon if in contravention of such restrictions.

(*b.*) Alleged alienations of land in defiance of the provisions of "The Native Lands Alienation Restriction Act, 1884," and "The Native Land Administration Act, 1886;" but this provision shall not apply to any alienations made pursuant to any certificate granted under the 24th section of "The Native Land Administration Act, 1886," notwithstanding that such certificate may have been invalid.

(*c.*) Leases in respect of which any fine, premium, or foregift has been paid contrary to the provisions of any statute.

(*d.*) Dealings or attempted dealings which are in contravention of any trust, or which are contrary to equity and good conscience.

This is the section restricting the powers of the Commissioners. This section embodies all cases which it may reasonably be suggested differ from the ordinary run of cases. It is a matter of policy whether all these exceptions should be retained. If exception (*a*) is retained it will exclude from the jurisdiction of the Commissioners (except as to a report under section 20) a very large part (probably the greater part) of the disputed titles in the Poverty Bay district, in which the special orders for restraining alienation appears for a long time to have been made as a matter of form. There is a theoretical reason for retaining this exception, but it is doubtful if there is a practical reason. On the investigations in the matter of the Whangara, before the Commission at Gisborne, it was stated by counsel that the restriction had been frequently evaded by obtaining a partition between the Natives and the issue of a fresh memorial of ownership without any restriction. If the exception (*c*) is retained it will probably shut out many leaseholds. If exception (*a*) is cut out exception (*d*) should be altered so as to make it clear that dealings with lands under special restrictions are not for that reason only to be deemed to be contrary to equity and good conscience.

9. Notwithstanding the provisions of the last section, the Commissioners may, in any case not coming within subsection (*d*) of the last section, by order under their hands, ratify and confirm any voluntary arrangements come to between the majority of the owners of any parcel of land included in any memorial of ownership, certificate of title, or other instrument of title issued by the Native Land Court, and any person claiming any interest in such land, provided that the Commissioners shall be satisfied that no injustice is thereby occasioned to any of the Native owners dissenting from such arrangements.

Any order made by the Commissioners under this section shall be valid and effectual to and for all intents and purposes to vest in any person therein named any parcel of land or any share or interest in land therein described.

Any such order may, for the purposes of completion of title or of partition, be dealt with as is provided with respect to orders made by the Commissioners under the provisions hereinbefore contained.

This is an important and necessary section, which it is believed will meet the wishes of the more sensible and prudent Natives. It was so stated by influential Natives in the investigations in the matter of the Whangara Block. It would enable arrangements similar to that come to in the matter of the Whangara Block to be carried into effect without the necessity for special legislation in each case. Mr. W. L. Rees has made a communication to the Native Minister urging the advisability of this provision.

10. The said Commissioners may from time to time, and either in open Court or by any writing under their hands or under the hand of their secretary, adjourn any proceedings before them, and any such adjournment may be made either to the same place or to any other place. Any adjournment heretofore had of any proceeding before the said Commissioners shall be deemed to have been duly and regularly made.

It is absolutely inoperative that this section should be passed, as was pointed out in Mr. Justice Edwards's letter of 30th May, 1890, to the Native Minister.

11. Any certificate heretofore granted under "The Native Land Court Acts Amendment Act, 1889," shall have the same force and effect, and may be dealt with in all respects, as if the same had been made under the provisions of this Act.

This is to meet the case of the Tokomaru Block, and to prevent the necessity for fresh proceedings in partition before the Native Land Court in respect of that block.

12. The time within which applications for inquiry may be received by the Commissioners is hereby extended until the 31st day of December, 1890.

No action shall be brought in any Court for the purpose of questioning the validity of any alleged alienation of land which might form the subject of inquiry before the Commissioners under this Act or "The Native Land Court Acts Amendment Act, 1889," before the 1st day of January, 1891, and no action shall be brought as aforesaid in respect of any alleged alienations of land in respect of which an application for inquiry has before the said 31st day of December, 1890, been made to the Commissioners until the final determination by the Commissioners of such application for inquiry.

It is reasonable, owing to the uncertainty in which the matter has hitherto been left, that the time for receiving applications should be extended for a limited period; but it would not be expedient to extend it for an unlimited time, as in that case nearly all the applications would be postponed until the applicants were driven to make them and the labours of the Commission would never come to an end, nor would it be just to preclude the Natives from resorting to the Courts in their ordinary jurisdiction for more than a limited period.

13. So much of section 22 of "The Native Land Court Acts Amendment Act, 1889," as gives to the Commissioners power from time to time to make rules with respect to fees and other charges is hereby repealed, and in lieu thereof it is enacted that the Governor in Council may from time to time make rules with respect to the payment or securing of the payment of fees and other charges for all proceedings before the Commissioners.

The question of fees is a question of finance, with which the Ministry ought to deal, and the power to fix the fees ought to be taken away from the Commissioners and vested in the Governor in Council.

The undermentioned letters and telegrams contained in Exhibit A will be found in the preceding correspondence, as specified hereafter, viz.:—

This is the exhibit marked "B" referred to in the annexed affidavit of William Johnston Morpeth. Sworn before me this 14th day of May, 1891.

LEONARD G. REID,
A Solicitor of the Supreme Court of New Zealand.

B.

EXTRACTS from REPORT of the COMMISSIONERS appointed under the 20th section of "The Native Land Court Acts Amendment Act, 1889."

. . . We, the said Commissioners, have, however, found that, with respect to the greater number of the said transactions, there exists other defects of title than those mentioned in the said 27th section of "The Native Land Court Acts Amendment Act, 1889," as interpreted in the Supreme Court of New Zealand, Wellington District, by his Honour the Chief Justice, in the case of Piripi *v.* Smith and Arthur. . . .

We, the said Commissioners, have, however, found that other technical defects exist with respect to several of the shares claimed in the said applications, and we believe that in dealing with other applications which may be brought before us, the said Commissioners, other technical defects, the precise nature of which cannot at present be foreseen, are likely to be found to exist. We, the said Commissioners, believe that we have not power to remedy any defect of title other than the defects specially mentioned in section 27 of "The Native Land Court Acts Amendment Act, 1889," and that, in cases in which we find that other defects of title exist, we ought not to grant any certificate under the said section. . . .

For the reasons before mentioned, we, the said Commissioners, believe that unless the powers created by "The Native Land Court Acts Amendment Act, 1889," are extended by the Legislature, the said Act will fail to relieve the greater number of persons who have, without any fraud or dishonesty, endeavoured to purchase Native lands; who have paid large sums to the proposed Native vendors in respect of such attempted purchases; who have been let into possession of the lands so attempted to be purchased, and who have expended large sums in permanent improvements upon such lands.

We, the said Commissioners, believe that it would be for the benefit of both Europeans and Natives if power were given to us, the said Commissioners, subject to proper conditions, by order, to render valid and binding upon all parties proposed compromises entered into between Native and European purchasers.

Lastly, we, the said Commissioners, have to report that, in consequence of proper power of adjournment not having been granted by statute to us, the said Commissioners, a very considerable

loss, both of public time and money, has been occasioned; and that, with a view to the avoidance of this in future, it is essential that we, the said Commissioners, should have power, by writing under our hands, or under the hand of our secretary, from time to time to adjourn the hearing of any application made to us; and so that such adjournment may be made either to the place originally fixed for the hearing of such application or to any other place.

We have, &c.,
W. B. Edwards,
John Ormsby, } Commissioners.

Dated at the City of Auckland, this 16th day of January, 1891.

AFFIDAVIT OF HENRY OTTERSON.

I, Henry Otterson, of Wellington, in New Zealand, Clerk-assistant, House of Representatives, do make oath and say,—

1. That the question of the validity of the appointment of the Defendant as a Judge of the Supreme Court came before Parliament on the 4th day of July, 1890, when His Excellency the Governor sent a message to the House of Representatives transmitting a Bill to amend the Supreme Court Act.

2. That a copy of the message and Bill are hereunto annexed, and marked "A" and "B" respectively.

3. That, as will be seen by *Hansard*, volume lxvii., pages 306 to 329 inclusive, the Committee reported progress without having given leave to introduce the said Bill, and there was no further attempt made in Parliament to introduce the said Bill.

4. That on the 9th day of September, 1890, His Excellency the Governor transmitted by message certain supplementary estimates to be considered by Parliament, and on such estimates the following item appeared: Salary of Commissioner and Judge Edwards, from 2nd March, 1890, to 31st March, 1891, £1,621.

5. That on these supplementary estimates being considered by the Committee of Supply on the 15th day of September, 1890, certain members objected to voting any salary to the Defendant as Judge, and, on such objection being made, progress was reported, and a message was sent by His Excellency the Governor recommending the striking-out of the words "and Judge" from the item in the supplementary estimates. The message was in the words following:—

Message No. 19.

Onslow, Governor.

The Governor recommends the House of Representatives to make the following alteration in the supplementary estimates transmitted with message No. 6, of the 9th September instant: viz., Class IV., Minister of Justice.—In the first item, after the word "Commissioner," to strike out the words "and Judge."

Government House, Wellington, 15th September, 1890.

6. That the said message was referred to the Committee of Supply, and after it was so referred there was great objection to any vote being passed, as will be seen from *Hansard*, volume lxix., pages 913 to 919, both inclusive.

7. That, on the motion of the Hon. the Colonial Secretary, the sum of £125 was deducted from the said vote of £1,621, which left the salary of the Defendant as Commissioner up to the 31st day of March, 1891, at the rate of £1,375 per year.

H. Otterson.

Sworn at the City of Wellington, this 15th day of May, 1891, before me—

Leonard G. Reid,
A Solicitor of the Supreme Court of New Zealand.

This is the copy of message marked "A" referred to in the annexed affidavit of Henry Otterson.
Sworn this 15th day of May, 1891, before me—

Leod. G. Reid.
A Solicitor of the Supreme Court of New Zealand.

A.

Onslow, Governor.

Message No. 4.

The Governor transmits to the House of Representatives the enclosed Bill, intituled "An Act to amend 'The Supreme Court Act, 1882,' and to provide for the payment of an additional Judge," and, on behalf of Her Majesty, recommends the House to make provision accordingly.

Government House, Wellington, 1st July, 1890.

This is the exhibit marked "B" referred to in the annexed affidavit of Henry Otterson.
Sworn this 15th day of May, 1891, before me—

LEOD. G. REID,
A Solicitor of the Supreme Court of New Zealand.

B.

(See copy of Bill, No. 21A, p. 6.)

AFFIDAVIT OF CHARLES JOHN ALLEN HASELDEN.

I, CHARLES JOHN ALLEN HASELDEN, of Wellington, in the Colony of New Zealand, Civil servant, do hereby make oath and say as follows :—

1. That I am employed in the Civil Service of New Zealand as Under-Secretary for Justice.

2. That I am informed, and do verily believe to be true, that Worley Bassett Edwards, of Wellington aforesaid, Esquire, was appointed a Commissioner under the 20th section of "The Native Land Court Acts Amendment Act, 1889," on the 2nd day of March, 1890.

3. That the said Worley Bassett Edwards was sworn in as a Judge of the Supreme Court of New Zealand by his Honour Sir James Prendergast, on the 14th day of March, 1890.

4. That a salary of £1,500 per annum was paid to the said Worley Bassett Edwards, commencing from the said 2nd day of March, 1890, up to and inclusive of the 31st day of August, 1890, at the rate of £125 per month, such monthly payment being charged to "Unauthorised."

5. That the salary voted by Parliament for the payment of the said Worley Bassett Edwards as Commissioner, up to the 31st day of March, 1891, was at the rate of £1,375 per annum.

6. That the payments for the months of September and October were at the rate of £1,500 per annum, and were erroneously charged to Vote 19, being the "Supreme Court" vote; whereas, of the said monthly payments of £125, £114 11s. 8d. only should have been charged to the said vote No. 19, and £10 8s. 4d. should have been charged to "Unauthorised."

7. That the said Worley Bassett Edwards has been paid, since the 1st day of November, 1890, out of the said vote the sum of £114 11s. 8d. per month, which is at the rate of £1,375 per annum, and he has also been paid the sum of £10 8s. 4d. per month from "Unauthorised."

8. That if any salary abstract drawn for payment of salary out of the aforesaid vote No. 19 to the said Worley Bassett Edwards for the month of September, 1890, or for any month thereafter, until and inclusive of the month of March, 1891, was drawn for payment of salary to the said Worley Bassett Edwards as a Judge of the Supreme Court of New Zealand only, such salary abstract was erroneously drawn, and should have been drawn for payment of salary for services as Commissioner only.

9. That, in accordance with directions given by the Minister of Justice, and approved of by the Colonial Treasurer, the aforesaid sum of £10 8s. 4d. per month was paid from the month of November, 1890, to the month of March, 1891, inclusive, to the said Worley Bassett Edwards for salary as a Judge of the Supreme Court of New Zealand, and such monthly payments of £10 8s. 4d. for services as a Judge of the Supreme Court were paid as aforesaid out of "Unauthorised," and have not yet been authorised by Parliament.

C. J. A. HASELDEN.

Sworn at the City of Wellington, this 16th day of May, 1891, before me—

D. G. A. COOPER,
A Registrar of the Supreme Court of New Zealand.

AFFIDAVIT OF C. J. A. HASELDEN.

I, CHARLES JOHN ALLEN HASELDEN, of Wellington, in the Colony of New Zealand, Civil servant, do hereby make oath and say as follows :—

1. That the Honourable Henry Barnes Gresson was appointed to be a permanent Judge of the Supreme Court of New Zealand on the 26th day of July, 1859.

2. That the defendant claimed salary from the 27th day of February, 1890, in a voucher signed by Frank E. Wilson, Judge's Secretary.

3. That a Commission, issued on the 7th day of July, 1880, under the hand of the Governor, in the name of Her Majesty, and sealed with the Public Seal of the Colony, his Honour Joshua Strange Williams and the late Thomas Bannatyne Gillies were called and recognised as Judges of this honourable Court. A true copy of the Commission appears in the Appendices to the Journal of the House of Representatives for the year 1882.

C. J. A. HASELDEN.

Sworn at Wellington aforesaid, this 18th day of May, 1891, before me—

LEO. G. REID,
A Solicitor of the Supreme Court of New Zealand.

AFFIDAVIT OF W. J. MORPETH.

I, WILLIAM JOHNSTON MORPETH, of Wellington, in the Colony of New Zealand, Civil servant, do hereby make oath and say,—

1. That the notification of the appointment of the Defendant as a Commissioner under section 20 of "The Native Land Court Acts Amendment Act, 1889," was made by a letter dated the 6th day of March, 1890, and after receipt of the letter of the Defendant dated the 5th day of March, 1890, set out in the Statement of Claim.

2. That hereunto annexed, and marked with the letter A, is a true copy of the letter sent to the Defendant on the 6th day of March, 1890, his order of appointment as a Commissioner.

W. J. MORPETH.

Sworn at Wellington aforesaid, this 18th day of May, 1891, before me—

LEOD. G. REID,
A Solicitor of the Supreme Court of New Zealand.

A.

SIR,— Native Office, Wellington, 6th March, 1890.

I have the honour to inform you that His Excellency the Governor in Council has been pleased to appoint you and Mr. John Ormsby, of Kopua, Waikato, to be Commissioners under section 20 of "The Native Land Court Acts Amendment Act, 1889," and enclose herewith the Order in Council of appointment.

I have communicated with Mr. Ormsby on the subject, and have forwarded him a copy of the appointment.

I have, &c.,

W. B. Edwards, Esq., Barrister, Wellington. E. MITCHELSON.

This is the copy-letter marked "A" referred to in the annexed affidavit of William Johnston Morpeth.

Sworn before me, this 18th day of May, 1891—

LEOD. G. REID,
A Solicitor of the Supreme Court of New Zealand.

AFFIDAVIT OF WORLEY BASSETT EDWARDS.

I, WORLEY BASSETT EDWARDS, of the City of Wellington, in New Zealand, Esquire, make oath and say,—

1. That I have read the affidavit of Charles John Allen Haselden, sworn and filed herein.

2. It is not true, as stated in the 2nd paragraph of the said affidavit of the said Charles John Allen Haselden, that I was appointed a Commissioner under the 20th section of "The Native Land Court Acts Amendment Act, 1889," on the 2nd day of March, 1890. I was appointed a Commissioner as last aforesaid, by Order in Council, on the 27th day of February, 1890.

3. It is not true, as stated in the 7th paragraph of the said affidavit, that I have been paid two separate sums of £114 11s. 8d. per month and £10 8s. 4d. per month.

4. I have been paid one sum of £125 per month, as and being my salary as a Puisne Judge of the Supreme Court of New Zealand, and in respect of such payments I have from time to time caused to be lodged abstracts of my salary as such Judge as aforesaid. I have never been requested by the Under-Secretary for the Department of Justice or by any other person to alter the form of the said abstracts or any of them, nor has it ever been intimated to me by the said Under-Secretary or by any other person that the said abstracts required any alteration.

5. Such payments have from time to time by my directions been made by the Department of Justice to my bankers, and my bankers have given acquittances therefor.

6. I have no knowledge or information as to what entries or minutes have been made in the Audit Office as to payment of my salary, nor was any communication as to such entries or minutes ever made to me.

Sworn at Wellington aforesaid, this 16th day of May, 1891, before me—

WILFRED E. BRUCE,
A Solicitor of the Supreme Court of New Zealand.

AFFIDAVIT OF EDWARD THOMAS SAYERS.

I, EDWARD THOMAS SAYERS, of the City of Wellington, in New Zealand, Judge's Secretary, make oath and say,—

1. That I have, since the 11th day of August, 1890, acted, and I am still acting, as Secretary to his Honour Mr. Justice Edwards, the Defendant in this action.

2. As such Secretary, it has been my duty to prepare and to forward to the Under-Secretary for the Department of Justice monthly abstracts of the Defendant's salary, and I have prepared and forwarded the same accordingly.

3. The abstracts so from time to time prepared and forwarded by me as aforesaid have been for one monthly sum of £125, as the salary of the Defendant as a Judge of the Supreme Court of New Zealand, and not in any other capacity.

4. I was never requested by the Under-Secretary for the Department of Justice, or any other person, to alter the form of the said abstracts or any of them, nor was it ever intimated to me by the said Under-Secretary that the said abstracts required any alteration.

5. I have no knowledge or information as to what entries or minutes have been made in the Audit Office as to payment of the Defendant's salary, nor has any communication with respect to such entries or minutes ever been made to me.

6. I also acted as secretary to the Commissioners appointed under the 20th section of "The Native Land Court Acts Amendment Act, 1889," from the month of October, 1890, until the 31st day of March, 1891, when the said Commissioners were removed from office.

7. I have read the affidavit of William Johnston Morpeth sworn and filed herein.

8. The exhibit hereunto annexed, marked "A," is a true copy of the report mentioned in the 4th paragraph of the said affidavit of the said William Johnston Morpeth.

9. The first hearing of all the applications referred to in the last paragraph and in the schedule attached to the said report was, on the application of counsel for the several applicants, adjourned on the 10th day of January, 1891, to the first sitting of the said Commissioners' Court which should be held at Gisborne after the lapse of three calendar months.

10. No full sitting has been held of the said Commissioners' Court since the said 10th day of January, 1891, and all the said applications were at the date of the removal from office of the said Commissioners still depending and unadjudicated-upon, under the circumstances disclosed in the said report.

11. There were also depending and unadjudicated-upon at the time when the said Commissioners were so removed from office as aforesaid five separate applications relating to blocks of land in the vicinity of Tauranga, and two separate applications relating to land in the Hawke's Bay District, and one application relating to land in the Coromandel district.

12. After the 14th day of March, 1891, when the present Ministry intimated to the said Commissioners their intention to remove the said Commissioners from office on the 31st day of March, 1891, but before the said 31st day of March, 1891—to wit, on or about the 20th day of March, 1891—twenty-two separate additional applications for inquiry by the said Commissioners, relating to twenty-two separate blocks of land, were lodged pursuant to the said Act, intituled "The Native Land Court Acts Amendment Act, 1889," pursuant to the provisions of the said Act and to the rules made thereunder.

EDWARD T. SAYERS.

Sworn at the City of Wellington, this 16th day of May, 1891, before me—

T. W. HISLOP,
A Solicitor of the Supreme Court of New Zealand.

EXHIBIT A.

In the matter of "The Native Land Court Acts Amendment Act, 1889," and "The Native Land Laws Amendment Act, 1890."

MAY IT PLEASE YOUR EXCELLENCY,—

We, the Commissioners appointed under the 20th section of "The Native Land Court Acts Amendment Act, 1889," have the honour to report, pursuant to the powers of the said Act, as follows:—

I. We, the said Commissioners, have recently held an open Court of inquiry, pursuant to the powers of the above-mentioned Acts, at the Town of Gisborne, in the Poverty Bay district, for the purpose of inquiring into all the circumstances attending alleged alienations of land in the said district, in respect of which applications have been duly made to us, the said Commissioners, pursuant to the said Act and to the rules made by us, the said Commissioners, thereunder.

II. The said applications are fourteen in number, and a schedule thereof is hereunto annexed marked "A."

III. Upon due inquiry into the several matters the subjects of the said applications, we, the said Commissioners, found that, except with respect to the transactions in respect of the block called the Wharekaka No. 1 Block, being the block of land named in the fourth of the said applications, and except with respect to a few shares in some others of the said blocks, the transactions in respect of which the said applications have been made were entered into in good faith, and were in no respect contrary to equity and good conscience, and that the agreed purchase-money in respect of each of such transactions was (except as aforesaid) properly paid. We, the said Commissioners, also found that each of the intended alienations purporting to be evidenced by the documents in respect of which the said applications respectively were made is liable to be impeached, because such alienations, being of land held under memorial of ownership or Native Land Court certificate of title, did not include the whole of the signatures of the Natives owning under such memorial of ownership or Native Land Court certificate of title.

IV. Each of the applicants named in the said applications applied to us, the said Commissioners, for a certificate under the 27th section of "The Native Land Court Acts Amendment Act, 1889," in respect of all the said transactions as to which we, the said Commissioners, have found that such transactions were entered into in good faith, and were not in any way contrary to equity and good conscience, and that the agreed purchase-money has been properly paid, and which we, the Commissioners, have found to be liable to be impeached for the reasons mentioned in the last paragraph.

V. We, the said Commissioners, have, however, found that, with respect to the greater number of the said transactions, there exist other defects of title than those mentioned in the said 27th section of "The Native Land Court Acts Amendment Act, 1889," as interpreted in the Supreme Court of New Zealand, Wellington District, by his Honour the Chief Justice in the case Piripi *v.* Smith and Arthur.

VI. The principal defects of title referred to in the last paragraph are,—

(*a.*) Want of compliance with the provisions of "The Native Lands Act, 1873," section 85, and "The Native Land Act Amendment Act, 1878 (No. 2)," especially with respect to the clear statement in Maori thereby required to be indorsed upon instruments executed by Natives, and to be certified as therein provided.

(*b.*) The fact that in the majority of cases the instruments executed by the Natives have been executed by them with certain blank spaces for the names of the vendors and the purchase-money, which blank spaces have, after the execution of the instruments, been filled in with the names of the vendors and with the purchase-money.

VII. We, the said Commissioners, have, however, found that other technical defects exist with respect to several of the shares claimed in the said applications, and we believe that, in dealing with other applications which may be brought before us, the said Commissioners, other technical defects, the precise nature of which cannot at present be foreseen, are likely to be found to exist.

VIII. We, the said Commissioners, believe that we have not power to remedy any defect of title other than the defects specially mentioned in section 27 of "The Native Land Court Acts Amendment Act, 1889," and that in cases in which we find that other defects of title exist we ought not to grant any certificate under the said section.

IX. Our reasons for this construction of the said section are fully set out in the judgment in the matter of the fifth of the said applications, a printed copy whereof is hereunto annexed marked "B."

X. No objection of a technical character was made by or on behalf of any Native at the hearing of the said applications, except with respect to the 4th of the said applications; and no objection of any character whatever was made at the hearing of the 6th, 7th, 9th, 10th, 11th, 12th, 13th, and 14th of the said applications.

XI. We, the said Commissioners, find that no injury or injustice whatever has been occasioned to any of the Natives mentioned in any of the said applications by reason of the technical defects referred to in paragraphs V., VI., and VII. hereof.

XII. We, the said Commissioners, also find that, with respect to the 9th, 10th, 11th, 12th, 13th, and 14th of the said applications, the instruments of title in respect of which the said applications are made were, notwithstanding the defects aforesaid, expressly approved by the Native Land Court, and order of freehold tenure made in respect thereof by the said Court in favour of the predecessor in title of the applicants named in the said applications.

XIII. From this fact, and from other facts proved in evidence before us, we, the said Commissioners, believe that technical defects of the nature hereinbefore mentioned have not been treated by the Native Land Court as in any way affecting the powers of the said Court to approve of the

complete proposed sales of lands held under memorial of ownership or Native Land Court certificate of title in manner provided by the Native Lands Acts; and we also believe that a great many sales which have been so approved of and completed have been founded upon instruments in respect of which such technical defects as aforesaid exist.

XIV. We, the said Commissioners, also believe that, in consequence of the facts mentioned in the last paragraph, persons dealing with Native lands and their advisers have been led to regard such technical defects as being of no consequence whatever.

XV. For the reasons before mentioned, we, the said Commissioners, believe that, unless the powers created by "The Native Land Court Acts Amendment Act, 1889," are extended by the Legislature, the said Act will fail to relieve the greater number of persons who have without any fraud or dishonesty endeavoured to purchase Native lands, and who have paid large sums to the proposed Native vendors in respect of such attempted purchases; who have been let into possession of the lands so attempted to be purchased; and who have expended large sums of money in permanent improvements upon such lands.

XVI. With regard to the fourth of the said applications—namely, that referring to Wharekaka No. 1 Block—we, the said Commissioners, will have the honour to make a special report to your Excellency; but we, the said Commissioners, have the honour now to report that the circumstances affecting the said block reflect no discredit upon the applicant Andrew Reeves, who was not himself the purchaser thereof from the Natives; and that, during the hearing of the said application, counsel for the applicant and for the objecting Natives informed us, the said Commissioners, in open Court, that they had arrived at an agreement for a compromise, but that, as a term of such compromise was that we, the said Commissioners, should grant to the said applicant a certificate under the said section 27 for certain of the shares claimed by him, and as we, the said Commissioners, believing that we had no power to grant such certificate, declined so to do, such proposed compromise could not be carried into effect, and was consequently abandoned.

XVII. We, the said Commissioners, believe that it would be for the benefit of both Europeans and Natives if power were given to us, the said Commissioners, subject to proper conditions, by order, to render valid and binding upon all parties proposed compromises entered into between Natives and European purchasers.

XVIII. Lastly, we, the said Commissioners, have to report that, in consequence of proper powers of adjournment not having been granted by statute to us, the said Commissioners, a very considerable loss both of public time and money has been occasioned, and that, with a view to the avoidance of this in the future, it is essential that we, the said Commissioners, should have power, by any writing under our hands, or under the hand of our secretary, from time to time to adjourn the hearing of any application made to us, and so that such adjournment may be made either to the place originally fixed for the hearing of such application or to any other place.

We have, &c.,

W. B. Edwards (J.),
John Ormsby,
} Commissioners.

His Excellency the Governor.

Dated at the City of Auckland, this 16th day of January, 1891.

"A" OF EXHIBIT A.

Sitting of Commissioners' Court.

In the matter of "The Native Land Court Acts Amendment Act, 1889," and "The Native Land Laws Amendment Act, 1890."

NOTICE is hereby given that the Commissioners appointed under the twentieth section of "The Native Land Court Acts Amendment Act, 1889," will, pursuant to the said Act, hold an open Court of Inquiry at their Courthouse, at the corner of Customhouse and Harris Streets, at the Town of Gisborne, on Tuesday, the 16th day of December, 1890, at the hour of eleven o'clock in the forenoon; and notice is hereby further given that, at such Court of Inquiry, the said Commissioners will inquire into all the circumstances attending the alleged alienations or acquisitions of land, or of any interest therein, which are specified in the Schedule hereto, and in respect of which applications for inquiry have been duly made to the said Commissioners pursuant to the above-mentioned Acts and to the rules made thereunder.

Dated at the City of Wellington, this 20th day of October, 1890.

By order of the said Commissioners.

EDMOND T. SAYERS,
Secretary to the said Commissioners.

SCHEDULE.

Applicants' Names, Occupations, and Residences, and their Addresses for Service.	Blocks affected.	Nature of Claims.	Names of Natives whose interests are affected.
I. Andrew Reeves, of Tologa Bay, whose address for service is at the office of Messrs. Nolan and Skeet, Solicitors, Gladstone Road, Gisborne	Uawa No. 2 Block	Claimant claims to have purchased the shares or interests in the block mentioned in the second column of the Natives whose names are mentioned in the fourth column	Rawiri Karaha, Hori Mokoera, Peta Komaru, Raniera Turoa, Hiria Riuhaunga, Paora Tutu, Hohepa Tue, Tame Kirimana, Hami Puha, Ramari Puhipuhi, Ramari Kanere, Nikorima, Henry Glover (h.c.), Karawira Pahura, Arapera Puhura, Peere Rakaitapu, Hami Rakitapu, Horiana Tautau, Wiki Rangi, Harata Makuru, Hanare Puhipuhi, Raiha Kakahupaea, Ka Tue, Irihapeti Pori, Keita Rakaitapu, Heremia Taurewa, Arapeta *or* Peta Rangiuia, Hare Huatau, Mihaere Koura, Tamati Tautau, Taare Kirimana, Ani Kirimana, Hepeta Maitai, Reweti Rangi, Hami Kirimana, Rewiri Tautau, Pera Kapa, Hirini te Kani, Wi Ringi Hori, Hare Hautapu, Patara Rangi, Eruera Harete, and Wiremu Konohi te Au *alias* Wiremu te Aau.
II. Andrew Reeves, of Tologa Bay, whose address for service is at the office of Messrs. Nolan and Skeet, Solicitors, Gladstone Road, Gisborne	Kourateuwhi No. 2 Block	Claimant claims to have purchased the shares or interests in the block mentioned in the second column of the Natives whose names are mentioned in the fourth column	Hori Mokai, Karauria Pahura, Arapera Pahura Ani Kirimana, Kihi Tupara, Hori Mokoera, Hohepa Pere *or* Tue, Hiria Riuhaunga, Raiha Kakahupaea, Harata Makuru, Aterea Mokai, Hera Keru, Pera Kapotaiaha, Karina Haua, Harawira Karaha, and Tamati Hautapu.
III. Andrew Reeves, of Tologa Bay, whose address for service is at the office of Messrs. Nolan and Skeet, Solicitors, Gladstone Road, Gisborne	Ihunui Block ..	Claimant claims to have purchased the shares or interests in the block mentioned in the second column of the Natives whose names are mentioned in the fourth column	Wi Kingi Hori, Heremia Taurewa, Karauria Pahura, Himiona te Kani, Raniera Turoa, Arapeta Rangiuia.
IV. Andrew Reeves, of Tologa Bay, whose address for service is at the office of Messrs. Nolan and Skeet, Solicitors, Gladstone Road, Gisborne	Wharekaka No. 1 ..	Claimant claims to have purchased the shares or interests in the block mentioned in the second column of the Natives whose names are mentioned in the fourth column	Karauria Pahura, Hami Taropo, Heremia Taurewa, Patara Rangi, Rutene Tamitami, Hirini Harereone *alias* Hirini Taketake, Eru Mokeke, Hirau, Maraea Kaipuke, Pane Korama, Ihaia Ingoa, Ruihi Takaroki, Wi Kingi Hori, Wi Tuku, Arapera Pahura, Hori Kirimana, Himiona Mokeke, Katene Hana *alias* Te Hana, and Rutene Tamitami (two of the successors to Hakaraia Tamitami), Waru Himiona te Kani, Tamatiu te Kani, Pirimona Tapona, Pera Kapo, Hoana Kautuku, and Haretae Kingi.
V. Andrew Reeves, of Tologa Bay, whose address for service is at the office of Messrs. Nolan and Skeet, Solicitors, Gladstone Road, Gisborne	Wharekaka ..	Claimant claims to have purchased the shares or interests in the block mentioned in the second column of the Natives whose names are mentioned in the fourth column	Hami Rakaitapu, Pere Rakaitapu, Henare Puhipuhi or Henare Pei, Watarawhi Rangi, Arapeta Rangiuia, Reweti Rangi, Raniera Turoa, Mokena Huatau, Horiana Tautau, Hare Huatau, and Tamati Hautapu.
VI. Alexander Creighton Arthur, of "The Willows," whose address for service is at the office of Messrs. Nolan and Skeet, Solicitors, Gladstone Road, Gisborne	Whatatutu No. 1B	Claimant claims to have acquired the interest in the block mentioned in the second column of the Natives whose names are mentioned in the fourth column	Hone Kewa, Tiopira Tawhiao, Epiniha Tipuna, Wirihana Tupeka, Wharekauri, Netana Puha, Tapine Turei, Mere Aira Tupeka, Mika Kawhena, Rapana Komata, Hona te Huhu, Maraea Tipare, Wi Rangowhakaata, Irihapeti Tawhiao (infant), Heni Tipuna, Heni Puha, Apirana Waimotu, Honi Morete (half-caste), Rawinia Whiwhi, Wiremu Pere (infant), Hine Wehi, Pete Morete (half-caste), Pere Morete (half-caste), Nepia Tokitahi, Hohepa te Kota, Maraea Tahuipare, Paora Matuakore, Hera Hokokao, Hemaima Moreti (Mrs. Black, half-caste), Timi Moreti (half-caste), Maraea Moreti (half-caste), Ahipaka Tawhiao, Hapeta Kuare, and Rawinia Ahuroa.

Applicants' Names, Occupations, and Residences, and their Addresses for Service.	Blocks affected.	Nature of Claims.	Names of Natives whose interests are affected.
VII. Alexander Creighton Arthur, of "The Willows," whose address for service is at the office of Messrs. Nolan and Skeet, Solicitors, Gladstone Road, Gisborne	Whatatutu A and Whatatutu C Blocks	Claimant claims to have acquired the interests in the blocks mentioned in the second column of the Natives whose names are mentioned in the fourth column	Rihara Rahui, Pita te Huhu, Marara Tahuipare, Mere Peka Kaimako, Hone Kewa, Heni Hinearangi, Paora Haupa, Atiria Hauwaho, Maraea Tipare, Hona te Huhu, Eruera Matauru, Ema Poho, Tiopira Tawhiao, Wi Peri (half-caste), Periki Tu te Kohi, Epiha Parau, Riria Mauaranui, Karaitiana Ruru, Hohepa Tahataha, Hemi Popata, Marara Kahungunu, Irihapeti Tawhiao, Oriwia Tu, Rango Tipare Tawhiao, Hirini Tutahau, Maata te Owai, Mere Aira Tupeka, Netana Puha, Hera Kiekie, Tapine Turei, Heni Puha, Wi Haronga, Atereta Ruru, Rawenia Kewa, Epiniha Tipuna, Erena Haupa, Apihaka Tawhiao, and Ka te Hane.
VIII. The Bank of New South Wales, whose address for service is at the office of Messrs. Nolan and Skeet, Solicitors, Gladstone Road, Gisborne	The Mokairau No. 2 Block	Claimant claims to have acquired the interests in the block mentioned in the second column of the Natives whose names are mentioned in the fourth column	Apiata te Hami, Heni Whareponga, Harawira Kahaki, Hopi Hinaki, Ihamaera Tei, Mere Arihi te Matengahere, Mihaka Ngahue, Henare Ruru, Mihaera Koura, Epineha Whakatete, Paora te Hura, Matiu Takaparae, Henapa Takaparae, Kataraina Teakepa, Rawiri Turanganui, Mare Kingi Toawha, Hoera Hinaki, Hauwera Hinaki, Rawiri Karaha, Henare Puhipuhi, Ramari Puhipuhi, Meriana te Mata, Heni Paraone, Tango Mate, Ihaka Whakatangi, Enoke Whakatete, Pera Whakatete, Heta Mangunga, Tamate Ota, Mere Whaki, Hori Peita, Hone Meihana, Manahi Puanga, Karepa Tipare, Hare Noanoa, Horomona Keu, Hariata Rotuhanga, Himiona Tekani, Hone Niwa, Mere Arihi Ruki, and Emi Miria.
IX. Leonard Harper and Edward Circuit Latter, both of the City of Christchurch, Trustees of the will of the late Robert Heaton Rhodes (the elder), deceased, whose address for service is at the office of Messrs. Finn and Chrisp, Solicitors, situated in Gladstone Road, in the Town of Gisborne	Rangikohua No. 2..	Claimants claim to have purchased the shares or interests in the block mentioned in the second column of the Natives whose names are mentioned in the fourth column	Ani Pouahaua, Nepia Hurikara, Hana Maraea Rairi, Hohepa Rairi, Hene Herewaka, Hori te Apinga, Ani Kuini, Katarina te Kani, Hanara te Whiu, Tuta Tawheo, Makere Rairi, Tuta Ngarimu, Maraki Tautuhi, Hekiera Taurare, Wi Hunia, Te Whiu Oparae, Pita te Haura, Makere Takawhenua, Winiata Kairohi, Mere Katene, Taiapa, Apikara Kurawai, and Hare Tokoaka.
X. Leonard Harper and Edward Circuit Latter, both of the City of Christchurch, Trustees of the will of the late Robert Heaton Rhodes (the elder), deceased, whose address for service is at the office of Messrs. Finn and Chrisp, Solicitors, Gladstone Road, in the Town of Gisborne	Rangikohua No. 3..	Claimants claim to have purchased the shares or interests in the block mentioned in the second column of the Natives whose names are mentioned in the fourth column	Tuta Nihoniho, Maraki Tautuhi, Erueta Rona, Himiona Hohua, Pekama Pahura, Maraea Tauoha, Eruera Pirita, Raniera Tuhua, Hate Taituha, Mokena Horua, Mere Whariki, Hamiora Ngarimu, Hareta Taiheke, Herewini Hori, Mere Nihoniho, Heni Nohoaka, Miria Whakaiti, Maraea Kahu, Te Roana, Pakau, Iritana Iriwaho, Makere Taiaha, Peti Waiariki, Reupena Torea, Anaru te Kahaki, Wi Pewhairangi, Hone Heke, Wiremu Tuhura, Erana Tuhura, Hira Whaikapakapa, Horomona Hapai, Pekama Waiti, Hare Maruata, Mere Ruawahine, Pine Tipuna, Eruera Kupenga, Apirana Tatua, Nepia Hurikara, Wiremu Taiaha, Wete Rure, Mokena Kahu, Renata Hape, Iehu Hake, Eruera Ariari, Hekiera Tuterangi, Hera Ngawati (successor to Heni Awanui), Hare Paraone, Hone Poihakena, Tuta te Ua, Reupene te Ana, Anaru Ngamu, Pekawa Tuha, Heni Taiaha, Hori te Rangikamata, Himiona Tiwhatiwha, Mere Arihi, Ngangira, Iritana Kakano, Pita Horuhoru, Te Wharu Taitua, Hamiora Houkamau, Perenata Kaiwi, Hekiera Taurore, Hoterene Karaka, Wiremu Tuhoro, Maraea Ngaki, Roka te Whataaruhe, Raiha Putoto, Pipi Taweka, Pita Rongo, Wi Patai, Koroniria Wehenga, Hohepa Rairi, Hana Maraea, Pohoi Tieki-Pita Tamahori, Eparaima Uruika, Horewini Waitatari, Wiremu Ngaupuku, Hetikia Waimotu, Hanara Tangiawha, Henare Tuatai, Renata Mahemahe, Miriama Tihore, Pane Tatua, Kereama Tamararo, Wiremu Tohi, Himi Ngatai, Hori Waiti, Hemi te Kahurangi, Mereana Okeokeo, Hiria Hokianga, Manahi Kaeha, Hate Houkamau, Tuta Ngarimu, Makere Ngangira, Tamati te Ota, Hori Peita, Hekiera Tataikoho, Raiha Kahupaea, Hunia Karaka, Riria Rehua, Ratimira Puni, Kiore Whatiria, Tamati Puni,

Applicants' Names, Occupations, and Residences, and their Addresses for Service.	Blocks affected.	Nature of Claims.	Names of Natives whose interests are affected.
XI.			
Leonard Harper and Edward Circuit Latter, both of the City of Christchurch, Trustees of the will of the late Robert Heaton Rhodes (the elder), deceased, whose address for service is at the office of Messrs. Finn and Chrisp, Solicitors, Gladstone Road, in the Town of Gisborne	Paekawa	Claimants claim to have purchased the shares or interest in the block mentioned in the second column of the Natives whose names are mentioned in the fourth column	Mere Waimanuku, Kereana te Owai, Ropihana Huatau, Erana Rauhaere, Te Homana Auriri, Mere Whariki, Ruiria Wharekohu, Mere Arihi Tauhara, Natana Maukau, Hiripi te Awarau, Te Hamara Moana, Heni Nohoaka, Renata Apawai, Hori Tutere, Ripi Taweka, Mokena, Harua, Perenata Kaiwi, Mere Ruawahine Ruira Kahawai, Raana Pakau, Wiremu Taika, Hare Maruata, Piniha Tahiriri, Riwai Tauranga, Nepia Hurikara, Naera Otiitu, Mokena Kahu, Wi Pahau, Wiremu te Owai, Eruera Ariari, Heni te Aomihia, Renata Hape, Kereama Kaipara, Apirama Tatua, Peti Poihakena, Hamiora Ngarimu, and Himiona te Moana.
XII.			
Leonard Harper and Edward Circuit Latter, both of the City of Christchurch, Trustees of the will of the late Robert Heaton Rhodes (the elder), deceased, whose address for service is at the office of Messrs. Finn and Chrisp, Solicitors, situated in Gladstone Road, in the Town of Gisborne	Whakamarutuna ..	Claimants claim to have purchased the shares or interests in the block mentioned in the second column of the Natives whose names are mentioned in the fourth column	Hekiera Tataikoho, Horomana Hapai, Wiki te Peri, Reihana Katua, Tuta Nihoniho, Matiu te Rango, Maraki Tautuhi, Haira te Rango, Makere te Hau, Piniha Pahau, Ritihia Riunui, Haore Paraone, Turuhira Whaaki, Hamiora Katia, Paranihi Tipare, Matire Huroa, Hakopa Tipaata, Tamati te Ohaere, Hana Horuhoru, Hare Pikoi, Arapera te Reo, Watene Ketua, Pirihira Materoa, Hekiera, Tuhou, Piripi Puoho, Hone Poi, Riria Katua, Rahara Whariki, Wi te Hau, Te Rina Kauri, Mere Ruawahine, Ruiha Rangiakina, Ihaka Maika, Anaru Teretere, Harete Uene, Maora Puke, Maraea Ketua, Paora Kahu, Miriama Oria, Eru Tokara, Mere Karaka Herehere, Marara Tahuka, Hira Whanautaua, Hone Taewa, Hira Tamahere, Patara Tuau, Pita Timotimo, Wirihana Pahou, Rahura Pahou, Winiata Taniwha, Ripeka Maiwera Hekiera te Oka, Mere Moana, Heni Haere, Piniha Tamaauahi, Moria Tipuna, Akaripa Hote, Mereana te Piri, Hirini Pehu, Mere Tuhou, Hoana Pari, Ngaperu, Reupena Tiere, Roka Wahawaha, Tuta Tamati, Hariata Parekaahu, Kereama Matehe, Hone Heke, Makere Timotimo, Mere Whariki, Heni Nokoaka, Renata Hape, Erana Kahina, Eruera Potaka, Pekama Pahura, Eruera Ariari, Wi Pewhairangi, Riria Kowhai, Peti Poihakeua, and Erana Waipapa.
XIII.			
Leonard Harper and Edward Circuit Latter, both of the City of Christchurch, Trustees of the will of the late Robert Heaton Rhodes (the elder), deceased, whose address for service is at the office of Messrs. Finn and Chrisp, Solicitors, Gladstone Road, in the Town of Gisborne	Pouturu	Claimants claim to have purchased the shares or interests in the block mentioned in the second column of the Natives whose names are mentioned in the fourth column	Tuta Nihoniho, Peta Tewa, Nepia Hurikara, Hone Paihakeno, Harata Tuari, Anaru te Kahaki, Hamiora Ngarimu, Hekiera Tuterangi, Maraki Tautuhi, Winiata Tapahi, Hoana Whakama, Mohi Turei, Raniera Tuhua, Pita Horuhoru, Miria Whakaiti, Horata Taheke, Reupene Tiere, Maraea Tauoha, Eruera Pirita, Tarati Wahakino, Rapata te Kooro, Hore Tokowaka, Henare Tuatai, Peti Matekino, Hetekia Motu, Piriha Tihore, Renata Rangipaia, Mere Hineitukua, Ripeka Paia, Peti Poihakena, Erana Rawhaere, Kararina Turaki, Mokena Romio, Herewini Huriwaka, Wiremu Pewhairangi, Himiona te Moana, Hare Paraone, Ruira Makuawe, Hoterene Karaka, Makari Tamanga, Hoani Kaikapo, Horomona Hapai, Hori Matamua, Apirana Tatua, Wiremu te Urupa, Reupena te Ana, Mata Pongahuru, Heni Nohoaka, Tamati te Ota, Himiona Tiwhatiwha, Hekiera Taurare, Hori Peita, Himiona te Owai, Pene Tipuna, Wi Turehu, Riria Kowhai, Eruera Kupenga, Hare Pikoi, Pekama Pahura, Paenata Kaiwi, Riwai te Hana, Hone Korokiangatua, Hori Tuhere, Te Paia Pakawe, Hana Kouewa, Heni Herewaka, Herewini Waitatari, Maraea Whakaki, Kereama Kaipara, Erana Okore, Hanara te Whio, Hohepa Rairi, Hiria te Rakahurumai, Makutu Tamati, Pekama Tuha, Anaru Ngamu, and Hamana Turi.
XIV.			
Leonard Harper and Edward Circuit Latter, both of the City of Christchurch, Trustees of the will of the late Robert Heaton Rhodes (the elder), deceased, whose address for service is at the office of Messrs. Finn and Chrisp, Solicitors, situated in Gladstone Road, in the Town of Gisborne	Kotorepaia ..	Claimants claim to have purchased the shares or interests in the block mentioned in the second column of the Natives whose names are mentioned in the fourth column	Tuta Nihoniho, Renata Hape, Heni Nohoaka, Hori te Ori, Erana Rauhaere, Peti Poihakena, Eruera Ariari, Peti Matekino, Kararina Turaki, and Ropata Wahawaha.

THIS is the printed copy, judgment, marked "B," referred to in our report hereto annexed:—
W. B. EDWARDS, } Commissioners.
JOHN ORMSBY, }

"B" OF EXHIBIT A.

NATIVE LAND COMMISSION, GISBORNE.—WHATATUTU No. 1.—APPLICATION OF A. C. ARTHUR.

JUDGMENT OF HIS HONOUR MR. JUSTICE EDWARDS.—THURSDAY, 8TH JANUARY, 1891.

THIS block of land is held under memorial of ownership issued by the Native Land Court, under the provisions of "The Native Land Act, 1873," to Hone Kewa and other Natives.

The applicant claims to have acquired by purchase from certain of the Natives named in the memorial of ownership, or their successors duly appointed by the Native Land Court, their interests in the block.

The applicant has applied to the Commissioners, under the provisions of "The Native Land Court Acts Amendment Act, 1889," to inquire into the circumstances attending the alleged alienations of the interests claimed by him in the block; and he asks the Commissioners, as the result of such inquiry, to grant to him a certificate under section 27 of the same Act, with a view to validate the instruments under which he claims. These instruments are two in number, the first bearing date the 1st April, 1878, purporting to be a conveyance from Hone Kewa and others to John Gibson Kinross and Andrew Graham, under whom the applicant claims title, and the second, dated the 27th November, 1882, purporting to be a conveyance from Pere Moreti and others to the applicant.

It is necessary to examine the form and the present condition of these instruments. The first of these, in its present condition, runs thus: "The deed made the 1st day of April, 1878, between Hone Kewa, Tiopira Tawhiao, Epiniha Tipuna, &c. [enumerating the names of thirty Natives], all of the district of Poverty Bay, in the Colony of New Zealand, aboriginal natives, of the first part, Wirihana Tupeka, husband of the said Mere Aira Tupeka, &c. [enumerating the names of five Natives], of the second part, and John Gibson Kinross and Andrew Graham, hereinafter called 'the said purchasers,' of the third part, whereas the said parties hereto of the first part are legally or equitably seised of or otherwise entitled to the hereditaments hereinafter expressed to be hereby granted, and have contracted and agreed with the said purchasers for the absolute sale thereof to them for the considerations hereinafter appearing. Now, this deed witnesseth that in pursuance of the said agreement, and in consideration of the several sums set opposite to their respective names in the schedule hereto annexed, which said several sums, amounting in the aggregate to the sum of £148 10s. the receipt, &c. They, the said parties hereto of the first part (such as them as are married women having obtained thereto the concurrence and consent of their respective husbands, testified by their said husbands becoming parties hereto), do each and every of them doth hereby grant, convey, assure, and release, and the said parties hereto of the second part, and each and every of them, doth hereby grant, convey, confirm, and release unto the said purchasers and their heirs and assigns all that piece or parcel of land, &c."

It is admitted on the part of the applicant that, at the time when this document was signed by the Natives whose signatures are attached to it, the names now written in as the names of the parties of the first and second parts, and the sum now written in as the aggregate amount of the purchase-money, were not written in, but that the document then contained blank spaces where these particulars now appear, having been filled in after the execution of the deed by the Natives. It also appears on the face of the document, and is not contested by the applicant, that the statement in Maori indorsed upon the deed in supposed pursuance of section 85 of "The Native Land Act, 1873," was not so indorsed until after the execution of the deed. It also appears upon the face of the deed that the name of Marara Tahuipare is written in the body of the deed as one of the conveying parties, but that she was then dead, and that the document was executed by Paora Haupa as her successor; and also that the signature of Tiopira Tawhiao, who signs the deed as the husband of Apihaka Tawhiao, one of the conveying parties, was attested by one witness only.

The second of the two deeds upon which the applicant relies is in the same form as the first, it contained at the time of its execution the same blanks, and these have since its execution been similarly filled in.

None of the Natives whose shares are claimed by the applicant appeared on the inquiry to oppose the application, and the Commissioners are satisfied upon the evidence adduced that the transactions purporting to be evidenced by the documents under which the applicant claims were entered into in good faith, and were not in any way contrary to equity and good conscience, and that the agreed purchase-money has been properly paid. The Commissioners are also satisfied (in the wording of the 27th section, under which the applicant claims a certificate) that the intended alienations purporting to be evidenced by the documents under which the applicant claims are liable to be impeached, because such alienations, being of land held under memorial of ownership, did not include the whole of the signatures of the Natives owning under such memorial of ownership.

The applicant therefore has so far brought himself within the provisions of section 27; but it appeared to me at the hearing that the documents under which the applicant claims are liable to be impeached upon other grounds than those mentioned in section 27—namely, upon the grounds that the documents in question had been altered in material parts since their execution, and that, inasmuch as the Maori translations were not indorsed upon the documents until after their execution, the provisions of section 85 of "The Native Land Act, 1873," had not been complied with. It also appeared to me that, while the Commissioners have power under section 27 to validate documents which are invalid for the special reasons therein mentioned, they have not power to validate documents which are also invalid for other reasons.

The Commissioners therefore directed that these points should be argued by counsel for the applicant, and they were accordingly argued by Mr. De Lautour and Mr. Skeet on the 6th January.

Upon the first point Mr. De Lautour contended that the alterations made in the deeds after their execution were not such as to void them at common law, and in support of this contention he cited several cases.

As, however, I have come to a definite conclusion upon the second point, it is not necessary that I should express any opinion on this point, and as it is not possible here to refer to the cases cited by Mr. De Lautour, I prefer not to do so. It is also unnecessary to express any opinion upon the questions arising upon the facts hereinbefore stated with respect to the shares of Paora Haupa as the successor of Marara Tahuipare, and of Apihaka Tawhiao.

With respect to the second point, Mr. De Lautour contended that the provisions of section 85 of "The Native Land Act, 1873," applied only to instruments which had of themselves a disposing effect, and that, as it has been repeatedly decided that transfers of land held by Natives under memorial of ownership have not of themselves any effect whatever save as the foundation of an application to the Native Land Court, it was not necessary with respect to such transfers that the provisions of section 85 should be complied with. I am clearly of opinion, however, that this contention is erroneous. By the interpretation clause the word "instrument" is made to include instruments affecting lands held under memorial of ownership. Section 85 is one of a series of sections, beginning with section 81, under the heading "Instruments of Disposition." Section 83 begins, "Every memorandum of transfer or of lease or other instrument of disposition affecting any land held under memorial of ownership shall be in duplicate." It is plain that in this section transfers and leases of land held under memorial of ownership are recognised as coming within the meaning of the words "instrument of disposition," as used in this part of the statute.

Section 85 provided that "no transfer, lease, or other instrument of disposition by any Natives to any person not of the Native race shall be valid unless properly explained to such Natives before the execution thereof by an interpreter appointed under this Act, and unless a clear statement of the contents thereof, written in Maori and certified by the signature of such interpreter, shall be indorsed on the transfer, lease, or other instrument. It shall be the duty of such interpreter to record in the Court of the district a certified copy of every such written statement. Every such instrument shall be signed by such Natives in the presence of and be attested by a Judge of the Court or Resident Magistrate, and at least one other male adult credible witness, or, if any Native cannot write, his mark will be made thereto in the same presence. The Judge or Resident Magistrate in whose presence any such instrument shall be signed shall satisfy himself that the Natives so signing such instrument fully understand its purport, and shall when attesting the same add thereto a memorandum to that effect." This section was amended by "The Native Land Act Amendment Act, 1878 (No. 2)," section 12, which provided that "any transfer, lease, or other instrument of disposition of any lands held under certificate of title, memorial of ownership, or Crown grant may be signed by any Native interested in the same before any Justice of the Peace, Clerk of any Resident Magistrate's Court, or any Inspector of Armed Constabulary, or a solicitor of the Supreme Court not professionally concerned or engaged for any of the parties to such transfer, lease, or other instrument, who shall have the same powers as conferred on Judges of the Native Land Court or Resident Magistrates under the provisions of section 85 of 'The Native Land Act, 1873:' Provided that any such officer holding a license as an interpreter under 'The Native Land Act, 1873,' shall not attest the execution of any deed which has been interpreted by himself: Provided, further, that the attestation of an adult witness, as required by the said Act, shall still in all cases be necessary."

It appears to me to be clear that the requirements of section 85 of the Act of 1873, as modified by section 12 of the Act (No. 2) of 1878, extend to instruments intended in any way to affect lands held under memorial of ownership. The only doubt which can reasonably be said to be raised upon the point is raised by the concluding part of sections 59 and 62 of the Act of 1873, which were no doubt inserted to remove any doubt. The last two paragraphs of section 59 run, "Sales of land held under memorials of ownership may be effected by memorandum of transfer in the form No. 2 in the Schedule hereto, or to the like effect. Such transfers shall be signed by all owners in the manner hereinafter provided in respect of the signing of deeds and instruments." The concluding part of section 62 contains a similar provision with respect to leases of lands held under memorial of ownership.

It is arguable that these provisions do recognise a distinction between instruments affecting lands held under memorial of ownership and lands held in fee, and that with respect to the former, while that portion of section 85 which relates to signature is specially adapted by sections 59 and 62, the first part of the section, which provides for explanation by a licensed interpreter prior to execution, and for a statement in Maori, is not so adapted. It appears to me, however, that this is not the correct view. The forms in the schedule to the Act of 1873 show that explanation by an interpreter was necessary with respect to transfers and leases of land held under memorial of ownership, and this is rendered additionally clear by the Act of 1878, section 12.

The provision for explanation by an interpreter is contained in the same part of the section which provides for the Maori statement, and, reading all the sections together, I feel no doubt that the interpretation and the Maori statement are both made essentials of the execution, and that sections 59 and 62 adopt the whole of section 85.

It is, however, only necessary to say that sections 59 and 62 do not exclude any part of section 85, which, apart from sections 59 and 62, does, as I have already pointed out, clearly include instruments intended to affect lands held under memorial of ownership.

I feel no doubt that the statement in Maori which by section 85 is required to be indorsed upon the instrument of disposition, and to be certified by the signature of the interpreter, is

required to be so indorsed and certified prior to the execution of the deed. This is in my opinion the grammatical construction of the words, and reason requires that this construction shall be given to them.

The plain reason for requiring the Maori statement was to insure that the Natives executing the deed might have reasonable means of acquainting themselves with its contents, and that some check might be put upon the interpreters.

The instrument must owe such effect as it had to the execution by the Natives, of which, in my opinion, it is clear that the interpretation and the Maori statement formed part, and it could not depend upon the writing by a licensed interpreter upon the deed of a statement in Maori years after the signature by the Natives.

Any other construction of the section would, with regard to freeholds, for the conveyance of which the assent of the Native Land Court was not necessary, involve the absurdity that the estate must pass by the interpretation, and not by the execution.

The construction which I have put upon this part of section 85 is strictly in accordance with the reasoning of the judgment of Mr. Justice Richmond in Kawatini *v.* Kinross, 3 jur., N.S., S.C., 149.

Further, it is plain that the words "such interpreter," in section 85, refer to the interpreter explaining the deed to the executing Maoris.

For these reasons I am of opinion that a memorandum of transfer complying in all respects with the provisions of section 85 was a condition precedent to the exercise by the Native Land Court of the provisions of sections 59, 60, 61, and 75; and I am further of opinion that the documents on which the applicant relies do not comply with the provisions of section 85.

Apart, therefore, from the fact that the instruments under which the applicant claims were not executed by all the Natives named in the memorial of ownership, they could not have formed a valid basis for an application to the Native Land Court for an inquiry, certificate, and order under sections 59, 60, 61, and 75 of the Act of 1873.

It was contended by Mr. De Lautour, however, that if the Commissioners find the facts necessary to bring the application within section 27 of the Act of 1889, they may, under that section, validate the instruments under which the applicant claims, notwithstanding that they find other facts which would in themselves have precluded the Native Land Court from giving any effect to such instruments, even if the same had been executed by every Native named in the memorial of ownership; and it is urged that this has already been decided by the Chief Justice in Piripi *v.* Arthur.

This is a startling contention, and, if it be correct, an applicant who claims under a state of facts which shows that three essentials are wanting to complete his title may be better off than an applicant who wants one only of such essentials.

Thus, if in the present case the applicant had procured the signatures of all the Natives named in the memorial to an instrument not executed in accordance with the 85th section of the Act of 1873, and which therefore could form no valid basis to give the Native Land Court jurisdiction to make an inquiry, certificate, and order under the provisions of sections 59, 60, 61, and 75 of the Act of 1873, and the Native Land Court had nevertheless made such inquiry, certificate, and order, it is plain that the Commissioners could give him no relief under section 27, because his conveyance could not be impeached for any of the reasons therein mentioned, nor could it be said that the completion of the intended alienations was prevented by a subsequent alteration of the law.

Yet it is said that in the present case the Commissioners can give him relief under section 27 because, in addition to the fact that the conveyances under which he claims are not executed in accordance with the 85th section of the Act of 1873, his title is further defective because they are not executed by all the Natives owning under the memorial of ownership, and because the transactions which they purport to evidence have not received the approval of the Native Land Court.

This would be a strange state of the law, and I am unable to find anything in the judgment in Piripi *v.* Arthur which justifies that contention.

On the contrary, I find in the judgment of the Chief Justice the following passage, which appears to me to be entirely at variance with such a construction of the section in question: "In substance the inquiries to be made by the Commissioners under the 27th section as to the alienations, whether by the whole or less than the whole of the owners, are those which would have had to be made by the Native Land Court under the Act of 1873 had the alienation been by the whole or by a majority, with one exception—that exception is that it is not provided that the Commissioners are to ascertain whether the Native owner still assents to the sale."

I am clearly of opinion that the construction contended for by Mr. De Lautour is not the true construction of section 27, and that, in cases in which it appears to the Commissioners that the instruments under which the applicant claims are void for reasons other than those mentioned in the section in question, they ought not to grant a certificate under that section.

If it had simply been provided that the effect of such certificate was to remove the difficulties occasioned by the defects mentioned in the section in question, I should have thought that the certificate might be granted for the purpose of removing the defects curable under section 27, leaving the instruments otherwise to such operation as they might have; but this is not the case.

Section 27 provides that, after the signature by the Commissioners of a certificate thereunder, "such intended alienation shall be deemed to be valid and effectual from the date of the instrument purporting to effect such alienation, or from such other date as the Commissioners may determine, and such instrument may thereupon be registered under 'The Land Transfer Act, 1885.'"

In the present case, the land in question has been under the provisions of "The Native Land Transfer Act, 1885," and the certificate of title is in the possession of the applicant, having been issued to him by the District Land Registrar under an erroneous view of the law.

To grant certificates under section 27 to the instruments under which the applicant claims would therefore be to enable him at once to procure himself to be registered as proprietor under

"The Land Transfer Act, 1885," of the interests which he claims, and so to divest them from the Natives, in whom they are at present vested, without, in my opinion, the sanction of the law.

It may be that it is desirable that the Commissioners should have power to validate such transactions as are in question in the present case, in which, from the fact that there is not a single objector, it is plain that the Natives must have fully understood the nature of their proposed dealings with their interests in the land, and that they have been in no respect injured by the non-observance of the formalities prescribed by law for the execution by Natives of valid deeds; but the duty of the Commissioners is to administer the law as they find it, and not to strain it to cover cases of real or supposed hardship.

The certificates under section 27 applied for by the applicant are therefore refused.

AFFIDAVIT OF DEFENDANT AND F. E. WILSON.

We, Worley Bassett Edwards, of the City of Wellington, in New Zealand, Esquire, the above-named Defendant, and Frank Edwin Wilson, of the same place, Law Clerk, make oath and say,—

1. We have read the affidavit of C. J. A. Haselden, sworn and filed herein on the 18th day of May, 1890.

2. This deponent, Frank Edwin Wilson, was, from a date towards the end of March, 1890, and for some time after, secretary to this deponent, Worley Bassett Edwards.

3. This deponent, Worley Bassett Edwards, left Wellington on the 2nd day of April, 1890, upon a visit to the South Island of New Zealand, and did not return to Wellington again until the 2nd day of May, 1890.

4. After arriving at Dunedin this deponent, Worley Bassett Edwards, wrote to this deponent, Frank Edwin Wilson, instructing him to take the necessary steps to obtain payment of the salary due to him.

5. In consequence thereof this deponent, Frank Edwin Wilson, made out an abstract of the amount which he, this deponent, Frank Edwin Wilson, considered was owing to this deponent, Worley Bassett Edwards, and in such abstract the amount appeared as £133 18s. 6d., and was calculated from the 27th day of February, 1890. The said abstract was not certified by this deponent, Worley Bassett Edwards, who was then absent from Wellington as aforesaid, or by this deponent, Frank Edwin Wilson, or by any other person.

6. The said abstract is produced to us at the time of the swearing of this affidavit, and is marked "A."

7. And I, this deponent, Frank Edwin Wilson, for myself, say, That I sent the said abstract to the Under-Secretary for the Native Department, and I heard nothing more of it until after the return of the Defendant to Wellington in the month of May following. I then learned from the Defendant that the amount paid to the bankers of the Defendant was not that for which the said abstract had been prepared, and, in consequence thereof, I, this deponent, Frank Edwin Wilson, waited upon the Under-Secretary for the Native Department, and asked him for an explanation. The said Under-Secretary for the Native Department informed me that the said abstract should have been sent to the Justice Department, and referred me to the Under-Secretary of that department.

8. In consequence thereof, I, this deponent, Frank Edwin Wilson, waited upon the said Under-Secretary for the Justice Department, who then explained to me that, as the commission of the Defendant as a Judge of the Supreme Court of New Zealand was dated on the 2nd day of March, 1890, he could be paid only from that date.

9. I informed the Defendant of this, and he at once acquiesced therein, stating that he preferred to be paid as a Judge to being paid as Commissioner.

10. And I, this deponent, Worley Bassett Edwards, for myself, say, That I never saw the aforesaid abstract until this morning.

11. That immediately I was informed that I was to be paid as a Judge of the Supreme Court of New Zealand only I acquiesced therein, and that I have ever since been paid as such Judge, and through the Justice Department, whereas the said Commission appointed under the 20th section of "The Native Land Court Acts Amendment Act, 1889," and the other officials connected with this said Commission, have always been paid through the Native Department.

W. B. Edwards.
Frank E. Wilson.

Severally sworn by the deponents, Worley Bassett Edwards and Frank Edwin Wilson, at the City of Wellington, this 19th day of May, 1891, before me—

A. Gray,
A Solicitor of the Supreme Court of New Zealand.

2146

WELLINGTON, NEW ZEALAND.

ABSTRACT and ACQUITTANCE of SALARY of HIS HONOUR MR. JUSTICE EDWARDS.

Department,

Entered in Folio 217 Treasury Books.

from the 2nd ~~27th February,~~ to the 31st March, 1890, inclusive.

Payable by cheques to be drawn on the Bank of New Zealand at _____

Treasury Voucher No. _____ Abstract received in Wellington _____

Number of Item.	Office held.	Name of Officer.	Date. From	Date. To	Rate.	Amount of Salary. £	s.	d.	Amount to be paid to Government Insurance Office. £	s.	d.	Amount payable to Officer. £	s.	d.	Number of Cheque.	I, the undersigned, do hereby acknowledge to have received from the Paymaster-General the sum opposite my name, being in full payment of my Salary for the period specified in this Abstract.	Date of Payment.
	Judge of the Supreme Court, and Native Commissioner.	W. B. EDWARDS.	1890 2nd ~~Feb. 27~~	Mar 31	1500	120	19	4				120	19	4	7258	For the Bank of New Zealand. W. VICKERS, Teller, Wellington.	
						~~125~~	,,	,,				~~125~~	,,	,,			
						~~133~~	~~18~~	~~6~~				~~133~~	~~18~~	~~6~~		NOTE. Please pay to the credit of W. B. Edwards with the Bank of New Zealand Wellington. FRANK E. WILSON, *Judge's Secretary.*	
	To be charged to Vote No. Unauthorised Consolidated Fund.					120	19	4									
						~~125~~	,,	,,									
	(Approval Stamp.) .	C. J. A. HASELDEN.		TOTAL, £		~~133~~	~~18~~	~~6~~									

NOTE.—The spaces enclosed by a line are to be left open for numbers to be filled in in the Treasury.

NOTE.—The following instructions contained in "The Treasury Regulations" must be strictly adhered to: The Officer authorised to certify this Abstract is to sign the "Provisional Certificate," and forward the Abstract to the Under-Secretary, or Head of his Department, between the 1st and 7th of the Month to which the payment relates. No Salary Abstract is to include salaries payable by cheques on more than one branch of the Bank. BEFORE COUNTERSIGNING THE CHEQUE FOR ANY CLAIM INCLUDED HEREIN THE OFFICER AUTHORISED MUST SIGN THE FINAL CERTIFICATE AT FOOT. (☞ See Sections 74, 75, and 78.

I certify that the individual named in the above Abstract opposite name of each respectively actually employed in the situation, and during the period specified

Provisionally certified: C. J. A. HASELDEN.

Finally certified: C. J. A. HASELDEN.

Thirteenth Form—Abstract of Salaries.]

ENDORSEMENT ON FOREGOING ABSTRACT.

THE Commission was signed on the 2nd March, and salary is payable only from such day. Please answer.

J. E. F. 18/4/90.

Accordingly.

W. M. R. 21/4/90.

THIS is the Abstract marked A, produced and shown to Worley Bassett Edwards and Frank Edwin Wilson, at the time of their severally swearing their affidavit herein, before me this 19th day of May, 1891, and referred to in such affidavit.

A. GRAY,
A Solicitor of the Supreme Court of New Zealand.

ORDER REMOVING MOTION INTO COURT OF APPEAL.

ON Saturday, the 9th day of May, 1891, upon hearing Mr. Gully, of counsel for the Plaintiff, and Mr. Harper, of counsel for the Defendant, and by consent: It is ordered that the notice of motion made herein and filed on the 6th day of May, 1891, be removed into the Court of Appeal.

By the Court.

R. G. THOMAS,
Deputy Registrar.

No. 83.

ARGUMENTS IN THE COURT OF APPEAL IN THE CASE OF THE HON. THE ATTORNEY-GENERAL *v.* W. B. EDWARDS.

MONDAY, 18TH MAY, 1891.

[Before His Honour the Chief Justice (Sir JAMES PRENDERGAST), His Honour Mr. Justice RICHMOND, His Honour Mr. Justice WILLIAMS, His Honour Mr. Justice DENNISTON, and His Honour Mr. Justice CONOLLY.]

Sir ROBERT STOUT and Mr. H. B. VOGEL for the plaintiff, instructed by Mr. HUGH GULLY, Crown Solicitor.

Mr. GEORGE HARPER, Mr. MARTIN CHAPMAN, and Mr. THEO. COOPER for the defendant, instructed by Messrs. CHAPMAN, FITZGERALD, and TRIPP, solicitors.

Sir R. Stout, having moved formally that the matter be set down in accordance with the rules, said: May it please your Honours, this is an action in which the Attorney-General for the Queen in the Colony of New Zealand is the plaintiff, and Mr. Worley Bassett Edwards, who claims to be a Judge of the Supreme Court, is the defendant. I do not think it is necessary to read the statement of claim and the statement of defence at length. I shall summarise them, and go into other matters as I go along. The statement shows that on the 2nd March, 1890, there were five duly-appointed Judges on the Supreme Court bench. It also states that the Acts to be referred to as New Zealand statutes dealing with the appointment of Supreme Court Judges are two—the Supreme Court Act of 1882, and "The Civil List Act 1863 Amendment Act, 1873." It also states that the five Supreme Court Judges have been paid the salaries mentioned in the Civil List Act, and then it proceeds to set out a Commission issued by the Governor to Mr. Edwards, appointing him a Judge of the Supreme Court. There are also set out in the statement of claim certain letters that passed between the Government and Mr. Edwards at the time of his appointment. These letters have been supplemented by letters in the statement of defence, and in affidavits; and even this morning there has been—because of a point raised by the defendant as to the date of the Commission as a Commissioner under the Native Lands Act of 1889—an affidavit filed, showing that the Commission for the Commissionership and the Commission for the Supreme Court Judgeship were both sent to the defendant on the same day—the 6th March, 1890, and subsequent to the letters referred to in the statement of claim of the 5th March. 1890. The Court will see by-and-by that something may turn on this point as to the dates. The reason why these letters have been set out is to show the terms upon which Mr. Edwards has been appointed a Judge of the Supreme Court. It will be noticed that in the defence raised the defendant desires to make out that there was some contract—so far as I can gather from the statement of defence—or something amounting to a contract, outside of the Commission or along with the Commission. I submit that the statement of claim discloses what this contract—if it was a contract—was. The letter of the 1st March was acknowledged by the defendant on the 5th March. He states that he accepted the appointment made therein. The words of the letter are, "I have the honour to acknowledge the receipt of your letter of the 1st March, and to say that I accept the appointment therein named on the terms therein mentioned." I do

not wish this case to turn on any trivial matter. It is, however, peculiar that in this letter of the 5th March the singular number is used—it only speaks of the "appointment," not of the "appointments." But after this letter there is the letter of the 6th March. The two letters of the 6th March which are set out in the affidavits were written, and this shows that the Commission under the Native Land Court Act of 1889 and the Commission as a Judge of the Supreme Court were both sent to Mr. Edwards on the same day—namely, on the 6th March, 1889. What I submit is that the letter of the 1st March shows that the appointment to the Supreme Court Judgeship was offered to Mr. Edwards as an office auxiliary to and subsidiary to his appointment as Commissioner under section 20 of "The Native Land Court Acts Amendment Act, 1889." I submit that this appears from the 2nd paragraph in this letter of the 1st March, but I shall read the letter at length, in case it may be said that the context of the letter explains the 2nd paragraph. The letter in full is as follows:—"Sir,—In reference to the conversation I had with you on the subject of the appointment of a Commissioner under section 20 of "The Native Land Court Acts Amendment Act, 1889," I have now the honour to inform you that His Excellency the Governor has been pleased to approve of your appointment to that office. It has appeared to the Government—and such appears to be the general feeling—that for an office of such importance, involving such large interests, the Commissioner should have the status of a Judge of the Supreme Court, and therefore you will be appointed to that office also. As you are aware, the demands on the time of the present Judges of the Supreme Court cause inconvenient but unavoidable delay in the despatch of business, and the leave of absence granted to Mr. Justice Richmond will aggravate the evil unless some provision is now made to meet it. The Government is averse to the appointment of a temporary Judge if it can be avoided, and they hope that the arrangement by which you will afford occasional assistance in the Supreme Court work will temporarily meet the requirements. Your salary will be £1,500 per annum, the same as the present Puisne Judges'. Your Commissions to the above offices will be at once forwarded to you." Then, there is the letter of acceptance, as I have already said, dated the 5th March: "I have the honour to acknowledge the receipt of your letter of the 1st March, and to say that I accept the appointment therein named upon the terms therein mentioned."

Independent of the 2nd paragraph of the letter, which, I submit, plainly proves that Mr. Edwards was not appointed to the office of a Supreme Court Judge with the additional duties of Commissioner cast upon him, but was appointed a Commissioner with the duties of a Supreme Court Judge given to him, to be only auxiliary to those of Commissioner; further, that he was not expected to do Supreme Court work—that he was only to do it, apparently, occasionally, and therefore that he was only temporarily to do the work of a Judge. This, I submit, also appears plainly from the last paragraph but one of the letter—as to salary. The words are, not that he is to be paid as a Supreme Court Judge, but simply this: "Your salary will be £1,500, the same as the present Puisne Judges;" showing that the salary to be allocated to him as Commissioner is to be at the same rate as the Puisne Judges. I submit that, if contract there was between the Government and Mr. Edwards, the contract appears in these two letters. A great deal of matter which seems to me to be entirely irrelevant is set out in the defence and in the affidavits of the defendant. And, as this irrelevant matter has been set out in the defence, we have also brought before the Court the correspondence, which I submit is also irrelevant; only the whole correspondence has been set out. I do not think, however, that this correspondence has any bearing particularly on the questions which the Court has to decide. I may summarise it by-and-by. But, taking what I conceive to be the statement of claim and defence and the affidavits on both sides together, I think I may summarise the whole as follows: First, it is clear that Mr. Edwards was not appointed by way of a substitute for, or in succession to, any of the Judges; nor does his Commission purport to be an appointment under section 12 of the Supreme Court Act.

The Chief Justice: That is the provision for appointing a temporary Judge?

Sir R. Stout: Yes, your Honour. I submit, however, that the letter of the 1st March and the letter of the 5th March—if they can be read to aid the Commission in any way—are to be treated as the contract under which both commissions were issued.

The Chief Justice: That the appointment shows that he is not a temporary Judge?

Sir R. Stout: It does not say anything in reference to that. The words of the Commission are: "to have, hold, exercise, and enjoy office and place during good behaviour." However, if the defendant relies on some contract outside of the Commission, then I submit that, reading the letters and the Commission together, the Court must assume that his Commission as Judge must determine so soon as his office as Commissioner comes to an end. And if it appears, as it does appear—and is set out in the statement of claim—that his position as Commissioner was put an end to on the 31st March, 1891 (see the 9th paragraph of the statement of claim)——

The Chief Justice: How do you state that?

Sir R. Stout: I say that the Judgeship was, according to the letters, only to last so long as the Commissionership lasted, and to be auxiliary to that office; and if it appears on the face of the proceedings, as it does appear by the 9th paragraph of the statement of claim, that the Commissionership ended on the 31st March, 1891, I submit that the power to act as Judge must fall when the Commissionership falls. The Judgeship was only to be, as I again repeat, auxiliary to that of the Commissionership, and if it appears that the Commission was too large, and has gone beyond the contract, then the Commission may be vacated; because the Court will hold just the same as in the issue of a Crown grant or other patent, that the Commission is wider than the contract between the parties, and, being wider than the contract between the parties, must be rescinded. I submit that the correspondence of the 1st and 5th March, on which the Commission is issued, and in which Mr. Edwards accepts it, shows that he was not appointed a Supreme Court Judge independent of the duties and office of a Commissioner under "The Native Land Courts Act, 1889;" and if, therefore, there is a contract between the parties this contract was for the Commissionership, with the status of the Supreme Court Judgeship thrown in; and, once the Commissionership comes to an end, the

Supreme Court Judgeship comes to an end also. The Commission has gone beyond the contract, and the Commission itself can be vacated. I shall refer by-and-by to the power under the 12th section of the Supreme Court Act of 1882. It provides not only for the appointment of a temporary Judge during the illness or absence of a Judge, but also uses the words, "for other temporary purpose," which, I submit, is not limited by these other words precedent. I shall rely on this point.

The Chief Justice: I understand you to raise that the validity of the appointment depends on the validity of the contract.

Sir R. Stout: I go further, and say that, in reference to this contract, because of its particular nature, the Court will have to look at the letters of the 1st and 5th March.

The Chief Justice: That it would be proper to do so, irrespective of the defendant setting up any special answer.

Sir R. Stout: I have a right to ask this, as in reference to a Crown grant, if I can show that the contract was not for the appointment of a sixth Judge of the Supreme Court under the Act to act constantly as a Judge under the Act. But if I can show that the appointment as Judge was to be ancillary and auxiliary to the Native Commissionership, then when the Commissionership came to an end the Supreme Court Judgeship came to an end. I do not deny, however, that the main point that the Court will have to determine will be, had the Governor the power to issue any Commission to any person as Judge?

Mr. Justice Richmond: The Governor is never once mentioned, I think, in the correspondence?

Sir R. Stout: Yes, your Honour. The letter of the 1st March says, "I have the honour to inform you that His Excellency the Governor," &c.

Mr. Justice Richmond: I observe that little mention has been made of the Crown, and there is surely some difficulty in controlling a Commission under the seal of the colony by correspondence with Ministers.

Sir R. Stout: On the face of it the contract—if there be a contract—made between the Crown and Mr. Edwards was not a contract to appoint him a permanent Judge of the Supreme Court; it was a contract to appoint him a Native Commissioner under section 20 of the Act of 1889, and it gave him the status of a Supreme Court Judge in order to better fulfil his duties as Commissioner. If, therefore, I repeat, his duties as Commissioner came to an end, the reason for his appointment as Supreme Court Judge came to an end; and the proper Commission that ought to have issued, in pursuance of the correspondence, was a Commission to him as Supreme Court Judge, only to act so long as he remained a Commissioner. That is, I submit, the reading of the letters. The principal and main point is, however—and the Court will have to determine this, I submit—had the Governor power to issue any Commission to any person, appointing him to be a permanent Judge, without express legislative sanction of some sort? or, in other words, are the terms of section 5 of the Supreme Court Act of 1882 wide enough to allow the Governor to create five Puisne Judges or twelve Puisne Judges?—because I understand that the contention of the other side will be that there is no limit to the number that may be appointed. I shall submit that the Supreme Court Act of 1882 does not enable the Governor to appoint another Judge if there are five Judges on the Bench—*i.e.*, a Chief Justice and four Puisne Judges. And if the Court comes to that conclusion, the Court may, either by *quo warranto* or *scire facias*, repeal the Commission. In order that this argument may be made perhaps more clear to the Bench, I will, with the permission of the Court, give a short sketch of the history of the Supreme Court of New Zealand, and also a sketch of the history of the appointments of Supreme Court Judges in England and America; and I then propose to deal with this question from the interpretation—so to speak—point of view of the Supreme Court Act. Of course, when this colony was a Crown colony the appointments of all officers necessary to perform the functions of government in the colony rested with the Home Government; and wherever there has been a Crown colony it has been pointed out that the position of Judges has been looked upon simply as colonial officers, removable from colony to colony; and this practice still remains in Crown colonies. It is mentioned in a note in the second volume of "Bacon's Abridgment" that the Act of Settlement was held not to apply to the colonies. The Court will find on page 387 a note, which says,—"Our distant settlements are not considered as within the compass of this statute, which is understood to be limited to the Courts of Westminster Hall, and therefore the Commissions of the King's Judges in the East Indies are still during pleasure." "The Statute of 13 George III., c. 63, and 39 and 40 George III. c. 79, under which the Courts in that country were constituted, are wholly silent as to the estate which the Judges shall take in their office, and being left as at common law, an estate at will only is granted to them." So that in New Zealand, when the first Judges were appointed, they were looked upon as officers of the Colonial Department, just the same as the Supreme Court Judges now in any of the Crown colonies—Fiji, and Western Australia until lately, and the West Indies. They might be appointed to serve in various colonies; they might be shifted from one colony to another; and their total service was counted for a pension. They are practically not Judges attached to any particular colony or place. And one might refer, as an illustration of this—if it be necessary—to the struggle to get Judges freed from the control of the Crown in Ireland. I will not take up the time of the Court by stating the history at length; but there is a passage in Froude's "English in Ireland," second volume, at page 53, where he gives a sketch of the struggle to get the Judges removed from the powers of the Executive, and to be freed from the ordinary rules which had been in force as to their appointment at pleasure; and he says the Irish Judges, like the Judges in the colonies, had hitherto held office during the Crown's pleasure. Then he goes on, at pages 53, 59, and 184 to deal further with the question—I will not take up the time of the Court in reading these extracts at length. Then, at pages 245 and 250 will be found further statements of the struggle which took place in the Irish Parliament to assimilate the tenure of the Judges in Ireland to the tenure of the Judges in England. I come now, however, to deal with what has happened in New Zealand, premising, I again repeat, that, until New Zealand had responsible government the ordinary rule applicable to Crown colonies was

followed in New Zealand. The first ordinance passed dealing with the Judges was passed in 1841, and that ordinance said that the appointment of the Judges should be by Her Majesty or the Governor. Section 1 says——

Mr. Justice Denniston: How do you cite that?

Sir R. Stout: Supreme Court Ordinance, page 67 in this volume, 1841, Session II., No. 1, the first ordinance of the second session. It says, "The Court shall be holden before one Judge, who shall be called the Chief Justice of New Zealand, and such other Judges as Her Majesty or the Governor shall from time to time be pleased to appoint." There was no provision in this Act for salaries.

Mr. Justice Richmond: It goes on to say expressly they are to hold office during pleasure?

Sir R. Stout: That was in the next ordinance.

Mr. Justice Richmond: It is not in the first?

Sir R. Stout: No, not in the first. In the next ordinance it says that they are to hold office during pleasure. Then the next ordinance dealing with the matter was the first in the next session, that is, in 1844. Section 10 of that ordinance provided, page 119:—

"The Court shall consist of one Judge, who shall be called the Chief Justice of New Zealand, and of such other Judges as Her Majesty shall from time to time be pleased to appoint: Provided that it shall be lawful for His Excellency the Governor to appoint such Judges provisionally until Her Majesty's pleasure shall be known. The Judges of the Court shall hold their office during Her Majesty's pleasure."

The alteration made seems to be that the Judges were to be appointed by the Queen, not by the Queen or the Governor. The only power of appointment that the Governor had was to appoint provisionally. This, I submit, shows that the colony then recognised that the appointment of all officers practically rested with the Home Government; but the colony had not given to it the full powers of government; it was still governed from England. In this ordinance, also, there was no provision for salaries. There were various subsequent Supreme Court Acts and ordinances—1846, 1848, and 1853—but none of these amendments touched the question now to be considered by the Court. Then we come to the granting of a Constitution and representative government for New Zealand by the Constitution Act in 1852. The Constitution Act deals with the constitution of the Supreme Court indirectly, and I submit it is important to notice it, for at all events it attempted, I submit, to bring into the colony part of the privileges which the Supreme Court Judges held in England. I refer, for example, to section 65 of the Constitution Act, in which it says—I need not read the whole section:—

"Every Bill shall be passed by the said Legislative Council and House of Representatives, but every Bill which shall be passed by the said Legislative Council and House of Representatives altering the salary of the Governor, or altering the sum described as for Native purposes, shall be reserved for the signification of Her Majesty's pleasure thereon, and, until and subject to such alteration by Act or Acts as aforesaid, the salaries of the Governor and Judges shall be those respectively set against their several offices in the said schedule."

And further details are mentioned, but I need not read these. But there is this proviso to section 15:—

"Provided always that it shall not be lawful for the said General Assembly, by any such Act as aforesaid, to make any diminution in the salary of any Judge to take effect during the continuance in office of any person being such Judge at the time of the passing of such Act."

The salaries are set out—one Chief Justice, £1,000; one Puisne Judge, £800. In section 64 there is provision that practically these sums shall belong to what may be termed the Civil List, and be independent of appropriation by the Parliament of New Zealand. It says in section 64:—

"There shall be payable to Her Majesty, every year, out of the revenue arising from such taxes, duties, rates, and imposts, and from the disposal of such waste lands of the Crown in New Zealand, the several sums mentioned in the Schedule to this Act."

I have read the part of the schedule referring to the Judges of the Supreme Court. Now, I submit that, so far, therefore, as the Judges were concerned, they were practically put in a higher position than the Governor, because his salary might be varied—only I conceive that would have to be reserved for the Queen's pleasure—but the salary of the Judges could not be varied by any Act of the General Assembly of New Zealand.

Mr. Justice Denniston: That is, Judges then in office.

Sir R. Stout: Yes.

Mr. Justice Williams: I think the section goes further than that. If you read the section carefully I think you will see it applies to future Judges as well as to the Judges then in office.

Sir R. Stout: It might mean that, of course. It is stronger for me to put it in that way, but I was willing to take it in the modified form. My main point, however, is this——

The Chief Justice: What you say is that that provides that the salary shall be—Chief Justice, £1,000, and Puisne Judge, £800; and this has to be read into the ordinance, only it is made permanent and unalterable.

Sir R. Stout: That is so; that, at all events, those two sums—£1,800—were permanently appropriated for certain services, the one given for a Judge as Chief Justice, and the other for a Puisne Judge, and that these sums could not be taken from the Queen. That, I submit, is clear, according to section 64, and I shall show if it is necessary, afterwards, that, though there was power given to the General Assembly to repeal certain sections in the Constitution Act, these sections that dealt with Judges could not be repealed. This sum was permanently set apart by the Parliament of England for the Judges—and I submit that it was a permanent appropriation.

The Chief Justice: You mean, that it was not only an appropriation, but a fixing of the salaries.

Sir R. Stout: Of course, I submit it is a permanent fixing of £1,800, by placing it on the Queen's Civil List, and the reason for that, I shall show further when I refer to the Constitution. I do not know that it ever came before the Court, but this point happened in England. I cannot find a reference to it at present, but this is what happened; there may be no reference to it in the reports: There was a vacancy in one of the Courts, and when a Judge was appointed to the Court it was afterwards claimed that the salary, which had not been paid to anybody during the time there had been a vacancy, belonged to the Judge appointed, and it was said that it was like a life estate.

Mr. Justice Richmond: There was a statutory provision about it if I recollect.

Sir R. Stout: There may have been afterwards.

Mr. Justice Richmond: I know there is—one depriving the Judge of any right to go back to the vacancy of the office.

Sir R. Stout: The point which was raised was that one Judge claimed, as there was a life estate, he went back, and could claim the money that had accrued to that vacancy.

Mr. Justice Richmond: His Honour's suggestion was whether an Act of the Executive or the Crown was necessary. You say not.

Sir R. Stout: No. I said that when he was appointed Chief Justice the salary attached to the office.

Mr. Justice Richmond: Well, I am not aware whether that point has been decided. The question whether the Crown might make savings upon the money seems to me to be an open one.

Sir R. Stout: I will state what the practice here is at all events. In 1875, when his Honour the late Mr. Justice Gillies was appointed to the office, it was held there were savings in the Civil List. The Audit Department holds that these Civil List sums are permanently appropriated, and that they cannot be changed from the purposes for which they are set apart—that they are for the salaries of Judges and nothing else.

Mr. Justice Richmond: You will see there were in the Constitution Act other provisions—about the collection of Customs, and the administration of the lands. In both those cases the Crown might provide for the service without vote. The idea was, in handing over the power of the purse to the colonists, that the Crown reserved to itself the right to appropriate certain sums out of the revenue without a vote.

Sir R. Stout: I admit that, and also shall show from authority that it is looked upon as absolutely necessary for the independence of the judicial——

Mr. Justice Richmond: A Judge's salary could not be diminished by the General Assembly during his term of office.

Sir R. Stout: No doubt; and I shall also show that this is admitted, that without such permanency and without a permanent vote there is no independence of the Bench. I shall show by-and-by that in America it has been not only provided for federal but even in the case of the subsidiary Judges.

Mr. Justice Richmond: There is nothing in the Constitution Act expressly prohibiting the Executive from reducing a Judge's salary; but it is directed against the power of the Legislature.

Sir R. Stout: But I submit the salary attached——

Mr. Justice Richmond: They had a freehold, you mean?

Sir R. Stout: Well, it amounts to that. The Constitution Act does not go that length at all. I am going to show what was done in New Zealand to bring that into force.

Mr. Justice Richmond: Of course, there was nothing there to alter the tenure.

Sir R. Stout: Although there is nothing expressly preventing the Governor from reducing the salary of a Judge, there is by implication, though not expressed.

Mr. Justice Williams: Do you contend that the effect of section 65 of the Constitution Act is to limit the right given by the ordinance to the Crown to appoint any number of Judges?

Sir R. Stout: I submit that section 64 and section 65 read together do have that effect, but it is not necessary for my argument; but I submit it is——

Mr. Justice Williams: You may call it to your aid in support of that argument; section 66 I think it is.

Sir R. Stout: I intend to refer to that afterwards. In giving the rapid sketch I referred to, I submit I will be allowed to read things which may or may not be regarded as really evidence. Of course I do not say the Court is bound by what I may read in giving this historical sketch. I shall first refer to a series of resolutions passed in the House of Representatives in 1856. These resolutions will be found in *Hansard*, 1856–58, p. 300. The resolutions are as follows:—

"That, in the opinion of this House, the tenure of office of Judges of the Supreme Court ought to be assimilated as nearly as may be to that of Judges in England; that the Judges of the Supreme Court ought not to be removable except by Her Majesty, on an address from both Houses of the General Assembly, and should only be liable to suspension by the Governor on a like address. That there ought to be a Chief Justice and two Puisne Judges of such Court. That so soon as Judges shall be appointed in accordance with these resolutions, the salary of the Chief Justice ought to be £1,400 per annum, and that of the two Puisne Judges £1,000 each per annum. That a proportionate increase ought to be made in the Civil List; but no second Puisne Judge ought to be appointed till this House shall have resolved that the said appointment is necessary. That the appointment of Judges ought to be with Her Majesty, but to be exercised on the recommendation of some one of the Judges of the superior Courts in England, who may be from time to time designated in that behalf by the Colonial Government on behalf of the colony."

Mr. Justice Denniston: Is that a resolution of one House or two?

Sir R. Stout: Of the House of Representatives. There was a Committee of the Legislative Council dealing with the matter, and I will refer to that, if necessary, afterwards. But these are resolutions of the House of Representatives I am reading now.

Mr. Justice Richmond: That is Mr. Sewell's motion.

Sir R. Stout: Mr. Stafford first introduced the resolutions, but Mr. Sewell made some amendments, and Mr. Fox also. The resolutions conclude as follows: "That a respectful address be presented to His Excellency the Governor praying him to take the necessary steps towards effecting the above object. Resolutions adopted by the House." I submit these resolutions show that, at all events so far as the House of Representatives was concerned, it desired to have the law referring to the appointment of Judges in New Zealand assimilated to that which was in force in England. There was to be a Civil List to provide for their payment. No other Puisne Judge was to be appointed until the Civil List was amended; and the tenure was to be similar to the tenure of Judges in England. This was in 1856. The next session was, I think, 1858, and then the Supreme Court Judges Bill of 1858 was introduced. His Honour Mr. Justice Richmond apparently had charge of it, being then Colonial Treasurer, and *Hansard* says: "Mr. Richmond, after briefly recapitulating the leading provisions of the Bill, said the present Ministry could not expect in the ordinary course of things to remain in office any great length of time, but they wished while they did hold power to lay the foundation of sound and liberal institutions in the country, and, where beneficial results could accrue from it, to divest themselves as much as possible of executive power."

The Act of 1858 repealed section 10 of the Act of 1844. That was the section of the Act which said that there was to be a Chief Justice and other Judges, who were to hold office during pleasure. The second and third section provide,—

"The Supreme Court of New Zealand shall consist of one Judge to be appointed in the name and on behalf of Her Majesty, who shall be called the Chief Justice, and of such other Judges as His Excellency in the name and on behalf of Her Majesty shall from time to time appoint."

"The Commission of the present Chief Justice, and of every Chief Justice and other Judge of the said Court to be hereafter appointed (except as hereinafter provided) shall be and continue in full force during their good behaviour, notwithstanding the demise of Her Majesty, any law, usage, or practice to the contrary notwithstanding."

Mr. Justice Richmond: I am rather ashamed with having something to do with an Act which refers to the "demise of Her Majesty." It is a gross vulgarism, and also a blunder. It should be "the demise of the Crown," and the sooner it is set right the better.

Sir R. Stout: Yes. It also says,—

"Provided always that it shall be lawful for the Governor of New Zealand at his discretion, in the name and on behalf of Her Majesty, upon the address of both Houses of the General Assembly, to remove any such Judge from his office and to revoke his patent or commission."

Then there was power to suspend under section 5; and section 6 provided,—

"A salary equal at least in amount to that which at the time of the appointment of any Judge shall be then payable by law shall be paid to such Judge so long as his Patent or Commission shall continue and remain in force."

Then section 7 gave power to appoint a Judge for temporary purposes, and section 8 provided for superannuation-allowances. I submit that this Act was simply carrying out, though with some alterations, the previous decision of the House in 1856—to assimilate the law of New Zealand to that of England, so far as the Supreme Court Judges were concerned.

Mr. Justice Denniston: You do not intend to read the resolutions to interpret the Act?

Sir R. Stout: No; I am only giving a sketch of how the Act came to be passed. As to how the Court is to interpret the statutes, I will deal with that later on. Now, at this time, the passing of the Act of 1858, Sir George Arney was Chief Justice. The Act was passed on the 24th August, 1858, and in the same session that this Act was passed providing for a new tenure for the Supreme Court Judges there was passed the Civil Service Act.

The Chief Justice: He was in office.

Sir R. Stout: Yes, he was in office.

The Chief Justice: In 1857.

Sir R. Stout: I will give the date; it was in 1858, and he was in office then.

The Chief Justice: Mr. Justice Johnston, was he in then?

Sir R. Stout: No, he was appointed afterwards.

Mr. Justice Richmond: Shortly after?

Mr. Harper: In November, 1858, your Honour.

Sir R. Stout: His Honour Mr. Justice Johnston was appointed on the 3rd November, 1858, and the Chief Justice on the 1st March, 1858. There were eight months between them. This list, your Honour, is in this volume, page 354 of New Zealand Statutes, 1854 to 1860. It is called "The Civil List Act, 1858." It recited the Constitution Act, and then it proceeded to give a certain sum to the Governor, a certain sum for his Private Secretary, a certain sum for the Chief Justice, for the first Puisne Judge, and for the second Puisne Judge, following the resolution in the House in 1856; and it provided that this Act shall be deemed to take effect on and after the 1st July, 1858. Whether that was to have a retrospective or retroactive effect or not I do not think matters so far as this Act is concerned. This Act was proclaimed by the Governor, Sir Thomas Gore Browne, on the 25th July, 1859, as having been assented to by the Queen, and then became law; and on the day after its proclamation Mr. Justice Gresson, who had been acting as a temporary Judge, was permanently appointed; so that the Executive of that day waited till the day after the proclamation of the Act of 1858 before appointing the second Puisne Judge.

The Chief Justice: That is so.

Sir R. Stout: Yes; the affidavit in the proceedings which says it was in 1862 Mr. Gresson was appointed is a mistake. It was not Mr. Harrison's mistake, your Honour. I believe he was told this by the Justice Department. The correct date is the 26th July, 1859. The next Act which deals with the Supreme Court Judges—of course they deal with procedure, which I will not refer to—is "The Supreme Court Act, 1862." This Act repeals section 4 of the Act of 1854. The 4th section of the Act gave power to the Governor to remove on an address from both Houses The Act of 1862 took that power away from the Governor and left it with Her Majesty. It states "That it shall be lawful for Her Majesty, upon the address of both Houses of the General Assembly, to remove any Judge of the Supreme Court from his office, and to revoke the patent of his commission, and for the Governor to suspend any such Judge upon a like address." In the same session that this amending Act of the Supreme Court Judges Act was passed there was a "Civil List Act, 1862," passed. That provided an increase of the salary for the Governor, and it provided that a sum of £6,200 should be provided for Judges. It did not specify in this Civil List Act how the salaries were to be appropriated, and the 3rd section of this Act was this: "This Act shall be deemed to take effect on and after the first day of July, 1862."

The Chief Justice: Did it repeal the Civil List Act, or leave it standing?

Sir R. Stout: Section 2 says: "There shall be payable to Her Majesty every year out of the revenue arising from taxes duties rates and imposts levied under any Act or Acts of the General Assembly the several sums mentioned in the Schedule to this Act instead of the several sums mentioned in the Schedule to 'The Civil List Act, 1858.'"

It was a substitution of these sums—a substitution as to the Judges of £6,200. In fact, it lumped up the sums together. There are only four items in the schedule of the Act of 1862. This Civil List Act had a retrospective clause, deemed, I presume, to be retroactive, and to sanction the payments on and after the 1st July, 1862. This Act, however, was not proclaimed until 1863.

The Chief Justice: Mr. Swainson called attention to the impropriety of that—I think, in the Upper House.

Sir R. Stout: Of course, there was no need of having reserved the Civil List Act so far as the salary of the Judges was concerned; it was only because it altered the salary of the Governor. However, your Honour, this Act was passed when the population of the colony had rapidly increased and seemed to be very rapidly increasing, and it was impossible to carry on the judicial functions without an increase of the Judges. At this time the goldfields had broken out in Otago, and the population there had wonderfully increased. After this Act was passed, but before it was assented to, his Honour Mr. Justice Richmond was appointed a Judge—on the 20th October, 1862, but the Act was not gazetted in the *New Zealand Gazette* as law until the 11th July, 1863.

Mr. Justice Denniston: What do you mean by "gazetted as law"?

Sir R. Stout; It has to be gazetted here before it came into force, after receiving the Queen's assent.

Mr. Justice Denniston: Of course it was necessary to get the Queen's assent.

Sir R. Stout: It was not necessary for the Judges' salaries, but it was necessary, because the Act altered the salary for the Governor.

Mr Justice Richmond: That was in 1862.

Sir R. Stout: The next year there was another Civil List Act passed; that was the Act called "The Civil List Act, 1863." That Act had no retrospective or retroactive clause. The section is this. Section 2 says: "There shall be payable to Her Majesty every year out of the revenue arising from taxes duties rates and imposts levied under any Act or Acts of the General Assembly the several sums mentioned in the Schedule to this Act instead of the several sums mentioned in the Schedule to 'The Civil List Act, 1862.'" The Act of 1862 thus provided for a Governor £4,500, and for the Judges £7,700, saying nothing about their number. No doubt the need for this also was the great increase of judicial work in the southern part of the colony from the very rapid increase of population which had come into the colony through the goldfields. After this Act was passed, but before it was proclaimed the law of New Zealand, receiving the Queen's assent—namely, the 23rd March, 1864—the late Mr. Justice Chapman was appointed Judge, and the Civil List Act was not proclaimed till about four months later, the 27th July, 1864. I may therefore notice, your Honours, in passing, that, at all events, though the Civil List Act did not receive the Queen's assent, no appointment of an additional Judge was ever made by Parliament until Parliament had been consulted, and, so far as the Parliament of New Zealand was concerned, until it had voted the requisite sums for the Judge's maintenance and salary.

Mr. Justice Williams: No appointment was ever made by the Crown?

Sir R. Stout: Yes, by the Crown. The next Act that deals with the question is "The Civil List Act, 1873," and I would notice also about this that whenever a new Judge was necessary the Executive always seems to have consulted Parliament and gone to Parliament to obtain the necessary funds for the purpose.

Mr. Justice Conolly: You may state it more strongly, Sir Robert. Not only was Parliament consulted, but the two Houses of Parliament approved.

Sir Robert Stout: Yes; that is so. The next Act is 1873. That Civil List Act altered the form of the vote provided in "The Civil List Act, 1863;" and "The Civil List Act, 1863," is still in force. The Act says, "The short title of this Act shall be 'The Civil List Act 1863 Amendment

Act, 1873.' The sum of seven thousand seven hundred pounds granted to Her Majesty under 'The Civil List Act, 1863' (hereafter called 'the said Act') for defraying the expenses of the salaries of the Judges of the Supreme Court, shall be applied in paying to the Judges—" That specifies annual salary of Chief Justice £1,700, annual salary of the Puisne Judges £1,500, making a total of £6,000. That Act is still in force in New Zealand. What next follows, keeping to what I may term the history of the Supreme Court Bench, is in 1875. It appears to have been intimated that Messrs. Justices Gresson and Chapman would retire from the bench; but their resignations were not accepted, nor formally forwarded, I believe, until the end of March. They were accepted, I believe, on the 31st March, 1875, and before that date Mr. Justice Gillies and Mr. Justice Williams had been appointed.

Mr. Justice Denniston: What is the power of a Judge to retire? How is the resignation accepted? There is no provision for any formal act with regard to his vacation?

Sir R. Stout: I do not know. It appears that in the case of Mr. Justice Chapman and Mr. Justice Gresson the resignations were accepted by the Executive Council. If I recollect aright, it is my impression it was gazetted. I have not seen the *Gazette* for some months, but I think that is so.

Mr. Justice Denniston: There is no preappointed form of resignation?

Sir R. Stout: No.

The Chief Justice: There was some question about Brother Williams's appointment. The statement was made to him that the resignation had been sent in, and had been recorded before the appointment.

Sir R. Stout: Whether that was so I do not know. They were not gazetted until the 1st April.

Mr. Justice Richmond: When were the salaries paid?

Sir R. Stout: I think the salaries, according to the Audit minute—I do not know how it happened, but Mr. Justice Chapman was paid to July. I asked the Audit how it was, and Mr. Justice Chapman seems to have drawn under his leave of absence for salary to the 23rd June, 1875, and only began drawing retiring-allowance from the 1st July, 1875. There were, apparently, funds—he was on leave before, and I do not know whether that has anything to do with it, but there were funds in the Civil List, and, though I do not know how the Audit Department arranged it, that is the minute I got from the Audit.

Mr. Justice Richmond: There was an overlapping of salaries.

Sir R. Stout: There was an overlapping of salaries till June, but only half-salary. The reason was that there were funds in the Civil List standing to the credit of the Judges.

The Chief Justice: Perhaps it had something to do with the pension. It may have been lying to credit of the account.

Mr. Harper: We have no evidence before us of this, and could not get it. I think my learned friend ought to have given us some evidence about this overlapping of salaries.

Mr. Justice Denniston: If it goes further on into June it must have been a mere matter of agreement.

Mr. Harper: I submit that we ought to have evidence on affidavit as to the state of the account.

Sir R. Stout: Very well; I will let you have it.

Mr. Harper: Something for us to see.

Sir R. Stout: Well, you can see this. I do not think it is of any importance, but if it is wanted we will put in an affidavit.

The Chief Justice: We seem to be assuming that something or other was the fact which may not have been the fact.

Mr. Justice Denniston: What do you suggest vacates office of a Judge?

Sir R. Stout: I submit that if a Judge resigns, and the Executive Government accept his resignation, the office comes to an end; but there is no preappointed way of evidencing the fact of resignation.

Mr. Justice Denniston: If, therefore, the statement was conveyed to Mr. Justice Williams that the resignation was recorded, and that was followed by an appointment, that would be equivalent to a vacation?

Sir R. Stout: Yes. Not only that, your Honour, but I would point out this also. Of course, one cannot employ it, but in the public prints it was intimated that the Judges had resigned in February.

Mr. Justice Denniston: Would you claim that the appointment of another Judge under the circumstances implied that the office was vacated?

Sir R. Stout: I do not think it is of importance in this case; but if my friends wish further information I shall be glad to furnish them with anything I can find about it from any point of view. However, it has no bearing on the question. The Court has not to decide this, I shall show, hereafter.

The Chief Justice: It only may be of importance, perhaps, in this way: that some stress seems to be laid, possibly by both sides—at any rate, by the other side—upon the Executive action under the Act, as being valuable for the purpose of interpreting the Act; and, if it appears to be anything, to be an inconsiderate action on the part of the Executive to give the salaries, and the salaries ran on under an arrangement is made for the purpose of earning a pension. Well, it does not seem to be of importance at all.

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.

Now, prior to the Act of Settlement the Judges held office at the pleasure of the monarch. This will be seen in many books and reports: I might just mention Foss's "History of the Judges." In Croke's "Reports of the Time of Charles I.," page 52, there is a memorandum as follows: "Upon Friday, being 10th day of November, Sir Randolph Crewe, Chief Justice of the King's Bench, was discharged of that place by writ under the Great Seal, for some cause of displeasure conceived against him, but for what was not generally known." Then there is a note by the editor: "Hume says he was discharged as unfit for, and not sufficiently obsequious to, the purposes of the Court." In the same volume there are other examples given, which it is unnecessary for me to refer to, of Judges being discharged on writs simply because they held their office as at pleasure.

The Chief Justice : The Chief Justice was appointed by writ, and the other Judges by Letters Patent.

Sir R. Stout: There are examples of other Judges being discharged besides the Chief Justice. However, it is not necessary for me to deal with that. Under the Act of Settlement special provision was made in reference to the Supreme Court Judges. Their tenure was to be *quamdiu se bene gesserint.* Hence, save for misbehaviour in their office or by an address of both Houses of Parliament only was it possible to remove them. There may be a question as to whether this Act is in force in New Zealand. I submit it is, so far can be applicable to the circumstances of the colony.

Mr. Justice Richmond: It must: it affects the succession of the Crown.

Sir R. Stout: It must be in force, of course, because it deals with the right of the succession of the Crown, and has force in all parts of the Empire. It is set out in the "Imperial Acts in Force in New Zealand," compiled by Mr. Justice Johnston and the Solicitor-General. It will be found in section 396 of that volume. There is a great number of text-books bearing on the subject, showing what was the provision made by the law by this section ; but it appears to me, after reading a great number of them, that the best statement of the law about the office of the Judges and the Judges' tenure is that which is given in Hearn's "Government of England," at page 81 of the first edition, and page 83 of the second edition. He says—which is true, as far as I can find out—that there has been no judicial determination of the Act of Settlement referring to the Judges. He says, page 82,—

"The provisions of the Act of Settlement, and of the Act of George III., which determine the tenure by which the Judges hold their office, have never been the subject of judicial interpretation. Few of our historians or juridical writers have noticed the peculiarity of this tenure. They content themselves with remarking that the Judges have been rendered independent, and cite the terms of the Act without observing that any question has been raised concerning the precise meaning of these terms. . . . The question, therefore, is not undeserving of careful consideration."

This goes on for several pages, down to page 89, all showing what the real tenure of the Judges is. But it is unnecessary for my purpose at present to deal with that, except to show that, according to Hearn, it was absolutely necessary that if the Judges were to be independent their salaries should be ascertained and established, and be removed beyond the control even of Parliament. He says :— "The legal effect of such grant [as that provided for in the Act of Parliament] is the creation of an estate for life in the office, conditional upon the good behaviour therein of the grantee. Such an estate, like any other conditional estate, may be forfeited by a breach of the condition annexed to it—that is to say, in this case by misbehaviour." He argues this out at great length, and says, that "in the case of misconduct outside the duties of the office the misbehaviour must be established by a previous conviction by a jury according to law." He points out that there is a power of removal for misbehaviour, and also a power of removal or redress for both Houses, but the Crown is not bound to act upon the redress.

He argues that out at great length but it is not necessary to deal with it here. Then, as to the effect this Act, coupled with the Act of George III., has had in dealing with the Supreme Court, that is referred to in "Story's Commentaries," p. 192, Vol. ii.; and "Kent's Commentaries," Vol. iii., pp. 391 and 392; and there is also mention of it in "Hallam," Vol. iii., p. 192. I will not take up your Honour's time in quoting what these writers say ; but this may be said : that all constitutional writers recognise that the Act of Settlement, without the Act of George III., which made permanent appropriations for the salaries, would not have secured for the Judges the independence which was secured by the Act of George III., though, of course, Mr. Hallam assures us that we owe the independence to the Act of Settlement and not to the Act of George. No doubt the principle was laid down in the Act of Settlement; but it was not until the Act of George that this principle was properly given effect to and carried out. In England no doubt the Judges are made independent, I submit, by having a life tenure, or a tenure during good behaviour, subject to the condition of removal on misbehaviour or on a motion of both Houses; but they were also made independent by having their salaries secured to them, and I submit that both were necessary to make the Bench thoroughly independent. The Act of George was, so to speak, necessary to complete the principle that was laid down in the Act of Settlement. Of course, William III. declined to put any part of their salary on the Civil List. He thought, probably, that the Civil List was already heavily enough weighted. As to the meaning of "fixed and determined," I submit that it means fixed and determined by some person who has the power to pay. I will show that later on. "Bowyer, on Constitutional Law," p. 177, refers to the Act of George, and says,—

"And now, by the noble improvements of that law in the statute of 1, Geo. III., c. 23, enacted at the earnest recommendation of the King himself from the throne, the Judges are continued in their offices during their good behaviour, notwithstanding any demise of the Crown, which was formerly held immediately to vacate their seats, and their full salaries are absolutely secured to them during the continuance of their commissions, His Majesty having been pleased to declare that 'he looked upon the independence and uprightness of the Judges as essential to the

impartial administration of justice, as one of the best securities of the rights and liberties of his subjects, and as most conducive to the honour of the Crown.'"

Hearn, at page 81, having mentioned the circumstance of William refusing to put the salaries of the Judges on the Civil List, says, "In 1693 a Bill passed both Houses, which proposed to give to each Judge a salary of £1,000, payable out of the Civil List; that King William thought that Parliament, if it wished to be liberal, should not be so at his expense, and refused his assent. At length, however, a clause was inserted in the Act of Parliament directing that the salaries of Judges should be fixed and ascertained, and determining their tenure; that it was held that the death of the reigning King vacated all his commissions." He goes on, "One of the first measures of that King [George III.], and for which, useful though it was, he has received more than his fair share of praise, was to recommend to Parliament the removal of this limitation. His suggestion was adopted, and at the same time an improvement of much greater practical value was effected. Although the Act recited had directed that the salaries of the Judges should be for ever ascertained, it contained no precise enactment for the purpose. This defect was remedied by the Act of George the Third. The amount of salary attached to each office was specified, and the same was made a permanent charge on the Civil List. Thus the independence of the Bench was secured as far as law can secure it." That is what Hearn says. Now, I say that "fixed and determined" means fixed and determined by a body with power to pay, and that means Parliament. There can be no "fixing" by merely making a contract. Fixing means that some revenues are made liable for carrying it out. On every ground Hearn lays down the principle that in order to secure the independence of the Bench two things are necessary—first, a fixed tenure; and, secondly, a fixed salary. That is the view of all our constitutional writers and, though the first was secured by the Act of Settlement, it was not until the Act of George that complete independence was secured. From the time of the passing of the Act of Settlement until the Act of George independence was not thoroughly established.

Mr. Justice Richmond: The Act of Settlement declared the principles, but the principles were not carried out.

Sir R. Stout: It laid down what was to be the law, but it was not fully carried out until the Act of George III. was passed.

Mr. Justice Williams: I think the Judges were paid during that time by fees.

Sir R. Stout: Partially. Afterwards the fees went to the clerks, and it is stated in one of the books, I think, that the clerks made a greater salary than the Judges. What I would point out is this: that it has been considered in England essentially necessary that salaries of the Judges should be secured in some permanent way. Story, in his book on the Constitution of the United States, 3rd edition, page 473, paragraph 1627, says, "It is observable that the Constitution has declared that the Judges of the inferior Courts as well as of the Supreme Court of the United States shall hold their office during good behaviour. In this respect there is a marked contrast between the English Government and our own. In England the tenure is exclusively confined to the Judges of the superior Courts, and does not, as we have already seen, even embrace all these." In section 1628 he says, "The next clause in the Constitution declares that the Judges of the Supreme and inferior Courts 'shall at stated times receive for their services a compensation, which shall not be diminished during their continuance in office.' Without this provision the other, as to tenure of office, would have been utterly nugatory and, indeed, a mere mockery." Paragraph 1629 quotes from "The Federalist," and also refers to Kent's "Commentaries." It quotes from "The Federalist:"—

"Next to permanency in office nothing can contribute more to the independence of the Judges than a fixed provision for their support. . . . . In the general course of human nature, a power over a man's subsistence amounts to a power over his will. And we can never hope to see realised in practice the complete separation of the judicial from the legislative power in any system which leaves the former dependent for pecuniary resource on the occasional grants of the latter. Enlightened friends to good government in every State have seen cause to lament the want of precise and explicit precautions in the State Constitutions on this head. Some of these, indeed, have declared that permanent salaries should be established for the Judges, but the defendant has in some instances shown that such expressions are not sufficiently adequate to preclude legislative evasions. Something still more positive and unequivocal has been evinced to be requisite. The plan of the Convention, accordingly, has provided that the Judges of the United States shall at stated times receive for their services a compensation which shall not be diminished during their continuance in office."

Hamilton, in "The Federalist," gives the sections which I have quoted from Story, and Kent's "Commentaries," vol. i., pp. 307 and 308, deals with the same question.

I need not quote, but I may tell the effect of this writer. This principle is laid down. It points out clearly that, unless the salary can be drawn independently of the legislative department of the Constitution, that the judicial is not in an independent position. It may be said that in England this law was passed to preserve Judges from interference by the Crown. No doubt in those days that was the evil to be avoided—that the Crown should not have the power to dismiss Judges if they did not give judgments in consonance with the opinions of the Crown or in consonance with the policy of the Crown. But I submit that, although the power of the Crown has been lessened, there is just as good reason for insisting now on the independence of the Judges and of freeing them from legislative control as ever there was for insisting on their independence from Crown control, and that can only be accomplished by carrying out the principle laid down in the Act of Settlement, and which was given effect to in the Act of George, and which, I submit, is still given effect to in our Act—that the salaries of Supreme Court Judges should be independent of annual grants of Parliament for the purpose. Another authority dealing with this matter is in Bishop Burnet's history—folio edition, Vol. 2, p. 86; library edition, Vol. iv., p. 149; and also on p. 32 of the preface to his work. It is not, perhaps, necessary that I should cite this at length, as it would

take up too long a time. I submit, however, that there is a concurrence of constitutional authorities as to what is necessary for the due independence of the Bench. And now I come to the question: Has this view of constitutional writers any bearing on the interpretation of our Act of 1882 and of the Act of 1873, which go together. I submit it has. Freeman in his book, "The Growth of the English Constitution," chap. iii., asks what is meant by the term "constitutional," and shows that the term "constitutional" will be used differently when spoken to by different persons. The best statement, however, I submit, as to what "constitutional" is is laid down in "Dicey's Lectures Introductory to the Study of the Law of the Constitution," second edition, published in 1886. He says, on page 24,—

"Constitutional law, as the term is used in England, appears to include all the rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the State. Hence it includes, amongst other things, all rules which define the members of the sovereign power, all rules which regulate the relation of such members to each other, or which determine the mode in which the sovereign power, or the members thereof, exercise their authority. Its rules prescribe the order of succession to the Throne, regulate the prerogatives of the Chief Magistrate, determine the form of the Legislature and its mode of election. These rules deal also with Ministers, with their responsibility, with their spheres of action, define the territory over which the sovereignty of the State extends, and settle who are to be deemed subjects or citizens. Observe that I have throughout used the word 'rules,' not 'laws.' This employment of terms is intentional. Its object is to call attention to the fact that the rules which make up constitutional law, as the term is used in England, include two sets of principles or maxims of a totally distinct character. The one set of rules are in the strictest sense laws, since they are rules which, whether written or unwritten, whether enacted by statute or derived from the mass of custom, tradition, or Judge-made maxims known as the common law, are enforced by the Courts. These rules constitute constitutional law in the proper sense of the term, and may, for the sake of distinction, be called collectively 'the law of the Constitution.' The other set of rules consist of conventions, understandings, habits, or practices, which, though they may regulate the conduct of the several members of the sovereign power, of the Ministry, or of other officials, are not in reality laws at all, since they are not enforced by the Courts. This portion of constitutional law may, for the sake of distinction, be termed the 'conventions of the Constitution,' or constitutional morality. To put the same thing in a somewhat different shape, 'constitutional law,' as the expression is used in England, both by the public and by the authoritative writers, consists of two elements. The one element, which I have called the law of the Constitution, is a body of undoubted law; the other element, which I have called the conventions of the Constitution, consists of maxims or practices which, though they regulate the ordinary conduct of the Crown and of Ministers and of others under the Constitution, are not in strictness laws at all. The contrast between the law of the Constitution and the conventions of the Constitution may be most clearly seen from examples. To the law of the Constitution belong the following rules: 'The King can do no wrong.' This maxim, as now interpreted by the Courts, means, in the first place, that by no proceeding known to law can the King be made personally responsible for any act done by him: if, to give an absurd example, the Queen were to shoot Mr. Gladstone through the head, no Court in England could take cognisance of the act. The maxim means, in the second place, that no one can plead the orders of the Crown, or, indeed, of any superior officer, in defence of any act not otherwise justifiable by law. This principle, in both its applications, is, be it noted, a law, and a law of the Constitution, but it is not a written law. 'There is no power in the Crown to dispense with the obligation to obey a law.' This negation or abolition of the dispensing-power now depends upon the Bill of Rights—it is a law of the Constitution, and a written law. Some person is legally responsible for every act done by the Crown." He goes on to state a great number of maxims which come under the law of the Constitution, and then he deals with what may be called the conventions of the Constitution, and gives such examples as "the House of Lords does not originate any money Bills."

These are what he terms conventions of the Constitution. I submit that this practically has become not merely the convention of our Constitution, but that the Court must read into the Supreme Court Act of 1882 a declaration to this effect: that the salaries shall be fixed and ascertained, and that the Supreme Court Act of 1882, when it comes to be interpreted, must be read as if these words were in it in these express terms. And in interpreting the Act of 1882 the Court, I submit, cannot ignore what has been the practice in dealing with Supreme Courts in England since George III.'s time, in other colonies where there has been representative government, and in our own colony—viz., that practically this maxim has been followed in England and in all the colonies: that before Judges have been appointed the Legislatures have been consulted, and have always made an effort to fix the salary before the office of Supreme Court Judge has been filled. Now, I submit, therefore, that this is more than a convention of the Constitution, such as Dicey mentions in his book. It is, so to speak, a law of the Constitution, which the Court must, I submit, look at, and must read into our New Zealand Acts. Now, as to the effect of what may be termed custom, or outside practice, or what may be termed even constitutional law, as bearing on the interpretation of the statutes, there are many examples in our books. I shall proceed to refer to one example — a late one—a well-known one, which has come before three Courts, Bell Cox *v.* Hakes, in the December number of the Law Reports of 1890, Appeal Cases, Vol. xv. The case begins at page 506, and continues to page 547. The Court is perhaps aware of what the case was. An application made for discharge by *habeas corpus* came before two Judges of the High Court of Justice, common-law side, and they discharged the prisoner. There was then an appeal to the Court of Appeal. The Court of Appeal, consisting of three Judges, reversed the decision; and then there was an appeal to the House of Lords. The case was twice argued, as Lord FitzGerald died between the first argument and the giving of judgment, and ultimately the decision was given by Lord Halsbury,

Lord Herschell, Lord McNaghten, Lord Watson, and Lord Bramwell on the one side, and Lord Morris and Lord Field on the other, the majority holding that the decision of the Court of Appeal was wrong, and that the order should not have been reversed. This turned on the interpretation of the Act, which gave the right of appeal against the order, and the question was whether the word 'order' meant all orders made, or would the Court read into the Act practically this clause: viz., "such orders as by custom were appealable before the Act passed"—because that was the effect of the decision of the House of Lords; and they entered into an investigation as to whether it was customary or known to law, or whether it was constitutional, to allow an appeal against a decision under the Habeas Corpus Act discharging of the prisoner. I submit that reading passages from Lords Halsbury's and Herschell's judgments, it will be seen that the case has a great bearing on this case, in this way: that the Court now in this case will have to do the same as the Court in English cases has done—not to use the wide general words of section 5 without qualifying them by constitutional usage and law that has been in force in England and in all the colonies that have had representative government since 1760. Lord Halsbury says, on page 517,—

"My Lords,—I have insisted at some length upon the peculiarities of the procedure, because I think one cannot suppose that the Legislature intended to alter all the procedure by mere general words, without any specific provision as to the practice under the writ of *habeas corpus*, or the statutes which from time to time have regulated both its issue and its consequences. My Lords, I do not deny that the words of section 19 literally construed are sufficient to comprehend the case of an order of discharge made upon application for discharge upon a writ of *habeas corpus*, but it is impossible to contend that the mere fact of a general word being used in a statute precludes all inquiry into the object of the statute or the mischief which it was intended to remedy. In the great case of Stradling *v.* Morgan the Court of Exchequer was called upon after verdict to construe the statute upon which the action was brought, and which used the words 'any Treasurer, Receiver, or Minister accountant,' and the Court held that, however wide the words, the statute must be taken not to have meant to use the words in their absolute generality, and yet all agreed that the Receiver in question was within the words of the statute. In the argument and the judgment illustrations are given of the principle upon which statutes ought to be expounded, which have many times since been referred to as satisfactory in reason and common-sense. Thus, the word 'presently' answer to the creditor (*i.e.*, immediately), in a statute, has been construed to mean not that the extenders shall immediately pay, but immediately become debtors. The words 'no writ shall abate by exception of non-tenure of parcel, but for the quantity of the non-tenure which is alleged,' were held to mean, only some writs shall not abate, which determination is quite contrary, it is said, to the text. So that the statute of Marlbridge enacts that 'none from henceforth shall cause any distress that he has taken to be driven out of the county where it was taken,' and says, further, 'If the lord presume to do so against his tenant he shall be grievously punished by amercement.' Yet, in 1 Henry VI. it was held that if one had a manor in one county, and a person holds lands which he has in another county of this manor 'it was lawful for the lord to distrain for the services, and to carry the distress to the manor into the other county where the manor is, notwithstanding the said statute.' And yet it seems contrary to the letter of the Act, as it is in truth contrary to the generality of the letter of the Act. But the Judges have expounded the intent of the makers of the Act not to extend to the lord but where the seignory and the tenancy are in the same county. So that by such exposition, made according to the intent of the Act, the generality of the words is abridged. From these and similar examples a canon of construction has been arrived at which has often been quoted, but which is so important with reference to the question now before your Lordships that I quote it once again: 'From which cases it appears that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter they have expounded to extend but to some things, and those which generally prohibit all people from doing such an act they have interpreted to permit some people to do it, and those which include every person in the letter they have adjudged to reach some persons only, which expositions have always been founded on the intent of the Legislature, which they have collected, sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances. So that they have ever been guided by the intent of the Legislature, which they have always taken according to the necessity of the matter and according to that which is consonant to reason and good discretion.'"

I also might refer to Lord Herschell on page 529. The point in his judgment is this: "It is not easy to exaggerate the magnitude of this change; nevertheless it must be admitted that, if language of the Legislature interpreted according to the recognised canons of construction involves this result, your Lordships must frankly yield to it even if you should be satisfied that it was not in the contemplation of the Legislature." I submit in reference to this case that, looking at this case, the position is this: Suppose there was no context to refer into the Act of 1882—suppose, for example, there was no other Act—as I submit there is—to be read along with it—*i.e.*, the Civil List Act of 1873—the Courts would hesitate to hold that the wide general words of section 5 meant, looking at the constitutional question, leaving out of consideration sections 11 and 12, leaving out of consideration the question of the Civil List Act altogether, but looking at section 5 alone,—the Court would hesitate to hold that under the wide general words in section 5 the Legislature had given power to the Executive to create perhaps ten or twelve Supreme Court Judges without any salaries at all. I submit that the other side will have to contend, if they hold that this Commission was duly issued, that the words of section 5 of the Act of 1882 gave power to the Executive to create, if they please, even twelve Judges. Now, we have heard something about packing the Upper House, and perhaps a defeated Ministry might pack the Upper House without the sanction of Parliament, and in history we hear once of an attempt, in the reign of William IV., to pack the House of Lords, but there has never been known yet in history an attempt allowed by the law to pack the Supreme Court Bench.

And yet, if the interpretation of the other side is to be accepted, an Executive who found fault with the decision of the Supreme Court Bench would have ample power under the wide general words of the Act to appoint Judges without any salary at all. Before the Court is driven to accept such an interpretation, it will have, I submit, to look at the statute very carefully, and will have also, I submit, to read into it the constitutional law—not merely the conventions of the constitutional law, but the law of the Constitution recognised by all British and, I may add, American authorities. I wish now to refer to one or two other cases bearing on the interpretation of the statute before I come to the statute itself. Maxwell on Statutes, at page 27, lays down this canon of construction. He says, "To arrive at the real meaning it is always necessary to take a broad general view of the Act, so as to get an exact conception of its aim, scope, and object. It is necessary, according to Lord Coke, to consider what was the law before the Act was passed," and so on; and he also points out that it is necessary to consider usage in interpreting an Act; and that, if such-and-such a thing has been the habit of the Legislature in reference to the subject-matter, they will not be bound by the exact words of the Act.

This has been decided in various cases. I shall cite two or three dealing with this. The first case I shall cite was a case in Law Reports, 4, Queen's Bench, 394. This was a case of Leverson *v.* The Queen:—

"A verdict and judgment having been given against the defendant on an indictment in the Central Criminal Court, error was brought on the following grounds: 1. That, two Commissioners being necessary under 4 and 5 Will. IV., c. 36, to constitute the Central Criminal Court a Court for the trial of an indictment, an Alderman sat for this purpose with the Judge of the Sheriff's Court, who tried the indictment, and, the trial having lasted several days, a different Alderman was substituted in the course of the trial, whereas the Court should have consisted of the same two Commissioners throughout the trial. 2. That the trial took place in a second Court, while the general sessions were being held before other Justices in their ordinary place of sitting; whereas by 4 and 5 Will. IV., c. 36, a single Court only is established and authorised to be held. 3. That, in consequence of the changes which had been made by different statutes in the jurisdiction of the Sheriff's Court, the Judge of that Court, who presided at the trial as Judge, had ceased to be a Commissioner under 4 and 5 Will. IV., c. 36, and was therefore incompetent to act as a Judge under the Commission of Oyer and Terminer in the trial of this indictment. Held, that none of the gounds of error were tenable."

The judgment delivered by Lord Cockburn, which is at the bottom of page 401, deals with the point:—

"The first of these grounds of error is the only one of three which really presents any difficulty, and it was upon this alone that we thought it necessary to take time to consider our judgment. Upon further consideration, however, we are of opinion that this ground of error is untenable. It is true that the 4th and 5th Will. IV., c. 36, after establishing and constituting the Central Criminal Court, and authorising the Crown to cause Commissions to be issued to try offences before it, goes on to enact that it shall be lawful for the Judges of the Central Criminal Court, 'or any two or more of them, to inquire, hear, determine, and adjudge' the offences specified; and there can be no doubt that, if this enactment is to be construed to mean that two Judges are required to sit on the trial of an indictment, a very serious question would arise whether the provisions of the statute had been complied with on the trial of the defendant. But we are of opinion that such is not the effect of the Act in question. It is to be observed that the Commissions to be issued under the Act are Commissions of Oyer and Terminer, and that the language of the Act and, of course, that of the Commissions under it is the same as that of the Commissions of Oyer and Terminer, under which justice in criminal cases has been administered for centuries. The Act must therefore, we think, be read"—and this, your Honours, is the point—"the Act must therefore be read by the light of the procedure of the other superior Courts of criminal judicature of the realm held under such Commission. Notwithstanding the explicit general words of the Act we feel warranted in assuming that the Legislature, in establishing the Central Criminal Court to exercise jurisdiction in criminal matters not only over the area of the City of London, but also over a large district taken from the adjoining counties, intended that the administration of justice should be conducted in the Court thus established according to the universal practice of all other Courts of Oyer and Terminer."

What is the inference, I ask the Court, to draw from these cases? It is this: that the Court, in interpreting the words of an Act which were apparently plain and unequivocal, will import into this Act, to aid in its interpretation, the practice of the other Courts in dealing with the same subject-matter; that they will take in what cannot be called written law, but the usage of the Court, to explain the precise words of the Act. I submit that the Court, in interpreting this Act, will take in the practice on the appointment of the Supreme Court Judges, and not attribute to the Legislature that these wide words of section 5 were to mean or could be used for such an absurdity as I submit the defence would have to prove if they wish to uphold this Commission. I have to cite one or two more cases to show that in construing an Act the Court will look at a custom to limit the general words. The other case I will mention is the case of Queen *v.* Cutbush and another (Law Reports, 2 Q.B. cases, p. 379). The passage of the judgment I refer to is at page 382. The judgment is a considered judgment by Chief Justice Cockburn, Mr. Justice Blackburn, and Mr. Justice Lush:—

"Now, inasmuch as that appears to have been for so long a series of years the practice of the Judges of the Central Criminal Court and upon the circuits, we must take it as affording a contemporaneous exposition of the effect of the 10th section of 7 and 8 Geo. IV., c. 28; and, inasmuch as the 25th section of 11 and 12 Vict., c. 43, is, although it varies somewhat in its language, substantially the same as that of the former Act, and, no doubt, was intended to give Justices the same power to make the sentence of imprisonment given upon a summary conviction for a second offence com-

mence at the expiration of the first; and, inasmuch as (though it is true, by some degree of technical straining)"—I rely upon that—"the words are capable of that interpretation, and imprisonment may be said to commence, and the man may be said to be imprisoned, from the moment he is convicted of the first offence and sentenced to imprisonment under it; and also as right and justice require, when a man has been guilty of separate offences for each of which a separate term of imprisonment is a proper form of punishment, that he should not escape from the punishment due to the additional offence merely because he is already sentenced to be imprisoned for another offence; and as it would be contrary to public policy and expediency that he should so escape with but one punishment; looking at it, I say, on the whole, in the first place, with reference to what is the fairly possible construction of the 25th section of 11 and 12 Vict., c. 43; secondly, to what justice and expediency require; and then to the light which is thrown on what ought to be the construction of the statute by the long practice that has prevailed under the similar and corresponding enactment of the former statute;—looking at all the matters in all these different points of view, it appears to us that we shall be putting the right and proper construction on the section of the Act of Parliament we have to construe by holding that the Justices, in making the second sentence commence at the expiration of the first, acted within their jurisdiction; and, the jurisdiction having been properly exercised, the rule for discharging the defendant out of custody must be discharged."

I submit that that case also helps the construction that I have contended for in dealing with this Act, because it shows that the Court in looking at the statute will not confine themselves to the literal interpretation of the words. They will, as the Court of Queen's Bench said, resort to even "technical straining." There is another very old case, Regina *v.* De Bewdley, in 1 Peere Williams's Reports, p. 222.

"We are all of opinion, though this clause might have extended to causes of the Crown had the objection come earlier, yet the constant practice ever since the making of the Act having been otherwise, and all the precedents, both in the Crown Office and in the Exchequer (in cases not expressly excepted) being *de vicineto*, to make a contrary resolution in the case would be in some measure to overturn the justice of the nation for several years past; besides, we consider that it is a matter of no great consequence, since it only gives the defendant a privilege of challenge, which otherwise he would not have."

Mr. Justice Richmond: "*Communis error facit jus.*" That is the maxim.

Sir R. Stout: No doubt that is so. No doubt the common practice makes the law. Now I shall refer to how the constitutional question also helps in the interpretation of the Act. In this I shall only cite the opinion—I cannot cite a judgment—of Lord Coleridge and the late Sir George Jessel. They were called upon to interpret a New Zealand Act—"The Privileges Act, 1865." Our Privileges Act of 1865, in the 4th section, says this:—

"The Legislative Council or House of Representatives of New Zealand respectively and the Committees and members thereof respectively shall hold enjoy and exercise such and the like privileges immunities and powers as on the first day of January one thousand eight hundred and sixty-five were held enjoyed and exercised by the Commons House of Parliament of Great Britain and Ireland and by the Committees and Members thereof so far as the same are not inconsistent with or repugnant to such and so many of the sections and provisions of the said Constitution Act as at the time of the coming into operation of this Act are unrepealed whether such privileges immunities or powers were so held possessed or enjoyed by custom statute or otherwise."

And so on. They were called upon to interpret that Act. It was held by the Legislative Council of New Zealand that that Act practically gave them the power of the House of Commons in dealing with money Bills, because it was said that they held "the power of the House of Commons." That question was referred to the Law Officers of the Crown in England, and, as I have said, the opinion was given by—he was then Sir John Coleridge and Sir George Jessel. It is in Todd's "Parliamentary Government of the Colonies," p. 478, first edition. It is also in the blue-books—in the Appendix to the Journals of the House of Representatives, Vol. i., 1872, A.–1B.:—

"We are of opinion that, independently of 'The Parliamentary Privileges Act, 1865,' the Legislative Council was not constitutionally justified in amending 'The Payments to Provinces Act, 1871'"—the Court will notice, "was not constitutionally justified"—"by striking out the disputed clause 28. We think the Bill was a money Bill, and such a Bill as the House of Commons in this country would not have allowed to be amended by the House of Lords; and that the limitation proposed to be placed by the Legislative Council on Bills of aid or supply is too narrow, and would not be recognised by the House of Commons in England.

"(2.) We are of opinion that 'The Parliamentary Privileges Act, 1865,' does not confer on the Legislative Council any larger powers in this respect than it would otherwise have possessed. We think that this Act was not intended to affect, and did not affect, the legislative powers of either House of the Legislature in New Zealand.

"(3.) We think that the claims of the House of Representatives, contained in their message to the Legislative Council, are well founded, subject, of course, to the limitation that the Legislative Council have a perfect right to reject any Bill passed by the House of Representatives having for its object to vary the management or appropriation of money prescribed by an Act of the previous session."

I submit that in the interpretation there the Law Officers of the Crown in England again followed and recognised the constitutional law in aiding them in the construction of the statute. I shall cite two or three other cases dealing with how the wide words of statutes such as these are to be construed. The cases referred to are: *In re* Brocklebank, *Ex parte* Jones and Raeburn, 23 Queen's Bench Division, pages 462, 463. Lord Esher says—I am citing from his judgment,—"In this proviso the Legislature have used language of the widest kind—'in all cases'—so wide that,

if its full grammatical meaning be given to it, the proviso will produce injustice so enormous that the mind of any reasonable man must revolt from it. When the language of the Legislature construed literally involves such consequences, the Court has over and over again acted upon the view that the Legislature could not have intended to produce a result which would be palpably unjust, and would revolt the mind of any reasonable man, unless they have manifested that intention by express words. The Court will not infer such an intention from the use of merely general words." Then, your Honours, there is the case, which was only decided in 1889—that of Coluquhun *v.* Brooks, in the House of Lords. This was a question on the income-tax (14 Appeal Cases, p. 506). This is Lord Herschel's judgment: "It is beyond dispute, too, that we are entitled, and, indeed, bound, when construing the terms of any provision found in a statute, to consider any other parts of the Act which throw light upon the intention of the Legislature, and which may serve to show that the particular provision ought not to be construed as it would be if considered alone and apart from the rest of the Act." That is the only part of the judgment which deals with this point that I am arguing; for I wish now to cite just two or three other cases to show how the express words of one section may be held to be limited by another section in comparing them. There is a case of Moyle *v.* Jenkins (51 Law Journal, Queen's Bench, p. 112). This action was under "The Employers' Limited Liability Act, 1880," and the question arose in this way: Section 4 deals with giving a notice, but it does not say whether the notice is to be in writing or orally; but section 7 provides how the notice shall be served, and they say that the general words of section 4 are thereby limited, and the words "in writing" are to be construed as coming within it. That is practically what the decision says. Mr. Justice Grove says,—

"This rule must be discharged. Our duty is simply to construe the statute according to the usual rules of interpretation. If we were to adopt Mr. Crump's contention we should be legislating and not interpreting the statute. If the 4th section stood alone the defendant's argument would no doubt be worthy of grave consideration. But there is the 7th section, containing the essential requisites of a notice, which means the notice required to be given under the 4th section. The 4th section deals with the time for giving a notice; the 7th section contains the requisites of the notice, and its terms clearly show that a written notice was necessary. There can be no question here as to any inaccuracy in the notice, because there was no notice at all."

And so on. The 4th section is this: "An action for recovery under this Act of compensation for an injury shall not be maintainable unless notice that injury has been sustained is given within six weeks." That is all—unless notice is given within six weeks. Section 7 says, "Notice of injury under this Act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury, and the date at which it was sustained, and shall be served on the employer. The notice may be served by delivering the same to, or at the residence or place of business of, the person on whom it is to be served. A notice under this section shall not be deemed invalid"—and so on.

The Chief Justice: A stronger case than that is that of Reg. *v.* Shurmer (17 Q.B. Div.).

Sir R. Stout: That case was referred to, I think, in a Gisborne murder-case which came before the Court of Appeal. I appeared in that case. Then there is the case of the Queen *v.* Mount (Law Reports, 6 Privy Council, p. 283). The part of the judgment I wish to refer to is at page 300, and it will be seen from the interpretation put upon a statute by the Privy Council that they practically struck three words out of the statute—the words "now in force"—by saying that what they thought must have been intended by the policy of the Act. This is what is said at the bottom of page 300:—

"On this question their Lordships think that, although the Imperial Act abolishing transportation does not in terms include the colonies, it is applicable to them with respect to the sentences to be passed on persons convicted in the colonies of offences only triable there by virtue of the Admiralty jurisdiction conferred by the Imperial Act on colonial Courts. Such offences might be tried after that Act, either in England or the colonies, and the Legislature clearly expressed its intention that the punishment should be the same wherever the trial might take place. This general interest and policy should, therefore, govern the construction of the Acts, unless it plainly appears from the language of the later statute that the Legislature meant to change it.

"The words 'now in force,' in the original Act, no doubt apply in terms to the existing law. But the latter part of the section, directing that the punishment should be the same as it would have been if the offence 'were inquired of, tried, and adjudged in England,' shows with distinctness that the Imperial Legislature was conferring power upon the colonies to try offences properly cognisable in England, with the consequences which would have attended a trial there. The punishment was accordingly directed to be the same as it would have been by the existing law if the offence had been tried in England.

"When the Imperial Legislature altered that law, and substituted penal servitude for transportation, it is reasonable to suppose that the alteration was intended to embrace sentences for offences tried in the colonies under the special jurisdiction conferred by the 12 and 13 Vict., since there is no trace of any intention on the part of the Legislature to change the policy of that Act, which orders these sentences to be passed according to the law of England."

And so on. I submit that that again shows that they will allow what may be called the policy of the law to control the interpretation of the statute. And now I come to the next question, dealing with this interpretation, before I deal with the Act itself. Is the Civil List Act to be read along with "The Supreme Court Act, 1882." My contention to the Court is that this Civil List Act is to be read as if it had been re-enacted as part of the Supreme Court Act itself; and the mere fact of its having been placed in a different statute will not make any difference in its interpretation along with "The Supreme Court Act, 1882;" in fact, it is to be construed as the text-books on the interpretation of statutes laid down *in pari materiâ* with "The Supreme Court Act, 1882." These are pro-

visions, so far as the First Schedule of the Act of 1873 is concerned, referring to the same subject-matter. They are *in pari materiâ*, and, as one of the books lays down, are not *similis*. They are dealing with the same matter; the identity of the matter is the same. They are dealing with the tenure of office of the Supreme Court Judges, and in dealing with that I submit that "The Civil List Act, 1873," that part of it referring to the Supreme Court Judges, ought to be read as if it had been re-enacted as a clause in the Act of 1882, and as if, therefore, the whole of the laws dealing with the Supreme Court had been in one statute. There are text-books that I may refer to as dealing with this. There is "Hardcastle's Statutory Law." At page 57, first edition, there is a note which says,—

"The question has frequently been raised as to when statutes are to be considered as being *in pari materiâ* and when not. There are several dicta in the books on the point, but (in England) the question has never been very clearly answered. Thus, in Crossley *v.* Arkwright (2 T.R., 609), Buller, J., said that all Acts relating to such a subject as stamps must be construed *in pari materiâ*. In R. *v.* Loxdale (1 Burr, 447), Lord Mansfield said that the laws concerning church leases, and those concerning bankrupts, also all the statutes providing for the poor, are to be considered as one system. See also Tennyson *v.* Lord Yarborough (1 Bingle, 24), Bayley *v.* Murin (1 Vent., 246). In Duck *v.* Addington (4 T.R., 447), it was admitted, without argument on the point, that all statutes regulating hackney coaches and their drivers were *in pari materiâ*. In Davis *v.* Edmonson (3 B. and P., 382), it was held that all statutes making provisions as to the certificate to be taken out by solicitors were *in pari materiâ*. In Redpath *v.* Allen (L.R., 4, P.C., 518), it was held that certain Canadian statutes relating to pilotage were *in pari materiâ*. But in Bazing *v.* Skelton (5 T.R., 16) it was held that certain statutes which only incidentally affected toll-gate keepers were not to be considered *in pari materiâ;* and in Moore's case (Ld. Raym., 1028), it was held that a statute which prohibited a warrant from being executed on a Sunday was not *in pari materiâ* with a subsequent statute which regulated the arrest of escaped prisoners. I submit, however, that this fulfils all the requirements of what has been laid down in these various cases as being *in pari materiâ*. It is dealing with the same identical subject—with the power of the Judges—and I submit that in construing (whether it is *in pari materiâ* or not) the Court will look at what has been the constitutional usage, and look also at the English statutes dealing with Judges."

Now, in this colony, and in most other colonies—for I have looked through the statutes of almost all the other colonies—it is provided by statute what the salary shall be; and I submit that that is some guide, because the general rule laid down in drafting statutes is that a statute shall deal with one subject-matter—that a statute shall not include different subject-matters. If, then, we find that in the English and colonial statutes, and in the American statutes as well, that the same Act which provides for the tenure of Judges also provides for their salaries, the Court will assume, surely, that it is one subject-matter; and I submit, therefore, that in dealing with the Civil List Act the Court will assume it is one subject-matter. There is one bit of evidence—I do not say it is of much importance, but I know that in one of the affidavits that appear in this case it is set out that a Bill was introduced into Parliament in 1890 dealing with the question of the Judges.

The Chief Justice: It was not introduced.

Sir R. Stout: It was sent down by message, and in that Bill sent down by His Excellency the Governor to Parliament for consideration I notice that they have put "The Supreme Court Act, 1882," and the Civil List Act into one Bill. Of course I do not say that is an argument; I only wish to point out what is considered the practice in dealing with the matter. I refer rather to the Acts; but that is something to be noticed in considering this question. Then, your Honours, if the Court holds that these two statutes are to be read together, this question will arise, What is to be the rule in their construction? I submit the rule for their construction is laid down in Hardcastle at the bottom of page 57 and the top of page 58. Hardcastle says: "The rule as to Acts of Parliament which are *in pari materiâ* was laid down by the twelve Judges in Palmer's case (1 Leach's C.C., ed. 3, 339), to be that such Acts are to be taken together as forming one system, and as interpreting and enforcing each other; and, as Knight Bruce, L.J., said in *Ex parte* Copeland (22 L. J., Bank 21), upon a question of construction arising "upon a subsequent statute on the same branch of law, it is perfectly legitimate to use the former Act, though repealed. For this," continued he, "I have the authority of Lord Mansfield, who in R. *v.* Loxdale (1 Burr 447), thus lays down the rule: 'Where there are different status *in pari materiâ*, though made at different times, or even expired and not referring to each other, they shall be taken and construed together as one system, and as explanatory of each other.' If it had been necessary I should myself have acted on this rule in the present case." Then follow in Hardcastle two or three pages of illustrations and examples of the rule, and I submit that, looking at the examples given in Hardcastle, the things that are said to be *pari materiâ*, and aid each other in the interpretation of the law, are more diverse than can be said to be the Civil List Act of 1873 and the Supreme Court Act of 1882.

The Chief Justice: The Act of 1873, I suppose, was not reserved?

Sir R. Stout: It did not require reservation.

The Chief Justice: Or was that restriction removed?

Mr. Justice Richmond: I do not think it was ever removed.

Sir R. Stout: Of course this was not lessening the salaries of the Judges, and so far as the Judges were concerned it never needed any reservation. It did not deal with the Governor, and therefore did not need reservation. It is only when it deals with the Governor that it needs reservation.

Mr. Justice Richmond: Or for Native purposes.

The Chief Justice: The Act of 1873 did deal with the Governor, did it not?

Sir R. Stout: No; only with the Judges and the members of the Ministry; so that reservation was not necessary. There are other authorities on the rule; for example, Maxwell, another text-book dealing with this same question, says, on page 36, for example, that on looking at an

Act the Court should not confine itself to one particular section, and that the context of earlier and later Acts and of analogous Acts are all to be looked at as aiding in the interpretation. That is at page 36. He says, "Such survey is always indispensable, even when the words are the plainest, for the true meaning of any passage is that which best harmonizes with the subject and with every other passage of the statute." Then, Maxwell also says at pages 42 and 43, "Where there are earlier Acts relating to the same subject the survey must extend to them, for all are, for the purpose of construction, considered as forming one homogeneous and consistent body of law, and each of them may explain and elucidate every other part of the common system to which it belongs. For instance, a by-law which authorised the election of 'any person' to be Chamberlain of the City of London would be construed so as to harmonize and not to conflict with an earlier one which limited the appointment to persons possessed of a certain qualification, and 'any person' would be understood to mean only any eligible person." I submit that helps in construction. At page 42 he gives illustrations—but it is unnecessary to take up the time of the Court by reading them at length—which show, I submit, that in dealing with the Act of 1882 the Court must read into it the Civil List Act of 1873. I have previously submitted that they must read into it the provisions of the Act of Settlement, and, as I have said before, they must read into it also, if necessary, the constitutional law. I submit, however, that, independently of that, whether the Court reads in these two things or not, whether it reads into it the Act of Settlement or the constitutional law or not, if it contents itself with reading into it the Civil List Act, and then looking at the context in the Act itself, I submit that will show there is no power to appoint a sixth Judge of the Supreme Court. Now, I will very briefly refer to some of the provisions of the Act itself, which I submit bear out my construction of the Act.

Mr. Justice Denniston: You contend that the salary can only be fixed and established by Act of the Legislature—that is to say, that a mere resolution is nothing.

Sir R. Stout: Yes, nothing. I am going to cite cases. It is said on the other side that there is a contract, and also that the contract is sufficient to fix and ascertain the salary. I shall show that that is not so.

Mr. Justice Denniston: Your argument involves that there shall be no addition to the Supreme Court Bench until the Legislature has passed another Act.

Sir R. Stout: That is so; and I submit it appears from the Act itself. I am going to show now that it does appear from the Act itself, and that the Act implies that the Civil List Act has been incorporated. The first section that deals with that is section 11—"The salary of a Judge shall not be diminished during the continuance of his Commission." Obviously, that implies there can be no Judge without a salary.

Mr. Harper: That is exactly what we say.

Sir R. Stout: Then I wish you joy of it.

Mr. Justice Richmond: I suppose you can no more contemplate a Judge without a salary than you can a tide waiter or any other officer. I suppose if you had a tide-waiter without a salary he might be tempted, as even a Judge might, to pay himself in some other way.

Sir R. Stout: I submit that the section does not only not contemplate a Judge without a salary, but it goes further and contemplates a salary fixed; and section 12 means fixed and ascertained as much as the Act of Settlement. My learned friends say they have a salary. I should like to know where it is: I cannot find it. Now comes section 12. This section says, "It shall be lawful for the Governor in Council, in the name and on behalf of Her Majesty, at any time during illness or absence of any Judge of the Court, or for any other temporary purpose, to appoint a Judge or Judges of the Court to hold office during His Excellency's pleasure, and every such Judge shall be paid such salary, not exceeding the amount payable by law to a Judge of the said Court, other than the Chief Justice, as the Governor in Council shall think fit to direct." What is the meaning, I ask the Court, of "payable by law"? I submit there is only one law that provides for the payment of a Judge's salary, and that is the Act of 1873. When, therefore, the Legislature speaks about salary payable by law, the Legislature must be construed to mean payable by existing law, or any alteration of that law that may be made. That is the only salary that can be payable by law, and that is the salary fixed by the Act of 1873. But I go further. What does this section 12 show? This section shows that so careful had the Legislature been in carrying out the constitutional rule about fixing and ascertaining salaries without reference to Parliament, that actually the salary of a temporary Judge has to be fixed without reference to Parliament. Then, section 11, which provides that salaries shall not be reduced——

The Chief Justice: That clause, for some reason or other, has been altered from the Act of 1858, and the provision of the Constitution Act has been followed. The Act of 1858 was far better.

Sir R. Stout: What the 12th clause says is this: "Every such Judge"—that is, temporary Judge—"shall be paid such salary, not exceeding the amount payable by law to a Judge of the said Court, other than the Chief Justice, as the Governor in Council shall think fit to direct." Here, then, was, I submit, an appropriation by the Governor in Council without reference to Parliament. It is left to him to fix and determine the salary even of a temporary Judge; and I ask, would it be assumed, in construing this Act with section 12 in it, when it speaks of the amount payable by law—is it to be assumed then that the salary of a sixth Supreme Court Judge was to depend upon what the defendant says—a vote of the House—and the defendant says in an affidavit that there was obstruction in the House, and hence his salary was not provided for? I submit that it is not so, and the Court will not assume it to be so, and therefore will read sections 11 and 12 together, and also will read the words "annual salary," in section 13, together, though that is not, I admit, so strong. Still, putting sections 11 and 12 together, with any light that may be thrown upon them by sections 13 and 14, showing that even the superannuation allowance was fixed and determined independently of Parliament, the Court will not assume that the Legislature meant by section 5 to give power to the Executive to create more Judges than there were salaries fixed and

determined and ascertained for by the Legislature itself. That is my submission to the Court on the meaning of the Act of 1882; and I do not know that if I spoke for an hour I could put it any more distinctly. Looking at it, I submit the Court cannot say that the Legislature, in passing the Act of 1882, meant by section 5 to go further than this: "Yes, you may appoint as many Judges as you please, provided we have supplied funds for the offices." Now, as throwing light upon that, the next point I shall deal with is this question of contract. Is there a contract? As I understand, the other side say that there is a contract, and that this contract fixes and ascertains the salary. It is rather singular that this idea of fixing and ascertaining was not known to any of the writers on constitutional history. I do not know one of them from whom it can be inferred that fixing and ascertaining by contract between the Executive and the Judge would be fixing and ascertaining within the meaning of the Act of Settlement. Certainly Hearn, Hamilton, and May do not think so; and so I could run through the constitutional writers of England and America: they never thought that fixing and ascertaining salary by contract was fixing and ascertaining to make a Judge independent. What is the contract? I submit that all the Court can look at as evidencing the contract is the letter of the 1st March and the reply of the 5th March. The rule as to admission of prior or oral evidence as affecting a written contract is referred to in Taylor on Evidence, page 986; and also by his Honour Mr. Justice Williams in a considered judgment, where he cited a great number of authorities dealing with this at length, in a case Colonial Bank *v.* Lewis (5 N.Z.L.R., Supreme Court, 472). I submit that this principle is laid down both in Taylor and in his Honour's judgment: that in the case of a plain contract, without any ambiguous terms, the Court will not look at prior negotiations; they will not look to any oral conversations that led up to the making of the written bargain or contract. What, then, is this written bargain or contract? I again repeat that this written bargain or contract is contained, independent of the commission, in two letters—one from Sir H. Atkinson, of the 1st March, 1890, and Mr. Edwards's acceptance of that contract four days later.

Mr. Justice Richmond: Can the Crown make a valid contract for the payment of public money for which, at the date of the contract, there was no provision?

Sir R. Stout: I say No; and I am going to cite cases to show it. On that point there are four or five cases I am going to cite.

Mr. Justice Richmond: The objection goes further than saying no damages can be recovered: the question is whether the contract may not be *ultra vires*.

Sir R. Stout: I say it is, and I am going to deal with that; but that is another branch of the case.

The Chief Justice: You might get judgment.

Sir R. Stout: If provisions exist at the time you could get judgment, and execution would depend upon whether the House chose to pass a supplementary vote.

Mr. Justice Denniston: I do not understand that the Crown Relief Act gives validity to any contract.

Sir R. Stout: I am going to cite cases to show there could be no contract without a prior vote of the House; but I am now dealing with what is the meaning of the contract itself as ordinarily understood. If the contract means anything, I again repeat, you cannot import into it oral conversations with the Premier. That will be absurd, and I am surprised at such a statement being put on affidavit and in defence. The only thing that can be done is to look at the letter of the 1st of March, and find what it means. I repeat with confidence that what was offered was an appointment of Commissioner under section 20 of "The Native Land Court Act Amendment Act, 1889," with the status of a Judge of the Supreme Court, so to speak, to use a vulgarism, thrown in. Therefore the Court, in interpreting that contract, will have to say this, that as this status of a Supreme Court Judge was only given ancillary to the Commissionership under the Native Lands Act, when the Commissionership ceased the Supreme Court Judgeship also ceased, independently of what appears on the face of the Commission. I submit that is the meaning of it, and that is the meaning apparently that Parliament put upon it, if you put any weight upon what Parliament did. The Parliament only voted the salary of a Commissioner. They only allowed it at the rate of £1,375 per year to pass, and, as appears from the evidence, not until the Governor had sent down a message striking out the words "and Judge." They declined to recognise the position of Judge, so that, so far as Parliament has spoken, it has spoken definitely, even through the mouth of the Governor, who, of course, sent down the message asking that the words "and Judge" should be struck out of the supplementary estimates. I submit that the salary is allocated to the Commissionership on the face of this letter, and that there is no salary allocated to the Judge at all, and the Commission allocates no salary; because what does the commission say? It says, "together with all and singular the rights, privileges, powers, authorities, rank, and precedence whatsoever to the office and place belonging or in any wise appertaining." But if they have to say, as they will have to say, that there was no salary appertaining to a fifth Puisne Judge, then there is no salary found in the Commission.

The Chief Justice: There was none in my Commission; it was just the same.

Sir R. Stout: The reason for that is obvious. There was no need to put in any salary when the law specially fixed the salary as appertaining to the Chief Justice.

Mr. Justice Richmond: There is no salary mentioned in the Commission?

Sir R. Stout: There is no salary in the Commission, but the point I wish to make is this: that on the face of this Commission they could not contend there was any salary allocated, and there was none allocated by law, and so the words "together with all and singular the rights, powers, and privileges belonging or in anywise appertaining," cannot include salary; and if it cannot include salary, where is the salary fixed and ascertained, I ask? I say the only place where salary is mentioned is the letter of the 1st March; and this letter of the 1st March, I submit with confidence to the Court, implies that the salary is to be paid to the Commissioner *qua* Commissioner, and not as a Judge of the Supreme Court at all, because it says,

"Your salary will be £1,500 per annum, the same as the present Puisne Judges. Your Commissions to the above offices will be at once forwarded to you." I do not say that the subsequent letter of Mr. Mitchelson's will throw light upon it, but, apparently, in his mind the Commissionership came first, and the Supreme Court Judgeship followed a long way after. That is the way, I submit, Mr. Mitchelson's letter reads. Apparently there was also written a reply to Mr. Edwards's letter raising a contrary contention, but that reply was never sent. That I cannot explain to the Court—that is, I could, but, as it is not before the Court I cannot explain it in this case. I do not see that the subsequent letters of Mr. Edwards or Mr. Mitchelson can have any bearing on the interpretation of the documents; but, at all events, Mr. Mitchelson assumed in his letter, rightly or wrongly, that Mr. Edwards was to be Commissioner first, and Supreme Court Judge only occasionally, to help. That was the assumption, and the letter of the 1st March supports it; and therefore the contract, if a contract existed, was a contract for a Commissionership, with the status of a Judge only existing so long as the Commissionership existed; and therefore, as the statement of claim shows, and as cannot be denied, as the Commissionership has been put an end to and finished with, the status of a Supreme Court Judge must also fall with it. If this Commission purports to go beyond that which ought to be provided for under section 12, this Commission goes far beyond the contract made between the parties, and, being beyond the contract made between the parties, it ought to be repealed. I again, however, submit they cannot rely upon this contract as fixing and ascertaining the salary for a Supreme Court Judge. There are no words in it that do that, and therefore the Court will have to hold that if the Commissionership has come to an end, there is to be a Supreme Court Judge without any salary. Now I come to the question which his Honour Mr. Justice Richmond, and also Mr. Justice Denniston, referred to—that is, could the Crown make a contract without first having an appropriation made by Parliament for the office. I submit it could not do so so as to bind Parliament to any salary whatever, and the Parliament might be pleased to vote a shilling a year—it is not bound to any salary. There are various cases bearing on that. There is the well-known case of Churchward *v.* The Queen (L.R., 1 Queen's Bench Cases, 173.) There are expressions there by Chief Justice Cockburn, in commenting upon the case, which other Judges later think went beyond what was necessary for the decision of the case, and I notice that the Supreme Court of Victoria, for example, says that the judgment of Justice Shee puts the thing more concisely. Chief Justice Cockburn, I submit, shows this. The judgment is a very long one, but the note is this:—

"*Held*, That there was in the above agreement only a covenant by the Commissioners, on behalf of the Crown, that, in consideration of the contractor performing his part of the contract by having vessels always ready for the service, the Crown would pay him if Parliament provided funds; and that there was no implied covenant on the part of the Commissioners to employ the contractor; and that a petition of right, founded on the agreement, alleging that the Commissioners had refused to employ the contractor to carry the mails, and did not nor would permit him to perform the agreement, and prevented him from carrying the mails and claiming damages, could not be maintained."

Mr. Justice Richmond: They would not let him be employed, leaving him to go to Parliament and say, "I have done the work and am entitled to be paid."

Sir R. Stout: No, they would not allow him to do that. Sir Hugh Cairns practically admitted that in his argument. He said: "Your Honours will see that Sir Hugh Cairns had to go this far: that if a man did the work and then sued for the money, the Commissioners could set up that Parliament had not provided the money; and that is an answer to our breach for non-payment."

Mr. Justice Richmond: The whole position was that Churchward said, "You have agreed to employ me, let alone the payment, but let me do the work.

Sir R. Stout: Yes, that is how the thing is put. They, however, raised this question: that before the Commissioners employed any one they ought to have seen that Parliament was going to provide the funds; and they had to say that in the argument. The judgment of Chief Justice Cockburn is so long that I cannot attempt to quote it all, but I will read a short extract, commencing on page 199. "We start with this," Chief Justice Cockburn says: "that there is involved in this contract the possibility of Parliament refusing to find funds. The Commissioners do not make themselves, nor their department, nor the Crown answerable for a default in the payment of the £18,000 a year to the contractor. It is left to Parliament to find the funds, and in that is necessarily involved the possibility of Parliament, in the exercise of its absolute power, refusing so to do; and, in point of fact, we cannot shut our eyes to the fact, because I think it sufficiently appears from this record, and the Acts of Parliament referred to, that Parliament has refused to find the funds [and so I say here]. In two successive Appropriation Acts Parliament has not merely omitted to find a fund applicable to this purpose, but it has had the case of Mr. Churchward before it, and has cautiously provided for the exclusion of the satisfaction of his claim from the fund which it has appropriated for the postal service. Therefore, when we come to consider whether there is to be implied from the other terms of this contract an intention on the part of the Lords of the Admiralty to bind the Crown in the event of Parliament not providing the funds, let us see what the position of all parties concerned would be if, after Parliament had refused to find the funds to satisfy the exigency of this contract, the Lords of the Admiralty had taken upon themselves, nevertheless, to continue to employ the contractor. In the first place, the Government would have put itself in a state of antagonism to Parliament, inasmuch as it would have set the authority of Parliament at defiance. In the second place, the head of a public department would continue to employ a public contractor without the means of paying him; for when it is said that possibly in the future Parliament may find the funds, one can hardly suppose that a public Minister would be warranted in assuming such a possibility when so far experience has shown Parliament has refused to find the funds; and I must say it appears to me that to employ a public contractor without the

means of payment, even if he were willing to be so employed, would be a course of proceeding altogether derogatory to the dignity of the Crown and to the honour of the country. In the third place, the contract certainly could not be enforced under such circumstances. I mean, enforced by the public department. Suppose that Parliament refused for the coming year to find the fund wherewith to remunerate Mr. Churchward, he, under such circumstances, would be entitled to say, 'As I cannot look to you the other contracting parties, as I am not entitled to look to the Crown, as I can only look to Parliament, and Parliament refuses to find the funds to pay me, I am not bound to go on.' I take it, if the other contracting parties then endeavoured to enforce the contract, equity would relieve the contractor from the obligation to obey it; and if an action were brought at law I doubt very much indeed whether a Court of law would not say that the providing of the fund by Parliament was a condition precedent to the fulfilment or necessity of fulfilling the contract. At all events, Sir Hugh Cairns himself admitted, if an action at law were brought, it is impossible to suppose that any jury would give the public department at whose instance such an action was brought, anything in the shape of damages beyond the smallest coin."

Then there is a passage in the following page which the Supreme Court of Victoria considered extra-judicial, and said they preferred the judgment of Mr. Justice Shee. That is as follows:—

"I am very far indeed from saying, if by express terms the Lords of the Admiralty had engaged, whether Parliament found the funds or not, to employ Mr. Churchward to perform all these services, that then, whatever might be the inconvenience that might arise, such a contract would not have been binding. And I am very far from saying that in such a case a petition of right would not lie, where a public officer or the head of a department makes such a contract on the part of the Crown, and then afterwards breaks it. We are not called upon to decide that in the present case, and I should be sorry to think that we should be driven to come to an opposite conclusion."

However, as Sir William Stawell said, this is a matter which need not be now considered, because it did not give an affirmative answer to the question raised. Then, Mr. Justice Mellor gave a judgment, and Mr. Justice Shee gave a long judgment, which means, as I have already said, that the Crown is not bound, unless there were funds provided by Parliament. There are a few words, commencing on page 209, which I may cite: "It was beyond the power of the Commissioners, as the suppliant must have known, to contract on behalf of the Crown on any terms but those by which the covenant is restricted and fenced."

Now, the way it was restricted and fenced was, that it was subject to a vote of Parliament. "I am of opinion," said the learned Judge, "that the providing of funds by Parliament is a condition precedent to its attaching. The most important department of the public service, however negligently or inefficiently conducted, would be above control of Parliament were it otherwise." I submit that that case applies with great strength here, and that if you have allowed Mr. Edwards—it does not matter whether it is a Judge or a contractor—to do work without any funds being provided by Parliament, or after Parliament has refused to provide the funds, then, as Chief Justice Cockburn says, you have taken a course of procedure which is derogatory to the dignity of the Crown and to the honour of the country. The next case to which I will refer your Honours is the well-known Victorian case of Alcock *v.* Fergie (4 Wyatt Webb and A'Beckett, 285). This was a case which occurred during the deadlock arising, I think, out of the Darling Grant controversy, during which the Upper House had thrown out the annual Appropriation Bill. The case arose in this way—but perhaps I had better read the head-note, for that will explain the position. "Alcock *v.* Fergie: Plaintiff sued defendant for breach of an agreement to give time to the plaintiff for payment of a debt, in consideration of the assignment by plaintiff to defendant of a judgment recovered against the Crown for a large amount. It appeared upon the pleadings that the judgment went by default on a petition under the Act No. 241, upon a contract for the supply of furniture to the Board of Land and Works; that the session of Parliament in which the Legislative Assembly voted money to provide for such contract ended without an Appropriation Act; and that such contract was made after the close of such session.

Mr. Justice Denniston: Does the Crown Redress Act validate a contract, or only provide for procedure?

Sir R. Stout: It only provides for procedure; but nothing turns on that. There seems to have been a full Bench. Sir William Stawell was on the bench, and there were others, but I do not know who the other Judges were, except Judge Barry. I know it was a case which created great excitement in Victoria, because the question raised was whether the Government, having no Appropriation Act, could make contracts and consent to judgment. At any rate two or three of the Judges were on the bench, as I gather from remarks made during the course of the argument. Sir William Stawell, in giving judgment, referred to the case of Churchward *v.* The Queen, and he says at page 310,—

"As regards the first ground, Parliament may by legislative enactment, either in express terms or by necessary implication, authorise the Government to enter into contracts. Statutes directing the execution of certain works, and appointing a certain department or person to carry them out, afford instances of the former. Statutes appropriating part of the consolidated revenue for certain services, and thus implicitly empowering contracts to be made for the performance of those services, afford instances of the latter kind. But no authority was cited to show, and we are not aware of any decision in Courts of law which determines, that, in the absence of such enabling-power, the Government can enter into contracts to bind the State. Cases of unforeseen exigencies may not unfrequently be met by the Government acting on the faith of Parliament confirming their acts; but until this confirmation has been given, although it may scarcely ever be withheld, the act done by the Government is not at law obligatory on the State. It is clear that the adoption of legal proceedings merely to recover a debt will neither confer a power nor render valid an act; the power must have previously existed or the act must have been

otherwise authorised. Observations of the Lord Chief Justice in the case of Churchward *v.* The Queen were much relied on by the plaintiff in support of the proposition that a binding contract on which a petition of right would lie might be made by the Admiralty or head of a department agreeing in express words to employ any particular person, whether Parliament found the funds or not. These observations were not necessary to sustain the judgment, and are admittedly extra-judicial." The judgment then proceeds:—

"They conclude with an express remark that the Court was not called on to decide that proposition in the case then before them, and that he, the Lord Chief Justice, individually, should be sorry to think that the Court should be driven to come to an opposite conclusion; obviously implying that, did such a case arise, he might be so driven. These remarks received no response from other members of the Bench, and the observations, as well as the judgment itself, appear to us to have been somewhat misapprehended. The Court decided in that case that there was no express covenant on the part of the respondent, as alleged in the petition, and they declined to infer any other covenant on the part of the Admiralty binding on the Crown, except a covenant to employ if Parliament provided the funds."

Then he goes on to hold the same in this case. The same conclusion was arrived at in a case in our own Court of Appeal, Holmes *v.* Richardson (2 Appeal Cases, p. 1). This was a case against the Superintendent of Canterbury by a contractor on the contract for the Lyttelton tunnel. The Court of Appeal held that the words of the 2nd section of the Act did not empower the Superintendent to give public money for the construction of the line, or engage the public credit by contracts for the execution of works without appropriation by the Provincial Council. Then there was a decision in the Supreme Court by Mr. Justice Ward, Murray *v.* McAndrew (Macassey's Reports, 360). The same was held in that case. And there were other cases. There was also a case against the Superintendent of Southland, in which Mr. Justice Richmond held similarly. I need not refer at greater length to this point, but I submit that all these cases show that there can be no contract to pay a salary until Parliament by its Act ascertains and determines that salary. There has been no fixing, and ascertaining, and determining by Parliament of any salary in this case. There is no contract to pay any salary until Parliament authorised the making of such a contract by Act. I understand that in this case this gentleman, although he only got his Commission on the 6th March—that was the day on which his Commission was sent to him—claimed his salary as dating back, whether as Commissioner or Supreme Court Judge I know not, to the 27th February, the date on which the Order in Council appointing him a Commissioner was issued.

Mr. Harper: I do not know that there is any evidence of that.

Sir R. Stout: I think evidence can be obtained of this, and I think there is a good deal to be said on this point. However, what happened was this: The Executive, having no vote available for the payment of any salary, either as Commissioner or Judge, proposed to pay it out of "Unauthorised expenditure." This gentleman, apparently, says that he made out his vouchers as Judge; but, at any rate, he claimed his salary from the 27th February, the date on which the Order in Council was issued making him a Commissioner under the Native Lands Act. I submit that he ought not to have claimed salary until the 14th March, because he was not ripe for judicial duties until he had taken the oath under the Promissory Oaths Act of 1873. The Promissory Oaths Act of 1873 provides that the oath of allegiance and the judicial oath shall be taken as soon as may be after acceptance of office. I submit that the acceptance of office could not have preceded the 5th March, and that, at any rate, he could not deem himself completely a Judge until he had taken the judicial oath and performed some judicial act. At any rate, this salary was paid out of "Unauthorised expenditure." Having been so paid, the Parliament was then, by message from the Governor, informed of the supplementary estimates providing for the Commissioner's salary. It was not on the ordinary estimates, the reason no doubt being that Parliament was to be invited to pass an Act providing a salary for a sixth Judge of the Supreme Court. There has been an affidavit filed showing that the House went into Committee of Supply to consider this question of an Act, and it seems to have reported progress after an hour or two's discussion, and never went into Committee of Supply on the Bill again. Of course, I may say about this that from one point of view a Court can only look at the acts done by Parliament by means of the Acts agreed to by the Governor, the Legislative Council, and the House of Representatives. Parliament never speaks in a negative way, but always in a positive way. That is alone how Parliament can speak. It makes some positive declaration of law, or it does nothing. To say that Parliament does nothing is of no avail. If Parliament does nothing, nothing can come of it. It is not a body which speaks negatively; it must do positive acts. That is laid down clearly enough by Chief Justice Cockburn, in the case of Churchward *v.* The Queen, who referred to the fact that Churchward had apparently petitioned Parliament, and Parliament had done nothing for him. So we have the right to say that Parliament declined to do anything, seeing that nothing was done when this Act was sent down. Your Honours will see on page 30 of the affidavits which have been filed the Act that purported to validate the appointments that had been made. Of course that does not prove anything. It only shows that there seems to have been doubt in the minds of the Executive. I do not say that the Court need interpret this draft Bill at all; but if it is to interpret it I say that it will bear the interpretation of the need of making provision for an additional Judge. Well, this Act never came before the House further than that it was referred to a Committee of Supply. What did go before the House was the supplementary estimates, and when the supplementary estimates were before the House the Governor sent down a message striking out the words "and Judge," and even when those were struck out the defendant says there was obstruction. There does not seem to have been any obstruction until the words "and Judge" were struck out, and then there was obstruction to voting any salary at all. After a vote of a smaller sum had been agreed to in the House,-the Minister of Justice, the defendant says, got up and said that the Ministry would not interfere with the discharge by the defendant of his

duties as a Judge of the Supreme Court, and that the Ministry would pay to the defendant his full salary of £1,500 a year. Well, we know that Ministers of Justice have done foolish things.

Mr. Harper: The right thing was done.

Sir R. Stout: Well, my learned friend has not had much parliamentary experience, or he would not talk about doing the right thing. At any rate, this seemed to be doing what Lord Chief Justice Cockburn condemned when he spoke of the possibility of making the executive contrary to the legislative authority, instead of all working together harmoniously in the interests of the State. That is the view which Chief Justice Cockburn would no doubt have taken of this matter, whatever may be the views of Mr. Harper. However, that is what happened. It was as if, two persons having been engaged in a tussle, one, finding himself beaten, retired shouting defiance at the other side. That seems to have been the action of the Minister of Justice. He saw that he was defeated, but he still shouted defiance: "I am licked, but I shall fight in another way. I shall do as I please notwithstanding my defeat." That would appear to have been the action of the Minister of Justice. At any rate, Parliament did not pass the vote as proposed. Apparently it did pass a vote for £1,375 for Commissioner, but gave the Judge nothing; and the Government, having got the £1,375, paid £125 out of "Unauthorised" to make up the salary of a Judge. Now, the defendant says in his affidavits, "I have got £125 paid to me every month, and I am a Judge." But what has that got to do with it. He did get his £125 a month, but that does not touch the question. No doubt he did not care so long as he got his money; but, so far as Parliament is concerned, if it recognised him as Commissioner it did not recognise him as a Judge. Where, then, is the contract? I submit there is no contract. There is no contract even on the letters; and Churchward *v.* The Queen, and Alcock and Fergie, and other cases, all go to show that there could be no valid contract unless Parliament had authorised it; and Parliament has never authorised any contract for any salary to be paid to Mr. Edwards. That is all I have to say upon the question of a contract. As to the Crown Suits Act, as I have said, it only provides for procedure. It has been held by the Court of Appeal that the Crown Suits Act can never make a contract. The point was raised before Mr. Justice Williams.

Mr. Justice Williams: That was the ferret case.

Sir R. Stout: Yes: Lowe *v.* The Queen. I do not know whether it has been reported, but during the argument your Honour said that the Act was nothing more than a procedure statute; it could not make a contract. There the man had gone to large expense for ferrets for the Government, and had letters authorising the expenditure; but the Crown set up that there was no authority from Parliament to make a contract. The department had no authority.

Mr. Justice Williams: They could not trace a contract up to a Minister of the Crown, I think. There was a missing link there, and that is why the case broke down. Some subordinate head made the contract, and that was not binding upon the Government.

Sir R. Stout: The officer could not bind the Crown.

Mr. Justice Williams: They could not connect the subordinate with the Minister.

Sir R. Stout: There was no proof that the Minister had given authority to the Under-Secretary or whoever it was who made the contract, although the contract purported to be made in writing with the Queen.

Mr. Justice Denniston: In this case the difficulty is that there is no express authority for a salary.

The Chief Justice: The point, in my estimation, is this: Parliament may give authority to make a contract, and undoubtedly Parliament may commit a breach of faith by not voting the money to fulfil it. The question is not settled by saying, "Oh, well! Parliament may not vote the money;" that might be, in the estimation of all, a breach of faith: but it is whether the words of this Crown Redress Act gave a general authority.

Sir R. Stout: But what is the value of it, your Honour?

The Chief Justice: That is another matter.

Sir R. Stout: Judge Stawell says the Court of Victoria has no right to sit and consider the honour of Parliament.

The Chief Justice: Are the words taken from the original Act?

Sir R. Stout: I have not looked up the Victorian Act for a long time.

The Chief Justice: I forget what the words of the Act were. I do not think the Act was in force at the time.

Sir R. Stout: They had a Crown Suits Act in force then in Victoria, because it was decided that there could be judgment by default. Apparently, under the Crown Suits Act of Victoria, if once a man got a judgment he had a right to go and get a certificate, and get his money.

Mr. Justice Denniston: The point was, did this Act make a contract what was not a contract before?

Sir R. Stout: I submit that it does not. I also point out to your Honour, what would proceeding under the Crown Suits Act amount to? Supposing they were to say, "There is no money; there is no power of getting it except Parliament votes it." There can be no mandamus against the Treasurer or the Governor. There was an attempt to get a mandamus against the Governor. I appeared in the case.

Mr. Justice Richmond: It must have been in some democratic place.

Sir R. Stout: Yes, your Honour, it was in Otago.

Mr. Justice Denniston: You say the salary is not fixed because the only legal means of getting paid are not available.

Sir R. Stout: Yes, your Honour; and I go further and say that there was no attempt to fix the salary. I also submit that it was held that there could be no mandamus against the Colonial Treasurer. This happened in Christchurch in 1878, before Mr. Justice Johnston and Mr. Justice Williams.

The Chief Justice: Not absolutely, I think.

Sir R. Stout: Yes, your Honour; I think so.

Mr. Justice Williams: I think there was some discretion left, or something to be done.

Sir R. Stout: Yes, there was to be a warrant from the Governor. Until that comes there can be nothing done. How was this money to be got? First I say there was no money voted, and under the Crown Redress Act there could not be a judgment got at all; but, even if there was a judgment got, the person was no further forward.

Mr. Justice Denniston: You say he is still at the mercy of Parliament?

Sir R. Stout: I think there was a case in which there was a judgment, and still Parliament would not vote the money. I also understand that a case came before Mr. Justice Richmond, in Marlborough, in which the Crown Lands Commissioner made a contract for the surrender of a lease, and it was held not to be binding on the Crown. I therefore submit that there was no contract at all; I submit there could be no contract without the express authority of Parliament. With regard to the point that may be raised that the other Judges were not properly appointed, I have two replies to this. I submit several cases dealing with this matter: The Queen *v.* The Councillors of Derby (7 Ad. and Ellis's Reports, 419); The Queen *v.* The Mayor of Winchester (215 of the same volume); and these two are referred to in the argument in The Queen *v.* Grimshaw (10 Queen's Bench, 754). Then there is the decision of Mr. Justice Williams, showing the question of estoppel *In re* the Bruce Milling Company—I do not think it is reported—where it was held that the appointment of a liquidator by the Supreme Court Judge was improper; but, as it had been recognised by a District Court Judge, it was practically an estoppel, and, as he had been mentioned in the orders as liquidator, that was held sufficient to make the appointment good. That, coupled with the fact that there is this proviso in section 5, makes all appointments prior to 1882 absolutely valid, especially as they were acting as Judges *de facto*, and more especially as the Queen had recognised them as Judges of the Supreme Court, under the public seal, in the Commission I have already referred to.

I do not know if it is necessary to trouble the Court with all this mass of affidavits, because really it seems to me that they really do not touch the point at all. Why they are set out I do not know. The points may, so to speak, resolve themselves into two: First, if there was a contract, was it not for a Judge for a temporary purpose—to last as long as the Commissioner acted? If so, then I submit that the Commission ought to be vacated. Secondly, whether this be so or not, was there any power to appoint a Judge under the Act of 1882? I submit that there was no power to appoint a Judge under the Act of 1882, and that the consensus of decisions on construction of the statutes that I have referred to bears this out. I need not submit to the Court that this is a most important case as far as affecting the independence of the Supreme Court Bench is concerned, because if it is held hereafter that an Executive is to have the power to multiply Judges of the Supreme Court without any provision being made for their salaries, and that those Judges so appointed have to depend on an annual vote of Parliament, or, as it turned out in the session of 1890, no vote of Parliament, then the independence of the Supreme Court Bench is gone—there is no such thing in existence. It is all very well for the other side to say that what had to be guarded against in the old days was the interference of the Crown with the Supreme Court Bench. That was so. But I submit that in these latter days there is—and the Americans have seen it, and have wisely provided for it—just as much need, perhaps more need, of having the Judicial Bench looked upon as an independent part of the State authority as there is for having the Parliament independent of the Executive. It is, in fact, I submit, even more important now. The constitutional law that has grown up now has so limited and controlled the action of the Crown that the action of the Crown is a mere myth—it has not been much in later years. In order to make the Supreme Court Bench independent—to be removed above party struggles and party feeling—it must have the salaries of the Judges made independent of parliamentary vote. I submit that it is a most unfortunate thing that this case should have occurred, and I cannot—and I would not if I could—refer to any political aspect this case may bear; but I think it is exceedingly to be regretted that a barrister of such standing should have accepted the position of Judge, knowing that no salary was appropriated. It is, in fact, the profession that should stand up in defence of the Bench, and it seems to me in this respect the Bench was "wounded in the house of its friends." I am not asking it—it would be a wrong thing for me to do, and I know the Court would not go beyond what is the law in this matter—but I do press upon the Court this: that it ought to do what Lord Chief Justice Cockburn said should be done—if the section is to be strained, it ought to be strained to maintain the dignity and independence of this Court. If, however, it be held that the defendant is right, and that he still remains a Judge of the Supreme Court Bench, then the dignity and honour and independence of the Supreme Court Bench in New Zealand have vanished.

Mr. Vogel: May it please your Honours, I apprehend there is very little left for me after the argument of my learned friend, Sir Robert Stout. This case is simply one of interpretation, but it has assumed the magnitude it has because of the important law which is attempted to be interpreted. My learned friend has given perhaps almost every possible case there is of importance in the way of interpreting statutes. There is one, however, which I would cite as, I think, being applicable to this case. It is a case contained in the Law Reports, Vol. ii., Appeal cases. I will cite a very short passage from it. It is at page 762. It is the case of the River Wear Commissioners *v.* Adamson. This was a case which arose out of damage done to a pier. A ship had been wrecked and the sailors and master had abandoned her, and she was driven against a pier, doing certain damage. This was an action brought by the River Wear Commissioners against the owners of this vessel for compensation for damage done, and they founded their case upon 10 Vict., cap. 27. This section very explicitly enacted that "The owner of every vessel or float of timber shall be answerable to the undertakers for any damage done by such vessel or float of timber, or by any person employed about the same, to the harbour, dock, or pier, or the quays or works connected therewith." The question arose as to the interpretation of that section. It was held finally that the owner of this wreck was not liable, and in giving judgment Lord O'Hagan used these words, which,

I think, are very applicable: "It seems proper to suggest that we should not, upon any phraseology of a doubtful character, or without the clearest and most unequivocal expression of legislative intention, or if we may anywise reasonably interpret that intention in another sense, assume that a maxim so ancient, so well established, and so accordant with the moral sense of mankind has been set at nought by the statute before us." The statute said that the owner of any vessel should be liable; and yet it was held, this being a vessel without anybody on board of her, and being cast away—the question of whether or no it was an act of God not being taken into account in the argument or judgment—that the statute could not possibly have been meant to apply to a decision such as that sought for, involving unheard-of hardships. This case, perhaps, may be reduced down to at least four points. I will suggest that these are—(1) That a Judge must have a salary; (2) and that it must be ascertained and established; (3) such salary must be granted and ascertained before or at the time of such appointment, and not subsequent thereto; (4) such salary can only be ascertained and established by Parliament. The first two points are practically one. Taking the history of England, both the constitutional history—or rather the constitutional history arising from the statutory laws, because I imagine that a particular constitutional law may be evolved from constant repetition by Parliament, under particular circumstances, of that same fundamental principle—that is to say, that that is one way, at least, of arriving at what might be termed constitutional law—I take it that it is a constitutional law or ruling that a Judge in England has a salary. Every Act, I think, does imply the necessity of a salary; every statute assumes that a salary will be paid to this officer of the Court who is to act as Judge, and although it was remarked from the Bench just now that it is one of the inducements to taking the office of Judge there being a salary attached to it, still what I have contended for is such a recognised thing that perhaps it is unnecessary for me to go into all these statutes to show it. So recognised as a rule is this that I take it that even if it were a statutory fact it is necessary for a statute to set aside this rule, and expressly state its intention so to do; and this is even more so in the case of a rule constantly repeated in every case that law has arisen to which it may be applicable. It is unnecessary for me to go into the history of all the statutes in England, but there is one fact that I think has some reference to what I am saying. It has been held in England that the salary of a Judge is such a necessary thing that he even cannot assign it. There is the case of Flarty *v.* Odlum (3 Term, 682.) This was an assignment by a half-pay officer, and the Judge in his judgment says: "It might as well be contended that the salaries of Judges which are granted to support the dignity of the State and the administration of justice may be assigned." That is, I think, a very strong statement as showing the necessity, in the opinion at least of the Judges in England, of the payment of salary to the Judges. The great law in England controlling this subject is no doubt the Act of Settlement, and with it 1 George III.; and the point I wish to come to now is whether those two Acts may be said of themselves to be in force in New Zealand. I submit that they are in force. The Constitution Act in 1852 altered very largely, or in one very important particular, the circumstances under which a Judge holds his appointment. That Act provides that the Judges' salaries shall not be diminished; and I contend that, it having been provided that the Judges' salaries shall not be diminished, the Legislature practically enacted that there cannot be a Judge without a salary; otherwise it would be simply a nonsensical enactment for a person who has no salary could not possibly have it diminished. Six years after that was passed came the Act of 1858, and that Act at least named the minimum sum the Judge should receive. It recognised the fact that a Judge must have a salary. I contend that by its mentioning the minimum sum that he could have, which sum under the Constitution Act even the Legislature could not reduce—that is, they could not reduce that salary after they had once given it, because of the provisions of an Imperial Statute—the Constitution Act. These two statutes, then, paved the way to the applicability at least of the Act of Settlement, and of 1 George III., prior to the passing of "The English Laws Act, 1858." It might have been said that the Act of Settlement was not applicable to New Zealand; but the moment that Act passed, I think it is out of the question that the two English Acts did become applicable, and therefore that they were brought into enforcement in New Zealand.

Mr. Justice Williams: What is the date of the English Laws Act?

Mr. Vogel: 1858.

Mr. Justice Richmond: That has never been supposed to act from time to time.

Mr. Vogel: I have never found anything to the contrary so far.

Mr. Justice Richmond: Lord Watson, in the House of Lords, says something to the effect that statutes not applicable at the foundation of a colony might subsequently become applicable, but that had never been understood here.

Sir R. Stout: That is a Privy Council case, Queen against Mount.

Mr. Justice Richmond: Cooper *v.* Stuart is the only case I know.

Mr. Vogel: I submit that that would be the interpretation of the English Laws Act. This Act of Settlement was rapidly after it passed made applicable, or rather its applicability was made possible. The reading of the section of the English Laws Act is, "The laws of England as existing the 14th day of January, 1840, shall, so far as applicable to the circumstances of the said Colony of New Zealand, be deemed and taken to have been in force therein on and after that day, and shall continue to be therein applied in the administration of justice accordingly." There does not seem to me to be anything in that Act to preclude its bringing these other Acts into force.

Mr. Justice Richmond: The Act is purely retrospective. It is new to me that Acts of the Imperial Parliament can become applicable here at the present day if not already applicable. I think it would be a very inconvenient doctrine.

Sir R. Stout: There was a decision of Mr. Chapman that was somewhat analagous. He said that the English Acts provide for certain things to be done in counties would become applicable as soon as we got counties in New Zealand.

Mr. Vogel: Apart from the Act of Settlement, the Constitution Act practically re-enacted the Act of Settlement. Prior to the Act of 1882 all the terms of the Act of Settlement were in force in New Zealand.

Mr. Justice Richmond: An English county would have a mere resemblance in name. I may be wrong in supposing that was Lord Watson's opinion. It was not an opinion necessary to the decision as far as I know.

Mr. Vogel: Supporting my contention for this ascertainment, Parliament must fix a sum and authorise it to be paid. I would submit that the true definition of ascertainment and establishment in the way used under the Act of Settlement would be that ascertainment means the naming or deciding a minimum amount, with the qualification that any increase from time to time would form that minimum; and following that, that the word establishment means the giving of such a minimum by a person, or body, or power authorised or having authority to give it; and I submit that I am only repeating what my learned friend has said, and that it is useless for me to add any cases to those he has cited to prove that until Parliament has directly authorised such a person or body—and I submit it is an Act alone that can give authority—that no one, no person or body, is able to ascertain or to establish the amount to be paid to any person. The distinction, I submit, is this: that after such sum has been given by the Executive, under circumstances such as these, it requires an Act of Parliament to ratify or to definitely give it; and, although I admit that Parliament cannot bind its successors, still, if Parliament gives this sum, and it is placed as a permanent charge on the Civil List, it requires an Act of Parliament passed by both Houses to negative or repeal that grant; and I submit there is no possible comparison between a grant that requires an Act of Parliament to ratify it and a grant of money that it requires an Act of Parliament to negative it. If the one can be called a sum ascertained and established certainly the other cannot be. Now, taking up the Act of 1882. At any rate, prior to the Act of 1882 it was necessary that a Judge should have a salary, and I think the words of the section in the Act of 1858 are so definite that it could but have been held prior to the Act of 1858 that a Judge must have a salary. The words there are very strong, and they affirm the constitutional rule, or at any rate the rule which has been acted upon, that such a thing as a Judge without a salary is practically unknown. Then, I submit, the question arises: Does this Act of 1882 negative that rule or law? It is not so much does it re-enact it, but does it enact the contrary. I submit the words of that Act cannot be so interpreted, but that they can be reasonably and properly interpreted so as to mean all that has been the law in force before the passing of that Act, and that it has not made this radical change, and that it has not created a law and will not create a law of such a kind as must be contended for on behalf of the defendant. Parliament has refused to give a salary to Mr. Edwards. He has mentioned in his statement of defence that he is only in the position of other Civil servants, and that their salaries stopped on the 31st March, 1891, or are only paid because the Government have authority to pay out of the "unauthorised;" and that the stopping of his salary in March, 1891, does not mean the stoppage of his salary entirely. I submit that that of itself is, at any rate, an argument against the propriety of his position—that a Judge of the Supreme Court admits that his salary is stopped, and that he is dependent upon a vote of Parliament to say whether he shall get his salary renewed, and even as to its amount, whether he is to get it fully renewed. The impropriety of the position, I cannot but think, was strongly shown before this Court not very long ago—a case that is only in its early stages—the case of Whitaker *v.* Hutchison. Surely there is impropriety in a Judge sitting on the Bench whose salary depends to a large extent upon the good-will of one at least of the parties contending before him. The position would be one of the most painful I can imagine to those who have respect for the dignity and status of our Bench. In the case there is an ex-Minister as plaintiff, whose power is probably gone, but the case is of the utmost importance to him; and on the other side there is a most prominent member of Parliament, who would have much power in deciding whether the Judge in the case was to have a salary or not in the coming year. I think that case must at least bring out the impropriety of such a law as this Act of 1882 is, it will be contended, able to be interpreted into. Nor must this case be looked upon as simply applying to this one circumstance. It may be that the appointment is only wrong when tested by constitutional rules and principles, and that the Bench itself would lose nothing in its worth by reason of the appointment. Nor, I submit, must it be considered in the light of any possible legislation that may be passed, wisely or unwisely, to alter the Act. I submit the Court has to interpret this as the law of the land, and there must be no idea of its being amended. That is unquestionable. I submit that this Act, without any great strain, may be interpreted to mean that which we submit it is capable of being interpreted to mean, and that this Court will not interpret the Act to mean that under it an unlimited number of Judges may be appointed by the Executive of the day. I venture to think that such a thing must not be thought lightly of, because, in that case—if we can imagine such a possibility as an unscrupulous Ministry, and, perhaps, a weak Governor—things may be done which would greatly drag down the Bench.

The Chief Justice: I do not know about a weak Governor—a constitutional Governor, I suppose.

Mr. Vogel: He would be weak, inasmuch as he would be acting without consideration of the consequences, because, although the Governor makes an appointment in consequence of the advice of his Ministers, he has power to make them without the advice of the Ministry, and might be subject to certain influences, and make improper appointments. I do not suggest the probability of an unscrupulous Government or Governor, but I say that we must consider these things in the light of possibilities. I therefore say that the Act must be interpreted without any thought that it may be amended. The very fact of an amendment of the Act being considered necessary is one of the strongest arguments that could be brought in support of the interpretation which we claim for it. It is capable of a thoroughly constitutional interpretation, and that interpretation ought to be placed upon it, which is, that it is not possible for the Executive to appoint any number of Judges. It is not contended for one moment that it is not right for the Executive to have power of nominating a Judge to fill a vacancy; but that is a very different thing from appointing a fresh Judge. It is very proper and constitutional that the Executive should have certain power; but that it should have unlimited power of altering in any respect any one great branch of our Constitution is, I venture to say, that which the Legislature had no intention of granting. That, your Honours, with the remarks of my learned friend, completes all that is to be said for the present for the plaintiff.

The Court adjourned at twenty minutes past 4 p.m.

TUESDAY, 19TH MAY, 1891.

The Court resumed at half-past 10 o'clock this morning.

Mr. G. Harper: May it please your Honours, I think that I am entitled in this case to say that possibly it is a unique one. My learned friends have not been able to bring before your Honours at all in the course of their elaborate arguments any case like this one which has ever been before any Court, either in England or elsewhere, and I feel sure that your Honours will, under these circumstances, allow me and my learned friends to take up possibly a little longer time than the other side did in considering this very important case. I feel quite justified in going into the matter in detail because of the very important issue attached to it; and that issue is whether Mr. Justice Edwards, who now holds the Governor's Commission issued under the seal of the Colony—whether that Commission can be cancelled and set aside by this Court simply upon the ground that Parliament—or the Government, rather, for the time being, and Parliament subsequently—did not act in a strictly constitutional way. These proceedings have been started in this Court for the purpose of testing this question, which of course is peculiar, and there is very little authority, as far as one can gather from the books and reports, for the institution of such proceedings; but it appears that they are rightly commenced by way of *quo warranto* in the first instance, in order to enable the person who is charged with usurping the office to come forward and show by what warrant he holds his office. Your Honours will see by the statement of defence that the warrant under which we say he held the office is the Commission issued by His Excellency the Governor; so that practically the Court has before it two proceedings—in the first instance one calling upon Mr. Justice Edwards to show by what warrant he has usurped this office, and then the Court has to go still further—and that, I submit, will be the main point in this case—and say whether its arm is long enough and strong enough to cancel the warrant or Commission which he sets up in defence of these proceedings. I repeat again that there is no case in the books that my learned friends on this side have been able to come across under similar circumstances. I shall presently quote a case which has not been referred to by the other side—a case somewhat analogous to this, which came before the Supreme Court in Victoria; but the analogy in it is only in this respect: that in that case the Commission of a County Court Judge was tested. But the whole question went off on the ground that that Commission was held during pleasure; it was not brought for the purpose of cancelling the Commission, but merely to test the Governor's right to revoke the Commission on the ground that the County Court Judge held it during pleasure.

The Chief Justice: We have instances in England of County Court Judges.

Mr. Harper: There are plenty of instances where they have held during pleasure, but not during good behaviour. There is not one single case I have come across in looking into this matter where a Patent or Commission, such as this we have in this case, issued during good behaviour, has been upset except for certain specific grounds. Now, those grounds upon which any proceedings in the nature of *scire facias* have been allowed, or were supposed to have been allowed, to enable action to be taken in connection with the repeal of a Commission held by a Judge are stated in Todd's "Parliamentary Government" to be such grounds only as would entitle him to be removed for misconduct or bad behaviour. So, for the moment, I merely in passing state to your Honours that we shall not, except in a very indirect manner, be able to bring before your Honours any authority which is at all on all-fours with the present position. I will now proceed to deal with the first point my learned friend raised, because I wish to get rid of that as shortly as I possibly can. It comes rather out of order, but my learned friend took it first in order, and I will reply to it in that order. And it was with reference to the letters which passed between Mr. Edwards and the Premier of the day—the letter of the 1st March and also the letter of the 6th March following, comprising the offer and the acceptance of this Judgeship. My learned friend, your Honours will recollect, referred to these letters in support of one of his points, that Mr. Edwards was to receive the status of a Supreme Court Judge only, and that that was the basis of the understanding upon which he accepted the office of Commissioner. I am not going to take up the time of the Court in replying to this at any great length.

Mr. Justice Denniston: Was it not that, accepting it first to be a contract, and assuming that you rested upon that as a contract?

Mr. Harper: No, your Honours, I do not take it in that way; I take it generally, and I may say I was somewhat surprised at the other side having put their case in that way. I expected the other side would simply come into Court on the main issue whether under the Act of 1882 it was competent for the Governor to appoint Mr. Edwards a Judge. Instead of that, my learned friend, at the starting of the case, drew attention to the actual contents of this offer, for the purpose of showing that, as a matter of fact, Mr. Edwards simply required the status of a Supreme Court Judge in addition to that of Commissioner. My learned friend did not—and possibly for his case it was not necessary for him to do so, but for our part of the case it is most decidedly necessary—he did not refer to the sequence of events set out in the statement of defence leading up to it. I am not going to refer to this at the present moment for the purpose of bringing it to bear upon the so-called contract, but I am entitled to refer to these facts, now that my learned friend has given me the cue, for the purpose of showing the circumstances under which Mr. Edwards was negotiated with for the purpose of accepting these two offices; and for that purpose it was set out in the defence—and I think the Court is entitled to take these facts into consideration in coming to any conclusion it may arrive at with reference to the salary being ascertained and established, apart from any question of contract, which is also raised as an alternative defence on the pleadings. That, again, was another reason for setting out the defence in the manner which has been done for the purpose of applying the facts to any aspect of the law which may crop up during the case, and for the purpose of showing what the real negotiations were under which this office was accepted, and also for the purpose, if we cannot—I do not say we cannot, but if we cannot—establish an absolute contract—for the purpose of showing that, as far as Mr. Edwards was

concerned in his acceptance of the office, every step was taken by him for the purpose of having not the status only, but the position of a Supreme Court Judge assured to him, and the salary ascertained and established. I will refer your Honours briefly to what took place, before we come to the abstract question—that is, the abstract question raised by the Commission which is set up in defence, and also the letter which accompanied it, and the letter of acceptance. The defendant, in his statement of defence, says—to put it shortly—that some time before the offer came to him from the Premier he was in correspondence with, as well as seeing, various officers connected with the State with reference to his appointment as Commissioner in the first instance; and Mr. Edwards tells us what followed in paragraph 14, after having seen the Minister of Native Affairs, and shortly after his interview with the Native Under Secretary,—

Mr. Harper read the following paragraphs:—

"14. Shortly after this interview the defendant again saw the said Under-Secretary, and intimated to him that he, the defendant, had determined to adhere to his first impression, and that he would not accept the office unless he received as Commissioner the same salary and allowances as those of a Judge of the Supreme Court, and unless he was also at liberty to carry on the practice of his profession, so far as it was possible to do so.

"The defendant heard nothing further about the matter for some time, and he considered that the negotiation was at an end.

"15. On the 15th October, 1889, however, the defendant received a message from the Hon. the Native Minister requesting the defendant to call upon him at the Government Buildings.

"16. The defendant did so, and the Hon. the Native Minister formally offered the defendant the appointment of Commissioner, at a salary of £1,200 a year, and £1 1s. per day travelling-allowance, with the liberty of private practice. The Hon. the Native Minister also informed the defendant that it was estimated that the work would last from five to ten years.

"17. The defendant then informed the Hon. the Native Minister that since the said Under-Secretary had spoken to the defendant upon the matter a change had taken place in his business arrangements, and that it was hardly likely that he could accept the appointment, and that if he did so he did not think that he could accept less than he had already stated—namely, the salary and allowances of a Judge of the Supreme Court, with liberty of private practice. The defendant also informed the Hon. the Native Minister that his books had been balanced, and his income from his practice had been found to be as previously stated.

"18. After some consideration the defendant determined to accept the appointment, provided he received the salary and allowances of a Judge of the Supreme Court, and he had a guarantee of a three years' engagement, but not otherwise; and he intimated this determination to the Hon. the Native Minister."

Then the defendant heard nothing of the matter for some time; and he considered the negotiations were at an end. On the 15th October the defendant received a message from the Native Minister requesting him to call upon him at the Government Buildings; and the Native Minister formally offered him the appointment of Commissioner, at a salary of £1,200, and one guinea per day travelling-allowance, with liberty of private practice. But defendant then informed the Native Minister that, since the Under-Secretary had spoken to the defendant on the matter, a change had taken place in his private arrangements, and it was hardly likely he would accept the appointment. In the meantime the defendant had an opportunity of reconsidering the matter, and then he wrote the letter of the 6th November, 1889, in the concluding paragraph of which he refers generally to the necessity supposed to exist amongst the people and the profession that an additional Judge would shortly require to be appointed. That letter, so far back as the 6th November, is important, because it shows what was in Mr. Edwards's mind at the time, clearly. Then we have got the receipt to that letter from Mr. Mitchelson, in which he says that the question which was raised was one of so much importance that it would be referred to the Cabinet. Then we come to this statement—it is an oral statement, but Mr. Justice Edwards has sworn to it as being correct, and it is not denied. Mr. Harper then referred to paragraphs 23 and 24 of the defence, as follows:—

"23. After the lapse of some time, and on or about the 20th day of February, 1890, the Hon. Sir Harry Atkinson, then Premier of the Colony of New Zealand, sent a message to the defendant requesting the defendant to call at the Premier's office, and on the defendant doing so the said Premier then offered to the defendant the offices of a Judge of the Supreme Court of New Zealand and of Commissioner under the said statute, at the same salary and allowances as the other Puisne Judges of the said Court, and the defendant agreed to accept the said offices upon those terms.

"24. On or about the 1st day of March, 1890, the defendant received from the said Premier the letter set out in the 5th paragraph of the statement of claim in this action; and on the 5th day of March, 1890, the defendant wrote and despatched to the said Premier the letter set out in the 6th paragraph of the statement of claim in this action."

Mr. Harper then resumed:—

I submit that up to that point there is no doubt Mr. Edwards was unwilling to accept the position of Commissioner only, which was an appointment to be held only during pleasure. The work might last five years or six months, or the Act might be repealed. He made it a condition precedent to his accepting the offer that he should also be appointed a Judge of the Supreme Court. Now we come back to the letter from the Premier—and my learned friend Sir Robert Stout has referred to that over and over again as showing what was in the mind of the Government of the day. I submit that even if we rested our case only upon that letter—taking that letter alone—that it shows clearly on the face of it that the defendant was to be a Judge of the Supreme Court—not a temporary or additional Judge, but a Judge of the Supreme Court. Your Honours will see the wording. Of course it can be twisted to read either way, but I was surprised at my learned friend taking the view of the case he did. I am sorry to take up time in referring to it, but I am bound

to do so, as he has made a point of it, and, I suppose, attaches some importance to it. In this letter he says,—

"Sir,— "Wellington, 1st March, 1890.

"In reference to the conversation I had with you on the subject of the appointment of a Commissioner under section 20 of 'The Native Land Court Acts Amendment Act, 1889,' I have now the honour to inform you that His Excellency the Governor has been pleased to approve of your appointment to that office. It has appeared to the Government, and such appears to be the general feeling, that, for an office of such importance, involving such large interests, the Commissioner should have the status of a Judge of the Supreme Court, and therefore you will be appointed to that office also.

"As you are aware, the demands on the time of the present Judges of the Supreme Court cause inconvenient but unavoidable delay in the despatch of business, and the leave of absence granted to Mr. Justice Richmond will aggravate the evil unless some provision is now made to meet it. The Government is averse to the appointment of a temporary Judge if it can be avoided, and they hope that the arrangement, by which you will afford occasional assistance in the Supreme Court work, will temporarily meet the requirements.

"Your salary will be £1,500 per annum, the same as the present Puisne Judges.

"Your Commissions to the above offices will be at once forwarded to you.

"I have, &c.,

"W. B. Edwards, Esq., Wellington." "H. A. Atkinson.

Now, my learned friend says the words "the same as" imply that "you are to have the status, precedence, and authority of a Judge of the Supreme Court, but you are only a Commissioner with the same salary as the other Puisne Judges." I submit confidently that your Honours will not, in a case of this importance, decide, or attempt to decide, the case upon such a narrow straining of the construction of these letters, and that your Honours will pass on to the main issue which you have been brought here to try. Since that time everything was done as far as Mr. Edwards was concerned, as far as the Governor's Commission was concerned, as far as the right to hold the office of Judge under that Commission was concerned—everything was done by him that should have been done to meet all the requirements of the law and constitutional practice. If I can establish this to your Honours' satisfaction I shall submit that it matters little that Mr. Edwards has been subjected to be kicked, as I may say, from one side to the other, simply for political or party purposes, and that no salary has been given to him by Parliament. I am prepared to rest my case upon this ground—it may seem a high ground to take up, but I hope I shall be prepared to support it to your Honours' satisfaction. I am prepared to rest my case upon this—looking at the correspondence and what has passed—taking this point first: that this appointment was offered to Mr. Edwards as a Judge of the Supreme Court, and it was accepted by him as such; that his Commission was issued to him as such; and that all the steps were taken, as far as he was concerned, to obtain the ascertainment and establishment of his salary. And I would here, in passing, remind your Honours that this is a case in which it is sought nominally by the Queen to cancel or upset her own grant by these proceedings. As I said at starting, the authorities on the subject are very meagre. There are mere dicta, so to speak, in the books of procedure—there are mere dicta which show that the King or Queen can repeal his or her grant, if the King or Queen had no power at law to issue it, or if they have been deceived in the grant of it, or if it were granted on a false suggestion; and, further, when it has been granted on a false suggestion in reference to the person who claims the office or right under it. In regard to the last ground, there cannot be suggestion in this case as to that. We do not want to take advantage of any technical procedure if we could, but we desire to have the thing out, and have done with it. I wish to point out to your Honours that the suggestion for the issue of this Commission to Mr. Edwards as a Judge of this Court was a suggestion through the proper channels. There was no—to use the word colloquially—deceit in any way. The Queen or Governor were not deceived into granting it, and up to that point it was granted in a perfectly *bonâ fide* manner, and as far as Mr. Edwards was concerned he took it in that spirit.

Mr. Justice Denniston: Is there not a great difference between a prerogative grant and a grant which is placed upon statute?

Mr. Harper: I submit not.

Mr. Justice Denniston: Surely it must make all the difference.

Mr. Harper: No, I submit not—only this, the prerogative grant is embodied in the statute; we have nothing really to do with the prerogative apart from the statutes. It would amount to this, with regard to the prerogative: The prerogative did exist—as I shall show presently—in the Queen, until it was altered by the statute appointing the Judges. Up to the time of the Elections Petitions Act—that was the first Act in England where it was stated by statute that the Queen should appoint the Judges—up to that time the appointment was by virtue of the King's or Queen's prerogative. See 31 and 32 Vict. It was for the purpose of having three additional Judges to hear election petitions, and remove those petitions from Parliamentary Committees. Up to that time the Judges did not have their appointments in England under any statute. They took it direct from the King or Queen, as the case might be; and in one statute, which I shall refer your Honours to, that is very plainly put. It is a statute of the last year of the reign of George IV. and the first of William IV. It is a statute relating to the appointment of three additional Judges, and the words of the statute are, "Whenever it shall please your Majesty to appoint three additional Judges, then the salaries of the Judges shall be a charge upon the Consolidated Fund." The next statute in order was the Elections Petitions Act, and then we come down to the Judicature Acts, which fixed the number of Judges to be appointed. It was to be done by the Queen, but the prerogative is, so to speak, embodied in that statute. Now, your Honours, to resume. I submit to the Court that everything was done that could be done as far as Mr. Edwards was concerned, and the issue of this Commission to him was right and proper as far as it went,

and that, as far as could be done, it was both constitutional and legal at the time when it was issued to him, and that he took under that Commission the office of a Judge, which office is now sought to be taken from him. I shall only briefly refer to the history which my learned friend Sir Robert Stout sketched yesterday with reference to the growth of the great constitutional principle which is embodied in the Act of Settlement, as to Judges not only holding their Commission during good behaviour, but that their salaries should be ascertained and established. Up to the time of the Act of Settlement it appears that the Chief Baron of the Exchequer and the Barons of the Exchequer only held their Commissions during good behaviour. They are the only Judges at that date who did so; but in some Commissions issued by Charles II. all of them held their commissions for a time during good behaviour. But that was transitory. It may be taken, generally speaking, that up to the Act of Settlement it was not a settled thing at all that the Judges generally held their Commissions during good behaviour. From that time it has been settled absolutely by law. We have to go no further than our own Act to find the same great principle embodied with regard to that—the Act of 1882. But with regard to salaries, another question altogether arises. Up to the end of 1692, I think it was, or thereabouts, all Judges were entirely at the mercy of the Crown both as to the amount of and the sources from which they were to get their salaries. Parliament did not protect them at all in that respect, but they were at the mercy of the Crown as far as tenure of office was concerned, and as to the amount of and the sources from which their salaries were to be obtained. This was felt so much that before the Act of Settlement an Act was submitted to the King for his assent, asking him to assent to the salaries being ascertained and established, and Burnett, in his history of his own times, says that the Judges themselves begged the King not to assent to that because they thought it was a proper thing that they, the Judges, should be dependent upon the Crown. It was the Judges who prevailed upon the King not to assent to it. This is in Burnett's history of his own times, Vol. iv., page 86, folio edition.

Mr. Justice Williams: What King was it—William?

Mr. Harper: Yes, William III. Then, shortly afterwards the House of Commons and the House of Lords got their own way, and the Act of Settlement was brought in, embodying the great principle that Judges were to have their salaries ascertained and established. Now, from that time to the first year of the reign of George III., we have not been able to discover how these salaries were ascertained and established in any shape or form. The contrary rather appears to be the case. What happened during that period has not been very clearly mentioned by the different text-writers, but I think it may be fairly assumed, from their silence on that particular question, and also from the manner in which they show how gradually the salaries came to be ascertained and secured, that, from their statements as to the gradual securing of the salaries, it is shown that up to the time of George III. at the least the Judges' salaries were at the mercy of the Crown, as they had been previously to the Act of Settlement. Now, in "Todd's Parliamentary Government," in the chapter relating to the Judges in their relation to the Crown and to Parliament, at page 726, and at the bottom of page 725——

The Chief Justice: Is it the second volume?

Mr. Harper: This is the second volume, it is paged consecutively through. At page 725 it says:—

"Previous to the revolution of 1688 the Judges of the superior Courts, as a general rule, held their offices at the will and pleasure of the Crown. Under this tenure there were frequent instances, from time to time, of venal, corrupt, or oppressive conduct on the part of Judges, and of arbitrary conduct—in the displacement of upright Judges and conniving at the proceedings of dishonest Judges—on the part of the Crown, the which gave rise to serious complaints, and led to several attempts during the seventeenth century to limit the discretion of the Crown in regard to appointments to the bench. At length, by the Act of Settlement, passed in the year 1700, it was provided that after the accession of the House of Hanover to the Throne of England 'Judges'' Commissions be made *quamdiu se bene gesserint*, and their salaries ascertained and established; but upon the address of both Houses of Parliament, it may be lawful to remove them.

"One step only remained to place the Judges in a position of complete independence of the reigning sovereign, and that was to exempt them from the rule, ordinarily applicable to all office-holders, whereby their Commissions should be vacated upon the demise of the Crown. It is very doubtful whether this rule applied to the Judges after they began to be appointed 'during good behaviour;' but it was deemed expedient to place the matter beyond dispute. Accordingly, one of the first public acts of George III., upon his accession to the throne, was to recommend to Parliament the removal of this limitation. The suggestion was adopted by the passing of an Act which declared that the Commissions of the Judges shall remain in force during their good behaviour, notwithstanding the demise of the Crown: 'Provided always that it may be lawful for His Majesty, his heirs, &c., to remove any Judge or Judges upon the address of both Houses of Parliament.' It was further provided that the amount of the Judges' salaries now or hereafter to be allowed by any Act of Parliament should be made a permanent charge upon the Civil List. By various subsequent statutes the Judges' salaries are now made payable out of the Consolidated Fund, which removes them still more effectually from the uncertainty attendant upon an annual vote in Committee of Supply."

Now, your Honours, on the opening of Parliament by George III.—from the Commons Journals, which are in the parliamentary library here—it appears that, in the Speech from the Throne, George III. was made to say—so some of the sarcastic writers of that period put it—he was made to say by Lord Bute, who was in power at the time, that "steps ought to be taken to remedy the evil which had existed in the past and up to that date, and which had not been overtaken in any sense by the Act of Settlement, and therefore he begged the Commons to originate and pass a Bill for that purpose."

Mr. Justice Richmond: I really owe an apology to the framers of the Act of 1858. Yesterday, I censured the use of the term "demise of Her Majesty;" I had forgotten what I believe I knew thirty years ago, that the phrase, though etymologically incorrect, is warranted by legal usage. Blackstone says so tender is the law of supposing even a possibility of the death of the Sovereign, that it is euphemistically referred to as "his Majesty's demise." But of course the purpose for which I mentioned it yesterday is unaffected. I mean to say that the Act is plainly defective in not providing for the demise of the Crown generally. But no doubt the term is sanctioned by legal usage. I think it is used in the Act you are referring to.

Mr. Harper: Yes, your Honour.

Mr. Justice Richmond: I am bound to admit I was wrong. When I had charge of the Act I suppose I knew more than I did yesterday.

Mr. Harper: The Speech from the Throne is contained in Vol. xxviii., House of Commons Journals, pages 1094–1098.

The Chief Justice: You have not got it there.

Mr. Harper: I did not know I should be permitted to take it.

The Chief Justice: You have only an extract.

Mr. Harper: I have not an extract, only a memory of it; but that is its effect, and there is the reference I gave your Honours. In Adolphus's "Reign of George III.," which is in the Government library, Vol. i., page 17, he alludes pointedly to the fact that up to that time the Judges' salaries were not ascertained and established, and that the necessity arose to charge them on the Civil List; and also in Blackstone's "Commentaries"—the old Blackstone—Vol. i., page 268. Then, in May's "Constitutional History," Vol. i., at page 232, the Civil List—the nature and security, if you may call it so, of the Civil List—is explained, and its history and how it grew is given. May starts with the settlement of the Civil List of William and Mary, which gave to the Crown certain revenue, out of which were to be paid all the great officers of State, as well as pensions. And then he goes on to show how that Civil List, by every King and Queen, as a matter of course, was exceeded, and gradually how Parliament managed to bring it down, till we come to George the Third's reign, when the King consented, it is said, to give up the hereditary revenues of the Crown of England, to be dealt with as the Parliament might think fit. He gave up all the hereditary revenues, and accepted a fixed amount as the Civil List for the support of "the household, the honour and dignity of the Crown." I call attention to these words because in all Civil List Acts they continually occurred during the different reigns. In all of them, up to the one in 1779, there is no mention whatever of the Judges' salary at all in these Civil Lists Acts; the only thing at all mentioned in the Acts is that a certain amount is granted to the King or Queen, as the case may be, for the support of his household—the honour and dignity of the Crown—and by these words—these large general words—the salaries of the Judges were, so to speak, secured. They were not charged on the consolidated revenue at that time. Now, this is shown pretty plainly by the Act which was passed in George III.'s reign: 39 Geo. III., 3rd chap., p. 110. That is the first Act that I have been able to find which really deals with salaries, and in that Act it recites that the Judges are not well paid, and that they ought to have their salaries augmented, and it goes on to charge the augmentation only on the Consolidated Fund, not the salaries, but the augmentation of those salaries on the Consolidated Fund, thereby, of course, taking the augmentation completely out of the power of the Crown, which is the main object to be attained. Then we find, your Honours, that by the Act of 6 Geo. IV., chap. 82, in the end of 1825, after the lapse of about twenty-five years, they abolished the sale of offices in the Courts of Queen's Bench, Exchequer, and Common Pleas, and the Chief Justices were given a salary—a certain salary, to be paid out of the Consolidated Fund, and to be a charge on the Consolidated Fund. It was in the Civil List no longer, but on the Consolidated Fund. Then the next Act was the 2nd of Geo. IV., and the 1st of William IV., chap. 70.

Mr. Justice Conolly: The 7th of George IV. it should be.

Mr. Harper: The 7th it ought to be—your Honour is right. Then, as his Honour Mr. Justice Williams referred to a short time ago, three additional Judges were appointed under this Act, and their salaries were charged on the Consolidated Fund. We next come to the 2nd and 3rd of William IV., chap. 116, in which all the salaries of the Judges of the Courts were ascertained in amount and charged on the consolidated revenue; and that is where they have been from that time up to now in England.

Mr. Justice Richmond: And under the Judicature Act.

Mr. Harper: They are repeated under the Judicature Act, but your Honours will see—and I wish to mention this—that from the time of William III. up to George III. they were not actually fixed on the Civil List. He might have paid them out of it or might not; probably he did.

Mr. Justice Richmond: There may have been a scheme of appropriation, apart from the Act.

Mr. Justice Williams: There was no other fund out of which they could be paid.

Mr. Harper: Except by fees. As your Honours will see, they were dependent upon the Crown till they got on to the consolidated revenue. They were dependent upon the Crown for their salary even if they were charged on the Civil List.

The Chief Justice: Surely they could enforce their right against the Crown if they were made a charge on the Civil List.

Mr. Harper: No, your Honour, I submit not. The object shown was to get more and more security.

Mr. Justice Denniston: Were they not paid largely by fees?

Mr. Harper: Yes, by fees and the sale of offices.

Mr. Justice Denniston: Would they not probably make a much larger revenue in that way?

Mr. Harper: It might be so, but my point is this: that the Act of Settlement has been honoured in the breach rather than in the observance, and the Legislature at Home have tried, step by step, to fix the Judges' salaries to certain amounts, which ultimately were put down and secured to

them on the consolidated revenue, and therefore, not coming under the purview of the Legislature every year in the same way as the Civil List would. Todd, however, shortly refers to what the Civil List is. That is in the first volume of Todd, at page 472. He is speaking about permanent grants, and he says:—

"There is (1) the funded debt; (2) the Civil List; (3) annuities to the Royal family, and pensions; (4) salaries and allowances to certain independent officers, including the higher class of diplomatic functionaries; (5) Courts of Justice;" and so forth. "These charges are made payable out of the Consolidated Fund by permanent statutes from year to year, without any renewal of parliamentary authority. The principle of not subjecting to the uncertainty of an annual vote the provision for the security of the public creditor, the dignity of the Crown, annuities and pensions to Royal and distinguished persons, the salaries of Judges and other officers in whose official character independence is an essential element, compensations for rights surrendered, and like charges, is one the soundness of which is generally admitted, although it may have been in certain cases carried too far."

Now, your Honours, what I wish to submit is this: That, if I may put it shortly, up to the time of William IV. the Judges' salaries were not so ascertained and established as to be beyond, at any rate, the control of the Crown; but they were and are always within the control of Parliament, as I shall presently show, although, since they have been charged on the Consolidated Fund, they have been placed beyond the control of the Crown.

The Chief Justice: I do not think you have shown that yet.

Mr. Harper: I think so.

The Chief Justice: If you mean ascertained and established at the time of the appointment I understand it, but if you mean after I do not think anything stated shows that they were.

Mr. Harper: Yes, your Honour. I think, in this respect, a great deal of magic was attached by the other side to the words "ascertained and established." They are attempted to be read into and implied as being in our Act of 1882. Now, what I wish to show your Honours is this——

The Chief Justice: All I meant to say was, I did not understand you were able to show that at the time of the appointment there was no security given to a Judge of salary after the 3rd of William III. and before George III.

Mr. Harper: But the absence of authority shows that there was no ascertainment or establishment. In George the Third's reign it is shown that the Judge's salary was to be at least fixed upon something definite. All the authorities are silent with regard to what happened prior to that. There was a hiatus between the Act of Settlement and the accession of George III., and there can be nothing to show that the constitutional principle in the Act of Settlement was carried out by statute or otherwise during that time.

Mr. Justice Williams: Supposing between the Act of Settlement and the Act of George III. the Crown had appointed a Judge, and in appointing him had intimated that his salary was established at so much and fees, or at so much, would not then the provision of the Act of Settlement come in and protect that Judge, and would not he then have had a remedy against the Crown so long as he held office? Of course he would hold office, by virtue of the Act of Settlement, during good behaviour. Would not he have a remedy against the Crown if the Crown attempted not to pay, or to reduce his salary?

Mr. Harper: I submit not, and for this reason: that the Consolidated Fund——

Mr. Justice Williams: The Judges were not paid out of Consolidated Fund. They were paid out of the Civil List and the hereditary revenues of the Crown. They looked to the Crown, and not to Parliament, for salaries.

Mr. Harper: I think the answer to the question is the fact that this would be paid now out of consolidated revenue, and that the power is taken now from the Crown and the salaries removed from the Civil List. All through these Acts the object is to have the charges made on the consolidated revenue. These words occur: "It shall be lawful for the Commissioners of Her Majesty's Treasury to pay out to the Judges the sums mentioned and set opposite to their names in the schedule." There was the fixing of the salary, and a definite source from which it could be obtained. Your Honours, there are many actions brought at Home against the Lords of the Treasury. They are different in position to the Colonial Treasurer here under the Public Revenues Act, for they can act upon the funds without obtaining, in the first instance, any warrant from the Crown; and therefore there have been many actions brought, not only actions of contract, but actions to obtain moneys, that have been brought against the Lords Commissioners of the Treasury, and for mandamus to compel them to pay out the sum mentioned; so that the Judges have got this absolute security, that when once a salary was a charge upon the Consolidated Fund and the sum was fixed opposite the Judges' names, they would have to take no action by way of petition of right against the Queen, for in that case they would be probably met as we are met on the question of our contract, that they could not sue the Queen. They could not be met with that, but they would have a right; and there are other officers mentioned—besides Judges there are Registrars, who would have a right to a mandamus to the Commissioner to do his duty and pay the money.

Mr. Justice Denniston: What right do you suggest there would be against the Crown? How could you enforce the right to be paid out of the Civil List?

Mr. Harper: That is a difficulty, and I say that very difficulty acts strongly to maintain my point. The very difficulty of getting at the Crown under the Civil List without having some intermediate functionary to get at, who could be told to do his duty and to pay out a certain sum—that very difficulty assists me in saying that up to the time that it was made a charge upon the Consolidated Fund there was no ascertainment or establishment of the salary. I would like to point out to the Court once more that Todd, at the very end of this part of the book, with reference to the Judge's salary, says,—

"By various subsequent statutes the various Judges' salaries are now made payable out of the Consolidated Fund, which removes them still more effectually from the uncertainty attendant upon an annual vote in Committee of Supply."

And the principle of the Civil List given in May's "Constitutional History" is that, not being an Act, but merely annual, the Civil List would come under review of the House of Commons from year to year, granting a lump sum, for it was a lump sum granted to the Crown in support of the dignity and honour of the Crown. Now, your Honours, more than once yesterday my learned friend said that the great object of the growth of legislation has been to try and get in all countries the question of Judges' salaries removed not only from the Crown but from Parliament. That has been so, no doubt, in England, and also in the United States; and in Victoria and New South Wales the salaries of the Judges have been absolutely removed from any interference by the Crown, which is the great object, in order to secure the independence of the Judges. But in a great many writers on constitutional history it has been stated, even by writers on the American Constitution, that there attempts only have been made, but there has no way been found of placing the Judges completely above the Parliament, so as to make them independent of Parliament with regard to their salaries. Now, that is clearly shown in Dicey on the Law of the English Constitution—a book referred to yesterday—at page 142, first edition.

Mr. Justice Richmond: Well, even private property is not free from interference.

Mr. Harper: Yes, your Honour, that is it. Dicey says, "our Judges are independent, in the sense of holding their office by a permanent tenure, and of being raised above the direct influence of the Crown or the Ministry; but the judicial department does not pretend to stand on a level with Parliament; its functions might be modified at any time by an Act of Parliament; and such a statute would be no violation of the law."

Mr. Justice Richmond: Yes; that simply means that Parliament, in political matters, is omnipotent.

Mr. Harper: Then, Cooley "On Constitutional Limitations," at page 276, says,—

"Where an office is created by statute it is wholly within the control of the Legislature. The term, the mode of appointment, and the compensation may be altered at pleasure, and the latter may be even taken away without abolishing the office. Such extreme legislation is not to be deemed probable in any case; but we are now discussing the legislative power, not its expediency or propriety. Having the power the Legislature will exercise it for the public good, and it is the sole judge of the exigency which demands its interference."

Sir R. Stout: That does not apply here.

Mr. Justice Williams: That is an amplification of the maxim that Parliament is supreme. If it chooses, it may pass an Act saying that the public creditor is not to be paid, and then that is the law.

Mr. Harper: It was asserted over and over again by my learned friend that the great object was to make them independent of the Parliament, not so much of the Crown, but of Parliament. It seems to me to have been the object to make them independent of the Crown, and then to see how far they could be made independent of Parliament. The Civil List is nothing but an annual vote and appropriation of the consolidated revenue, and it cannot be touched except by legislation. But it could be touched by legislation. It is clearly laid down by Story in his "Constitution of the United States," sec. 1632, Vol. ii.: "Tenure of good behaviour does not prevent the separation of the office from the officer, but only secures to the office his station upon the terms of 'good behaviour' so long as the office lasts."

Mr. Justice Richmond: There is less power in the Legislature under the American Constitution.

Mr. Harper: I am only giving these instances for the purpose of showing that the independence of Judges, both with reference to salary and tenure, has been of gradual growth in England, and that it has gone as far as it can go now. This gradual growth has also been recognised thoroughly by all the Australian Colonies ever since they got their Constitutions. There is a great difference between their Acts and our Acts. In all the Acts relating to the constitution of the Supreme Court, and the appointment of Judges, your Honours will find, in the case of Victoria, for instance, that the number of Judges has been fixed, just as in the Judicature Act at Home in England. In the case of Victoria the number of Judges was originally fixed at three, including the Chief Justice. The amounts of their salaries were named, and charged upon the consolidated revenue. Then from time to time Acts have been passed adding additional Judges, and in each of these Acts the salaries and emoluments have been mentioned and charged upon the consolidated revenue. So that the Judges of the Supreme Court of Victoria are on almost the same footing as Judges are who hold office under the English Judicature Act. There is no doubt whatever about the Acts. The numbers of the Judges are fixed, the salaries are fixed, and the source from which the salary is to be paid is secured. When we come to compare that state of things with the Act of 1882, and the previous legislation in connection with the Supreme Court in this colony, we shall see that it would be straining the Act if the Court has got to read into it a mere constitutional convention which has never been observed in England and elsewhere except by statutes embodying it; yet your Honours are asked by my friend to interpolate a number of words into the Act of 1882, and to refer to the Civil List Act for the purpose of incorporating into the Act of 1882 the constitutional law, as he calls it. I wish your Honours to make a point of that, whatever your Honours may think of it eventually, that notwithstanding the growth we have seen in the security of the salaries, the establishment and ascertainment of the salaries of the Judges has not been looked upon as a law of the Constitution. It has been put on one side, and the Legislature, instead of relying upon a rule outside the statutes, have gradually got the statutes so drawn as to permanently fix and ascertain those salaries; and they do not for one moment pretend in England at the present day to look outside the statutes, and apply to them a constitutional convention to aid those statutes. Neither do they in Australia. So we simply come to this, and I submit, in this colony we stand in a different position, so far as we are able to understand our Supreme Court Act of 1882, as far as the appointment of

the Judges of the Supreme Court is concerned. To show how our present position has gradually come about under the Supreme Court Act of 1882, I think it will be necessary for me, without taking up too much time, to refer to what has been done in the past in New Zealand; and what I am going to say will be exact, and not exaggerated in any way. If your Honours will look into the matter you will see that prior to the Act of 1844, already mentioned by my learned friend, the Judges held their Commissions during pleasure. That was contrary to the Act of Settlement, to start with. Then, when the Constitution Act was passed in 1852, that ordinance of 1844 was expressly recognised in the preamble, which set out that its provisions should not have the effect of abrogating and repealing any ordinance in force at that date. That kept alive the Act of 1844, under which the Judges were appointed at pleasure, and merely added this, that these Judges were to be paid a salary equal, at least, to the sums mentioned in the schedule during their continuance in office; and the local Legislature, to which was given power by the Constitution Act, might alter these sums so long as they did not alter them during the tenure of any particular Judge. When the Constitution Act was passed, it must be taken that the English Legislature which passed the Act had in view the fact that the Judges were appointed during pleasure; but there was given power to the colonial Legislature to put the Judges upon a different footing whenever they chose to do so. I may mention in passing that between 22 and 23 Vict. an Act was passed to validate any Supreme Court established in the colonies, and the acts of Judges in those Courts. It was a general sweeping measure; but nothing turns on that. We find, then, that from the year 1852, when the Constitution Act was passed, the Judges still continued to hold office until the year 1858. So that up to to the year 1858 it could be said that the so-called—well, I will not say that—but the great constitutional principle laid down in the Act of Settlement was not in force so far as the tenure of office of the Judges was concerned. When we come to the year 1858 a different state of things was introduced. For the first time the Judges were to hold office during good behaviour, and the 6th section of the Act enacts that the salary to be paid to any Judge who shall be appointed and then payable by law shall be paid to him. That Act was passed—I am going to refer particularly to dates—on the 3rd July, 1858, and was an Act to regulate the powers and tenure of Judges of the Supreme Court. The Civil List Act, on which so much dependence is placed in this case, was passed, or, rather, dated, the 21st August, 1858. It was reserved for assent. In the 6th section it said, "A salary equal at least in amount to that which at the time of appointment of any Judge shall be then payable by law shall be paid to such Judge so long as his Patent or Commission shall continue and remain in force;" and in the Constitution Act it is said that a Judges' salary should not be diminished during his tenure of office. At that time the only law applying to show whether the Judges' salaries were ascertained or established was the Constitution Act.

The Chief Justice: Sir Robert Stout suggested that section 6 was more favourable to his argument than what was placed in the Act of 1882.

Mr. Harper: Possibly. It is difficult to explain how that clause crept into the Act of 1882. At that time there was a Chief Justice in existence. The temporary Judge, Mr. Gresson, was not permanently appointed until afterwards, and of course he would be appointed through the power given to the Governor to appoint additional Judges. But when this Act was passed in 1858, as well as when the Constitution Act was passed, there was no limitation whatever of the power of the Governor to appoint. I wish your Honours to see what I mean there. With the exception of using the word "Governor," the very words appear again in the Act of 1858, in sections 2 and 3. These are nearly the same words as appear in the ordinance. There is no attempt at any limitation; and this Act contemplates further appointments, emanating in the first instance, I submit, from the Governor. It was not as in the Australian Acts, where the number of Judges was fixed, which number could only be increased by a further Act of Parliament. Possibly to meet the exigencies of our country, not knowing whether the population would increase rapidly or not, it was left open to appoint from time to time additional Judges. Now, it must be argued, I submit, that at the time of the passing of the Act of 1858, if the Act was limited by the Constitution Act, it would have been limited only to the two salaries mentioned in the Constitution Act at that time; but there can be no doubt—and subsequent acts prove it better than anything I can say—subsequent acts on the part of the Legislature prove it, and subsequent appointments on the part of the Governor prove it, that it was contemplated that there should be from time to time additional Judges appointed; and that there was to be no limit in number or otherwise. My learned friend says—putting aside the Act of 1882 for the moment—the Court must read into the Act of 1858 the constitutional principle laid down by the Act of Settlement, and that it must look to the Civil List Act of 1858, which was passed a month later, for the purpose of showing that no appointment might take place, or ought to take place—legally and validly take place—he must be driven to that, unless the salary was fixed beforehand. It is most unfortunate, I repeat, that both in the Act of 1852 and in the Act of 1858 and in that of 1882 we have to invoke this constitutional principle. One would imagine, especially in respect of the Act of 1882, nothing could have been easier, nothing more simple or reasonable, than to have put it into the Act that only a certain number of Judges should hold office, and that additional Judges would have to be appointed by Parliament, or provided for by Parliament, by another Act. But we have to look for all this, to gather it from outside, and to invoke that constitutional principle, and really apply it in the extreme way in which it is sought to be implied in this case by the counsel who represent the Government. I am now going to advance what may appear to be a technicality; but we shall take advantage of any technicality, and we feel that we have a perfect right to do so, in order to maintain the position of Mr. Edwards. In view of the position in which he has been placed, and in view of what has been done and is being done, we are entitled to use, without the slightest scruple, any technicality which is open to us to maintain his position. I started by showing that the case was unparalleled, and I intend to show that the breach of constitutional principle, if any, is with the Government and the Parliament, and not with

the appointment of Mr. Edwards under the law as it exists. I go to the Act of 1858—to the clause giving unlimited power of appointment which we find there—and I submit to your Honours that power is given to appoint Judges from time to time. These words, "from time to time," cannot be got over. Then I come to the Act of 1858, the Civil List Act. I am only going to refer to it shortly, and we will see what interpretation the Legislature has given to the Act of 1858—the best interpretation that can be put upon an Act, by an Act of a subsequent date. We find that in the Civil List Act of 1858, which purports to be an Act to amend the Constitution Act, the salaries of the Chief Justice and of two Puisne Judges are specially mentioned.

The Chief Justice: Does it say "two Puisne Judges"?

Mr. Harper: Yes; the "first Puisne Judge," and then "second Puisne Judge." It says the Chief Justice shall receive £1,400, and the other two £1,000 each. When that Act was going through Parliament Mr. Justice Johnston was not appointed; he was not appointed until November, 1858, and that Act was in transit to England to obtain Her Majesty's consent to it. I presume his Honour got paid from the time when he accepted his office. It is not to be supposed that he did his work for nothing; and at that time the only law in force regulating the Judges' salaries was the schedule to the Constitution Act, which was at a lower rate. The Chief Justice received £1,000 a year, and £800 was paid for a Puisne Judge. It was not until the 25th July, 1859, or nearly a year after the passing of the Act, that it was found out whether or not it had received Her Majesty's consent. During that time Mr. Justice Johnston must have been paid in the ordinary way, out of ordinary revenue, for he was appointed in November, 1858. The Constitution Act says distinctly this, in section 59:—

"No Bill which shall be reserved for the signification of Her Majesty's pleasure thereon shall have any force or authority within New Zealand until the Governor shall signify, either by speech or message to the said Legislative Council and House of Representatives, or by Proclamation, that such Bill has been laid before Her Majesty in Council, and that Her Majesty has been pleased to assent to the same; and an entry shall be made in the journals of the said Legislative Council and House of Representatives of every such speech, message, or Proclamation, and a duplicate thereof, duly attested, shall be delivered to the Registrar of the Supreme Court, or other proper officer, to be kept among the records of New Zealand."

What we submit to your Honours is this: that Mr. Justice Johnston's appointment took place before any salary was ascertained or established. There was no law in New Zealand then, any more than there was in the interval between the reign of William III. and George III., ascertaining or establishing salaries.

Sir R. Stout: The Constitution Act provided for a salary.

Mr. Harper: It was for a salary of £800 a year.

Sir R. Stout: Exactly; and there was a vacancy when Mr. Justice Johnston was appointed. Mr. Justice Gresson was not appointed till the day after "The Civil List Act, 1858," came into force.

Mr. Harper: I will pass over Judge Johnston's case. It may be that technicality is met by another technicality, and sets the law at large. I will pass over this, and also pass over Mr. Justice Gresson's appointment, and we will come next to the Civil List Act that was passed in the year 1862. Under that Act there was no longer any appropriation for the Judges, specifying the Judges. There was a lump sum of £6,200 to be paid for the Judges. That Act was presented to the Legislature here on the 15th September, 1862, and it was after reserved for Her Majesty's consent. After that Act was presented to the Legislature Mr. Justice Richmond was appointed—in the next month—that was, in October, 1862; but that Act was not consented to until—I have not the exact date, but, at any rate, it was not until the middle of the next year.

Sir R. Stout: It was not until the 11th July, 1863.

Mr. Harper: Your Honours will see that not only was that Act not in force according to the Constitution Act, and that it had no force or validity in New Zealand, and not only had an appointment been made before it came into force, but provision for the Judges was made in a lump sum of £6,200. Where was the ascertainment and establishment of Mr. Justice Richmond's salary at the date of his appointment? We see in the law previously in force that the Chief Justice was to receive £1,400 a year, and two Puisne Judges were to receive £1,000 a year each. That was the law when previous appointments were made; but when Mr. Justice Richmond received his appointment the Bill then subject to reservation simply provided that a sum of £6,200 was to be divided amongst the Judges. Of course we know how it has been divided up; but the Legislature did not divide it up—there was no ascertainment or establishment of any one single Judge's salary. The only way in which that could be ascertained or established would be—and I am diverging here for a moment—to go back to the original appointment of the Judge, and find out what he was told that he was to get, at the time of his appointment, by way of salary. And this, even, would not do it, because we see nothing about the salaries of the other Judges: and their salaries were raised, as a matter of fact, by this Act. With regard to this Civil List Act, we have these two points, and we press them: the fact that this was not an Act at all when Mr. Justice Richmond was appointed; he received a salary of £1,500 a year out of "Unauthorised expenditure," or something of that sort. And, again, there was no distinct ascertainment or settlement of his salary in the Act. Then we come to the Civil List Act of 1863, and this again repeats the same lump sum which was to be divided amongst the Judges. It gives a sum of £7,700 to be given to Judges; there is no allocation; it says "amongst the Judges;" there is nothing to show that the existing Judges were to have their salaries increased, or whether it was to provide—as it really was to provide—for an additional Judge, Mr. Justice Chapman. He was appointed while this Act was in transit to England, on the 23rd March, 1864. And here, again, there was no ascertainment or establishment of salary at the time

he was appointed. And, moreover, by this Act there was no retrospective clause, as was in the other two Acts; and your Honours will notice that the retrospective clause was to take effect not from the time of the appointment of Judges under this clause, but from the time of the commencement of what was then the financial year. It was put back to the 1st July in that clause, which was the financial year at that time, and would go back further than the appointment. But in Mr. Justice Chapman's case there was no retrospective effect given to it in any way; he was simply to take what he could get out of the £7,700, and he could only find out what he was to get by reference to what passed on his appointment; that was his ascertainment and establishment, and nothing else. And he could only find out by going back to the terms of his appointment and to the time of the Act coming into force. He must have been paid out of annual vote, and not out of any settled sum or revenue for the purpose, until——

Mr. Justice Denniston: Why was it necessary to send the two Acts Home?

Mr. Harper: There was no necessity, your Honour, except in so far as——

Mr. Justice Denniston: But, whether it was necessary or not, the fact remains that they did not get the assent of anybody till they were sent Home?

Mr. Harper: No, your Honour; they did not get the assent of the Crown, and had therefore no force or validity within the colony till they were received from Home. This state of things went on until the Act of 1873; but that was merely for the purpose of correcting the error in past years, so far as the Judges were concerned—which is manifest on the face of the Act—and to allocate the salaries amongst the Judges for the first time since 1858. And your Honours will see that up till 1873 these salaries, which had been ascertained and established, as we say, after the appointment of the Judges, were not even allocated amongst them so as to enable them to get them individually from Her Majesty until the Act of 1873.

Mr. Justice Richmond: Might not the act of the Executive in assigning a salary be an allocation sufficient?

Mr. Harper: Sufficient, I have no doubt. My point is this: that it is all short of the security which has been ultimately found necessary in England and elsewhere for fixing the salaries once and for all.

Mr. Justice Richmond: Might it not be enough if the salary assigned is covered by the amount provided for by lump sum?

Mr. Harper: That is so, your Honour—in the same way as we shall show that Mr. Edwards's salary was ascertained and established as far as he was concerned. He could do no more—if the Legislature did not keep faith with him he at least could do no more. In all these cases—it may be technical or otherwise—these Acts were not law until they came back from England, and long after, in each case, the appointment of the different Judges. Then arises this point—I do not rely so much upon this point, but it is worth mentioning: whether even in the Civil List Acts the salaries are a charge upon the consolidated revenue.

Mr. Justice Richmond: I doubt if the term was used before the first Public Revenues Act in 1867. I think it was the present Controller-General who introduced the use of the term.

Mr. Harper: I do not attach so much importance to that. I do not think we need do so. The salaries come out of the revenues of the Crown, and these are payable to Her Majesty. The consolidated revenue at Home is payable by the Commissioner of the Treasury, and the sums are allocated on that. But I am not relying strongly on this.

The Chief Justice: You must not frighten us too much, Mr. Harper.

Mr. Harper: I will not do that, your Honour. The salaries are fixed in this indefinite way, so that you might fairly say that the Judges would have to get their salaries by taking action against the Crown. There may be instances where this might occur. As my learned friend Mr. Chapman reminds me, a deadlock, or a stonewall, or something of that sort, might occur, as it did in this particular instance with regard to Judge Edwards; and in that case the Judges are left to take action against the Crown; and that, according to what my learned friends raised yesterday, they would not be in a position to do. I want to pass over the legislation such as I have shown has taken place in New Zealand up to the passing of the Act of 1882; and I have relied on it to show, as I have already mentioned, that in the Act of 1882 there was nothing more simple or easier than to have introduced into the Act that which the other side claim now to read into the Act. This Act of 1882 is sought to be controlled by this Civil List Act of 1873. As I have already mentioned, in the Supreme Court of Victoria and in the English Acts now, in the very Act which creates those Courts the Judges and salaries are mentioned, and the fund from whence they come. Here your Honours are now asked to construe the large words which give to the Governor unlimited power of appointment, and which have been repeated Act by Act up to the Act of 1882 from the ordinance of 1844—to limit these large words—limit them, and control them, and practically take the Judges' Commissions under the Civil List Acts, and not under this Act. I beg your Honours to put a construction upon this Act of 1882 which I submit the Court can follow. There is not a particle of difference between the Act of 1882, with reference to the appointment of a Judge, and the Act of 1858 or the ordinance of 1844. There is an unlimited power of appointment reserved in a statutory manner—not by the exercise of prerogative only, but in a statutory manner—and reserved to the Governor. It is sought, as my learned friend told us yesterday over and over again, and as I have mentioned before—it is sought to interpolate in this Act the words, "Provided that the number of Judges shall not exceed the number mentioned in the Civil List Act of the time being." My learned friend says this must be read into the Act by the Court. Why? Because of the convention—the constitutional convention or principle established by the Act of Settlement. Your Honours, I take this to be my learned friend's main point in the case—his strongest point—the point upon which he relies; or, I take it, he does not succeed in the case. And I have endeavoured, whether successfully or not, to show your Honours that throughout the whole legislation of New Zealand, from the ordinance of 1844 to the Act of 1882, there has not been any attempt whatever to limit this power of appointment. On the contrary, it has

been increased from time to time, and there has not been any attempt whatever to limit it by any Act that might have to be passed before any appointment was made. If the Legislature at Home and the Legislature of Victoria have not been satisfied with relying on constitutional principle, then I submit that this Court will not do so; because the remedy would have been as simple as possible if it was intended by the Legislature, having in view their past legislation and their Civil List Acts, that this principle should apply to the Act of 1882; and nothing would have been easier than for them to have expressed it. In this connection, your Honours, my honourable friend referred to the difference between the law of the Constitution and the conventions of the Constitution; and he said that the Court was bound in interpreting a statute of this sort to bring to bear on it the law of the Constitution. I shall submit this to your Honours with confidence: that this enactment in the Act of Settlement certainly was not a law of the Constitution till then—this enactment is not a law of the Constitution except in so far as it refers to the Act of Settlement itself, and to what has been done afterwards in the various Acts appointing the Judges—carrying out, in fact, the principles laid down in the Act of Settlement. I submit to the Court confidently that it cannot take this—this outside unwritten law, so to speak—and apply it in the interpretation of this statute. It has never been attempted to be applied in any sort of way at Home. The principle has been laid down distinctly in words in the various Acts, whereas here we have not got it in our statute.

My learned friend read from Dicey, showing the difference between the law and the conventions of the Constitution. The principle is in Dicey, on page 24, the test of what is constitutional law as distinguished from convention of the Constitution.

The Chief Justice: Do you say that outside of this section there is not an indication of the intention to introduce what you have referred to as the constitutional principle?

Mr. Harper: No; I am not driven to that, but I am prepared to rest my case in this way: that this constitutional principle is not to be invoked as a condition precedent to the exercise of the unlimited power given to the Governor. The Act may be unfortunately worded, but our client's appointment is under the Act, and he says that he holds his appointment under those words which give the Governor power from time to time to appoint Judges. We then say this constitutional principle ought to be recognised, and recognised by the Legislature, but not as a condition precedent to the appointment of a Judge. To go back to the Act of Settlement, it does not say that a Judge's salary shall be ascertained and established prior to appointment. It says they shall hold their tenure during good behaviour, and that their salaries shall be ascertained and established. The growth of history connected with this shows that there have been augmentation and appointment of salaries since.

Mr. Justice Richmond: You regard it as a vow by Parliament—a vow which it did not fulfil till fully sixty years after?

Mr. Harper: I can put it as high as this: Parliament allows the King to exercise his prerogative and appoint Judges; it is true that the number was generally fixed, but James the First did not keep to that number. He created nine at one time, and Parliament at that time gave the King the full exercise of his prerogative. It did not limit the exercise of his prerogative, although the King, as a rule, did not act up to it.

Mr. Justice Richmond: Hearn says that the Crown may not increase the number of Judges.

Sir R. Stout: I referred to it, your Honours: it is on page 74.

Mr. Justice Richmond: But it does not appear to be supported by the authority he cites (4 Inst., 75).

Mr. Harper: I have authority to show he may create Judges, but not create jurisdiction. I submit that my learned friend must go as far as this to interpret this constitutional principle—the prior ascertainment and establishment of salaries. Now, I would make bold to say that there is not a single writer on constitutional history, nor is there any authority that has been cited by the other side, or that can be cited, to show that it was intended by the Act of Settlement that the ascertainment and establishment of salaries should be prior to the appointments. Therefore, if the Act of Settlement did not contemplate the ascertainment and establishment being made prior to the appointments, then, when the Crown has given to it by statute, not by prerogative, the power of appointing Judges from time to time, why should not the Crown appoint a Judge, trusting to the Ministry of the day not to advise the Crown to do what is unconstitutional—and go to Parliament afterwards to ascertain and establish the salary? Why should the Judge be turned out in the cold because Parliament does not do what is laid down in the Act of Settlement as one of the principles of the Constitution?

Mr. Justice Williams: Now you are invoking the Act of Settlement.

Mr. Harper: I always have.

Mr. Justice Richmond: Is not prohibition of such appointments the only security against the present position—a position which was never contemplated—a Judge without a salary.

Mr. Harper: The Court has to go to such lengths as have never been attempted in any other case. My friend is asking your Honours to cancel an appointment under the seal of the colony, being a life office. In the first instance, it is not contrary to law if you read the Act of 1882 alone. It is not contrary to law, because that Act *primâ facie* gives the Governor power to appoint Judges; but my learned friend says you must invoke into the Act a constitutional principle—a practice which obtains in New Zealand prior to the Act of 1882. I have endeavoured to show that this constitutional practice was technically not observed. I go further, and say you cannot bring into the Act of 1882 a mere constitutional principle if the Act in itself gives, as it does give, the power to the Governor, in plain and distinct words, to appoint Judges from time to time. There is no mention of salaries; that is the fault of the Legislature in drawing up the Act. There is no mention of salaries, nor of the fund upon which they are to be charged. There is no fixing of any number of Judges. But the whole thing is left in a general way to the Governor to appoint as he pleases. I was referring to this because it is very essential to apply the test given here

by Dicey as to what is the law of the Constitution and what is constitutional convention. This is what he says of constitutional law and constitutional convention. He says, "The test of it is, can the Courts get at a breach of one or the other? There is the maxim that the King can do no wrong: the Courts can reach that—they can prevent the King from being sued. That the King can dispense with the observance of a statute: that the Court can disregard." Then he gives the conventions, on the other hand—for instance, the convention that the House of Lords may not originate a money Bill, and so on. Supposing they did, could the Courts get at the House of Lords by way of injunction, to restrain them? No. That is the answer. The violation of constitutional conventions cannot be reached by the Courts, however wrong it may be; but violation of constitutional principle, which has come to be law—although an unwritten law—can be reached by the Courts. Now, the Court is asked to go this length, and revoke this Commission that has been issued by the Governor. It is asked to go this length, and introduce into this Act of 1882 a constitutional principle which has only been observed by legislation in England and Australia, and was only attempted to be observed here by the passing of the Civil List Act. It has only been observed from George III.'s reign to a certain extent, and subsequently by the Legislature in no longer treating it as a mere constitutional principle in the abstract. I have said enough with regard to this point.

And now with regard to what has been said as to the right of the Court to confine this Act in its operation, and to restrict it by reference to an Act which is anterior in every respect to the Act of 1882—not merely anterior in date, but which is not recognised in any way as being an Act by the Supreme Court Act of 1882, or contemporaneous with it. It is a mere financial Act, and cannot control the unlimited power given to the Governor under this Act. I have shown your Honours that up to 1858 the Crown appointed Judges at pleasure, and the salaries of two, at least, were fixed by the Act of Constitution—there was only half, so to speak, of the principle invoked into the Acts at that time. By section 12 power is given to the Crown—which does not occur in English Acts in any way: I think it occurs in the Victorian Acts where Acting-Judges are appointed—to appoint any number of Judges for temporary purposes, at such a salary as the Governor pleases, and to hold office during his pleasure—to receive amounts not exceeding the amounts payable to the Judges of the Supreme Court at the time, other than the Chief Justice. So that we see here the power contemplated by the Act—the power given to the Act by the Legislature—not only by section 5, of appointing permanent Judges of the Supreme Court from time to time, but also a large power, contrary to the spirit of the Act of Settlement, of appointing additional Judges with the same power as this Court holds. Why should this Court read into this Act a constitutional principle, so called, to the detriment of a Judge who purports to hold a permanent position under section 5? One would have thought (as the Premier says) that the appointment of a temporary Judge was undesirable. And the reason for it is so simple. He is under the power of the Crown. If this is to be so, he lies at the mercy of the Crown for salary and tenure. And yet my learned friend wants your Honours to enact—I put it in this way—to put into this statute these words, because he says they are constitutional so long ago as the Act of Settlement. I submit to your Honours that if such a principle is at the bottom of the whole of English law—as my learned friend says it is—and if it is to be made so by statute, then I submit that side by side there is nothing to prevent the Governor here, if he chose, from appointing any number of additional Judges. Of course, it is not to be supposed that he would strain the rights given to him, or that the Ministry of the day would do so—some good faith and reliance must be placed upon them; but at the same time the power is there to appoint additional Judges.

Now, your Honours, I am going to leave the question of the constitutional convention, which we submit it to be. I shall leave that for the present. But I want to refer your Honours shortly to the position we take up under the Act of 1882 itself. We maintain, taking the Act as it stands, reading it in its plain words, the Governor has been given—whether wisely or not—the power to appoint Judges from time to time. Then we say that we can invoke for this purpose the spirit of the Act of Settlement. We see it going through the Constitution Act; we see it also mentioned in the Act of 1858; and we say that it is the Legislature which ought to act in a constitutional spirit and establish the salary of the Judge. It is laid down in Todd—which I find, as far as I am concerned, the most convenient book on the subject, although I can refer to many others—in the first volume, speaking generally of the appointments and remuneration of public officers—and this is where the Crown exercises its prerogative, not where it exercises its right under the statute (Todd, Vol. i., p. 401)—

"The authority that appoints to office is necessarily competent to dismiss any insufficient or untrustworthy servants. It is also the proper judge of their qualifications and of the remuneration they should receive. In all such matters Parliament has no right to interfere, except in cases of manifest abuse or corruption, when it may be called upon to exercise its inquisitorial power. Upon such occasions, however, the Houses of Parliament are constitutionally empowered to institute investigations, to declare their opinion as to the manner in which this prerogative has been exercised in any particular instance, and, if need be, either to appeal to the Crown to redress the grievance or to proceed to remedy it themselves by an act of legislation."

Now, granted, as in this case, that the Crown is exercising in a proper way the powers given to it under the Act of 1882, of appointing a Judge, and of stating the remuneration that the Judge was to receive, the Legislature, on the other hand, had the power given to it—which is pointed out by Todd here—to censure and, if need be, to turn out the Ministry if it disapproved of the exercise of the right of appointment, or to pass an Act of Parliament revoking the appointment, or to take care that the mischief did not occur again by passing an Act of Parliament limiting the number of Judges. There are all those safeguards if the Governor went out of his way and appointed a Judge—there are all those constitutional safeguards which can be invoked by the Legislature. I submit that the Legislature would, under these circumstances, not visit the offence—if you can call

it so—of the Governor upon the person whom he has appointed, if there is nothing against that person being appointed. I think it is useful to refer here to what was done at the time Sir Robert Collier was appointed to the Privy Council. The action taken by the House of Commons then was, I submit, the proper and constitutional course which should have been taken in this case. This occurred in 1872. Sir Robert Collier was appointed temporarily for three days to the Court of Common Pleas, with the view of qualifying him, by having held that office, to be a judicial member of the Privy Council. I think I am entitled to refer to what took place in the House of Commons. The result was that the Government were very nearly turned out—they only got a majority of 27. That was a vote of censure passed upon the Government for having made such an appointment.

Sir R. Stout: And the Government were defeated at the poll.

Mr. Harper: Yes! I am glad my learned friend has told me so. I am glad to learn that the Government were beaten upon the poll. As pointed out in Todd, Parliament has got its powers, and we cannot control them in any shape or form. I allude to this to show that if the Ministry or the Government for the time being attempt in any way to increase the number of Judges, Parliament has got its remedy. Therefore, there was a reason, and, I submit, a good reason, why the Legislature should be satisfied to trust to the Governor exercising this unlimited power of appointment in the first instance. I say that, in answer to what my learned friend has repeatedly said, over and over again, that your Honours are bound by this constitutional principle that the salaries must be ascertained and established before any appointments.

Sir R. Stout: But what was unconstitutional in the appointment of Sir Robert Collier?

Mr. Harper: I am only showing what was done in that case.

Mr. Justice Conolly: There was a vacancy in the Court of Common Pleas at the time.

Mr. Harper: Yes, but it was looked upon as not a proper act on the part of the Government. There is another passage in Todd which I shall read—it may be regarded as a little more against me than the other one, but I do not dispute the power of Parliament to interfere in any shape or form——

Mr. Justice Richmond: You are rather suggesting that the power was left unlimited—that as many Judges as the Governor is advised to appoint the Legislature ought to provide for?

Mr. Harper: Yes.

Mr. Justice Richmond: Is not that rather loading your argument, and might it not sink it?

Mr. Harper: Yes, if the power were not properly exercised by the Governor. But I am assuming, and we must give credit——

Mr. Justice Richmond: If you are trying to convince us that the House ought to provide for every additional Judge that the Governor chose to appoint without consulting it, we might find it difficult to believe in the existence of such a power in the Governor.

Mr. Harper: I submit that, taking the Act by itself, and reading it *in pari materiâ* with English and other colonial statutes—there being no limitation in number, there being a fixity of salary, and there being no source from which that salary is to be derived—then I submit that certainly with regard to the number the Legislature have chosen to give the Governor power to appoint Judges—and he has done that in past times, as has been seen from the original number of two being increased to five. It is true, it is said there is provision for five Judges, but they are not limited to the number of five by the Act of 1882. If it can be said that the limit is five, then that ought to have been put in the principal Act itself, which, however, gives the power to appoint from time to time.

Mr. Justice Richmond: Here—and this seems to be the difficulty of your argument—the Governor has power to appoint, but the Legislature must provide; and if the two do not concur we come to this difficulty—and I venture to call it a scandal—of having a Judge of the Supreme Court without having a salary provided.

Mr. Harper: That is, of course, a difficulty I am coming to; but, I submit again to the Court, if the difficulty and scandal exists, it has been created by the Legislature in this particular instance; and a reference to *Hansard* will show that. What we submit is that, notwithstanding the constitutional principle laid down in the Act of Settlement, under the terms of the Act of 1882 it cannot be said that such a power of appointing from time to time has been limited by that principle as if it has to be read into the Act, and that no more than five Judges were to be appointed. We submit that the Governor had the power in the first instance, and it comes right down from the ordinances. It has been given to him advisedly, and the words "from time to time" occur right through. A Judge is a Judge all the same, salary or no salary. The fact of a salary not having been appropriated to him cannot, I submit, invalidate his appointment and enable your Honours to repeal this Commission. The only way in which that can be done is—and your Honours are invited to do so by my learned friends—that those words "from time to time," in the Act of 1882 and the preceding Acts, should be limited by reference to other Acts giving salaries to the Judges under those Acts. I may put it in this way: Supposing, in the Act of 1882, the words had occurred "from time to time," as they do, and there were salaries also fixed to be paid to Judges generally, but not the exact number, it could not be contended for one moment that the Governor would not have the right to appoint. He would have to take the initiative in doing so. It is given to him to do so in the first instance. So in this case we submit that, however unfortunate the circumstances may have turned out, for which we are not responsible, the appointment is none the less good. That brings me to where I started this morning, when I said advisedly that all the circumstances surrounding the appointment of Mr. Edwards in this case were according to the Act in the first instance; and the Commission was issued in the first instance by the Governor, and I have not been able to find any authority—and I submit there is none—to show that the Commission can be revoked. We shall be prepared to show that there may be an office without compensation, which cannot be reached by *scire facias;* and so in this case we shall rest our case in that respect, not mainly, but as a

consequence upon what we have said we shall rest our case, if we are driven to that—that the appointment must be good notwithstanding that there has been no salary attached to it. However undesirable it may be to have a Judge without a salary, however much it may not be contemplated by the Constitution, still, the validity of the patent cannot be called in question on that account. I would like to refer your Honours to the case Regina *v.* Rogers, *Ex parte* Lewis (4 Victorian Law Reports, p. 335). In this case a County Court Judge was dismissed, with a lot of others, on "Black Wednesday." He afterwards, apparently, insisted on carrying on his office as a County Court Judge. He was called upon by *quo warranto* to say by what authority he claimed to exercise the office of Judge of the County Courts, and so forth. The whole question, which was very elaborately argued, turned upon the question—the Court was not unanimous in its decision—whether this Judge's patent could be revoked, and whether it was not practically during goodb ehaviour. It also turned upon the question, incidentally, that there had been no appropriation made by Act of Parliament. It was held ultimately, by Mr. Justice Barry and Mr. Justice Molesworth, that it was a patent during pleasure, and therefore could be revoked by the Governor, as it had been. I cite this case because it is an instructive one, inasmuch as they traced the history of the tenure of Judges in England; and in a very valuable note, given at page 355, compiled by Mr. Justice Barry, he gives a list of no fewer than twenty-two Judges who were dismissed, superseded, or prohibited from sitting in the Courts of Queen's Bench or Common Pleas. Amongst that list occur the names of two Chief Barons, who held their Commissions during good behaviour. One of them, Sir John Walter, who was Chief Baron of the Exchequer in 1630, and who had been appointed during good behaviour, refused to surrender his patent. He died about six months afterwards, but apparently his position was not filled up, or any proceedings taken by way of *scire facias* to repeal the patent. There is another case, that of Sir John Archer, who, in the same way, refused to give up his patent. He was suspended, and no proceedings were taken by way of *scire facias* to repeal his patent. Sir John Archer, who was a Puisne Judge of Common Pleas at the time of Charles II., was dismissed A.D. 1672, and, disregarding the Royal prohibition, put the Crown to a *scire facias* to repeal his Commission; which it was not expedient to bring. See also Slingsby's case."

The Chief Justice: You do not say that that shows that this is not a right proceeding?

Mr. Harper: We do not say that, but we say this Court cannot repeal this Commission because there has been no appropriation of any salary. We say Mr. Justice Edwards still remains a Judge even without a salary under the Act of 1882.

The Chief Justice: I do not understand that to be the argument.

Mr. Harper: That is my argument. That is the position we take up.

Sir R. Stout: I never used that argument at all.

Mr. Harper: I did not say you did. Chief Justice Stawell dissented from this judgment, and at page 378 he says,—

"In answer to the objection that, conceding the Judge could not be removed from office, yet, as the necessary supply might not be voted by Parliament, and the office could not continue without salary, the office itself would be abolished, it may be sufficient to observe that an office may exist though no fee, 'annual or casual,' be attached to it (Bishop of Salisbury's case); and this view of the law was adopted by Lord Ellenborough in Regina *v.* Bingham (2 East, 37)."

As I have mentioned, in this case it was argued, as a second point, that Parliament had not appropriated any sum of money. In Comyn's Digest A appears the following: "So, in the grant of a new office, the gift of a fee, casual or annual, is not necessary (Cont. 27 H. 8 28, R. Acc. Mo. 809 Acc.), for he shall have a *quantum meruit* for his labour." In Hardress's Reports, at p. 351, it says, "Besides, a fee is not of necessity (*vide* Moor, p. 808, 809—the Bishop of Salisbury's case—where it is held that the constitution of a new office and officer is good in law though no fee, neither annual nor casual, were annexed to it at first)." I would refer your Honours to Croke (Charles I.), page 205. He says,—

"On the 18th of November, 1630, in this term, John Walter, Knight, the Chief Baron, dies at Serjeants' Inn, being a profound learned man and of great integrity and courage, who being Lord Chief Baron by patent, 1 Car. I., *quamdiu se bene gesserit*, being in the King's displeasure, and commanded that he should forbear the exercising of his judicial place in Court, never exercised his place in Court from the beginning of Michaelmas term, 5 Car. I., until this day; and because he held that office *quamdiu se bene gesserit*, he would not leave his place, not surrender his patent, without a *scire facias*, to show what cause there was to determine his patent, or to forfeit it; so that he continued Chief Baron until the day of his death. But it appears that the Judges of both benches are made only *durante bene placito regis*, so as they are determinable at the King's pleasure."

It appears subsequently that his successor was appointed in Hilary term, a proceeding which would show it to be after the death of the Lord Baron who occupied the office. Whether he got pay or not history does not tell us, but he kept his office and maintained his right to retain his patent, and no proceedings were taken by way of *scire facias* to repeal it. Then it is well accepted that in England there is the power to remove Judges by joint address of Parliament presented to the Queen; but it has been held in practice that, notwithstanding that power, there is also power to remove a Judge by way of *scire facias* for the same reasons that make him removable on the joint address of the House of Commons and the House of Lords. That was to a certain extent touched upon in the celebrated case of Sir J. Barrington, who was removed on the joint petition of both Houses presented to the Queen.

The Court adjourned from 1 p.m. for an hour. On resuming—

Mr. Harper: I was about to point out at the adjournment a statement contained in Todd on "The Duties of Parliamentary Government," under the same chapter—"The Judges in relation to the Crown and to Parliament" (2nd volume, page 728). I am pointing this out for

the purpose of showing what extreme steps can be taken, and how rarely they are taken, for the purpose of removing Judges and impeaching their commissions,—

"To the same effect, Mr. (afterwards Lord Chief Justice) Denman stated at the bar of the House of Commons, when appearing as counsel on behalf of Sir Jonah Barrington, that independently of a parliamentary address or impeachment for the removal of a Judge, there were two other courses open for such a purpose. 'These were—(1) a writ of *scire facias* to repeal the patent by which the office had been conferred; and (2) a criminal information [in the Court of King's Bench] at the suit of the Attorney-General.' By the latter of these, especially, the case might be decided. Elsewhere, the peculiar circumstances under which each of the courses above enumerated would be specially applicable have been thus explained: First, in cases of misconduct not extending to a legal misdemeanour, the appropriate course appears to be by *scire facias* to repeal his patent, "good behaviour" being the condition precedent of the Judges' tenure; secondly, when the conduct amounts to what a Court might consider a misdemeanour, then by impeachment; fourthly, and *in all cases*, at the discretion of Parliament, by the joint exercise of the inquisitorial and judicial jurisdiction conferred upon both Houses by statute, when they proceed to consider of the expediency of addressing the Crown for the removal of a Judge. By these authorities it is evident the Crown is duly empowered to institute legal proceedings against the grantee of a judicial or other office held during 'good behaviour' for the forfeiture of such office on proof of 'misbehaviour' therein."

Now, your Honours, for what it may be worth, it seems that the extreme proceeding by way of *scire facias*, if taken, would be taken on grounds analagous to those for the removal of a Judge by joint petition of the House of Commons—that is to say, as was done here, it must be on the ground of misconduct, good behaviour being the condition precedent on which he holds his office. That only brings me to point out again to your Honours that in this case it is going to a far greater extreme. It is a case—the only one in existence of its kind—in which it is sought to cancel and repeal a Judge's patent, simply, not, of course, on the ground of misconduct or incompetency, but simply on the ground laid down in Foster on *Scire Facias*, "That the King hath granted something which by law he could not grant."

Mr. Justice Richmond: Judgment in these proceedings would, of course, not be judgment of cancellation, but judgment of ouster.

Mr. Harper: No, your Honour; I submit that that would not advance the case any further. Mr. Edwards would still have his Commission unrepealed. This is a mixed case of *quo warranto* and *scire facias*. They are asking that the one may follow the other.

Mr. Justice Richmond: You suggest that they cannot be combined?

Mr. Harper: I suggest that most confidently—that you cannot deprive a person who is the holder of an office by Commission, except by cancelling the Commission. So long as that remains he could continue in office.

Mr. Justice Richmond: *Quo warranto*, then, is inapplicable?

Mr. Harper: It is not laid down as one of the modes of procedure where there is a patent issued.

Mr. Justice Richmond: *Quo warranto* is not?

Mr. Harper: It is only so where there has been a usurpation following a suspension of the office under which office was held. Take the case cited already, Regina *v.* Rogers (Victorian Law Reports). I would refer your Honours to that, for I think Mr. Justice Richmond's question is answered by it. It seems to have been accepted by Justice Barry and Justice Molesworth, who were the Judges in the case Regina *v.* Rogers. During the course of the argument——

The Chief Justice: What was the procedure.

Mr. Harper: The Governor in Council had removed from office a County Court Judge because it was said a County Court Judge held office during pleasure. This the County Court Judge denied, and claimed to exercise his office, and then they went by *quo warranto* to oust him from office, it having been cancelled previously to the hearing. The practice is given on argument, which seems to have been agreed to. The counsel arguing in the case says (pages 344 and 345),—

"The Court will not on *quo warranto* inquire into its validity. It can only be inquired into by *scire facias* issued at the suit of the Attorney-General, or by an *ex officio* information." Then Justice Barry says, "Or by *supersedeas*." Then Justice Molesworth says, "The precise question is not whether Judge Rogers is a Judge of the County Court at all, but whether he is a Judge in these places. His Commission appoints him to these Courts, and so long as he holds that Commission under the Great Seal, this Court will not oust him by *quo warranto*." There the question in dispute was not whether he held his patent, but whether the authority was during pleasure of the Governor. Now, in Foster's book on the writ of *scire facias* it is said that the Queen can repeal her own grant; as when she hath granted anything which by law she cannot grant in her own right, and for the advancement of justice she may have a *scire facias* to repeal her own letters patent; or, where a patent is granted to the prejudice of the subject, the Queen, of right, is to permit him to use her name for the repeal of it, in a *scire facias*, at the Queen's suit, and to prevent multiplicity of actions, for such actions will lie notwithstanding such void patent. And so in Bacon's Abridgement, under the title *Scire Facias*, Vol. vii., at page 137, it says, "The writ of *scire facias* to repeal letters patent lieth in three cases: Firstly, when the King by his letters patent doth grant by several letters one and the self-same thing to several persons, the first patentee shall have a *scire facias* to repeal the second; secondly, when the King doth grant a thing upon a false suggestion, he, *prærogativa regis*, may by *scire facias* repeal his own grant; thirdly, when the King doth grant anything which by law he cannot grant, he, *jure regis*, and for the advancement of justice and right, may have a *scire facias* to repeal his own letters patent."

Sir R. Stout: That is the reason we coupled both in these proceedings.

Mr. Harper: Well, I said so at the commencement, that the proceedings probably could not—

I did not say could not possibly be so taken, for we are not taking technical objections to the mode of procedure. But I submit to the Court that it is perfectly plain that if the Court goes so far it will have to go further than merely to say that Mr. Justice Edwards has no right to usurp the office which he purports to usurp; they will have to go further, and cancel these letters patent as being a record which can be got at by the Court. Otherwise Mr. Justice Edwards could go on, I submit, attempting to hold his position under an unrepealed Commission so long as it remains unrepealed. I have already referred the Court to the latter part of the judgment, where Chief Justice Stawell states that there may be an office without payment, and that there need not necessarily be payment attached to it. Of course, that brings us to this position in this case—one we have had to face all through—namely, that we cannot control, that we can say anything at all as to what Parliament has done or ought to do or would do in this case. We can say nothing about that; we cannot import it into the case at all; but we do rely upon this—and I once again refer the Court to the great distinction that has been drawn by Mr. Dicey in his book, between what may be called the law of the Constitution and the function of the Constitution—and we do rely upon this: that the Act itself under which Mr. Edwards received his appointment of necessity put the initiative upon the Crown to make the appointment. I omitted to support my statement before the adjournment, and I should like to support it, even at the risk of repetition. It has only come into my mind since, but I had it on my notes, and I wish to say that the Court will see that when the Constitution Act was passed in 1852, and between that time and up to the end of 1858, when the first Supreme Court Judges Act was passed, up to that time the so-called constitutional law, which my learned friend stamps as absolute constitutional law, was not observed in any way in New Zealand, with the exception of as to the fixing of salaries. The Judges up to that time still held their offices at the pleasure of the Crown, and the number was practically unlimited. It cannot be said for a moment that under the Constitution Act the number was limited by the Crown itself in assenting to the Constitution Act. When the Constitution Act was given to New Zealand it cannot be said for a moment that it was limited in principle to two Judges, for whom salary was provided under the Act, because we find still the old ordinance was in existence—the ordinance of 1844, which gave the Crown unlimited power after the Constitution Act, the same that it had before, in appointing any number of Judges. I think it is important also to add this, looking at the Act of 1882, where this same unlimited power of appointment is repeated in the very same words: Can it be said that the Governor, in appointing Mr. Edwards under that Act, violated any constitutional principle. That he was appointed without first consulting Parliament cannot do away with the validity of the appointment under these general words. I am not going to address the Court in particular with reference to the question of the construction of this statute by the light of other statutes. I am going to leave that to my learned friends by arrangement. Neither do I intend to address the Court with reference to the case of Cox *v.* Hakes, and the other cases connected with the matter of contract, which still remains to be discussed in the case. I have a little more to add to the Court in connection with the general constitutional aspect of the whole subject, and I wish to impress that upon the Court before closing this part of the argument, subject to what my learned friends may say—I wish to impress upon the Court again, as at starting, that this is a most singular case. It is of greater magnitude in one sense of the word than even the case quoted in the course of the argument, which was a case where there was an attempt to give a further right of appeal, which was not successful under the Habeas Corpus Act, and in that case Lord Halsbury starts by stating that it is one of the most important cases that ever came before the Court; and in this case, although the questions may not be difficult either in themselves or in the law that is brought to bear upon them, still, the object of the case which is before the Court is, I submit, one that the Court will take into the very gravest consideration before it will say it is possible to import into a statute such as the Court has before it what at most may be termed a doubtful question as to whether it is the law of the Constitution or a convention of the Constitution. It is admitted by the other side that it is necessary to read something into that statute before the Court can say that this appointment of Mr. Edwards was invalid and not according to law. It is necessary for the Court to do so; and I once more submit, with some confidence, that the Court will see that this so-called great principle has never been accepted in any way but by actually putting it into and introducing it into all the statutes which apply to the appointment of Judges. It has never been left to be implied, never left as a matter of inference, and never left to these numerous canons of construction to be brought to bear upon any statute which may come before the Court. The Legislature at Home has been careful, although the process has extended over many years, step by step, to secure the independence of the the Judges as well as their salaries, and we see how far they have gone. They have gone a step further in America, and in Victoria they have gone as far as in England; but our Act does not go so far, and it may be for a purpose that it does not go as far, especially when it contains side by side with this unlimited power of appointment also an unlimited power for the appointment of temporary Judges. I may say, in answer to what my learned friend said yesterday, that the Governor might go so far as to pack the Bench if he chose to do so; but under the Act he may, if he chose to appoint half a dozen temporary Judges, and to allot to them salaries during his pleasure, there is nothing to prevent him doing so under the 12th section. It would probably be very unconstitutional, but still, strictly speaking, it could be done, and when we are arguing in this way we may as well argue down to the bed-rock; and there is nothing to prevent him—he has power so to appoint temporary Judges.

Sir R. Stout: Only during pleasure.

Mr. Harper: Only during pleasure. That is all the more serious, for then the independence of the Bench would be utterly gone, for all the constitutional safeguards would be taken away. If we are to argue the matter in that way it will go to that length, and I am perfectly correct in pointing that out to the Court. I submit to the Court generally, with regard to the Act, that it does not

attempt in any way to tie down the Legislature or the Governor acting through the Act to the appointment of any number of Judges, and the fixing of their salaries as a condition precedent to their being appointed. My learned friend stated to the Court yesterday—it was rather in the way of peroration that he put it—that the dignity of the Bench had suffered through what had been done. I am not going to cavil at what my learned friend says. We all wish to see the dignity and independence of the Bench supported as far as possible; but I think, to put it colloquially, the boot is on the other leg, and say that, as we read the law, the dignity of the Bench has been upheld as far as possible by the constitutional appointment in the first instance of Mr. Justice Edwards, an appointment which was perfectly proper. All the surrounding circumstances showed that it was proper in every way—that there was reason for it, and that Mr. Justice Edwards accepted it on condition that he got his salary, and that everything was done so far as it could be done. Whatever my learned friend may say, Mr. Justice Edwards was appointed by the Governor, and we may presume that the Governor was acting on the advice of his Responsible Advisers, as well as on the advice of the Crown Law Officers, at that time. Therefore I do not think it lies in my friend's mouth at all to attempt, in a serious case of this sort, where nothing can be said against my client with reference to the appointment so far as his appointment *per se* is concerned, to say that he himself brought about any question relating to the dignity of the Bench or of his position thereon.

Mr. Chapman: May it please your Honours, I propose to say a few words in the first place about the argument of my learned friend on the construction that should be put on the Governor's warrant to Mr. Justice Edwards. Sir Robert Stout said that his Commission as a Judge was to be taken as auxiliary to his Commission as Commissioner—that the two must be read together, and that the Commission of the Judge was to be read as simply giving the status of Judge with its emoluments and dignity, and that the two fell with the latter appointment; and in order to enforce that argument he made use of letters which were sent with the Commission. The letter which Sir Robert Stout relied upon was this:—

"In reference to the conversation I had with you on the subject of the appointment of a Commissioner under section 20 of 'The Native Land Court Acts Amendment Act, 1889,' I have now the honour to inform you that His Excellency the Governor has been pleased to approve of your appointment to that office. It has appeared to the Government, and such appears to be the general feeling, that for an office of such importance, involving such large interests, the Commissioner should have the status of a Judge of the Supreme Court, and therefore you will be appointed to that office also."

That is the letter of the 1st March, 1890, on page 2 of the case; and that, it was submitted, shows that it was not intended to appoint Mr. Justice Edwards as a Judge of this Court, but that it was intended to appoint him as Commissioner with—whatever this means—the status of a Judge of the Supreme Court. Now, had that letter been intended to do that—had that been the intention of the Government—it would, reading that letter with prior correspondence, have been actually a fraud upon Mr. Justice Edwards to have put the matter in that way, when it is manifest from the previous conversation, and from the correspondence, that Mr. Edwards actually refused any such appointment as that. He refused the appointment of a Commissioner and Judge when the appointment was proposed to last only so long as his office of Commissioner should last. When it was proposed that his position as Judge should last only so long as his position as Commissioner that was refused. That is manifest from the correspondence. My friend has read the letter of the 1st March; but why did he not also read the letter of the 6th March.

"I have the honour to transmit to you the accompanying Commission, under the hand of His Excellency the Governor and the seal of the colony, appointing you to be a Judge of the Supreme Court of New Zealand.

"I also enclose a Commission assigning you to hold the office of a Judge in bankruptcy."

Now, if he was to have the office of Commissioner with the status of a Judge of the Supreme Court—whatever that may mean—why should he be appointed a Judge in Bankruptcy? because that gave him really nothing additional, and that appointment could only be made on the assumption that he was to exercise his function of a Judge—that he was, in fact, to be a Judge. The conversation with the Premier is set out on page 6 of the case—"The said Premier then offered to the defendant the offices of a Judge of the Supreme Court of New Zealand and of Commissioner under the said statute, at the same salary and allowances as the other Puisne Judges of the said Court, and the defendant agreed to accept the said offices on those terms"—must be also considered by the Court. If the Minister had only sent Mr. Edwards a Commission as Judge which was only to last while the office of Commissioner lasted, then that would have been departing from the agreement—the honourable agreement—which was made between himself and the proposed Judge. But there is a very excellent reason, I submit to your Honours, why your Honours should not adopt that sort of construction. Sir Robert Stout has attempted to read into these Commissions—he has attempted to read into both Commissions the correspondence which took place with the Minister. I submit that cannot possibly be done. That amounts to this: It is controlling an instrument of high solemnity by means of an instrument of low solemnity; and that cannot be done. Anything in writing cannot be controlled by mere words, by mere parole. If there is a deed under seal, that cannot be controlled even by writing, and, *a fortiori*, an instrument of such high authority as letters patent from the Crown cannot possibly be controlled by a letter from a Minister, or by a letter from any person, however high in office—not even by a letter of the Governor himself. I apprehend that that principle is unassailable. Of course, as a matter of fact, looking at the Commission alone, the whole of that argument disappears. Looking at the Commission it is found not simply to give the status of a Judge, but to give the office of a Judge.

Mr. Justice Richmond: I do not know what "status" can mean if not the office.

Mr. Chapman: I have been attempting in my argument to show that I do not profess to understand what was meant by "status."

Sir R. Stout: I never argued, what my friend said I argued.

Mr. Chapman: My friend's argument was that the Commission as Judge was auxiliary to the Commission as Commissioner under the Native Land Act, and fell with it.

Mr. Justice Richmond: It seems to me that the power of a Judge is as nothing to the power given under the Commission. The powers given to Mr. Edwards as Commissioner in many respects exceed those which are exercised by a Judge. There is given a wider discretion in dealing with applicants to the Commission than is given to the Supreme Court with regard to litigants which appear before it. It is altogether different from the Commission of which I was the head some years ago, which simply had power of inquiry and report. The power to be exercised by Mr. Edwards as Commissioner was so extensive and, I may say, so arbitrary that I cannot wonder that it was contemplated to confer it upon an officer who should have the high status of a Judge of this Court. The powers given to the Commission over which I presided were as nothing compared with the powers conferred by the recent Act, because in the former case the power was simply that of inquiry and report.

Mr. Chapman: My friend Sir Robert Stout used not, perhaps, these words, but what amounted to the same thing, that the Commission of Mr. Edwards as Judge was auxiliary to that of his Commission as Commissioner.

Sir R. Stout: Yes; I said so.

Mr. Justice Richmond: As regards the intentions of what we may call the parties—that is perhaps scarcely a proper phrase here, but is intelligible—Sir Robert Stout argues that, at the beginning of what may be termed the bargain, the Commissionership was the service to be engaged for. The Judge's Commission was auxiliary and merely to give a standing. I will not say "a status," because its sense is not quite clear. That was the argument.

Mr. Chapman: He read the letter of 1st March without reading the letter of the 6th March, and without reading that portion of the negotiations which took place in words alone.

Mr. Justice Richmond: This Court has no power to interfere, even if a Judge's Commission was something which went beyond what the parties agreed to.

Mr. Chapman: I was going to argue that this Court cannot go behind the Commission to ascertain what was said before a Commission was issued, in order to discover whether the Commission itself is good or bad. There is another point connected with the letters. I may say at once we do not rely on the letters to show a contract to appoint Mr. Edwards a Judge. That is not the purpose for which the letters were put in. The warrant itself is the justification on that point. But the letters show something else. We wish to show that the letters ascertain and establish the salary and emoluments of the Judge, and for that purpose we rely on the whole correspondence, not merely the letters, but also the verbal correspondence. It would appear from that, that Mr. Justice Edwards was not satisfied to take a salary merely at the rate paid to a Judge. He wanted something more. When the appointment was made there was the stipulation that the salary and allowances should be the same as those of a Supreme Court Judge. The letters and conversations ascertained and established the salary. Sir Robert Stout submitted that certain letters only could be looked at. That is to say, not the letters which led up to the contract, but the final letters, which he said embodied the agreement between the parties. I submit that is not a proper way of looking at it. Supposing it were sought to make out a contract between two parties before a Judge, the whole of a correspondence would be put in, and not only that, but in all probability the conversations which led up to the correspondence would be before the Court. That would be to ascertain whether there was a consensus. Once a consensus was established, the letters making that consensus would be looked at to ascertain its meaning. And so I submit in the present case. No one letter here professes to give the whole contract—not a single one of the letters. They were not written with that object. The contract, such as it was, was by parole. It was made with the Premier when he said that Mr. Edwards would be appointed with the emoluments of a Judge of the Supreme Court. I was unable to understand on what principle Sir Robert Stout said that one letter only would be looked at. If we were dealing with the Statute of Frauds it might be a different thing. I do not say it would; it might be. However, in the present case the Statute of Frauds has nothing to do with the matter. It does not relate to the matter in the slightest degree. The Statute of Frauds is not binding on the Queen, and it could not be introduced in this case to govern a contract made with the Queen. I apprehend that it is quite well established that the Statute of Frauds does not bind the Queen, but, if necessary, I can cite authority for it. Chitty on Prerogatives, 360 and 383, and also the case of the Wellington and Manawatu Railway Company *v.* the Queen (8 N.Z.L.R., 132). In that case it was argued, at page 142,—

"The Statute of Frauds does not bind the Crown. A somewhat similar point was raised in Brogden *v.* The Queen (1), on the statute of set-off: see Chitty's 'Prerogatives' (2). It is there stated that the doctrine was doubted by Lord Hardwicke as to the Statute of Frauds; but the case mentioned—Adlington *v.* Conn (3)—shows he doubted the doctrine as to all statutes, than which nothing is better established."

It was only noticed slightly by the Court, but, I apprehend, sufficiently. Mr. Justice Williams said,—

"In order that the Crown may be said to acquire, I quite concede that all that it is necessary to prove is that there was agreement, by parole or otherwise, between the Natives and the Crown, that

they should give up their possessory rights for the benefit of the Crown. If such an agreement had been proved the suppliants would have been entitled to recover."

I apprehend that principle is thoroughly well established, and, unless a clear case could be cited to the effect that the Statute of Frauds does bind the Queen, I take it that the larger principle would rule the case.

The next point relied upon by my friend was that it was a general constitutional principle that the salary of the Judges must be ascertained and established before an appointment was made. My friend went further than that, and said that it is a constitutional principle that not only is the salary to be ascertained, but the amount, whatever it may be, must be fixed by Act. I apprehend that if he is obliged to go to that length, that every authority almost is against him. However, taking it not so wide as that, I propose to say something on that point. He says that it is a constitutional principle. Now, I apprehend that if it is a constitutional principle it must be so in other places than in New Zealand. It must be a principle that is carried with English colonists wherever they go. I do not see how otherwise it can be invoked. It must be taken with them by British colonists wherever they go, or it must be shown that it has been introduced by some Act of Parliament. In the first place, it undoubtedly was never a common-law principle; it was never the common law in England, and it found its way into the statute-book at the time when the Commons were in the course of gaining the upper hand in the affairs of the kingdom. Further, it did not arise by dint of constitutional usage and precedent, but it arose when it did arise *per saltum*—that is to say, by statute—and it is only by considering the various statutes on the subject that have been passed that we can arrive at such a constitutional principle existing at the present day. My friend has carried the constitutional principle very much further than it was intended to carry it at the time it was introduced by statute. There is no doubt—all history shows it—that what Parliament was aiming to destroy was the undue influence of the Crown over the law Courts. That was what had been a scandal in one of the preceding reigns, and a determined attempt was made to destroy what was considered the undue influence of the Crown over the Courts at Westminster. That, I submit, was the mischief which was to be remedied by the new lords, and that is one of the inquiries always made in construing statutes—that is, to ascertain what was the common law before the new law was passed; and next, what was the mischief intended to be remedied; then, finally, to inquire what remedy Parliament has given. In the present case, I submit that the mischief was the undue influence of the Crown. I submit that at the time when the Parliament was trying to control the power of the Crown over the Supreme Courts of the Kingdom no one thought of controlling the power of Parliament, and, further, no thought arose in the mind of any constitutional writer, either of that period, or apparently of any subsequent period, that any action was desirable in order to remove the control of the Courts from Parliament. The argument here is this: that the control of Parliament is taken away by delivering the Courts over, bound hand and foot, to the Crown. I confess that that is an extraordinary argument on the part of my learned friend; it might have come from a high prerogative lawyer without exciting surprise, but I was surprised at it coming from my friend.

Sir R. Stout: I never said that.

Mr. Chapman: What my learned friend said was this: That the Courts might be packed, if an appointment like this was allowed, by appointments made by the Governor; and he said, further, that temporary Judges might be appointed; but he had to admit that their salaries were fixed by the Governor—that is to say, that the salaries are fixed by the Governor, and that makes them independent of Parliament. Is not that handing the Courts over, bound hand and foot, to the Crown? The Governor in Council is the person whom the Judge looks to instead of looking to Parliament. He is independent of the Parliament, and he looks only to the Governor. Now, the first attempt at removing Judges from control is the statute of William III., and whether that statute was evaded or not it is difficult to tell at this length of time. Whether that be so or not, after that statute had been passed it was evidently found that the freedom was not such as Parliament thought sufficient, and accordingly fresh statutes were passed from time to time, the last being passed not only within the lifetime of all of us here, but within very late years—the Judicature Act in England. That is the last statute on the subject, and which we may say put a crown to the edifice which had been built up gradually.

Mr. Justice Richmond: What was the date of the Election Petitions Act?

Mr. Harper: 31 and 32 Vict., chap. 125.

Mr. Justice Richmond: There the words are, "It shall be lawful." Is that so?

Mr. Harper: The Queen may.

Mr. Chapman: I proceed to say that first we find a mere statutory declaration that salaries should be established, which they were not before; then we find the amount of the emoluments of the Judges fixed in George the Fourth's reign, and their being a charge on the Consolidated Fund eventually followed. These show, I submit, that the constitutional principle which my friend has invoked owes its origin entirely to statute, not to any growth of common law, or to any other kind of convention, but by the growth of the statute-book. And this statute law, I submit, the first colonists who came here did not bring with them to this colony. I prefer not to go into that question, but to take the English Laws Act. By that Act the common law was transplanted here, and such part of the statute law as should be considered as being applicable to this colony. Now I submit that it cannot be said that a provision like that of the Act of Settlement, relating to the tenure, &c., of the Judges, or any such provision as the statute of George III. fixing the salaries on any particular fund—the Consolidated Fund or any other—cannot be considered applicable to the conditions of the colony. The statute of William III. has been declared not to be applicable to the colonies. Of course, in a sense, part of the statute must be applicable—those parts of it, for instance, which relate to the succession of the Crown.

No one could ever doubt—in fact, it would be absurd to hold in any of the English colonies that that part was not applicable to the colony. But the part relating to Judges is not applicable to the colony. In a note in Bacon's "Abridgment," Vol. ii., page 387, it says, "Our distant colonies are not considered as within the compass of this statute, which is understood to be limited to the Courts of Westminster Hall"—then he draws a deduction—"therefore, the Commissions of the King's Judges in the East Indies are still during pleasure." Very well; the first Commissions to Judges in New Zealand were during pleasure. My learned friend Mr. Vogel contended that this statute became in force in New Zealand when the circumstances of the colony became suitable to it; but I do not propose to say anything on this, because that is not the construction of the English Acts Act which has been put upon it by this or by any other Courts. Though a portion of the statute is in force in New Zealand the other portion is not. There is no objection to one portion of a statute being in force in a colony; that is the case with many—for instance, the Abolition of Fines and Recoveries Act. It is perfectly clear that the parts of that Act which relate to ancient demesne and to copyhold land have no application to the circumstances of the colony; and, again, a disentailing deed has to be enrolled in Chancery, and we have no Chancery to enrol it in.

Mr. Justice Richmond: You suggest that we have entails without the means of disentailing. Perhaps you will say the statute *de donis conditionalibus* is not in force?

Mr. Chapman: It is rather a debating-society's point; but I do not imagine that this Court, or any other Court, will say it was necessary to levy a fine or suffer a recovery in New Zealand.

Mr. Justice Richmond: No; because recoveries were abolished before the colony was founded.

Mr. Chapman: It might be sufficient for any disentailing deed to be filed in this Court, that being the nearest approach we have to filing in Chancery.

Mr. Justice Denniston: You will find a Victorian decision on the point, which shows that a difference in the machinery does not prevent an Act from applying.

Mr. Chapman: The difference was relied on in the Attorney-General *v.* Stewart to show that the Mortmain Act was not in force in New Granada.

Mr. Justice Richmond: I have always thought that the so-called Mortmain Act ought to be held applicable to the circumstances of the colony; and the time may come when we may very much regret it is not.

Mr. Chapman: I merely mention parts of the Act which are inapplicable to New Zealand to show that part of a statute may be applicable to the circumstances of a colony and the rest not.

Mr. Justice Richmond: I quite agree with that.

Mr. Chapman: My submission being that the constitutional principle which my learned friend invokes derives its origin, its whole force, from a succession of statutes, and nothing else. I next wish to point out that these statutes are not in force in New Zealand. None of these statutes which my friend has invoked are in force in New Zealand. We must therefore, in order to find what the constitutional law of this colony is—we must not go to these statutes except so far as we wish to use them by way of illustration—almost, one may say, from a literary point of view, to assist in the construction of our statutes. Except for the purpose of illustration, we must look within the four corners of our own statutes in order to find what the law is in New Zealand; and I venture to submit to your Honours that your Honours will be unable—taking the statutes as they run from the beginning of the colony to the present time—to say that this principle underlies the whole of the New Zealand statutes—viz., that salaries must be ascertained and established by statute, so that by looking at the statute we can always tell how many Judges there may be sitting on the Supreme Court bench, and what the salary of each Judge should be. That I understand to be what my learned friend argues is ascertaining and establishing salaries; and I venture to say that no one looking at our statutes can say this could always be done—viz., that by looking at the statutes in force we could say what the salaries of the Judges are, and how many Judges there are sitting on the bench. In order to ascertain these things it is necessary to inquire how many Judges there were, and to ascertain what their contract with the Government or the Executive was as to salaries. My learned friend has treated this subject at some length, and I feel some diffidence myself in going into it; but I feel very strongly on the subject. I may be, of course, entirely wrong, but I feel bound to say that I feel very strongly on the subject, and it appears to me that the argument cannot be refuted. The Chief Justice, when my learned friend argued about the appointment of Justice Johnston, suggested that the Constitution Act fixed his salary. The Constitution Act, in its schedule, fixes the salaries of the Chief Justice and one Puisne Judge.

Mr. Justice Richmond: Justice Gresson only had a temporary Commission; though I understood the meaning of the observation of the Chief Justice to be that there was room for a Puisne Judge on the Civil List when Judge Gresson was appointed.

Mr. Chapman: Yes, your Honour, that was what I understood him to say; but I did not understand him to extend to anything beyond that. But there was this difficulty in this case: Mr. Justice Johnston was receiving a salary not ascertained by any statute in force. He was receiving £1,000 a year.

Sir R. Stout: We have no evidence of that.

Mr. Harper: We can get evidence of it.

Mr. Chapman: It was ascertained to the extent only of £800. I submit that is not sufficient.

Sir R. Stout: My impression is that it was only £800 that he got.

Mr. Chapman: However, we get into surer ground when we come to the later statutes. At the time of the passing of the Act of 1862 by Parliament there were a Chief Justice and two Judges. That was the actual state of affairs at the time of the passing through Parliament of the Civil List Amendment Act of 1862. The position was that there were a Chief Justice and two Puisne Judges. Now, assuming the next Judges were appointed after that Act was passed—they were undoubtedly appointed after the Act passed the two Houses of Parliament—how could we ascertain the salaries of those Judges from that Act? There was an appropriation of £6,200, and that is the whole

indication. Who can tell from this, even knowing that before the introduction of the Act there were a Chief Justice and two Puisne Judges—who can tell what salary the Judges were to have, and how many Judges there were to be? If we take it that the number of Judges was to remain the same, we are still unable to tell what were their respective salaries. If we assume there was to be an addition to their number, we are unable to tell how many were to be added or what their salaries were to be.

Mr. Justice Williams: Do you contend this: There was a fixed amount to be divided. You contend that there was power to appoint as many Judges as the Governor chose. Will you contend that those appointed afterwards would have still to share that sum?

Mr. Chapman: No.

Mr. Justice Richmond: Do you contend that, supposing all the Judges' offices became vacant, if the Governor thought fit, and if he could find people to accept, he might appoint sixty-two Judges at £100 a year?

Mr. Chapman: There is nothing in the Act to prevent it, your Honour, if circumstances made sixty-three Judges proper.

Mr. Justice Denniston: He would never be able to find sixty-two lawyers to accept the position.

Mr. Chapman: He might find sixty-two persons who had been called to the bar for seven years.

Mr. Justice Richmond: Are the unemployed so numerous?

Mr. Chapman: Your Honours must see that we have three unknown quantities to determine —namely, the salary of the Chief Justice, the number of Puisne Judges, and the salary of each— and we have only one equation to determine them; that is what is known in mathematics as an indeterminate equation; and this Act must have remained subject to an indeterminate equation.

The Chief Justice: Your contention leads to this: that one Judge might be appointed to whom the Governor might allot £6,200 as salary, and there would be no power to prevent that.

Mr. Chapman: I do not see that my argument leads to that, with all respect to your Honour.

Mr. Justice Williams: If the Governor had the original power to appoint the Judges, he could divide the amount as he chose.

Mr. Chapman: It appears to me that is the construction of the Act, though it is not necessary for my case to say so.

The Chief Justice: This was the case till the Act of 1873.

Mr. Chapman: From 1862 to 1873. In 1862 it was absolutely indeterminate. The Act of 1873 first divides it up. That appoints the annual salary of the Chief Justice at £1,700, and the annual salary of the four Puisne Judges at £1,500 each. There it is divided, but up to that time I submit that the constitutional principle my learned friend is contending for was in abeyance.

Mr. Justice Denniston: Might not the equation be determined by the Legislature going outside the Act, and finding out not only the contract, but the equity and agreement, which each Judge held? That would determine the equation.

Mr. Chapman: That is my contention. I do not say anything illogical. I only say it proves that the contention of my learned friend is invalid in New Zealand, at least—viz., that there is no validity in the appointment of a Judge unless his salary is ascertained and established by Act.

Sir R. Stout: I never said so.

Mr. Chapman: My learned friend Mr. Vogel said it; and I understood him to be adopting the previous argument of my learned friend. But I say, looking at the Judge's contract with the Crown, whatever it was—it might have been a verbal conversation with the Minister, but some arrangement there was between the Judge and the Crown which absolutely ascertained the amount that was to be paid. And I submit that from 1862 to 1873 no Judge of the Supreme Court—supposing he were put to enforce his remedy, whatever it might be, against the Crown for his salary—could have informed the Court what his salary was without reference to his contract. That is my argument—that it was not ascertained by any Act of Parliament, it was ascertained by his contract; and I submit that was perfectly legal. I have no doubt my learned friend Sir R. Stout would say that there was no Judge on the bench who was validly appointed so long as the Civil List Act was in force——

Sir R. Stout: Nothing so absurd.

Mr. Chapman: Because the amount of his salary was not ascertained nor established by Act we say that the amount was ascertained by the Judge's contract, aad that this is sufficient. Then, again, I wish also to insist on this as showing that my learned friend's constitutional principle has not the force of law in New Zealand, however valuable it may be and however wrong it may be for a Minister to ignore it. There are many things which it is wrong for a Minister to ignore, but the only constitutional remedy is to turn him out of office. I rely on this as showing that the constitutional principle invoked by my learned friend is not in force in New Zealand; that Ministers, without any instruction from Parliament or any other source, appointed the Judges under these Acts before actually they had received the Queen's assent. I say that shows that the constitutional practice invoked by my honourable friend is not in force, and that the present appointment stands on exactly the same footing as those. I should be ready always to contend in the very strongest manner that all these appointments were not only valid, but unexceptionable; but I rely on the usage of the colony in these appointments—as showing what the constitutional usage of the colony is, as showing that the constitutional usage of the colony is not such as my learned friend has contended; for I apprehend—my learned friend relied on the constitutional usage of England—I apprehend that we here, not having adopted the statutory laws of England, have nothing better to look to when construing our own statutes than the constitutional usage—which has been hitherto, at least, productive of good results. My learned friend Sir Robert Stout said that the Executive always went to Parliament before making an appointment, and Mr. Justice Conolly said that you might put it stronger—the appointment was not made until Parliament had approved.

Mr. Justice Conolly: I said, till the two Houses of Parliament here had approved, not Parliament in the general sense of the three estates.

Mr. Chapman: So I understood, your Honour. Well, my submission is, that, however true that may be, it cannot be supposed for a single instant that Ministers can ever have looked at Acts of Parliament which had gone Home for the sanction of the Queen—a sanction which, for all they knew, might be withheld—it is quite impossible, I say, to suppose that Ministers ever supposed that they were acting under the authority of those Acts. It is impossible to suppose that Ministers would ever be so badly advised, with the Constitution Act staring them in the face, and telling them that no Act had any force or validity whatever until it had received the assent of the Queen—it is quite impossible to suppose that they could be so badly advised as to think that they were acting under the sanction of those Acts of Parliament. The Queen's assent might be refused. I apprehend that, as these Acts had no sanction at all, they might be revoked by the two Houses of Parliament; so that my learned friend's contention that Parliament at least had made Judges independent, and that they were dependent only on the Queen, has no force, because Parliament the day after the Act had been passed might revoke its request to the Queen for her assent, and the Act would be nothing at all. It would be a curious constitutional question if it should ever arise, but I apprehend that the words of the Constitution Act would be too strong to be got over. These Acts have no force whatever till they have received the assent of the Queen. They palpably could not have any force to bind the Parliament which made them, for Parliament would only have to pass a revoking Act, and then the assent of the Queen would give no force to those Acts. Therefore I say that even the argument of my learned friend that Parliament binds itself has no force, because the two Houses could not bind themselves until the Queen had given her assent. These Acts, so far as validating or rendering constitutional any act of Ministers is concerned, are the same as if they had never been drafted. My learned friend, I submit, is really driven into a corner in order to support his contention of the constitutional principle by such an argument as that. If the constitutional principle exists, then the appointments were bad. I am not denying its advisability; and the existence of the principle as something which ought to govern Ministers. I say nothing about this, as this is not the place to discuss that sort of thing; but if the constitutional principle exists to the extent to which my learned friend submits, then the fact of these Acts not having received the assent of the Crown does not affect the validity of the Acts one iota. Then, my learned friend says it does not matter at all, because these Judges have been named Judges in the Commission, because it is specially put in in an affidavit specially filed. I really feel ashamed to say anything about this.

Sir R. Stout: That was not my agument.

Mr. Justice Denniston: That was not Sir Robert Stout's argument at all.

Mr. Chapman: My learned friend said something about it. He did not say it in those words, but he read the Commission.

Mr. Harper: He said it was an estoppel on the Crown.

Sir R. Stout: I said you had to read the Commission to find that they were Judges *de facto* at the time of the Commission.

Mr. Chapman: My learned friend said that it was an acknowledgment under the Seal of the Colony that these Judges were acting *de facto*. Well, we have an acknowledgment under the Seal of the Colony that Judge Edwards is acting *de facto*.

Sir R. Stout: That is the reason we are bringing *quo warranto*.

Mr. Justice Denniston: Sir Robert Stout argued that previous to the Act of 1882 the Judges' names appeared as Judges in the Royal Commission, and if you wanted to find out what they were you would find it in that Commission. I understand that to be a very different thing from saying that their appointment was validated by the Commission.

Mr. Chapman: I do not propose to occupy the time of the Bench any more. In order to save time, we have arranged to take different branches of argument, and my learned friend Mr. Cooper has something to say.

Mr. Theo. Cooper: May your Honours please, I shall take up very little time of the Court after the elaborate argument of my learned friend Mr. Harper, followed by my learned friend Mr. Chapman, but I have a few words to say upon the construction of the statutes, and on one or two minor points, also in relation to several cases quoted by my learned friend Sir Robert Stout. I shall confine my observations to the statutes themselves practically; and I submit that if your Honours trace the history of the Supreme Court from the earliest times of this colony to the present day, you will find one golden thread, if I may so term it, running through it, and that is, a reservation to the Governor of the power to appoint Judges. I shall not trespass too much upon your Honours' time if I first refer to the Charter. When this colony was separated from New South Wales in 1840 there was a Governor of the colony appointed, and a power reserved to appoint Judges. At page 7, Domett's "Ordinances," we find that under the charter of 1840 the authority or power was delegated by the Queen to the Governor. It says, "And we do hereby authorise and empower the Governor of our said Colony of New Zealand for the time being to constitute and appoint Judges, and, in cases requisite, Commissioners of Oyer and Terminer, Justices of the Peace, and other necessary officers and ministers in our said colony for the impartial and due administration of justice." Of course, the colony was then a Crown colony. Later on, before the Constitution Act, we find in the Charter of 1846, when the colony was divided into two provinces, and we had a Lieutenant-Governor and a Governor, who was practically Governor-General of the whole colony, the same power reserved. In Domett's "Ordinances," p. 36, appears the following: "And we do hereby authorise, empower, and require the respective Governors of the said provinces respectively from time to time"—in almost the same words which appear in our Act of 1882—"in our name and on our behalf to constitute and appoint Judges and, in cases requisite, Commissioners of Oyer and Terminer." Then, referring again to the constitution of the Court—the colony still being a Crown colony—the ordinance of

1844 provided: "The Court shall consist of one Judge, who shall be called the Chief Justice of New Zealand, and of such other Judges as Her Majesty shall from time to time be pleased to appoint." Before I pass to the Constitution Act and the legislation subsequent to that Act, I submit to your Honours that in framing those subsequent Acts the Legislature had been guided by the original manner in which the Supreme Court was constituted in this colony, and by the manner in which the Judges were originally appointed, and they have reserved throughout the legislation the powers reserved in the Queen's original Charter. Thus, the ordinance of 1844 evidently contemplated that the Queen should from time to time appoint additional Judges; it left it open to Her Majesty to add to the number of Judges from time to time, and left that number indeterminate. In Domett's "Ordinances," p. A.–4, we find the first provision for a Court of Appeal: "The Governor for the time being, and the Executive Council of the said colony (excepting the Attorney-General), shall be a Court of Appeal;" but that provision was expressly stated to be of only temporary application—namely, "Until there shall be within the colony a sufficient number of Judges." Then comes the Constitution Act, granting to the Queen a certain sum of money for the payment of two Judges, but leaving unaffected altogether the Queen's power of appointment. If I apprehend my learned friend Sir Robert Stout's argument aright, and follow it to its legitimate conclusion, the effect of the Constitution Act was to limit the Queen's power of appointment of Judges. I submit that could not have been so. The Queen still preserved her prerogative. It was by virtue of her prerogative the Judges were appointed, and the Governor now exercises his power of appointment as well by the Queen's prerogative as by statutory power dedicated to him in a constitutional colony. My learned friend's argument must go to this extent: that if it is necessary, in order to have a valid appointment of a Judge, that the salary shall be first ascertained and established, then our Constitution Act, in only fixing the salary of two Judges, limits it to those two Judges, and so controls the Queen's prerogative. I submit that would be an unwarrantable limitation of the Queen's prerogative, and is contrary to all authority. The Queen's prerogative can only be limited by express words.

The Chief Justice: I do not understand there is any question of prerogative.

Mr. Cooper: The ordinances preserve the Queen's prerogative.

The Chief Justice: The power is under the ordinance, surely.

Mr. Cooper: The ordinance does not give the Queen power to appoint. The ordinance is simply a statement that the Court shall consist of certain Judges that the Queen may be pleased to appoint.

The Chief Justice: She could not establish a different Supreme Court.

Mr. Cooper: She could not establish a Court with original jurisdiction. The Crown cannot erect Courts with fresh jurisdiction without the consent of Parliament, but the Queen can increase the number of Judges in Courts already in existence, without the consent of Parliament. There is the decision in the Bishop of Natal's case.

Mr. Justice Richmond: It was held that after an independent Parliament had been granted to a colony the Queen could not create a new coercive jurisdiction.

Mr. Cooper: The same question arose in Canada when they tried to introduce a Rolls Court. The Law Advisers of the Crown advised the Crown that the Imperial Government could not erect a Court of fresh jurisdiction in Canada, but it might appoint Judges of a Court which already existed. Under the ordinance of 1844, I submit to your Honours, the Queen's prerogative was untouched. The Charter of 1840 was under an Imperial statute, 9 Geo. IV., sec. 3, chap. 72, amended 3 and 4 Vict., chap. 72. The Queen's prerogative was preserved. The Legislative Council acted in obedience to the instructions from the Crown, and, in accordance with the powers which had been given to it under that statute and the Charter, it passed the ordinance creating the Supreme Court, but did not attempt by that ordinance—and it would have been an improper thing to do so—to give the Queen the power to appoint Judges. It simply created the jurisdiction, if I may put it in that way, and left it to the Queen, by virtue of her prerogative, to appoint the Judges. The Act of 1858, coming after the Constitution Act, first, as has been pointed out, altered the tenure of the Judges. The question of whether or not the Act of Settlement is in force in this colony has really very little bearing on the question at issue, but it is necessary to deal with that. I submit that that portion of section 3 of the Act of Settlement relating to the Judges was never in force in the colony. It certainly was not in operation during the time the colony was a Crown colony, if the conclusion that the editor of Bacon's "Abridgment" comes to is correct; that section in the Act of Settlement was intended simply to apply to Her Majesty's Courts at Westminster—that the section had a local significance, and nothing more. In one sense, as has been pointed out, the Act of Settlement is in force in the colony, but not in relation to the Judges, and not in the sense in which English statutes are held to be in force in the colony. The Act of Settlement appears to me to apply to the person of the Sovereign more than to her subjects. The Act of Settlement binds the Queen or Sovereign. In that sense we, being all subjects of the Queen, are entitled to the protection of that portion of the Act of Settlement. It prescribes what the Sovereign may or may not do, and the particular religion that the Sovereign shall follow. This is a personal Act, in the first sense, in relation to the Crown, or the person who constitutes the head of the State; and, in a second sense, it gives protection to the subjects of the Crown. It lays down no original law. It simply states the constitutional principle which was practically obtained by Magna Charta and the Bill of Rights. That really, I submit, was the effect of the Act of Settlement. There are two authorities upon the point which I venture to submit to your Honours in reference to the applicability of such a statute. I do not insist very strongly upon this point—it has been covered already by my friends; but I submit it is important to determine whether or not that particular clause of the Act of Settlement is in force here, or whether or not we have legislated in the light of the spirit of that section, or whether or not we have not created special legislation governing the Supreme Court, and within the four corners of which the matters lie for the determination of this

question. There is the case of Whicker *v.* Hume (7 House of Lords Cases, p. 123), in which it was held that the statutes of mortmain were not applicable to the circumstances of the Colony of New South Wales, following the case of the Attorney-General and Stewart, where the same principle was established in reference to the Colony of Grenada.

Mr. Justice Richmond: That was a very small island.

Mr. Cooper: Yes; but Whicker *v.* Hume was a case from New South Wales, and was decided in 1862 by Lord Chelmsford.

Mr. Justice Richmond: I suppose their Lordships knew of the difference in size.

Mr. Cooper: Whicker and Hume was followed by the Privy Council last year in the cases, Cooper *v.* Stewart (L.R. 14, App. Cases 286), and Jex *v.* McKinney (L.R. 14, App. Cases 77).

Mr. Justice Richmond: I have always disliked the case, because of the narrow ground it is put on. I think the colleges of Eton and Westminster, and some other places, are named in it as beneficiaries to whom these donations may be made. They are made exceptional, and if that were the ground of saying the statute did not apply—that there were some local provisions in the statute—it would be of very serious consequence to the colonies.

Mr. Cooper: The main ground on which it was held in Whicker and Hume that it did not apply was that there was not a Court of Chancery in New South Wales in which a deed could be enrolled.

Mr. Justice Richmond: It has always seemed to me to be a dangerous decision, but we must bow to the decision of the House of Lords. It has been understood that English statutes might be in force, *mutatis mutandis*.

Mr. Cooper: Lord Chelmsford says, "In the course of the argument your Lordships intimated a strong opinion that the Mortmain Act did not apply to the colonies—at all events, not to the Colony of New South Wales. It will therefore be necessary for me to address your Lordships only very shortly upon that subject. I consider that this question is almost determined by the opinion of the Master of the Rolls, Sir William Grant, in the case of the Attorney-General *v.* Stewart, because, although a distinction was sought to be established between that case and the present, by reason of the Island of Grenada, which was the colony in that case, being a conquered country, and this being a settled colony, yet I apprehend it will be found that, unless the Act of 9 George IV., c. 83, applies to this particular case, the principle involved in the decision of Sir William Grant would be conclusive on the present question. It is true that the inhabitants of a conquered country have those laws only which are established by the Sovereign of the conquering country, and that the colonists of a planted colony, as it is said, 'carry with them such laws of the mother-country as are adapted to their new situation.'" That seems to be the true ground on which to determine the question of applicability. But the opinion of Sir William Grant related generally, I think, to the Statute of Mortmain as applicable to all the colonies, for he says, "Whether the Statute of Mortmain be in force in the Island of Grenada will, as it seems to me, depend on this consideration: whether it be a law of local policy, adapted solely to the country in which it was made, or a general regulation of property, equally applicable to any country in which it is by the rules of English law that property is governed. I conceive that the object of the Statute of Mortmain was wholly political—that it grew out of local circumstances, and was meant to have merely a local operation. It was passed to prevent what was deemed a public mischief, and not to regulate as between ancestor and heir the power of devising, or to prescribe as between grantor and grantee the forms of alienation. It is incidentally only, and with reference to a particular object, that the exercise of the owner's dominion over his property is abridged." Then he says, "Now, I think, upon general principles, if the question were, without any reference to any Act of the Legislature, whether the Mortmain Act was applicable to the situation of New South Wales, I should most decidedly, without any hesitation, come to the conclusion that it was not; and therefore I think that it would be necessary for the appellants to show that under some Act of Parliament that particular law was transplanted to the colony, and was engrafted upon the law and institutions there." There is another case upon the same point that I will quote. I submit here that that section of the Act of Settlement was wholly political, and it was shown to be wholly political by the stand the King took for some time prior to the Act being passed in reference to the Bill which fixed and ascertained the Judge's salaries, or, rather, proposed to do so. There was a political party, supported, by the way, at that time by the Judges, and the King refused assent to the Bill. That political party was strong enough for eighty years to prevent that Bill being introduced again.

Mr. Justice Richmond: Do you suggest that it was the subject of a party struggle?

Mr. Cooper: I suggest it was, undoubtedly.

Mr. Justice Richmond: What is your reason for supposing so?

Mr. Cooper: Only that the King would not assent to the Bill——

Mr. Justice Richmond: King William, we know, would not give in.

Mr. Cooper: —and that he was advised not to do.

Mr. Justice Richmond: I understood Mr. Harper to say that he was not able to make out how the Judges were provided for in the interval.

Mr. Cooper: The Bill was dropped, and dropped for nearly eighty years, until 1760.

Mr. Justice Richmond: Is there any record of such a Bill having been brought in in King William's reign.

Mr. Cooper: Yes, shortly before the Act of Settlement. That Bill was not only ancillary but was intended to be introductory to the Act of Settlement; but the party in opposition to the King was not sufficiently strong during that time, nor during the two succeeding reigns, to obtain the kingly sanction to the measure, and it was not introduced again until King George the Third ascended the throne; and then one can quite understand the reason. He was a young king, and it was about the first year of his reign, and he was prevailed upon by his Advisers to approve of the measure.

Mr. Justice Richmond: The Judges seem to have been put upon the Civil List, although I think I understood from Mr. Harper that May does not mention them until 1779.

Mr. Harper: Not until 1779.

Mr. Cooper: There was a lump sum voted to the King for his Civil List, and that was the case even in this colony, and the Judges had to refer to their own contract for the terms of their appointment before their salaries could be ascertained. There was a lump sum for the maintenance of the King's household and Judiciary, and that sum was divided according to a particular agreement and arrangement the King made with the persons entitled to receive the money—showing that, so far as the Act of Settlement was concerned, the establishment and ascertaining of salaries was by the King, up to, at any rate, the year 1763, and that it was not until some considerable time afterwards that the Civil List was removed, and the Judges' salaries placed on the consolidated revenue. Then the last case on the question of applicability is the case of Cooper *v.* Stewart, reported in L.R. 14 Appeal Cases, page 286, and there is a very instructive judgment by Lord Watson upon the whole question. If your Honours permit me, I will read one or two passages. The quotations are from pages 290 and 291, and it is the last judicial deliverance on the subject.

"The extent to which English law is introduced into a British colony, and the manner of its introduction, must necessarily vary according to circumstances. There is a great difference between the case of a colony acquired by conquest or cession, in which there is an established system of law, and that of a colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions. The colony of New South Wales belongs to the latter class. In the case of such a colony the Crown may by ordinance, and the Imperial Parliament, or its own Legislature, when it comes to possess one, may by statute, declare what parts of the common and statute law of England shall have effect within its limits. But when that is not done the law of England must (subject to well-established exceptions) become from the outset the law of the colony, and be administered by its tribunals. In so far as it is reasonably applicable to the circumstances of the colony, the law of England must prevail until it is abrogated or modified, either by ordinance or statute. The often-quoted observations of Sir William Blackstone (1 Comm., 107) appear to their Lordships to have a direct bearing upon the present case. He says,—

"It hath been held that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every English subject, are immediately there in force (Salk 411, 666). But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law as is applicable to the condition of an infant colony, such, for instance, as the general rules of inheritance, and protection from personal injuries. The artificial requirements and distinctions incident to the property of a great and commercial people, the laws of police and revenue (such especially as enforced by penalties), the mode of maintenance of the Established Church, and the jurisdiction of spiritual Courts, and a multitude of other provisions are neither necessary nor convenient for them, and therefore are not in force. What shall be admitted and what rejected, at what times and under what restrictions, must, in case of dispute, be decided in the first instance by their own provincial judicature, subject to the decision and control of the King in Council, the whole of their Constitution being also liable to be remodelled and reformed by the general superintending power of the Legislature in the Mother-country."

Blackstone, in this passage, was setting right an opinion attributed to Lord Holt—that all laws in force in England must apply to an infant colony of that kind. If the learned author had written at a later date he would probably have added that, as the population, wealth, and commerce of the colony increased, many rules and principles of English law which are unsuitable to its infancy will gradually be attracted to it, and that the power of remodelling this law belongs also to the colonial Legislature. Then they discussed the question, the particular question raised in this case, which was whether the law of perpetuity was in force in New South Wales, and they came to a conclusion on that ground. Before the same Committee of the Privy Council, in the same volume, at page 77, there was another case in which the same question arose, and was disposed of in the same way. In Jex *v.* Mackinney the note is,—

"*Held*, that, on the true construction of the local Acts and ordinances, the Mortmain Act (9 Geo. II., c. 36) has not been introduced into British Honduras. Although the said Act is included in the description of laws thereby introduced, yet its provisions do not satisfy the prescribed condition of applicability to the colony."

So I put this to the Court: that when the Act of Settlement was passed the Judges who were referred to in the Act were Judges of the Superior Courts at Westminster, and those only. The Act was never intended to apply to Judges outside the King's Courts. Those Courts are Courts which have grown up with the English Constitution, and whatever that section did it was of local significance, and did not affect the colonial possessions of the Crown. That that was so is shown by the circumstance that from that time the King appointed Judges during pleasure to the East Indies, and in the early infancy of the great colonies. The main object of the statute, too, was to place the office of the Judges beyond his control—not so much the Judges themselves as the offices of the Judges. History shows conclusively that neither the Legislature nor the Sovereign ever conceived that the Act restricted the prerogative of the Sovereign or the Crown in any British possession, but only in reference to the superior Courts at Westminster. That being so, I submit to your Honours that we have only our own statutes to deal with. We have no great constitutional principle adopted in this colony through the Act of Settlement. We have only our own statutes to deal with, and the question resolves itself into a question of construction. Now, there is an authority in 23 Chancery Division, L.R., Division I., Chancery, Vol. xxiii. It arose upon the Bankruptcy Acts. There had been a number of Bankruptcy Acts prior to the Act of 1883, and a number of decisions on the law of fraudulent preference, and with a lot of Judge-made law and a lot of statute-made law the Courts

were getting into an inextricable state of confusion in endeavouring to arrive at something really definite from the conflicting statutes and the conflicting decisions. At last Sir George Jessell cut the Gordian knot, and was supported by Lord Justice Lindley and Lord Justice Bowen. On page 75 Sir George Jessell says,—

"I think it is far better that we should in all these cases look to the intention of the Act, and not entangle ourselves in an inquiry as to the precise views and intentions of the parties, in order to see what was the motive of the transaction and what was the law before the statute. The law has now been put in a definite shape and form, and our duty is to construe the words of the Act."

Lord Justice Lindley says,—

"What we have to consider is the true construction of section 92. I emphatically protest against being led away from the words of the section by any argument that the standard which the Legislature has laid down is equivalent to the standard of the old law. It may be so, but the language is different, and it is our duty to construe the language."

So I protest against Sir R. Stout's arguments being substituted for the plain words of the Act of 1882. Lord Justice Bowen says,—

"The first thing which the Courts did was to discuss the question whether the Act had altered the old law and introduced an entirely new law, and they came to the conclusion that it had not altered the old law. Then began, what I may call the old metaphysical exploration of the motives of people. The Courts first adopted a supposed verbal equivalent for the words of the statute, and then pursued the old inquiries as to what were the deductions which followed from the adoption of this verbal equivalent. And so we have been drawn into questions of pressure and volition, and at length, in the present case, we have got into a discussion as to what is the motive of a motive, whatever that may mean. I think it is a wiser policy to go back, as I do, in a humble spirit to the words of the statute."

I submit that is the true mode of construction. I do not for one moment submit that your Honours are not entitled to examine other statutes which have preceded, or statutes for which the later statute is a substitution, but I submit that this Court ought to do as Lord Justice Bowen says, it ought to go back "in a humble spirit to the words of the statute." Coming back to the statute, I submit that the Act of 1882 expressly and clearly reserves to Her Majesty the right, through the Governor, to appoint the Judges of the Supreme Court, and that that right is unlimited by any words which could restrict the number which the Governor might have power to appoint. The words of section 5 are: "And such other Judges of the said Court as His Excellency, in the name and on behalf of Her Majesty, shall from time to time appoint." Of course, the power must be exercised in a reasonable manner, and is subject to the safeguard that the Governor will only act on the advice of his responsible advisers, who are themselves answerable to the country for the proper performance of their duties.

In passing, I venture to suggest that no constitutional law or rule can entirely tie the hands of the governing body, whether the governing body be a despotic king or the power that rules our Empire now, consisting of King, Lords, and Commons. It is impossible to absolutely tie their hands. As his Honour Mr. Justice Richmond has pointed out, Parliament is supreme. It is omnipotent, and no doubt in a sense there may be great wrongs perpetrated by high constitutional power. If a weak—a constitutionally weak—Governor is supported by a corrupt Ministry, no doubt grave errors may be committed by them, and there may be grave wrong done to the country and to the Bench by the appointment of Judges. But so there may be in reference to the highest Court of Appeal in the United Kingdom. In the House of Lords, though the assistance of the law Lords is necessary to determine cases of appeal, yet each member of the House is entitled to go and give his vote on the question of law which may be submitted to that tribunal for ultimate decision. And we might suggest—it has a greater force than the suggestion made by Sir Robert Stout—that, because the Queen has by her prerogative the power of appointing Peers, and because these Peers are entitled to vote and decide as an ultimate Court of Appeal, the House of Lords could be packed for the purpose of obtaining judicial influence in favour of the Government of the day. There may be a possibility of it, but it is a possibility upon a possibility, and the very fact that the power exists, but would be so extreme a power to exercise, is the protection of the State. I will not refer in detail to the Acts between 1844 and 1882, but will make a few observations in reference to the Act of 1882, because I submit to your Honours that this is the question which the Court has to decide: What is the meaning of section 5. Now, the section states that "The Court shall consist of one Judge to be called the Chief Justice, and of such other Judges as His Excellency the Governor, in the name and on behalf of Her Majesty, shall from time to time appoint." There is no limit there—no limit of number, no limit in time of appointment. I submit that the first portion of section 5 is the substantive enactment, and that the Governor has the power to make as many appointments as he may think fit, the protection being that he will not be advised by his Responsible Advisers to make appointments unless it is in the interest of the country that he should do so. That is the real constitutional safeguard. If that section stood alone without any other section I submit there could be no doubt whatever. The proviso which my learned friend calls to his aid in limiting the words really strengthens our position. Paraphrasing that paragraph, it does nothing more than recognise the Judges previously in office. It is not a validation, but a recognition of the original validity of the appointment of the Judges to the Court reconstituted under that Act. Supposing that proviso contained the names of your Honours, even that would not limit the power of the Governor in the matter of appointing other Judges. It simply provides that the Judges in office at the time the previous Court was in existence should be the first members of the Court, and in no sense controls the power of the Governor to appoint other Judges if he chooses so to do. It is, in fact, the appointment of the Chief Justice and other

Judges to be Judges of the Court under that Act. If the Act had gone further, and had actually adopted the very words of the Civil List Act, it would not have limited the right of the Governor to make additional appointments if he chose so to do, and if it said also that the particular salaries referred to should not be diminished during the office of these particular gentlemen, I submit that that would not restrict the powers of the Governor, and that is incorporating into the Supreme Court Act of 1882 the substance of the Civil List Act of 1873. My friend's argument can go no further than this. If it was intended to limit the Governor's power of appointment, then the Act would have prescribed the number of the Judges who should constitute the Court, as has been done in Victoria and in England in the latest legislation. Until this is done, the Governor has power to appoint. The appointment must precede the voting and ascertainment of the salary. The Governor has done his part—the duty which is imposed upon him under the statute, and it rests upon the Legislature to do theirs. No doubt it is an unfortunate matter that circumstances should arise under which a Judge should be left without a salary, but I submit that this is the fault of the existing state of the law. The appointment must precede the ascertainment of the salary, because no salary can be paid to a Judge until he is appointed, and my friend's argument practically goes to this length: that the Legislature limits the Governor's power of appointment; and he says that the Governor has no power to appoint a Judge until the Legislature has first voted a sum for his maintenance. I put this case to your Honours: Supposing that before these proceedings had been instituted the Legislature had met and voted a sum of money for Judge Edwards, would he have derived his jurisdiction because of the vote of money, or under the Governor's Commission? I submit he would derive his power to sit on the bench as Judge of the Supreme Court by virtue of his Commission. But my learned friend would suggest that the voting of the sum of money would validate his exercise of powers which he ought not to exercise under the Commission.

Mr. Justice Conolly: No one has suggested that the Act provided for the Judge's salary by name.

Mr. Cooper: These Acts have no other bearing. There was a Chief Justice and four Puisne Judges in 1873. There was a Chief Justice and four Puisne Judges in 1882. These Judges are, in effect, nominated Judges of the new Court under the Act of 1882, and they receive their salaries because they are the Chief Justice and four Puisne Judges under the Act of 1873—in other words, they are appointed under the Act of 1882, with the salaries they received in 1873.

Mr. Justice Conolly: But they are not the same persons by name.

Mr. Cooper: That makes no substantial difference, your Honour; they were in fact the persons named. It is true they were not, all of them, the Judges when the Act of 1873 came into force. As each Judge came into office he became Judge by name under this statute practically, and therefore they were the Chief Justice and four Puisne Judges by name. The effect of the Act of 1882 is nothing more than the appointment of Chief Justice Prendergast as Chief Justice and the other Judges on the bench, with £1,700 for the Chief Justice, and with £1,500 for all the other Judges, and with a proviso that the salary of these Judges should not be diminished while they remained in office. That is the clear and logical manner of reading the statute. To read it in any other way you must strain the statute, in order to upset the validity of the appointment. Unless this can be done, unless the words of the statute are strained, I submit that the defendant is entitled to hold office because of his Commission. But the view I submit to your Honours is the true test: Is this Commission good or bad? If it is bad, then nothing can make it good, there must be a fresh Commission. If it would be good twelve months hence, because Parliament chose to vote a salary, it is good now, without the salary. I have not understood my learned friend to contend that if the House, during last session, instead of wrangling all night over the question of salary, had chosen to vote the salary——

Sir R. Stout: As Commissioner's salary; "as Judge" was struck out.

Mr. Cooper: If the House, instead of wrangling over the question of salary, had voted it as for a Judge of the Supreme Court, my learned friend would, I submit, have had no case to go on with.

Sir R. Stout: I do not admit that.

Mr. Cooper: Then, this is the position in which I wish to place my friend. He is driven to this: that even though the Legislature choose to vote the salary the Commission would nevertheless be bad. We meet my learned friend on this ground. There is no authority either in any statute or in any case that has been cited which warrants your Honours in holding that if the Crown proposed a salary, and the salary was voted the session afterwards, or even a day afterwards, this Court would nevertheless be justified in holding that this Commission was bad.

The Chief Justice: The reduction of salary could be complied with, but because there is no salary there could be no reduction.

Mr. Cooper: There can be no reduction, and we can bring in the words of this clause.

The Chief Justice: You say the section is complied with.

Mr. Cooper: Yes, substantially. And whatever the position may be in which the matter is placed by Parliament in the future, all that is to be done is to construe the words of the statute and give them their plain logical meaning. My friend has suggested that the spirit of the Act of Settlement is in force here under this Act, because the Judges are to hold office during good behaviour. I am not going to occupy the time of the Bench with traversing ground over which my friends have already gone, but I cannot help once more drawing attention to the fact that the spirit of the Act of Settlement has been deliberately broken by the Act of 1882. If a statute had been introduced into England giving the Crown power to appoint temporary Judges of the highest Courts of judicature, to hold office during the pleasure of the Sovereign, and to have their salary at the mercy of the Sovereign, it would be a direct violation of the Act of Settlement. Yet that is what our Act does. In the strongest possible manner the Legislature has declared that the colony is not to be bound by the spirit of the Act of Settlement. The provision in the Act of Settlement, that Judges should hold office during good behaviour, was introduced in order to prevent sub-

servient Judges being placed on the bench of the highest Court of justice—Judges who would as in the days of the Stuarts, give any decision in favour of the King if asked to do so. In these enlightened days, of course, no such thing would be possible where the Judges are appointed during pleasure, otherwise we should have the Crown and the Government pre-eminent in the lower Courts, where all the Judges are appointed during pleasure. It has been shown clearly that the safeguards introduced by the Act of Settlement are not necessary now. There is too fierce a light beating upon the Bench and upon the Government to allow subservient men to occupy judicial offices, or to allow a weak or corrupt Government to pack the Supreme Court Bench for the purpose of obtaining decisions contrary to equity and law. But, still, under the Act of 1882, if times were such that such men could be appointed, there is the power to do so. This, we submit to your Honours, is the true construction of the Act. I understand my learned friend to suggest that Commissioners of Assize were appointed in England during pleasure. As I understand, they are appointed by special Commission; they take cases at Assize, and only act, as it were, as representatives of the other Judges. The appointment of Commissioners of Assize is not analagous to the appointment of Judges of the highest Courts of justice; they have not the same jurisdiction, nor the same duties to perform.

Mr. Cooper had not concluded when the Court adjourned, at twenty-five minutes past 4 p.m.

WEDNESDAY, 20TH MAY, 1891.

The Court resumed at half-past 10 o'clock this morning.

Mr. Cooper: Your Honours, at the adjournment last night I was proceeding to the second branch of the argument I propose to address to your Honours, and that was in reference to the authorities quoted by my learned friend Sir Robert Stout on the construction of statutes, and the usage which should be read into the Act of 1882; and, though I submit it is not necessary in deciding the present question to rely upon those authorities at all, yet I claim that we are entitled, on behalf of the defendant, to claim the assistance of the very maxims and propositions that my learned friend quoted to your Honours. Before I refer to the authorities, your Honours will pardon me if I quote one or two passages from Maxwell on the Interpretation of Statutes. First of all, page 161 has some bearing upon this branch of the subject. I shall refer later to another branch of the question. At page 161 of the second edition the author states that the Crown's rights are not affected by statute unless the Crown is either expressly named, or the Crown's rights are expressly limited, or the limitation is necessarily implied. Maxwell says—and he quotes a number of authorities: I will not trouble you with the authorities,—

"On probably similar ground rests the rule commonly stated in the form that the Crown is not bound by a statute unless named in it. It has been said that the law is *primâ facie* presumed to be made for subjects only. At all events, the Crown is not reached except by express words, or by necessary implication, in any case where it would be ousted of an existing prerogative or interest. It is presumed that the Legislature does not intend to deprive the Crown of any prerogative, right, or property unless it expresses its intention to do so in explicit terms, or makes the inference irresistible. Where, therefore, the language of the statute is general, and in its wide and natural sense would divert or take away any prerogative or right from the Crown, it is construed so as to exclude that effect."

The language of this statute is general, but its very generality preserves the right which the Crown through its Executive Officer possesses to appoint Judges of this Court, and therefore I am entitled to claim the full benefit of the rule that, even though the words are general in their terms, they cannot have the effect of restricting the Crown's right. If that rule is sound—and I submit that it is—then, where the general words preserve the right of the Crown the argument which I base upon the proposition laid down by Maxwell is stronger in support of the defendant's case. Then, on page 44 of Maxwell the learned author states,—

"The language and provisions of expired and repealed Acts on the same subject, and the construction which they have authoritatively received, are also to be taken into consideration; for it is presumed that the Legislature uses the same language in the same sense when dealing at different times with the same subject, and also that any change of language is some indication of a change of intention."

Then, on page 374 the author, in referring to the remarks of Lord Campbell, says,—

"When the Legislature puts a construction on an Act, a subsequent cognate enactment in the same terms would *primâ facie* be considered in the same sense.

* * * * * *

"Where it is gathered from a later Act that the Legislature attached a certain meaning to certain words in an earlier cognate one, this would be taken as a legislative declaration of its meaning there."

Then, on page 369 the author, in referring to Lord Kenyon, says,—

"Not *communis error*, but uniform and unbroken usage, *facit jus*. 'Were the language obscure,' said Lord Campbell in a celebrated case, 'instead of being clear, we should not be justified in differing from the construction put upon it by contemporaneous and long-continued usage. There would be no safety for property or liberty if it could be successfully contended that all lawyers and statesmen have been mistaken as to the true meaning of an old Act of Parliament.' If we find a uniform interpretation of a statute materially affecting property, and perpetually recurring, and which has been adhered to without interruption, it would be impossible to introduce the precedent of disregarding that interpretation."

Then, at page 366 the author states,—

"It is said that the best exposition of a statute or any other document is that which it has received from contemporary authority. *Optima est legum interpres consuetudo. Contemporanea expositio est optima et fortissima in lege.* Where this has been given by enactment or judicial decision it is, of course, to be accepted as conclusive. But, further, the meaning publicly given by contemporary or long professional usage is presumed to be the true one, even when the language has etymologically or popularly a different meaning. Those who lived at or near the time when it was passed may reasonably be supposed to be better acquainted than their descendants with the circumstances to which it had relation, as well as with the sense then attached to legislative expressions; and the long acquiescence of the Legislature in the interpretation put upon its enactment by notorious practice may perhaps be regarded as some sanction and approval of it. It often becomes, therefore, material to inquire what has been done under an Act; this being of more or less cogency, according to circumstances, for determining the meaning given by contemporaneous exposition."

Then on page 365 the author states,—

"It is said that the best exposition of a statute or of any other document is that received from contemporary authority. Where this has been given by enactment or judicial decision it is of course conclusive."

Now, I take it that my learned friend's argument, which he bases upon the authorities he quoted the day before yesterday—Reg. *v.* Cutbush, down to Bell-Cox and Hakes—was in support of the principle which is laid down in Maxwell, and we claim that that principle can be invoked in favour of the defendant, and invoked, I submit, your Honours, conclusively. In dealing with this branch of the subject, I do not suggest—in fact, it seems to me, so far as I am able to interpret the law, I cannot suggest—to your Honours that any question of invalidity could possibly arise in reference to the appointment of his Honour Mr. Justice Richmond, or his Honour Mr. Justice Chapman, or of the two later appointments, of their Honours Mr. Justice Williams and Mr. Justice Gillies. The strength of our case, to a very great extent, rests upon what I submit is the true reading of the law, that those appointments were valid in the strictest sense of the term, and that it required no Act of Parliament to validate them—that it required no recognition by Her Majesty in the shape of a Royal Commission, such as my learned friend suggested in argument, to validate those Commissions, because they were valid from their inception; and I claim that if my learned friend's admission yesterday is sound—and it seems to me he was driven to make that admission—that the virtue of a Judge's appointment rests in his Commission, and that there is no virtue in Mr. Justice Edwards's Commission, even though the Legislature passed a Civil List Act providing salary—I claim, if that is my friend's argument, then I have the most conclusive answer to that on the very principle which Sir Robert Stout invoked in favour of his case. I am sure your Honours will pardon me for a moment if I refer to the dates, because it seems to me the key to the interpretation which the Legislature and those who had the duty of advising His Excellency the Governor placed upon the Act of 1882 is to be found in the meaning which the Law Advisers of the Crown, and the Legislature, placed upon the corresponding enactment of 1858. His Honour Mr. Justice Richmond was appointed on the 12th October, 1862, and I submit it would be idle to suggest that the Commission issued on that occasion was invalid in any sense whatever, or that it derived its force from the subsequent coming into operation of the Civil List Act. I repeat that it cannot be suggested that it was either invalid in the first instance, or that it was inchoate, if I might so express it, and derived its life and validity from the subsequent coming into operation of the Civil List Act. I submit that the Commission was good because of the power of the Governor, acting on the advice of the Government of the day, under the Act of 1858, to appoint an additional Judge to the Supreme Court Bench; but, if my learned friend's argument is correct, then, inasmuch as by the Constitution Act the Civil List Act of 1863 had no force or validity until it had received the assent of Her Majesty, and the Commission was issued before any Civil List Act was in force, my learned friend is reduced to this: either to admit that that Commission was a good Commission, or to contend that that Commission was a bad Commission, and was validated by the Act of 1882; because he expressly stated yesterday that it could not derive any force from the passing of the statute of 1863. It seems to me that to that extent my learned friend has reduced his argument to an absurdity—and so also with the Commission of Mr. Justice Chapman. It was suggested, I think, by my friend himself in his argument that there was no necessity for the Queen to assent to any Act which provided for payment of the Judges of the Supreme Court. That may be so, but before any Act can have any validity it must receive either the Queen's assent or the Governor's assent, and there was no statute, there was no law in force on the 20th October, 1862, providing for the payment of the Judicial Bench. The same reasoning applies to Mr. Justice Chapman's appointment. There was no statute in force on the 23rd March, 1864, providing for an additional Judge. That statute came into operation on the 27th July, 1864. And if, as I repeat again, my friend's admission of yesterday is to be taken to be the limit of the length to which he wishes your Honours to carry his argument, then I must submit to the Court that, if the Court supports my friend's argument, it must follow that these two Commissions were issued without any authority on the part of the Governor to grant them. I submit, the statement of the proposition proves the unsoundness of the view which it records. In reference to the other two appointments, the appointments of Mr. Justice Williams and Mr. Justice Gillies, a similar question in principle arises, because at the date of these two appointments, if my friend's argument is that the Governor cannot appoint a Judge to fill an office which is already full—and I take it that that is what he wishes your Honours to hold—then the Supreme Court bench was full on the 3rd March, the date when their Honours were appointed;

it was full then, as it is now, and remained so till the 1st April. Therefore, if there was any vice at all in the appointment of Mr. Justice Edwards, there was, logically speaking, the same inherent defect in the appointment of four of their Honours, who have presided in this Court for many years past. Now, I submit that there was no vice in the appointment of any one of the Judges, and that there is no vice in the appointment of Mr. Justice Edwards, and that we are entitled in construing the Act of 1882 to take into consideration what the Legislature did in construing the provisions of the Act of 1858. The Legislature then recognised the right of the Governor to appoint a Judge, even though there was not at that time in force any statutory provision for the payment of that Judge. That is the view we submit to your Honours. The Legislature did recognise the right of the Governor to appoint a Judge, leaving it to the Legislature itself, consisting of the three branches, subsequently to make provision for the payment of that Judge. That being so, I submit that the true reading of the Act of 1858 is that there was unlimited power of appointment left in the Governor, as the Representative of Her Majesty, unaffected by the provisions of the Civil List Act; and that if a Civil List Act subsequently came into operation, and provided for the payment of those Judges, their Honours derived their right to hold the office of Judge, not because that Act came into operation, but because they were properly appointed by the Governor under the general clause of the Supreme Court Act. I submit that is no narrow construction, no technical construction; it is the principle which, as I endeavoured to submit to your Honours yesterday, underlies the whole legislation, from the Charter of Her Majesty down to the present time, by which the Supreme Court is constituted—that the Queen has reserved to herself, through her executive officer, the Governor, the power to appoint Judges to the Supreme Court bench, and that that power to appoint Judges is not limited either by implication or by the provisions of any statute. I claim, therefore, that every one of the authorities my learned friend quoted in his favour are authorities in favour of the position we take up on behalf of the defendant—that each one of those cases, from Regina *v.* Cutbush to Bell-Cox *v.* Hakes, recognises the principle that where there has been contemporaneous interpretation, either by the Courts of justice or by the public—because that is the principle which underlies the whole of the cases with reference to dealings with property, or by statesmen, or by the Legislature—that that interpretation, even though it might do violence to the words of the statute, is the one which will be adopted by the Courts. Now, I submit that the canon of interpretation which we have placed before your Honours does no violence to the words, but shows clearly that the Legislature correctly apprehended the intention, or, rather, that the Advisers of the Crown correctly apprehended the intention, of the Legislature in making the appointments which have been made to this Bench since the resignation and anterior to the resignation of the late Chief Justice. Now, there are one or two cases that I wish to refer your Honours to, in addition to the cases quoted by my learned friend. There is the case of Gorham *v.* Bishop of Exeter, reported in 15 Queen's Bench Reports, page 74. I quote that for the purpose of showing that the contemporaneous construction put upon a statute need not necessarily be a judicial construction. In that case Lord Campbell, in delivering the judgment of the Court, states, on page 73,—

"Were the language of statute 25 Hen. VIII. c. 19, obscure instead of being clear, we should not be justified in differing from the construction put upon it by contemporaneous and long-continued usage. There would be no safety for property or liberty if it could be successfully contended that all lawyers and statesmen have been mistaken for centuries as to the true meaning of an old Act of Parliament."

My friend may say that the statute in that case practically became a branch of the common law because it had been in existence for so many years, and that long and uninterrupted usage had grown up to interpret the terms, and that it was dealing with property. I submit that that argument is all the stronger if we are dealing with a modern statute; and if we find that since the passing of that modern statute, and immediately after the passing of that modern statute, a certain canon of interpretation has been applied to it, and a certain usage and meaning has been given to the powers contained in that particular statute. And if the Judges took notice of the meaning which statesmen had placed for a long period of time on the provisions of an old Act of Parliament, I submit that all the more ground is shown that the meaning which has been applied by contemporaneous statesmen should be the construction of the Act to be adopted by the Court; and when an Act of Parliament is passed, and appointments have been made under that Act of Parliament, based upon a particular construction of that Act, that would have very great force indeed in determining what the true construction of the powers contained in that Act of Parliament may be. Then, there is another case; indeed, there are many other cases. I am afraid I am keeping your Honours an undue length of time, perhaps, in referring to these cases; but it is a matter of such considerable importance that I feel it is necessary to quote one or two other cases in addition to those cited by my learned friends. I submit to your Honours the case Regina *v.* Leverson, in L.R., 4 Q.B., 394. That was in reference to the Central Criminal Court. The head-note of the case states:—

"A verdict and judgment having been given against the defendant on an indictment in the Central Criminal Court, error was brought on the following grounds: 1. That, two Commissioners being necessary, under 4 and 5 Will. IV., c. 36, to constitute the Central Criminal Court a Court for the trial of an indictment, an Alderman sat for this purpose with the Judge of the Sheriff's Court, who tried the indictment, and, the trial having lasted several days, a different Alderman was substituted in the course of the trial, whereas the Court should have consisted of the same two Commissioners throughout the trial. 2. That the trial took place in a second Court, while the general sessions were being held before other Justices in their ordinary place of sitting; whereas by 4 and 5 Will. IV., c. 36, a single Court only is established and authorised to be held. 3. That, in consequence of the changes which had been made by different statutes in the jurisdiction of the Sheriff's Court, the Judge of that Court, who presided at the trial as Judge, had ceased to be a Commissioner under 4 and 5 Will. IV., c. 36, and was therefore incompetent to act as a Judge under the Commission of Oyer and Terminer in the trial of this indictment. Held, that none of the grounds of error were tenable."

The usage here had been not for a very long period of years—not for more than a generation—but, seeing that a certain interpretation had been given by the authorities, both judicial and Executive, to the meaning of these statutes, although the wording of the statutes appears to be plain, yet long-continued usage and contemporaneous interpretation had given these provisions a particular meaning, and therefore, although these two Commissioners, by statute, ought to have been the same two Commissioners to try the case, and only one sat instead of the two sitting at the same time, the Judges held that they were entitled to take into consideration the practice that had grown up; and therefore, in their opinion, the decision was upheld.

The Chief Justice: The facts are not very well or at all distinctly stated with regard to the appointment of Mr. Justice Gillies or Mr. Justice Williams.

Mr. Cooper: I only deal with the facts as they appear in the case.

The Chief Justice: I do not know that they are stated there, and the *Gazettes* do not satisfy one as to how the resignations took place.

Mr. Cooper: Apparently they had not properly vacated the office of Judge. By reason of its being a freehold, a deed of surrender would be necessary. Under the Judicature Act a Judge can vacate an office by writing instead of by deed. But I take it that, although a Judge has resigned his position, he has not vacated it until the office is filled up by some other person.

The Chief Justice: Do you know anything as to the fact of the resignation, and how it was made?

Mr. Cooper: I cannot refer your Honour to anything more than the affidavit stating that the resignation of Mr. Justice Chapman and Mr. Justice Gresson took place on the 1st April, and that his Honour Mr. Justice Williams and his Honour Mr. Justice Gillies were appointed on the 3rd March. I submit that the matter was in perfect form. It was, no doubt, intimated to the Governor that these two gentlemen were going to resign; but before the resignation actually took effect the Governor, no doubt, was advised that he could legally appoint two Judges to take their places, but they were nevertheless appointed under the general power contained in the Supreme Court Act, and their appointment dates from a time when those two Judges whom they subsequently succeeded were Judges of this Court, with all the jurisdiction of this Court vested in them.

The Chief Justice: I do not understand, from anything we have had before us, how the resignation took place, or when it took place. There is some *Gazette* notice referred to, but I do not know that we can make any use of that. Supposing that we admitted the principle, I do not see that we have any facts to show that there was any contract made with anybody.

Mr. Cooper: Of course, I cannot state any facts other than those mentioned in the case.

Sir R. Stout: I might mention the fact that Mr. Justice Chapman sat upon the bench towards the end of March—about the 30th, I think. There was a case heard by him, I think, in the last week in March.

Mr. Harper: I remember the same thing occurred in the case of Mr. Justice Gresson. He held a sitting and made his farewell to the Bar about the end of March. There was an account given of it in a paper published. I think it is in "The New Jurist Reports," and we can find it out from that.

Mr. Cooper: It seems to me that it would be impossible, upon the construction of these statutes, to say that there was any invalidity in the appointment of Mr. Justice Richmond, or Mr. Justice Chapman, or Mr. Justice Williams, or Mr. Justice Gillies. What I contend for is that the Legislature recognised that the Governor, by virtue of the statutes and by virtue of his instructions, had the power to appoint Judges of the Supreme Court, although there were then five Judges holding office. In the first instance, he had power to appoint Judges, although no Civil List was in existence by which the salaries of Judges were established; and, secondly, he had power to appoint Judges, although the Bench consisted of five Judges. Therefore I claim that we are entitled to invoke the assistance of the very cases Sir Robert Stout has quoted, in support of our position; and he is driven to this—he must be driven to this: Either the appointment of Mr. Justice Edwards is bad, and if it be bad, then there was an inherent defect in the appointment of other Judges of the Court; or that the appointments of the other Judges were good, and therefore he must admit that the appointment of Mr. Justice Edwards is good also. It must not be assumed that the salary of Mr. Justice Edwards will not be voted by the Legislature; and if the Legislature do vote his salary next session, then I submit it would be idle to contend that there was any difference in principle whatever between his appointment and that of their Honours Mr. Justice Richmond and Mr. Justice Chapman. Then I come to the Act of 1882, which I submit did not validate, and never was intended to have the effect of validating, the Commissions of Judges whose appointments might be affected, but recognises the fact that they had been properly appointed, and consequently that the seal of the Legislature—not only have we the practice prior to the Act of 1882 on the part of Parliament and the Law Officers of the Crown, but the seal of the Legislature, by the Act of 1882, has been put upon the construction placed upon the statute of 1858 by the Governor appointing these gentlemen as Judges. The authorities my friend has quoted support, I submit—support to the fullest extent—the proposition I have submitted to your Honours. There is one case which my friend relied on very strongly indeed, and that was the case of Bell-Cox *v.* Hakes. I think he quoted that case for the purpose, first, of supporting the principle that usage gives a meaning to a statute, and, secondly, in support of the proposition—which none of us deny—that the words of a statute, although strictly speaking they express one thing, have been construed by the Courts in numbers of cases to express something else, and have been limited or restricted. That is a proposition which dates as far back as Plowden, and which, by the way, was more applicable to ancient statutes than to modern statutes, because we find when we examine the books upon the subject that the statutes were then drawn by the Judges, and that when they found a difficulty in interpretation they were disposed, not merely to declare the law exactly as it stood, but to make their statutes express what they meant them to express. The canon of interpretation referred to in Plowden was therefore more applicable to the old statutes than to modern statutes, and it was

used in that sense by the House of Lords. That case, however, in no sense weakens the position we have taken up; and if, as ought to be done, the facts are examined carefully, the true reason for the judgment in Bell-Cox *v.* Hakes will be apparent. The respondent had been discharged, by a Court having power to discharge him, upon a writ of *habeas corpus*, and, as it is put in one of the cases, it is a very difficult thing, where a man is discharged on a writ of *habeas corpus*, to catch him again, and it was never intended that when a writ of *habeas corpus*—one of the foundations of the liberty of the subject—had been issued, and the defendant discharged, that he should again be put in peril; and it was because of the strong general principle underlying the foundation of the writ of *habeas corpus* that the House of Lords held that it would require express words before an appeal could lie, from the discharge by the Court of Queen's Bench of a prisoner upon *habeas corpus*. That was the distinct principle upon which the Court decided that case—that mere general words in the Judicature Act would not give right of appeal. If they intended to so alter the constitutional principle—which had been well established both by statute and by judicial decision—that when a prisoner was once discharged by writ of *habeas corpus* he could not be again arrested, then the Court held that they should have done it by express words. Lord Herschell puts the principal ground of the decision, on page 532: "But when once a prisoner has yielded his body or been taken into custody, and has been discharged by a Court of competent jurisdiction, I can find no authority for a subsequent arrest."

If they had upheld the contention that the discharge of a prisoner by a competent Court could ever be set aside on appeal, and the prisoner rearrested, then, I submit, the whole of the virtue which is supposed to exist in a writ of *habeas corpus* would have been destroyed. The case went upon the narrow point expressly stated at page 534:—

"I think it is impossible to read the section your Lordships have to construe without seeing that the power to hear and determine an appeal, and the power to enforce the judgment of the Court of Appeal in case it should differ in opinion from the Court below, were intended to be coextensive. And I cannot think that it was ever contemplated that an appeal should be entertained from any class of orders when that which was effected by them could never be effectually interfered with. The jurisdiction of the Courts whose functions were transferred to the High Court to discharge under a writ of *habeas corpus* was well known, and if had been intended that an appeal should lie against such an order, I think that provision would have been made to enable the Court of Appeal to restore to custody the person erroneously discharged. In the absence of such a power the appeal is futile, and this appears to me to be a sufficient reason for holding that the Legislature did not intend the right to hear and determine appeals to extend to such cases."

That was all that was decided in the case, and, although Lord Halsbury quoted a canon of construction which no one would for one moment attempt to dispute, yet it was not necessary for the decision of that case to invoke the assistance of that canon; but there was the fact that the prisoner was discharged, and there was the fact that, even if the Court of Appeal reversed the order, there was no means of catching him again. He had been legally discharged, and the appeal would have been futile. That is practically the ground upon which the Court decided. I submit, therefore, your Honours, that an examination of my friend's authorities shows that every one of them, including the last case he quotes, is an assistance to the arguments which we have endeavoured to submit. Coming to the next question, I propose to offer a very few remarks on the subject of the arrangement or contract made by the Government with Mr. Justice Edwards. I did not understand my friend to deny that in some cases the Governor might have power to enter into a contract.

Sir R. Stout: He could not do it without statutory authority.

Mr. Cooper: I take it to be a clear and sound principle that the Governor could contract by virtue of either some express or implied power, but he does not require express statutory authority, and it is enough if there is sufficient grounds by which the necessary implication of authority to make a contract may be assumed; and that authority may be obtained either by virtue of the Governor's Commission or under some statute under which he may act. I will refer your Honours first of all to the Governor's Commission. The Commission under which Lord Onslow now acts, and was acting when this appointment was made, is the permanent Commission which was issued at the time Sir Hercules Robinson was appointed, and appears in the Appendices to the Journals of the House of Representatives, Session 2, 1879. First there is the general authority:—

"We do hereby authorise, empower, and command our said Governor and Commander-in-Chief (hereinafter called 'the Governor') to do and execute all things that belong to his said office according to the tenor of these our letters patent, and of such Commission as may be issued to him under our Sign-manual and Signet, or by our Order in Privy Council, or by us through one of our principal Secretaries of State, and to such laws as are now or shall hereafter be in force in the colony."

Then under paragraph 8 of the Commission: "The Governor may constitute and appoint in our name and on our behalf all such Judges, Commissioners, Justices of the Peace, and other necessary officers and ministers of the colony as may be lawfully constituted or appointed by us." Now, under the Act of 1882 the Governor has power to appoint. As to the words "lawfully constituted or appointed by us," we find the meaning of those on reference to the Act of 1882. First, a Judge must be appointed during good behaviour; and, secondly, he must be taken from a certain class of persons. Those are the two requisites which are necessary to make an appointment lawful. It must be an appointment permanent during good behaviour, and the appointee must be selected from a certain named class of persons. Therefore, if the Governor has power to appoint, he has power to contract in reference to an appointment, because he is entitled to do all things which are necessary to carry out the powers which are given to him, either by the Commission or by the statute, so long as he acts according to the law.

Sir R. Stout: You say the statute gives him the power?

Mr. Cooper: I say he has power by virtue of his Commission and the statute.

Sir R. Stout: Why do you invoke the Legislature at all?

Mr. Cooper: Because it has been held in one case quoted by my friend that the Governor's power to contract is derivable in part from his Commission and in part from statute. In the first instance, he is the delegate or agent of the Queen—he is not Viceroy of the Queen: that doctrine has been exploded—and as the agent or delegate of the Queen certain power is derived in the first instance from his Commission, and secondly from the Legislature of the colony. I only quote this Commission for the purpose of showing that the Queen herself in her Commission to the Governor has delegated any power which existed in her to appoint Judges and other necessary officers of State, and that the Governor also obtains these powers under the statute of 1882. He has ample power to contract if he has power to appoint, and I submit he derives power to appoint from the joint assistance of the Commission and the statute, and he acts as Her Majesty's agent, not because of the statute, but by virtue of the Commission.

Mr. Justice Conolly: Apart from the statute, how could he lawfully appoint a Judge?

Mr. Cooper: No doubt if a statute said he should not appoint a Judge, I do not say that the Commission would enable him to do so, but I say the two are to be read together. Passing from that to the Crown Suits Act of 1881, we have the Legislature recognising that there may be a contract entered into by virtue of the implied powers vested in the Governor. By section 37 it is provided,—

"No claim or demand shall be made upon or against Her Majesty under this Part of this Act unless the same shall be founded upon and arise out of some one of the causes of action hereinafter mentioned, and for which cause of action a remedy would lie if the person against whom the same could be enforced were a subject of Her Majesty."

Then, subsection (1) provides—

"(1.) Breach of any contract entered into by or under the lawful authority of the Governor on behalf of Her Majesty, or of Her Majesty's Executive Government in the colony, whether such authority be express or implied."

I submit that if the Governor has power to appoint he has power to do all things necessary for the appointment. I do not say that he can bind the Legislature by virtue of the terms of the appointment to vote a certain sum of money—I do not submit that for one moment, but I do submit that he can enter into a contract which, so far as the Crown Suits Act is concerned, is binding upon the Crown, leaving it to the Legislature subsequently, if it chooses to do so for the honour of the Queen, to vote the sum necessary to carry out the terms of the contract.

The Chief Justice: You mean, it would be dishonourable on the part of the Legislature if it did not carry out the contract.

Mr. Cooper: That is really what is laid down in a number of English cases. There is no compelling-power, but there is no doubt it would be dishonourable. It would be dishonourable assuming the contract was made by the Governor in pursuance of his power, and assuming that it was a proper and reasonable appointment—an appointment made upon proper consideration; and I say that it has been dishonourable in this case for the Legislature not to carry out their part of the contract which the Governor entered into.

The Chief Justice: I understand you to contend that if there is a contract there is an end to the matter, except that the Legislature has to vote the money. I do not go into the question as to whether the appointment was proper or not.

Mr. Cooper: The question of honour or dishonour might arise if there was a question whether the Governor had given the appointment to a proper or an improper person. We will not go so far as to suggest that if the Governor had appointed an improper person to the Supreme Court it would be a dishonourable thing on the part of the Legislature to refuse to vote sums to pay that person; but I submit that if the person appointed is a person fitted to hold the office, and the Governor appointed him in the exercise of the powers of the Executive Government according to law—of course my argument is based entirely upon the previous ground I have advanced, that it is made according to law—then it would be a dishonourable thing on the part of the Legislature to refuse to pay the salary to the person appointed. I think that may be put forward as part of our case.

Mr. Justice Richmond: If you were suing under the Crown Remedies Act, would you be entitled to judgment upon this correspondence?

Mr. Cooper: We should be entitled to judgment; but that would not give us the money. The next step would be to go to the Legislature; but even then it is difficult to say what the remedy would be. I intend to deal shortly with this branch of the subject, and to show that your Honours are practically placed in the same position as Judge Edwards. If an unconstitutional Governor or a weak and corrupt Ministry were to invoke feelings of dislike to the Supreme Court, and were to refuse to pay the salaries, your Honours would be in the same position—exactly the same position—as Judge Edwards, although the money is voted to Her Majesty for the purpose of paying you. We cannot for a moment suppose that such a concurrence of circumstance would ever arise, but I submit that such is the state of the law in the event of the Government refusing to recommend the Governor to sign his warrant. If the Governor declined to sign his warrant, there is no machinery that I am aware of in this Court for compelling the payment of the salaries of your Honours or of other officers whose salaries are secured upon the Civil List.

The Chief Justice: Do you contend that these provisions in the Crown Suits Act give power to the Governor to contract?

Mr. Cooper: No. I contend that the provision in the Crown Suits Act recognises that the power to contract may arise by implication. I do not say for one moment that the Crown Suits Act is other than a procedure Act. It gives the right to a certain remedy—which may or may

not be a substantial remedy—where no remedy previously existed. In reference to Churchward and the Queen—the case which Sir Robert Stout relies on—I submit that is really an authority in favour of the defendant on this branch of the subject. Dealing with the abstract principles of law which are suggested in the judgment of the Court, we must consider the facts of the case. In Churchward and the Queen the decision of the Court turned not upon whether or not a contract was valid, but upon the fact that no contract was made to support the declaration. The action was upon a covenant, either expressed or implied, to pay a certain sum of money to the plaintiff. A careful perusal of the contract, and the judgment, shows that there was no express contract and no implied covenant, and consequently no cause of action; and the case was determined upon exactly the same principles as determine a suit between subject and subject when a plaintiff has brought an action and has no contract to support it. It was, however, in the course of this judgment that the Lord Chief Justice made the remarks quoted, and which I submit show that there may be cases—and the Court recognised that there may be cases—where, even if no funds be voted by Parliament for the purpose, yet the executive officer of the Government may make a contract to bind the Crown, leaving it to Parliament subsequently to provide the funds to carry out that contract. The Lord Chief Justice says so in express words. It is evident, whatever construction the Chief Justice of Victoria placed upon his observations, that this was the meaning in the Lord Chief Justice's mind—that such a contract might be made; and he says that to say that it might not be made would be too extreme a proposition, and that he would be sorry to hold that that was the law. Then, there is the case of Regina *v.* Thomas, in which it was held, following the "Bankers" case (it is reported in Law Reports, 10 Queen's Bench, page 31), that where a contract is made on behalf of the Queen, there a petition of right will lie, even though unliquidated damages are claimed; and Justice Blackstone, in delivering the judgment of the Court, ten years after the case of Churchward *v.* The Queen, says, "Contracts can be made on behalf of Her Majesty with subjects, and the Attorney-General, suing on her behalf, can enforce these contracts against the subject; and if the subject has no means of enforcing the contract on his part there is certainly a want of reciprocity in such cases." This judgment is based upon the well-known "Bankers" case, where one of the Stuarts borrowed money from certain London bankers, and by letters patent contracted to repay it, and charge the money on excise; then the King, as often happened in those days, refused to repay either interest or principal. The bankers waited till the Stuarts had lost the sovereignty and then brought an action against the Crown. It was held not that the Crown was bound to pay, but that a petition of right would lie. Mr. Justice Blackstone follows this case, and says that where there is a contract on behalf of the Queen, even though the claim is unascertained, a petition of right will lie. I may illustrate the point by one or two cases. Suppose it was necessary to build a ship here—suppose that a set of circumstances arose in connection with the defences of the colonies so that it became necessary to build or to purchase a gunboat; and suppose the Government purchased one, and there were no funds appropriated for the purpose of the contract; I submit, there would be a good contract, and the shipbuilder could, by a petition of right, not enforce his contract to execution, but obtain a declaration from the Court that there was a sufficient contract between him and Her Majesty, leaving it to the Legislature subsequently to appropriate the amount. So that he would have to wait till the Legislature had appropriated the funds before he could receive remuneration for his services rendered: showing, I submit, that want of the appropriation of the money necessary to carry out a certain duty is not essential to a contract which the State enters into with a person to perform that duty. Want of money is no doubt a bar to that person getting payment by execution. All he can get is a barren judgment, leaving it to the honour of Parliament for the honour of Her Majesty to vote a sufficient sum of money to pay the Queen's debts. In the case of Alcock *v.* Fergie this principle is recognised by counsel for the Crown, and also by the Chief Justice.

Sir R. Stout: That was not a case between the Crown at all.

Mr. Cooper: Well, the defence raised was that the Crown had not the power to make a contract, and Mr. Ireland, in arguing in support of the proposition that this contract was *ultra vires*, said, "It must, however, be admitted that the Governor, by virtue of his Commission, which authorises him to do all things under the laws in force in the colony, is a duly-authorised agent to enter into contracts for the Crown." On page 310 of the judgment, the Chief Justice says, "Parliament may, by legislative enactment, either in express terms or by necessary implication, authorise the Government to enter into contracts." Now, I submit, without going over the ground that has been traversed by my learned friends yesterday, that, assuming the power of the Crown to make a contract, we have all the necessary essentials. We have the contracting parties, we have a proper definition of the office, the salary mentioned, and we have a Commission following upon the terms which have been settled between the parties, appointing Judge Edwards in the fullest possible way to the office of Supreme Court Judge.

The Chief Justice: Is the authority given expressly in this case, or is it by implication?

Mr. Cooper: I contend that it is given expressly. The authority to appoint is given expressly. The authority for the contract and the terms of the agreement is derived by implication.

Mr. Justice Richmond: Your argument would be equally valid if the Governor had fixed the salary at £5,000.

Mr. Cooper: It might have been unreasonable in such a case. We are only dealing with the actual contract in this case. I do not for a moment wish to shirk any inference that may be drawn from the argument that I have addressed to your Honours. Suppose the Queen or the Governor contracted for the construction of a man-of-war, and agreed to pay the contractor three times as much as the man-of-war was worth, and, instead of paying £10,000, contracted to pay £50,000, the contract would not be bad unless fraud had been practised on the Crown. The contract would not be bad simply because the Crown agreed to pay too much. I should say, in the case put by Mr. Justice Richmond, if the Governor's contract was to pay the additional Judge £5,000, the Commission would be bad because of fraud in its inception. The contract would be a fraudulent contract.

Mr. Justice Richmond: It would be quite clear that £5,000 was too much for a Judge.

Mr. Cooper: I should be sorry to say that, your Honour.

Mr. Justice Richmond: But, supposing the contract was for the appointment of a Railway Commissioner. You cannot pay too highly for a competent railway man. What would you say then?

Mr. Cooper: The Legislature appears to look on a Railway Commissioner as worth a very considerable sum. The view of the Legislature was that they could get a Supreme Court Judge for a much less sum than a Railway Commissioner. The salary of a Railway Commissioner was stated at £2,500.

Mr. Justice Richmond: A contract binding the Crown is really a modernism—it has grown up by degrees.

Mr. Cooper: Of course the law considered that the King would pay his just debts.

Mr. Justice Richmond: Until the petition of right was put on a better footing in England, it was so precarious a matter that it was not regarded as a legal remedy.

Mr. Cooper: Yes, your Honour.

Mr. Justice Richmond: My point is this: If it be, as I say, quite a modern introduction, why should we not take it to be subject to modern limitation—viz., that the Crown cannot contract so as to bind the revenues of the country, unless there has been a legal appropriation for the services contracted for? The question of the validity of contract would depend on the question whether or not there had been an appropriation.

Mr. Cooper: I submit that it would not be affected in that way. The fact that a judgment is obtained, even though the contract is valid, does not bind the Legislature.

Mr. Justice Richmond: No doubt the Crown Remedies Act provides for verdict and judgment, though there are no funds. But such a provision would be necessary for such cases as where, there having been funds at the time of the contract, they have been expended. The contract might be perfectly good. There might be a large sum, for instance, on the estimates for railway contracts; the Crown might have entered into a number of contracts, and all might have been good; and yet all the money might have been expended at the time of the suit, so that really there was no money to meet the contract sued on. That would be a case that would need to be provided for by allowing the contractor to get judgment, but saying that execution must depend on a vote.

Mr. Justice Denniston: Why should the power of appointment necessarily carry with it the power to fix the salary?

Mr. Cooper: I do not submit that it does. The Legislature is not bound by the particular emolument which the Governor may attach to an office.

Mr. Justice Richmond: I hope we have not got outside the question. The argument might have been very well in place if it had been the ascertaining of salaries.

Mr. Cooper: At the outset, in commencing this branch of my argument, I submitted that it was in no sense necessary to this question at all.

Mr. Justice Denniston: But it might have a very important bearing on the case, and might carry heavy weight.

Mr. Cooper: I simply am meeting the proposition submitted by my learned friend. I do not for one moment contend that the Governor can bind the revenues of the country when there has been no appropriation.

Mr. Justice Denniston: The question is, can he bind the Crown?

Mr. Cooper: There may be a contract with the Crown.

Mr. Justice Denniston: If there be a contract, and it merely happens to be unenforceable, it does not prevent its being a contract. The question is whether the mere power to appoint gives with it the power to enter into a contract.

Mr. Cooper: I submit that it is not necessary to decide that it does; nor do I contend that the power to appoint necessarily carries the power to contract.

Mr. Justice Richmond: Your argument is this: On the other side it is said, such a thing is done which is not contemplated under the law; therefore, if you cannot appoint a salary, you cannot appoint a Judge. That is the way you come to argue the question at all.

Mr. Cooper: I should not have touched this branch of the subject but for this. I was going to refer your Honours to the letters themselves, but I submit that they speak for themselves, and any assistance I might give by way of construction would be of very little value. Your Honours have the whole of the correspondence before you, which shows, I submit, that the argument is fallacious which suggests that the office of Judge was only intended to be auxiliary and ancillary to the office of Commissioner. That is the only object I have in view in drawing attention to the correspondence. I submit that the whole of the correspondence shows clearly that the office offered and accepted was the permanent office of Judge, and that Judge Edwards would not accept any less office; that he had been offered and refused the very office which my learned friend says he accepted. And the whole tenor of the correspondence shows that from the first to the last the intention of the Government was to offer to Judge Edwards, and the intention of Judge Edwards was to accept, only the permanent office of Supreme Court Judge with the duties of Commissioner and with the office of Commissioner; that, although his appointment as Commissioner was necessarily made, it was the office of Supreme Court Judge he accepted, though he had also the office of Commissioner and his duties to perform. Going back one moment to the question of the power to appoint, and the question of salary, I might put this case: Supposing the Native Land Act of 1889 had contained no reference to salary; suppose it had said that there should be a Commissioner appointed by his Excellency, and said nothing about the fixing of a salary, what would have been the position of the Governor then? He certainly would have been entitled to make reasonable arrangements with the Commissioner, leaving it with the Legislature not to vacate the office of Commissioner or to invoke the Courts to do it, but refuse to vote the sum of money the Governor has chosen to appropriate to it.

Mr. Justice Denniston: You say the Legislature could not absolutely refuse to vote it.

Mr. Cooper: We say that the Governor has power to appoint, and the Legislature would not be honest in refusing to vote the money; although we are not driven to this argument. It is the same with a temporary Judge. Supposing the Governor appoints a temporary Judge, and fixes his salary at the extreme limit of £1,500, the Legislature may say that it was improper to pay so high a salary to a temporary Judge, and might refuse to pay it. No doubt the Legislature parted with the power to fix salaries in other instances. My contention is that they parted with the power to appoint, though they may have retained the power to fix the salary. I was going to refer your Honours to the Public Revenues Act, but it is clear that in no case can any judgment be enforced against the revenue; that matter rests entirely with the Governor to sign the warrant, and no mandamus would lie against the Governor to compel him to sign the warrant; and consequently every officer of the State, although his salary is protected by the Civil List, is, in theory, in the position that he depends on the honour of all members of the State to pay his salary. I do not wish to submit an argument founded on this ground to your Honours.

Mr. Justice Williams: The same argument applies to the public creditor.

Mr. Cooper: Yes; it is one of those cases which can be put in theory, but may never arise in practice. I have to draw your Honours' attention to an additional affidavit which has been filed explaining the affidavit of Mr. Haselden filed on the 18th May, 1891. It has reference to the statement made by Sir R. Stout that the defendant received his salary from the 27th February.

Sir R. Stout: Mr. Haselden did not say so.

Mr. Cooper: No; Mr. Haselden does not say so; but I understand my learned friend's argument to be that the salary was claimed from the 27th February, and was paid out of unauthorised expenditure.

Sir R. Stout: As it was.

Mr. Cooper: It was only paid from the date of the Commission appointing Judge Edwards a Judge, on the 2nd March. The affidavit that has been filed in answer to Mr. Haselden explains the circumstances under which a voucher was sent in—not authorised by Judge Edwards, nor certified by him—in which, by a clerical error, the 27th was stated. This voucher was afterwards withdrawn, and the date altered by the officers of the department to the 2nd March, and the salary paid from that day. The necessity for filing this affidavit arises because Mr. Haselden's affidavit, although it contains part of the truth, does not contain the whole; and we think it advisable that the whole truth should be given. I have very little more to say to your Honours. I submit that we have shown that the Governor's power to appoint Judge Edwards can be derived from the statute of 1882; that this statute was passed in the light of the interpretation put on the preceding statute of 1858; and that from the commencement of this colony—from the erection of this colony in 1840 to the present time there has been the principle apparent in all the instructions and ordinances of the late Legislature and the Acts of the present Legislature, reserving to the Queen, or rather to her executive officer, the Governor, the power to appoint Judges, this power being limited only, I submit, by what is reasonable in the minds of the Ministry of the day. The magnitude of this case—the magnitude of the issues to the defendant, and the importance of the questions which have to be decided by your Honours to the country and to this Court—have rendered our task one of considerable difficulty. I, for my part, and I think I can speak on behalf of my learned friends, have endeavoured, while submitting all the arguments which we thought could bear on this case in the interests of the defendant, to submit nothing to your Honours except fair and legitimate arguments on which we can venture to ask your Honours for a judgment of the Court in favour of the defendant.

Sir R. Stout: May it please your Honours, it is unnecessary for me, in reply, to traverse at length the statement of my learned friend Mr. Harper in his opening, as it practically—excepting in one or two matters in which, I submit, I shall have to correct him, he having unwittingly, in reference to an American text-book, made a mistake—has amplified the position I laid down in my opening, which I submit was this: that the growth of constitutional law affecting the appointment of Judges in England has been developed bit by bit—that at first Judges were simply officers in the King's household, provided with salaries by him just the same as his other officers; and that through a long series of years in England they obtained a position of independence. If it were necessary, I could have gone further back than he went to show how in olden days the revenue of England was expended in dealing with Judges; but it has only a historical value, and no practical value in this case. But I might refer to what your Honours will get a copy of—what might be termed the Financial Statement—the estimates of expenditure of the Government of England, say, in 1421 and 1432, all set out; when the revenue of England hardly amounted to £55,000, and the expenditure, which was then apparently kept within the revenue, £52,000. As far back as that it will be seen that, like other constitutional rules which have developed under the English form of government, the law of the Constitution regarding the Judges' appointments and privileges has certainly been developed. Take the example of the Cabinet: Before the reign of William III. the Cabinet was practically unknown; and even now, if we read that interesting article by Mr. Gladstone on "Our Kin Beyond the Sea," he shows in it the development of the Cabinet and the acknowledgment of a Premier. We shall find that the first acknowledgment of a Prime Minister was in the Treaty of Berlin. All these things have gradually grown up; and in the colonies you will find the same growth. In new countries the same stages of growth are passed through as have been passed through in the older countries though the development is quicker. I submit that it has been shown that in New Zealand, as at Home, the rule as to Judges has gradually grown up; so that by our Act of 1882, with the Civil List Act of 1873, they are placed in the same position now in New Zealand as the Judges in England are placed. My learned friend was in error in assuming, because the Judges in the colonies were appointed to hold office during pleasure, that this principle of not removing the Judges save for misbehaviour in the colonies was not recognised In Todd's "Parliamentary Government," 2nd volume, it is pointed out that, though

Judges were in the colonies appointed during pleasure, yet the effect of this constitutional maxim which was laid down in the Act of Settlement even affected their tenure. I shall read the passage:—

"So long as Judges of the Supreme Courts of law in the British colonies were appointed under the authority of Imperial statutes, it was customary for them to receive their appointments during pleasure. Thus, by the Act 4 Geo. IV., c. 96, which was re-enacted by the 9 Geo. IV., c. 83, the Judges of the Supreme Courts in New South Wales and Van Diemen's Land are removable at the will of the Crown. And by the Act 6 and 7 Will. IV., c. 17, sec. 5, the Judges of the Supreme Courts of Judicature in the West Indies are appointed to hold office during the pleasure of the Crown."

Then he goes on to refer to the Act of 22 Geo. III., c. 75, which gave power to appeal on the removal of officers. In New South Wales there is the case of Robertson *v.* The Governor of New South Wales, where a Commissioner of Crown Lands appealed against his dismissal. In the argument it will be found that the counsel for respondent—I think it was Sir Roundell Palmer—expressly said that, so far as 22 Geo. III.. c. 75, was concerned, it only applied to Judges. He said, "It is therefore an office held during pleasure only, and there is no right of appeal from an order of a motion made by the Governor-General and Executive Council from such an office under the statute 22 Geo. III., c. 75, that statute being confined to judicial offices which are in the nature of freeholds." The reference is page 292 of 11 Moore's "Privy Council Cases."

The Chief Justice: The meaning of that is that this Act, limiting, as it were, the right or power of removal now in effect gave them something——

Sir R. Stout: Something similar to the English Judges' tenure; and if the Court will look at the statutes authorising Governors of colonies to appoint Judges, it will see that in the statutes also reference to the salaries is made. In 9 Geo. IV., c. 83, we see, "And the said Judges shall from time to time be appointed by His Majesty, his heirs and successors, and the said ministerial and other officers of the said Courts respectively shall from time to time be appointed to and removed from their respective offices in such manner as His Majesty, his heirs and successors, shall by such charters or letters patent as aforesaid direct; and the said Judges shall respectively be entitled to receive such reasonable salaries as His Majesty, his heirs and successors, shall approve and direct, which salaries shall be in lieu of all fees or other emoluments whatsoever."

Mr. Justice Richmond: What Judges are referred to?

Sir R. Stout: The Judges in the colonies. This was a statute which gave power for the better administration in New South Wales and Van Diemen's Land; so that I submit that, from what appears from Todd, this constitutional law which I have referred to, even though Judges were appointed at will or pleasure, was practically recognised by and was the practice of the Privy Council; and the Court will see from various cases which came before the Privy Council, that before a Judge could be removed he must have been guilty of misbehaviour. There are several of these cases in Moore. There is a case of Judge Willis—I forget the names of the others. So that this constitutional law, according to Todd, and according to the practice of the Privy Council, was recognised in the colonies before our Acts were passed; and it is not correct to say that the constitutional law was not recognised in England as affecting the tenure of Judges. The next point is that raised by Mr. Cooper in reference to the practice in America. I submit that the growth of the law shows how our English law has been developed. One has only to read the text-books on constitutional law to see that the prerogative has practically died away. There is a question which arose at the same time as the incident of Sir Robert Collier mentioned by Mr. Chapman. It was with reference to purchase in the army. What was then said? The Attorney-General and Solicitor-General differed: one said the warrant abolishing purchase could be issued by the prerogative, and the other that it must be issued by virtue of a statute. That case shows that the theory of the prerogative overriding or adding to the statute law is practically obsolete. In 3 Moore's "Privy Council," new series, p. 152, it is laid down: "It is a settled constitutional principle or rule of law that, although the Crown may by its prerogative establish Courts to proceed according to the common law, yet it cannot create any new Court to administer any other law." In construing the right of the Queen to issue a patent or commission, you have to look at what is the constitutional rule. In the case of the Bishop of Natal the Privy Council made very short work in setting that Commission aside.

Mr. Harper: The patent never was set aside.

Sir R. Stout: It was better than setting it aside, for it was declared to have no virtue or effect—it did not give the power it pretended to give to the Bishop. I do not see the need of having invoked the prerogative, because it is not the Queen who has exercised her prerogative. This is a Commission issued not under the hand of the Queen, but purporting to be issued by the Governor under the statute of 1882, and therefore the question of the prerogative cannot arise in this case. The question is, had the Governor a right to issue his Commission to Mr. Edwards under "The Supreme Court Act, 1882"? I submit that, so far as the prerogative is concerned, that can be brushed aside as having no bearing upon this case. My learned friends seem to think that it is a very extraordinary thing to have brought these proceedings against a Judge. Of course, there have been such cases brought against County Court Judges in England, such as The Queen *v.* Parham, 13 Q.B., p. 858. This question also rose in a case in the West Indies.

Mr. Harper: Why did you not cite that case in starting?

Sir R. Stout: I will show you why. It was only in reply to your arguments. In the case in the West Indies, what happened there? My learned friend said he could not find a case where Judges had no salaries. But in this case a second and third Puisne Judge were appointed with no salaries. Of course this place was only a small island; but what happened was this: The Governor of St. Lucia issued a Commission for a second Puisne Judge, whilst the second one was still in office. That was a Crown colony. In this case the second Puisne Judge was very angry with what had

taken place, and wrote a letter to the Governor. The other Puisne Judges brought the second Puisne Judge before them for contempt, and imprisoned him. He, however, took proceedings, and was reinstated. He also obtained £1,500 damages. This is referred to in 3 Moore's "Privy Council Cases." The judgment certainly was not very long. It was a judgment by Lord Brougham. He said,—

"Their Lordships are of opinion that the action in the case lay, that it was well brought, and that the respondent, the plaintiff below, was entitled to a verdict. The sentence of the Court below therefore must stand, but their Lordships think the damages given, £3,000, excessive, and that they ought to be reduced to £1,500. We therefore affirm the judgment, with damages to that extent, and, as we have reduced the damages, such affirmance will be without costs."

So that there the Privy Council did not think very much of the Commission even of a Supreme Court Judge, if that Commission had been issued without lawful authority.

The Chief Justice: I do not know whether I understood Mr. Harper correctly, but my impression of the correspondence is that Mr. Justice Edwards has shown no annoyance at these proceedings.

Mr. Harper: No; nothing was ever hinted at by me. I never wished to show that there was any annoyance. I said that we wanted to fight the thing out on its merits, and apart from any technical objections to the mode of procedure.

Sir R. Stout: That is quite true, but by the time my learned friend got to the middle of his argument he stated that he would take advantage of any technical point he could.

Mr. Harper: My learned friend is not stating correctly what I did say.

The Chief Justice: I understand Mr. Justice Edwards's position is this: If there is any question he is not disinclined to have it decided.

Sir R. Stout: Now I come to deal with how these Acts have been interpreted. What the other side say—and what I have admitted—is that the present constitutional law has been in process of growth for centuries, and that so far as New Zealand is concerned it also has been in process of growth, as also in the case of the other colonies. My learned friend quoted the following from Cooley, p. 276,—

"Where an office is created by statute it is wholly within the control of the Legislature. The term, the mode of appointment, and the compensation may be altered at pleasure, and the latter may be even taken away, without abolishing the office. Such extreme legislation is not to be deemed probable in any case; but we are now discussing the legislative power, not its expediency or propriety. Having the power, the Legislature will exercise it for the public good, and it is the sole judge of the exigency which demands its interference."

But Cooley is not speaking of Judges. The Judges of the Supreme Court are appointed under the Constitution, and Congress cannot vary that Constitution, and there is the distinction. The reference of my learned friend therefore has no bearing on the Judges. The Judges in America are just as independent of the Legislature as they can well be, The Legislature cannot vary their office—it cannot vary the portion of the Constitution under which they are appointed. The Legislature is one thing, the Executive is another, and the Judiciary is a third, and in America they have recognised the three co-ordinate powers in the State. On this point I might refer to pages from 42 to 47 of Cooley. So that as far as that is concerned my friends have cited a note which has no bearing upon the question of Judges. Now, what does the argument really come to on the other side? I admit at once that this constitutional law has been a process of growth, and the whole of Mr. Harper's argument was simply that. He traced its development bit by bit. I submit that he proved conclusively that the Judges had been placed in a stronger position of independence than they have ever been placed in before. In the other colonies it is so; and so it is, I submit, in New Zealand. What was the use of referring to this constitutional rule and growth? I referred to it for the purpose of showing, when this Court comes to interpret the Act of 1882, that it cannot shut its eyes to the constitutional law that has been developed in English-speaking countries during the past century; and it ought therefore to assume in construing this Act that this constitutional law was known to the Legislature, and that the Legislature intended to follow it. But it has been said, "Oh! but there have been appointments that have been practically in violation of this constitutional law." Here comes in technical violations, but not in spirit; because even in New Zealand there has been no appointment of a Supreme Court Judge until the Legislature had first been consulted. But we bring here before the Court a case not relying on technical defects, but because there has been an appointment without consulting the Legislature, and which the Legislature has so far refused to ratify; and the other side ask the Court not to interpret the Supreme Court Act along with the Civil List Act, but to throw all constitutional law aside, and say it is not to be looked at in the interpretation of our Supreme Court Act. I submit the Court ought not to do that. I have pointed out what the Constitutional law is, but I do not need to rely upon that. I only say if there should be any ambiguity or doubtful expression in the Act the Court will, in construing the doubt, lean towards the constitutional principle recognised both here and in England. That is all I quote it for. How is the Act to be construed? Have my friends ventured to say, or have they cited a single case to show, that this Court is not to construe "The Civil List Act, 1873," as part of the Act of 1882. I submit, no case has been cited. On the contrary, cases have been cited by the other side to show that these statutes are to be construed *in pari materiâ*. It has been shown that in the other colonies, as in England, the Act which provides for the creation and appointment of Judges also provides for their salaries. If the Parliament of New Zealand has done by two separate Acts what other countries have done by one Act, is the Court not to construe these two separate Acts as if they were one statute dealing with the same subject-matter? When are statutes not to be construed *in pari materiâ?* They are not to be construed *in*

pari materiâ when they deal with a different subject-matter. I gave an illustration where Lord Mansfield went so far as to read the Bankruptcy Act and the Poor-law together. How can they say that the Civil List Act, which allocates the salaries of the Judges, is not to be read along with the Act of 1882? If the Act is to be read along with the Act of 1882, as I submit it is, how can the Court construe certain words in sections 11 and 12 except by incorporating the Civil List Act? I submit the Court must read the 5th section with this limitation: that there are only to be one Chief Justice and four Puisne Judges. Sections 11 and 12 become quite insensible if that is not so. My friends contend that section 12 gives the Governor extraordinary powers of appointing temporary Judges, and therefore there is no harm in giving the Governor power to appoint permanent Judges. The two things are quite distinct. Parliament meets every year, and if Parliament finds that, so far as temporary Judges are concerned, there has been an attempt to flood the Bench it could step in and displace the Ministry, and advise the Governor at once to get rid of these Judges. But if their argument is correct the Bench can be flooded by Judges appointed permanently, and Parliament would be helpless. There is no power of removal except by petition to the Queen. There might thus be, in violation of all constitutional rule, perhaps twelve Judges appointed to the Supreme Court Bench, and Parliament have to provide for them, and they might still remain Judges though Parliament refused to vote their salaries. I submit that, if my friend's argument means anything, it means that Parliament has power to supersede, without reference to the Queen, by an Act, the Act of 1882. That is adding a new term to the Act of 1882. It is practically putting in a new section, which means this: that if the Governor appoints too many Judges those appointments may be revoked by Act of Parliament. I submit that is affecting the tenure of the Judges not contemplated by "The Supreme Court Act, 1882." What is the tenure of the Judges according to the Act of 1882? The tenure of the Judges is that they are to hold office during good behaviour.

Mr. Justice Denniston: Would it be good behaviour for twelve Judges to receive appointments at the same time? Obviously that would be most improper.

Sir R. Stout: It would be good behaviour as far as the Judges were concerned.

Mr. Justice Denniston: Would it? Do you contend that seriously? I should think it would not.

Sir R. Stout: It would not be misbehaviour individually, unless you could prove conspiracy. Your Honour, there can be no such thing as removing Judges in the lump, and when they came to remove a Judge on the ground of misbehaviour, how would they have to proceed? They would have to proceed on misbehaviour as a Judge individually, and the reason would be that he had received office without salary.

Mr. Justice Denniston: No; there would be a great deal more than that, surely.

Sir R. Stout: Pardon me; it would be—you received office without salary.

Mr. Justice Denniston: Surely it would be far more than that?

Sir R. Stout: I submit that if the theory is worth anything it is worth going to the extreme length with, and you would have to prove conspiracy against the twelve Judges who took office without salary, which you might never be able to do. You must have it as it affects them individually. The Court would not proceed against the Judges *in globo*. The cases would have to be heard one by one; and I submit that, so far as Mr. Harper's argument is concerned, it means this: that he is to add a new term to the tenure of Judges, which the Act does not recognise, and that new term to the tenure of Judges is this: Provided they may be removed by Act by the colonial Parliament. If the Parliament has power to remove a Judge by Act without reference to the Queen, then there is gone, I submit, the independence of the Bench. The Act of 1862 expressly altered the Act of 1858. By the Act of 1858 the Governor could remove on resolution of both Houses; but the Act of 1862 said No, this removal must be by the Queen, on the motion of both Houses; and, if necessary, I can refer to what the practice is before the Privy Council. Before the Privy Council will advise the Queen to remove a Judge, even though both Houses concur, it always asks what is the cause. The cause, I submit, must be shown. I do not deny the power of the Queen to remove a Judge on the motion of both Houses, although no cause may be shown, but I submit that if my friend is driven to this, that there is a new tenure added to the Act of 1882—that that tenure is, if they hold office they may be removed by Act passed by the colonial Parliament. Then, I submit that the words of the Act of 1882 about the Commission and assent of the Queen are not needed. How, then, does the matter stand? I submit it stands thus: that the Court has to interpret the Act of 1882. My friends have not cited a single case showing the Act is not *in pari materiâ* with the Civil List Act, nor have they, by criticism of the Act itself, attempted to show that the words of section 11, and those words of section 12, do not refer to the Civil List Act of 1873, and they have therefore to take the Act as a whole, and not to rely merely upon the general words of section 5. If that be so, then the case of Bell-Cox and Hakes——

Mr. Justice Denniston: In Dr. Barnardo's case, decided since Bell-Cox *v.* Hakes, it was held that there is a right of appeal where a *habeas corpus* has been refused. That, indeed, was suggested in Cox *v.* Hakes.

Sir R. Stout: That helps me, and I will show why. It means this: that these general words, "appeal against any order," are to be modified in this way: "appeal against any order of refusal to release," and not to appeal against an order where release has been granted. That is, practically, instead of merely excluding the right of appeal on *habeas corpus* altogether from the Court of Appeal, that they are to interpret the words "appeal against an order" when the discharge has not been granted. I submit that helps me, for it shows that the words of the Judicature Act, 19th section, are to be modified entirely by the constitutional maxim—namely, that if a person is once released by *habeas corpus* he ought not to be reimprisoned. Instead, therefore, of that injuring my argument, the effect of Bell-Cox *v.* Hakes is to show how the Court will control this matter. The Court, I submit, will see that section 5, in wide general terms, is controlled by the other sections of the Act; and, if it is controlled by the other sections, then the whole Act may be read together. Every word may have effect; every word in the Act may have meaning. If it is read the other way, I suggest that then section 11 has no meaning, and section 12 is unmeaning; and I submit

that the certain rule of construction is that every word of a statute shall be deemed to have some meaning and some validity, and the Court will not assume that there are words in the Act that are unmeaning and useless, and that ought not to appear. Before I conclude, just one word about the contract. I cannot understand my friends about the contract. It seems to me that each one of the three has a different way of putting it. As I understand the thing, there can be no contract prior to the Commission—that is, the contract to appoint a Judge. Is he to be appointed *in futuro?* I submit, your Honours, that a contract prior to appointment is unheard of. An agreement to give an office! Whoever heard of that? I submit there is no such thing known as an agreement to give an office, and I am not aware of a single case where any such contract ever came up, or was made against the Crown or even against an individual.

Mr. Justice Richmond: That would be an action for specific performance.

Sir R. Stout: And that, I submit, is unknown.

Mr. Justice Richmond: However, I did not understand the other side to contend that.

Sir R. Stout: Practically it amounted to some contract prior to appointment.

Mr. Justice Richmond: It was a contract as to salary.

Sir R. Stout: The reason I referred to the letters of the 1st and 5th of March was this: that, whatever the oral communications had been before, the letters crystallized, so to speak, the previous oral bargaining between the parties. I am not going into those bargains at all. I think it is unfortunate that there should have been bargaining; but I am not going into that. The two letters purported to crystallize what took place, and the Premier says in his letter—and that letter practically bears out what the oral communications were, and the defendant does not deny it—the Premier in his letter says,—

"In reference to the conversation I had with you on the subject of the appointment of a Commissioner under section 20 of "The Native Land Court Acts Amendment Act, 1889," I have now the honour to inform you that His Excellency the Governor has been pleased to approve of your appointment to that office. It has appeared to the Government, and such appears to be the general feeling, that, for an office of such importance, involving such large interests, the Commissioner should have the status of a Judge of the Supreme Court, and, therefore, you will be appointed to that office also."

What does that "therefore" mean? Does it mean that there had been an agreement prior to this? On the contrary, the Premier is arguing to show that, having got the appointment to the office of Commissioner, in order to give that Commissioner a status of a Supreme Court Judge, "therefore you will be appointed to that office also." This letter therefore did not contemplate the appointment of a Supreme Court Judge as a Supreme Court Judge. This letter no doubt only contemplated the appointment of a Commissioner with the status of a Supreme Court Judge, to enable him apparently the better to perform his duties as Commissioner. And I submit that is the true reading of this contract. Nor does the letter in reply attempt to say that this letter of the 5th March does not clearly set out the understanding between the parties. On the contrary, the letter is an acknowledgment to say that he accepts the appointment. How? "Upon the terms therein mentioned." What are the terms? I submit the appointment that is mentioned is the appointment of a Commissioner, and the terms that are mentioned are two. The terms are—first, that he is to have the status of a Supreme Court Judge; and the second term is the term as to salary. These terms are mentioned, and that is the acceptance, or else appointment would have been put in the plural number. That, I submit, is the true meaning of the letter and the true contract. I again repeat that, if contract it can be called, it was a contract for the Commissionership with the status of a Supreme Court Judgeship added to it, in order, it appears, the better to provide for the performance of the high duties of the Commissionership. I am not going to say whether it was right or wrong that the Supreme Court Judgeship should be deemed to be the secondary office to that of Native Commissioner. All I say is that it was peculiar—that is all. What, then, is it that the Court really has to decide in this case?

The Chief Justice: How did you understand Mr. Harper about this matter of contract?

Sir R. Stout: They had to abandon it towards the end. At first they wished to show that the contract was sufficient to fix and ascertain the salary in compliance with the Act of Settlement. That is how they began, but that has been abandoned during the argument. They were driven to this position to argue that the fixing and ascertaining could come after the Judge had been appointed. I ask when? How long are they to wait for it? Six years?

Mr. Harper: We did not abandon that.

Sir R. Stout: Pardon me, I have a note of it. My learned friend said that the fixing and ascertaining could come after the appointment.

Mr. Harper: That was on another point, at another part of the argument.

Sir R. Stout: Well, then, my learned friends mean either that it was fixed and ascertained or that it was not. Where was it fixed and ascertained, and who fixed and ascertained it? Not Parliament. I have shown, in Churchward *v.* The Queen, and in other cases to the same effect, that there could be no fixing and ascertaining of the payment of the money without the sanction of Parliament. Who, then, could fix and ascertain it but Parliament? and how can it be fixed and ascertained if Mr. Edwards's salary is to depend upon an annual vote? That never can be the meaning of fixing and ascertaining in the Act of Settlement. My learned friend Mr. Cooper cited a case to show that contemporaneous opinion on the interpretation of statutes could be invoked. So do I say. What then? Can my learned friend point to a single case in which it has been said that "fixed and ascertained" means fixed and ascertained in a series of letters between the Premier and a Judge? That surely would not be fixing and ascertaining. "Fixing and ascertaining" means fixing and ascertaining by Parliament, so as to make the office independent of an annual vote. That has not been done, and therefore that part of the contract is gone. The part they have left is that the fixing and ascertaining may come after the appointment.

The Chief Justice: I understood last night that you assented to what Mr. Cooper said—that your argument involved this: that if next session the Government choose to make a grant, and to put £1,500 on the Civil List for an additional Judge, that would not validate the Commission.

Sir R. Stout: That is what I say: they would have to expressly validate it, not by vote of money.

The Chief Justice: By an Act?

Sir R. Stout: There would have to be an Act to validate it; that is what I submit; or the Governor must reappoint.

Mr. Justice Richmond: That is supposing it was for an additional Judge. If it was to grant a salary to Mr. W. B. Edwards that would be another thing.

Sir R. Stout: That might prove legislative recognition. I submit there has been no fixing and ascertainment of the salary.

Mr. Justice Richmond: It would scarcely be a validation of the Commission. It would be a fresh title.

Sir R. Stout: Yes.

Mr. Justice Richmond: Your position is that the mere voting of money in that way is not a fixing and ascertaining. There must be a fixing and ascertaining prior to appointment.

Sir R. Stout: I submit that is what the statutes in England have done. I have taken up no position that cannot stand the strain of being pushed to its utmost logical conclusion; but I do not think my friend's argument will stand that test when they set up technical breaches of the Constitution, and then argue that because there have been technical breaches of the Constitution there can be no constitutional law at all. They have spoken of the so-called constitutional law, because there have been technical breaches; but I say that the spirit of the Constitution has always been observed hitherto, because, before any Judge had been appointed, Parliament had been consulted, and both Houses had done what was to be done. It was not until the Act of 1873 that practically the constitutional principle was fully complied with, the separate salaries then being voted for each office.

The Chief Justice: The principle was started in 1858.

Sir R. Stout: No doubt; even in the Constitution Act; but there was a change in 1862.

Mr. Justice Richmond: The statute might make the salary of the office certain, but the tenure remained precarious.

Sir R. Stout: It was precarious, but when it was reduced to practice it was not precarious, because the Privy Council never let a Judge be dismissed unless he had been proved guilty of misbehaviour under the Act of George. There must have been some misbehaviour before removal. There are various cases in 5 Moore's "Privy Council" and 6 Moore's "Privy Council" in point. One was a case of Judge Willis, of Port Philip, another was a case of a Judge in Tasmania. Now, I say, dealing with the question of contract, I submit there has been no such thing as a contract. If there was a contract the contract was for the position of Commissioner under the Native Land Act. I shall simply say one thing further: My learnd friend, running through all the statutes, said that the Judges in this colony were not in the same position as at Home, and that they were intended to be in a different constitutional position. I submit not, and that the Acts of 1873 and 1882 place them in the same position. Further, I say it is both for the benefit of Judge Edwards as well as for the benefit of the Bench and the colony that these proceedings should have been taken. Otherwise he might have been left in circumstances similar to those of the Judge at St. Lucia, and be sued for damages for exercising the duties of a position which he did not hold. I submit that it is for the benefit of the colony, because if it be allowable to appoint Supreme Court Judges without a tenure, and without a salary, leaving the Judges dependent upon the vote of the House, it is a most unconstitutional position, and if it be legally possible, it is well that the colony should know it, and that the people should take steps to see that the law is altered. Further, it is well that these proceedings have been taken, for it will be a warning to Executives in the future not to attempt to so deal with such a high position as that of a Judge of the Supreme Court, making it merely a sort of addendum to a Native Commission; and especially, I say, the Executive ought not to have attempted to appoint a Judge to the Supreme Court bench without being frank and open with Parliament, and without having consulted Parliament and asked for its advice upon the matter.

The Chief Justice: The Court will reserve its decision.

No. 84.

JUDGMENTS IN THE COURT OF APPEAL, NEW ZEALAND, IN THE CASE OF THE HON. THE ATTORNEY-GENERAL AND MR. W. B. EDWARDS.

JUDGMENT OF PRENDERGAST, C.J.

THE real question in this case is whether the general words in the 5th section of "The Supreme Court Act, 1882," are controlled by the subject-matter with which the provision is dealing, and the other provisions in the same Act, together with the 65th section of the Constitution Act, and "The Civil List Act, 1863," as amended by "The Civil List Act Amendment Act, 1873."

The provision in question, shortly stated, is that the Supreme Court shall consist of one Judge, to be appointed by the Governor, who shall be called the Chief Justice, and "of such other Judges of the said Court as the Governor, in the name and on behalf of the Queen, shall from time to time appoint."

It is contended in support of the validity of the appointment now questioned that the words of this 5th section do empower the Governor to create at any time, and from time to time, any number of offices of Judge of the Supreme Court, without restriction, and appoint persons to such offices; the only limit, according to this contention, apparently being that there may not be more than one Chief Justice.

It is contended that none of the other provisions of the Act control this power—such as the provision in the 8th section that the commissions of the Judges "shall continue in full force during good behaviour;" the provision in the 11th section that the salary of the Judge shall not be diminished during the continuance of his commission; the provision in the 12th section for the appointment of Judges temporarily, and that every temporary Judge appointed under that section shall be paid such salary, not exceeding the amount "payable by law" to a Judge other than the Chief Justice, as the Governor in Council may direct; and the provision in the 13th section for superannuation allowances to Judges, and which provision it is certain contemplates, and can only be satisfied by, the Judge having an annual salary, at any rate at the time of resignation.

It is contended that "The Civil List Act 1863 Amendment Act, 1873," together with the 65th section of the Constitution Act, and the provisions just referred to of the Act of 1882, do not control the general words in the 5th section.

In "The Civil List Act 1863 Amendment Act, 1873," it is provided that the sum of £7,700 granted by "The Civil List Act, 1863," for paying the expenses of the salaries of the Judges of the Supreme Court *shall be applied* in paying "to the Judges of the said Court respectively the salaries specified in the First Schedule," the schedule being as follows: "Annual salary of the Chief Justice," so much; "annual salary of four Puisne Judges, each," so much. The Act of 1863 provides that the sums mentioned in the schedule shall be in lieu of those in the schedule to the Act of 1858; and the Civil List Act of 1858 provides that the sums in the schedule to that Act shall be in lieu of the sums mentioned in the schedule to the Constitution Act.

I am unable to accede to this contention: in my opinion the general words relied upon are controlled. The Governor had not, as I think, at the time he made the appointment in question power to appoint another Puisne Judge to hold office during good behaviour, the other four offices of Puisne Judge being at the time full, and no salary provided by law for a fifth Puisne Judge.

The Act of 1882 repealed the Supreme Court Judges Act of 1858. A somewhat different phraseology is used in some of the sections of the Act of 1882, which are analogous to those in the Act of 1858. There being, however, clearly no intention in 1882 to extend the Governor's power of appointment, or to introduce any change in the tenure of office of the Judges, the law, as established by the Constitution Act, and "The Supreme Court Judges Act, 1858," and "The Civil List Act, 1858," ought to be considered; and if that state of the law assists in arriving at that construction of the repealing Act of 1882 which I think it capable of receiving, that assistance may certainly be used in conducting to the acceptance of that construction as being that which the Legislature intended the Act should bear.

Before noticing the provision of the Supreme Court Judges Act of 1858, and "The Civil List Act, 1858," it is necessary to advert to some provisions in the Constitution Act, which came into force in 1853, relative to the offices of Judges of the Supreme Court, and also to advert to the law as it then stood relative to the appointment and tenure of office of Judges of the Supreme Court.

The Supreme Court Ordinance of 1844 was then in force. By section 10 of that ordinance it was provided that "the Court shall consist of one Judge, who shall be called the Chief Justice of New Zealand, and of such other Judges as Her Majesty shall from time to time appoint." This provision closely resembles the analogous provision in section 2 of "The Supreme Court Judges Act, 1858," and section 5 of the Act of 1882, the only difference being one that I shall notice hereafter. In the section of the ordinance, however, it is provided that "the Judges of the Court shall hold office during pleasure," and there is no provision in the ordinance as to salary or superannuation, or providing for the appointment of temporary Judges.

In the Act of 1858, however, the 3rd section provides that the commissions of the Judges of the Court, except those of temporary Judges appointed during pleasure, shall continue during good behaviour—with a provision in the 4th section for removal on address by both Houses of the General Assembly; and in the 6th section it is provided that "a salary equal at least in amount to that which at the time of the appointment of any Judge shall be then *payable by law* shall be paid to such Judge so long as his commission continues."

The 7th section again refers to the "*salary payable by law.*" This section empowers to appoint Judges during pleasure for a temporary purpose, and it enacts that "every such Judge shall be paid" such salary, "not exceeding the amount *payable by law to a Puisne Judge of the said Court,* as the Governor in Council shall think fit to direct;" and the 8th section provides for superannuation allowances to every Judge appointed *during good behaviour,* such superannuation allowance to be proportioned to the annual salary of the Judge at the time of resignation.

Now, it is contended that, as the general words in the 2nd section of the Act of 1858, "and of such other Judges as the Governor shall from time to time appoint," are almost identical with the general words in the ordinance, where they undoubtedly were uncontrolled by anything in the other provisions of the ordinance, therefore they should be held to have the same meaning when used in the Act of 1858. But the office of Judge of the Supreme Court, to be held during good behaviour, and therefore practically for life, is a very different subject-matter to the office of Judge of the Court to be held at pleasure, and therefore revocable at the will of the Crown.

Irrespective of the reasons upon which the principle that Judges of a Supreme Court should have security of tenure of office, and should have their remuneration also fixed and secured, it is due to the credit and honour of the Crown that, in respect of any office, judicial or otherwise, and to which the Crown is empowered to appoint for life, and the holder of which has public services to perform, there should be adequate remuneration provided, and that such remuneration should be inseparably attached to the office; and, consequently, one is entitled to expect that, where such offices exist under the law, the law has provided for the payment of such remuneration, either by expressly defining such remuneration and providing for it, or by giving to the authority to which is given the power to appoint the power also to define the remuneration, and by providing for that which may be so defined.

As any other arrangement of authority is so clearly calculated to bring about not only a discreditable state of things, but a state of things inconsistent with the expectation that the duties of the office will be discharged with a due regard to the public interest, even as I think with regard to any office, though not the highest judicial office, that it ought not readily to be supposed that the Legislature would wittingly enact to that effect, and, consequently, that, in considering any legislative provisions dealing with such a subject, the improbability of the Legislature so enacting ought to be constantly borne in mind. If this be so with regard to any office to which the holder is appointed for life, it needs scarcely to be mentioned that the reasons have still greater force when the office is that of a Judge of the Supreme Court.

To proceed, then, to the consideration of the legislative provisions now in question: The general words used in the ordinance of 1844—the same being, it is to be borne in mind, in relation to offices that could be made only during pleasure—were not used expressly for providing as to the "*number*" of Judges that might be appointed, but rather as providing by whom the persons to hold the offices were "from time to time" to be appointed—that is, as vacancies from time to time occur. This appears from the fact that the words apply to the filling the office of Chief Justice, as well as to the other judicial offices. No doubt, when the ordinance was in force—at any rate, before the Constitution Act came also into force—these general words would, there being nothing in the ordinance to the contrary, justify the implication that Her Majesty might not only "appoint" to the office of Judge whenever from time to time vacated, but also appoint a Judge when no vacancy had occurred. As, therefore, the words as used in the repealed ordinance, where applied to the office of Chief Justice, mean *only* appoint when a vacancy from time to time occurs, and do not expressly relate to the defining the number of other judicial offices, but do so rather by implication, the same words, when used with regard to the different subject-matter and with the different context, are readily capable of taking their force and meaning from the context with which they are used and the subject-matter with regard to which they are used, and then assume a different meaning, and negative an implication which implication was quite justifiable in the ordinance when dealing with a different subject-matter, and having a different context.

The power from time to time to create what may be called a new "Judgeship" may still be capable of being implied when used with relation to a different subject-matter and with a different context, but, the power being still only an implied one, it needs less in the way of context to introduce a limitation upon the power than it would if the power to create were express on the matter. It hardly needs observation that the office of Judge of the Supreme Court, to which is attached in the interest of the public a tenure practically one for life, is a very different subject-matter to that of the like office held during pleasure.

As already more generally remarked, when the power to create Judgeships for life, and to appoint to them, is conferred by the Legislature, one would naturally look for some limitation upon the power, and, if not found expressly provided, one would seek to see if the Legislature, though it has not expressed the limitation, had not yet so provided as to put a limit upon the exercise of such a power. A person appointed to the office of Judge of the Supreme Court is surely bound to perform the duties of the office. It could not be intended that the Crown should have power to appoint to such an office without at the same time having power to allot a salary for the performance of the duties, unless a salary were by law attached to the office.

The position of a Judge appointed during pleasure is very different. It may be that the Crown, without appropriation of funds out of which to pay the salary, cannot enter into a contract for the payment of a salary while the office held during pleasure is held; but, as the appointment is revocable at pleasure, the obligation to perform the duties may be at once determined, and so the person is not only not obliged to perform the duties, but is rendered incapable of performing them. Not so when the office is held for life. It is true the holder may possibly have a right to resign the office, but he is not under any obligation to do so.

It is unnecessary to go fully into the many reasons which exist in the public interest for rendering the office of a Judge of the Supreme Court as nearly independent as possible. Ample provision is made for removing from office a Judge, *by Parliament;* and *the law* also amply provides for removing a Judge from office for misconduct. The importance, the necessity of that measure of independence is too well recognised to require to be dwelt upon. It is, I think, certain that Parliament in 1858 intended to carry out to its fullest extent this principle, the partial introduction of which into New Zealand is to be found in the Constitution Act. The question is, whether Parliament has used language which sufficiently conveys this intention. In my opinion it has.

It is contended that, though undoubtedly the intention was that the principle of judicial independence should be introduced, nevertheless the Legislature advisedly put it into the power of the Crown to create new Judgeships and to appoint to them, and advisedly omitted to make provision whereby in regard to those offices and appointments the principle would in every case be recognised—at any rate, in the manner and to the extent Parliament had determined that in general it should; and it is contended that this is not strange, for Parliament could itself, after the Crown had exercised the power, rectify that which Parliament had itself authorised to be done in violation of the principle which it had determined should in general be recognised. The meaning of this must be that Parliament could in any such case rectify the matter by providing, after the appointment was made, a permanent appropriation. But what if Parliament is not of opinion that a permanent appropriation should be made? Is the matter rectified then? The appointee holds his office for life, and without salary. Is not the office then held in violation of the principle which Parliament had determined should be maintained in general?

The answer, indeed, to this contention is that Parliament cannot, in the absence of unmistakable language, be supposed to legislate with its eyes open to a possible state of things which may require further legislation to put right that which it has itself intentionally authorised to be done in violation of a principle which it has said ought to be maintained. Parliament ought not, in the absence of clear and express provision to the contrary, be deemed to have so enacted as that it may afterwards feel itself forced, for shame's sake, to do what it disapproves of.

I have adverted to the different subject-matter dealt with by the ordinance, and the absence of context there from which restriction upon the implied authority could be inferred. I now proceed to consider the Act of 1858. The recital to this Act is that it is expedient to repeal section 10 of the ordinance, and to make other provisions in lieu thereof. This Act of 1858 must also be construed as if there were also recited in it the provisions in the Constitution Act relating to the offices of Judges of the Supreme Court. These provisions are contained in the 64th and 65th sections and the schedule to that Act. The 64th section grants to Her Majesty, to be paid annually and permanently, £1,000 for "Chief Justice," and £800 for "Puisne Judge." No one doubts that Judges of the Supreme Court are here meant. The 65th section provides that the Colonial Parliament may alter these appropriations, but enacts that until altered by Act of the Colonial Parliament the salaries of the Judges—that is, the Chief Justice and one Puisne Judge—"*shall be those respectively set against their several offices in the schedule:*"

And, though in this section it had been provided that the sums so appropriated could be altered by Colonial Act, it concludes by providing that it should not be lawful for the Colonial Parliament to make any diminution in "the salary of any Judge to take effect during the continuance in office of any person being such Judge at the time of the passing of such Act." The Constitution Act, then, subject to any Act of the Colonial Parliament being afterwards passed altering the salaries attached to the respective offices of Chief Justice and one Puisne Judge, fixed the salaries of these offices. The 64th section is an appropriation provision; the 65th is not, or, at any rate, is not that solely. There were then, when "The Supreme Court Judges Act, 1858," was passed, salaries fixed and moneys appropriated, and in every sense "provided by law," for two offices of Judge of the Supreme Court, and no more—a Chief Justice and one Puisne Judge. The Colonial Parliament having before it, then, these provisions of the Constitution Act, proceeds to provide what, in my opinion, is in effect that, *whatever Judges* of the Supreme Court are appointed by the Crown, they shall hold office during good behaviour, shall have "a salary provided by law," that a lawfully-provided salary shall be enjoyed by each Judge from the time he receives his commission, and throughout the time he holds it; and in express terms enacts that throughout the Judge's tenure of office *there shall be paid*—meaning, of course, out of the colonial revenues—to each Judge a salary equal at least in amount to that which at the time of his appointment was payable by law. This provision is mandatory. It is intended to secure to the person the continued payment of that salary which at the time of his appointment was payable by law; but in the public interest it is intended to maintain the independence of the office. If this provision could not be satisfied, the appointment could not, as I think, be made. It could not be satisfied unless at the time of appointment there were a salary payable by law. It certainly would be a strange thing to find that, while provision is made for fixing by law the salary of a temporary Judge, and for securing the actual payment of the lawful salary of such a Judge, yet the Legislature had so provided that a Judge for life might be appointed without lawful salary; and so this provision for the maintenance of the independence of the Judge appointed for life have no effect in his case.

This provision in the Act of 1858, section 6, has not been re-enacted in the Act of 1882. The draftsman was probably under the impression that the provision in the Constitution Act was to the same effect, and therefore introduced into the Act of 1882, section 11, the provision that "the salary of a Judge shall not be diminished during the continuance of his commission." This 11th section, no doubt, was intended to secure that a salary equal at least to that payable by law at the time of the appointment shall be paid throughout the tenure of the commission. The Legislature cannot be supposed to have intended by this provision to be attempting to put a restraint upon itself. The object of the provision in the Constitution Act was to put a restraint on the Colonial Parliament, though it was also to directly enact that the salary should not be diminished.

The provision in the 6th section of the Act of 1858 was intended to be a provision by Parliament for the actual payment of the lawful salaries throughout the tenure of office. The draftsman of the Act of 1882 possibly somewhat misapprehended the full effect of that section, otherwise he would not have omitted it. It may be, and probably was, the case that he had before him the provisions of "The Civil List Act, 1873," and conceived that the provisions there were enough, together with the legislative declaration in the 11th section. "The Civil List Act 1863 Amendment Act, 1873," as already stated, provides that the sum of £7,700, granted to Her Majesty by "The Civil List Act, 1863," for defraying the expenses of the salaries of the Judges of the Supreme Court, *shall* be applied in paying to *the Judges* of the said Court respectively the annual salaries specified in the schedule—that is, "Annual salary of *the* Chief Justice of the Supreme Court, £1,700; annual salaries of four Puisne Judges of the Supreme Court, £1,500 each."

That Act, with the Act of 1863, then, not only grants the funds, but provides how those funds *shall* be applied, and, in doing so, speaks of these five offices as being "the Judges of the Supreme Court." The Civil List Act of 1863 had granted the sum *in globo;* the Amendment Act of 1873 provides how the sums "shall" be applied, not how they "may" be applied; and is, I think, intended to be as distinct a provision as that in the Constitution Act, which is, that "the salaries of the Judges shall be those respectively set against their names in the schedule." The terms of a mere Appropriation Act are, there shall and "may" be applied any sum or sums, &c., not exceeding so-and-so.

I am satisfied that no inference in favour of the validity of the appointment now in question is capable of being drawn from the substitution of section 11 in the Act of 1882 for section 6 in that of 1858.

As already stated, I think that, in endeavouring to arrive at the proper import of the Act of 1882, attention should be given to the state of the law as it stood when the Act of 1858 was passed, and how it stood subsequently. I have shown that the provisions in the Constitution Act fixing and providing a salary for a Chief Justice, and for one other Judge, enabled all the provisions of the Act of 1858 to be satisfied as to these two appointments, but no more. In the same session of Parliament was passed an Act called "The Civil List Act, 1858," altering the appropriation in the 64th section of the Constitution Act, and the schedule thereto, by increasing the appropriation for the Chief Justice, and for one Puisne Judge, describing the office as the first Puisne Judge, and providing for one other Puisne Judge, describing the office as the second Puisne Judge.

It may be noted here that no importance is to be attached to the reservations of this Act and *the Civil List Acts of* 1862 *and* 1863. The reason was, that, as the Governor's salary was also altered by the same Acts, it was necessary by the Constitution Act they should be reserved. It is probable that the provisions in the Constitution Act and the Amendment Act, as to reserving Bills, were supposed to apply to Bills dealing with Judges' salaries, otherwise these provisions would have appeared in the Supreme Court Judges Act. This reading of the Constitution Act and the Constitution Act Amendment Act was erroneous. In 1873 the Governor's salary was separately dealt with by reserved Bills; but the Bill dealing with Judges' salaries was not reserved.

By this Civil List Act of 1858, then, provision was made for another judicial office, that of second Puisne Judge; and upon a person being appointed to that office all the provisions of "The Supreme Court Judges Act, 1858," could be satisfied as to the appointment: and I venture to think that, if this provision as to Judges' salaries had appeared in the Judges Act instead of the Civil List Act, as it well might, it would be beyond doubt that a limitation was effected by the provision.

It is unnecessary to consider whether, under the law as it then stood, the Crown could appoint at a salary less than the amount provided by "The Civil List Act, 1858." That Act has not, as the Act of 1873 has, a distinct provision that the amount granted for the judicial salaries shall be applied to the purposes for which granted.

It may be that under the Judges Act of 1858, and "The Civil List Act, 1858," a valid appointment could be made at any less sum than that granted. I am inclined to think otherwise. By this I mean, I think the appointee would have had a right to the sum in the schedule. For the provision in the Constitution Act was that the salaries there provided "*shall be the salaries;*" and "The Civil List Act, 1858," was really only intended to increase the amount, and to substitute a schedule in place of the schedule in the Constitution Act; and consequently the enactment in the 65th section of the Constitution Act remained—namely, that the Judges' salaries shall be those in the new schedule. Whichever view is taken, all the provisions of the Act of 1858 could be complied with—that is, even if a less salary were allotted by the Crown than the grant.

In 1862 was passed another alteration of the Civil List, appropriating *in globo* for Judges an increased amount. No doubt this was for the purpose of providing a salary for another Judge—a third Puisne Judge. And so in 1863 a similar Act was passed, the intention being, though not expressed in either Act, to provide for an additional Judge.

It may be that under or after each of these Acts, when the additional appointments were made, there was nothing in any Act giving the newly-appointed Judge a right to a salary of any particular amount; it may be that his right would be only to a continuance of payment of such sum within the appropriated amount as the Crown fixed: still, with regard to these additional appointments, all the provisions of the Judges Act of 1858 could be satisfied.

Then came the Civil List Amendment Act of 1873, which recognises the existence of five judicial offices in the Supreme Court, and provides that the lump sum previously granted *shall be applied* in the manner already pointed out. It is, in my opinion, a narrow view of this provision to read it as nothing more than an appropriation or grant to the Crown of the amount. The appropriation had been made before. This Act fixed and bound the destination of the amounts just as much as if contained in the Judges Act or Constitution Act, and is just as complete a fixing of the respective salaries as the Audit Act fixing the Auditor's salary, or Comptroller's Act, or Attorney-General's Act, or any other similar Act, such as the Surplus Revenues Appropriation Act, or as any English Act defining a salary to be paid to a Judge, the only difference being that in the present case the ascertained amount is made a charge on the Civil List.

Then came the Supreme Court Act of 1882, under which the appointment now in question was made. It is admitted that at the time the appointment was made no provision had been made for the payment of a salary to a fifth Puisne Judge. There was then no salary payable by law to the person so appointed. Effect could not be given to the 11th section,-for he had no salary which could be diminished. This provision, as already pointed out, was intended to secure during the whole tenure of office payment of a salary at least equal to a lawful salary payable at the time of appointment.

The manifest intention of the superannuation provision could not have effect given to it, for undoubtedly the Legislature was not providing a superannuation allowance for an officer who had no salary. Then, the provision as to the appointment of a temporary Judge could not be properly satisfied; for that provision contemplates not only that each Judge other than the Chief Justice shall have a salary, but shall have a salary payable by law; and here would be a Puisne Judge without any salary.

There are, then, in the Act of 1882 ample indications that in the public interest a secured salary shall be payable to each Judge throughout the tenure of his office, and that on his resignation he shall have a definite superannuation allowance proportioned to the amount of his lawful salary.

These provisions alone would in my opinion be sufficient to show that the general words in the 5th section relied upon as authorising the appointment now in question must be deemed to be controlled, and that the power can only be exercised if and when these indispensable provisions can be complied with. But when these general words are also found to be used in relation to the making appointments practically for life, it is still more apparent that that limitation upon the authority ought to be implied which the provisions relating to salary and superannuation suggest.

If the appointment is valid, what is the remedy? It is answered: Parliament to provide a salary if it thinks fit; and, as the Ministry of the day when the appointment was made had thought fit, the Legislature also ought to think fit, whether it does approve or not, and so for the credit of the country feel itself forced to do what it disapproves of. This, no doubt, is a position Parliament may often find itself in when the Ministry of the day has done an authorised act—when, in the exercise of that general but undefined and inexpressed authority subject to Parliamentary sanction afterwards to be obtained, the Ministry in a case of emergency does some act. This, however, is not the meaning of the contention. The contention is that Parliament has expressed itself, has given the authority, but retained the power of repudiation. I cannot think that Acts of Parliament are to be interpreted from such a point of view.

It is not contended in support of the validity of the appointment that Parliament has probably given a power it did not intend to give. That, no doubt, was felt to be dangerous ground to take; for if this were admitted it was no doubt felt that the argument as to the interpretation would be much weakened.

It was also contended that the legislative provisions in the Act of 1882, expressed and to be implied, relating to a fixed and secured salary, were satisfied in the case of this particular appointment, inasmuch as the Governor had contracted to pay the appointee an annual salary and that the Governor had power so to enter into a binding contract, and so it was urged that there was a "*salary provided by law.*" To lay a foundation for this contention, a mass of matter is brought before the Court for the purpose of showing that a contract in fact was made, and, as I understand, it was contended that the authority to enter into the contract was to be found in the power to appoint. The idea that the 37th section or any section in "The Crown Suits Act, 1881," gave any authority to enter into any contract was expressly repudiated at the argument, and with good reason.

Does this power to appoint, assuming it to exist, give the power to contract for a salary? In my opinion, irrespective of any other considerations, the whole course of legislation as to the appointments of Judges, and the express provisions therein as to their salaries, show, that nothing was left to Executive action in this respect, except in one case—the appointment of a temporary Judge; and in that case, as already pointed out, express provision is made on the subject, defining a limit, and providing a salary within the limit, and providing the means for the payment of it. I think it beyond question that no power was given to contract. It is unnecessary, therefore, to go at length into the facts relied upon as showing a contract attempted to be made. It seems to me clear from the facts that the Ministry of the day did not profess to enter into such a contract, or profess to be able to do so. It appears that the Ministry were desirous of setting up the Commission authorised to be set up by the 20th section of

"The Native Land Court Acts Amendment Act, 1889;" the 23rd section of which provides that out of money voted by Parliament, or to be voted, for the purpose of the Commission, there were to be paid such sums as authorised by the Native Minister in payment of the services of the Commissioners. One of the Commissioners appointed was Mr. Edwards, his appointment bearing date the 27th February, 1890. Mr. Edwards's appointment as Judge of the Supreme Court was dated the 2nd March, 1890. In the letter informing Mr. Edwards of these appointments no distinction is made in respect of which of the two the salary mentioned in the letter is to be paid. There being express authority, therefore, as to agreeing, subject to appropriation, as to one appointment, and no express authority at all as to the other, I should infer that the agreement, if any, was made with reference on both sides to the express authority. Moreover, it was evidently in the contemplation of the parties that Mr. Edwards's services, subject to some temporary service during the absence on leave of Mr. Justice Richmond, were to be devoted almost if not wholly to the work of the Commission. The incompatibility of the two appointments on other grounds, arising out of the judicial functions conferred on the Commissioner by the 27th section of the Act under which the Commission was made, does not seem to have been considered.

As already remarked, it is not worth while to go into the facts stated in the defence as to the circumstances under which the appointment was made, inasmuch as want of authority to contract for the payment of a salary as Judge of the Supreme Court is, I think, clear. But Sir Robert Stout contended that the facts relied upon by the defendant as showing a valid contract, and so a provision by law for a salary, so as to satisfy the provision of the Act of 1882, instead of supporting that contention, showed such an exercise of the power of appointment as was an abuse of the power, and, consequently, not being within the contemplated exercise of the power, was not within it according to the intention of the Legislature. By this is meant not that the Supreme Court can for this reason exercise a sort of equitable jurisdiction, and cancel the grant, but that, as stated in Maxwell on the Interpretation of Statutes, p. 146, ed. 2, "Enactments which confer powers are so construed as to meet all attempts to abuse them by exercising them in cases not intended by the statute." "Though the act done was ostensibly in execution of the statutory power, and within its letter, it would nevertheless be held not to come within the power if done otherwise than honestly, and in the spirit of the enactment." It was urged that the facts in the defence showed that the object in the exercise of the power in this case was not to provide for the exercise of judicial functions in the Supreme Court, but either to give to the holder of the commission under the Native Land Court Act some so-called "status" or that the provision of the Supreme Court Judges Act was to be made use of as the means of inducing Mr. Edwards to accept the Native Land Commission.

It appears that the first suggestion of the creation of a new Judgeship came from Mr. Edwards himself, as appears by his letter of the 6th November, 1889, set out in the statement of defence, addressed to the Minister for Native Lands. This seems to have been the origin of what has eventuated in the present state of things—a state of things the meaning and effect of which cannot, as appears to me, be ascertained if the opinion of the majority of this Court correctly interprets the law on the points involved.

The Governor must now, in accordance with the judgment in this case, be taken to have had the power to make the appointment. What, then, is Mr. Edwards's position? If one of the other Judges resigns his office, has not the Crown power to abstain from allotting the appropriated funds to the payment of a salary to Mr. Edwards? May not another appointment be made, and the funds allotted to that appointment, and not to Mr. Edwards? If the Chief Justice vacates his office, may not a salary equal to what he receives be allotted to Mr. Edwards, and a Chief Justice appointed without any salary? May not several appointments be made, and the funds released by the vacation of any office be distributed amongst them? and so there will be some Judges on the bench with one rate of salary, and others with another rate.

The Legislature will presumably accept the interpretation of the law as determined by the judgment of the Court; and, as that law was the intention of the Legislature in 1858 and 1882, why should the Legislature in 1891 intend differently, and alter the law? The incongruities are too apparent. It cannot be said in this case, as may be said in some, that the Legislature omitted to foresee the results of its legislation; for these results are manifest—they cannot be deemed to have been overlooked.

In support of the contention that the authority to appoint a Judge without provision as to salary existed, reference was made to some Executive action in the appointment of some of

the Judges. There appears some reason to think that, as to one of the existing appointments, and another, the appointee of which has since died, these had been made, though in anticipation of vacancies about immediately to take place, yet, in fact, before the vacancies did occur; and as to two other appointments—one of which is still existing—the appointments had been made before the Queen's assent had been given to the Bills providing the salaries, though after the Bills had passed both Houses and been reserved, and in one of which Bills was a clause giving a retrospective effect to it. It was contended that the Executive action could be used as aiding the interpretation. Some authorities were cited in which long usage universally acquiesced in had been allowed to control the language of Acts of Parliament. These cases have no application to the present. Indeed, with regard to the appointment of Mr. Justice Williams and Mr. Justice Gillies, the facts are not sufficiently before the Court to enable it to know what the Executive action was. In none of the cases does it appear whether or not any consideration was given to the present question.

There is, on the other hand, in the instance of the appointment of Mr. Justice Gresson—the first appointment made after the Judges Act of 1858—a tolerably clear indication of a reading of that Act adverse to the construction contended for in support of the validity of the appointment now in question.

It remains only to notice one matter that was mentioned during the argument. That is, that if either of the existing appointments was invalid at the time of appointment, the enjoyment of a salary since would not make them valid; and so, that, if these appointments were invalid in the inception, they would have remained so, and consequently there would have been a vacancy in law, though not in fact, when Mr. Edwards was appointed. The learned counsel who argued for the defendant not only did not rely on this contention, but repudiated it as untenable. It is as well, however, to notice that, whatever invalidity there may have been in any of the appointments existing at the time of the passing of "The Supreme Court Act, 1882," there were persons who were ostensibly holders of the offices, and were at that time acting as Judges. Those persons are referred to in the concluding part of the 5th section of that Act, and are there declared to be Judges as if appointed under the Act itself. There can, I think, be no doubt that it is the persons, and not their appointments, that are referred to. The matter was not deemed worthy of investigation, but it seemed that there were other matters which might be relied upon as giving validity to the appointment if such validity was brought into question, such as commissions, under the Seal of the Colony and in the name of the Queen, addressed to the holders of these offices, and speaking of them as Judges of the Court. It was not questioned, and was, in my opinion, beyond question, that Mr. Justice Richmond and Mr. Justice Williams were in fact and in law Judges of the Supreme Court at the time of Mr. Edwards's appointment.

As I think there was no authority in law to make the appointment, the judgment of this Court ought to be for cancelling the letters patent; but, the opinion of the majority of the Court being otherwise, the judgment will, of course, be for the defendant.

JUDGMENT OF RICHMOND, J.

In this case the information avers that the salary of the defendant as a Judge of the Supreme Court was not, prior to his appointment, ascertained and established; that no salary has yet been ascertained or established for him; and that Parliament has refused to vote any salary for him as a Judge. As a conclusion of law it is asserted that the patent issued to the defendant is void. The defendant joins issue on the averments of fact. Much time was occupied in discussing whether the salary promised by the late Administration could be considered to have been ascertained and established—a question which, as all the evidence is documentary, and the documents are admitted, becomes purely one of law. If the cause turned upon this issue I should hold that judgment must go for the Crown; for I am unable to see how a salary merely promised by a Minister, without the authority of the Legislature, express or implied, and without legal provision for its payment, can possibly be in any sense ascertained and established. To say so even sounds like irony.

I pass on, therefore, to the ulterior question of the validity of the patent. The position actually taken in argument on the part of the informant is founded solely on the averment that no salary had been prior to the appointment ascertained and established. Sir Robert Stout contends, and, as I think, is bound to contend, that a grant next session to meet the salary of Mr. Edwards would come too late to validate his commission. The legal question at issue therefore is, whether the non-existence of any provision for the salary of a fifth Puisne Judge at the time when this commission was issued makes it invalid—in other words,

whether the number of Puisne Judges is in law limited by the provision for the time being existing for their remuneration.

The Act of Settlement (13 Will. III., c. 2) prescribes two securities for the independence of the Judges of the Superior Courts—that Judges' commissions be made *quamdiu se bene gesserint*, and that their salaries be settled and established. The latter security it rested with the Legislature itself to provide, and the object does not appear to have been fully attained for nearly a century after the passing of the Act of Settlement. Indeed, the full purpose of the Act can scarcely be said to have been effected until the number of the Judges of the High Court was fixed by Act of Parliament in the present reign; for, so long as the power remained with the Crown, as until then it did remain, to appoint an unlimited number of Judges to each of the three Courts of common-law, it was a legal possibility that there might be a Judge without a salary permanently provided by Parliament. I take it to be clear that by the original constitution of the three common-law Courts at Westminster the number of Puisne Judges was unlimited. Historically it is certain that the number has varied from time to time. Coke (4th Inst., 80) speaks of the number of the Judges of the Court of King's Bench as four at the least. And so late as the Acts 11 Geo. IV. and 1 Will. IV., c. 70, when an additional Puisne Judge was appointed to each of the three Courts, the right of the Crown, *proprio motu*, to increase the number of Judges appears to have been recognised. The language of that enactment imports as much. It would be impossible to argue that the Act of Settlement took away this power of the Crown.

It is, however, contended on the part of the informant that the Legislature of this colony, whilst adopting, as it has done in substance, the securities for judicial independence mentioned in the Act of Settlement, has by implication done what the Act of Settlement did not do, by abolishing the existing power of the Executive Government to appoint permanent Puisne Judges without restriction as to number. The question in truth turns upon the interpretation of the laws of the colony, reference to the constitutional law of England being useful merely by way of illustration.

Under the Charters of 1840 and 1846, and the ordinances establishing a Supreme Court, there was no limit to the number of Puisne Judges. Under the express terms of the ordinance of 1844 they held office during the pleasure of the Crown, and no provision existed for the security of their salaries. Coming down to the date of the Constitution Act, the only provisions of that statute which in anywise relate to the matter in hand are sections 64 and 65. Section 64 establishes a Civil List of £16,000 per annum for definite purposes, amongst which are stated amounts for the salaries of a Chief Justice and a Puisne Judge. Section 65 empowers the General Assembly to alter the appropriation of the Civil List; but it is provided that it shall not be lawful by any Act passed in exercise of that power to diminish the salary of any Judge holding office at the passing of such Act. These are the first provisions in our laws relative to the salaries of the Judges. The proviso in section 65 is a limitation by the Imperial Parliament of the powers of the local Legislature, and nothing more. The words in the earlier part of the section, that "until and subject to alteration by the Legislature the salaries of the Governor and Judges should be those respectively set against their several offices in the schedule," must obviously refer to the particular salaries and Judgeships provided for. There is nothing in such words to affect the Governor's power under the then existing law of the colony of creating other Judgeships. It is impossible to read the Act as enacting that "the Supreme Court of the colony shall henceforth consist of a Chief Justice and one Puisne Judge," or as enacting "no Judge shall henceforth be appointed without previous provision for his salary." The latter restriction might, under our present system of government, be desirable as a protection against possible abuse of the Executive power, but there is no trace of such a purpose in the Constitution Act. In reserving funds for the payment of two Judges, the Act did not bar the appointment under any existing legal power for the purpose of a greater number. Section 7 of the Act saves all existing laws and ordinances except so far as they may be repugnant; and there is here no repugnancy. The informant must therefore look to the legislation of the General Assembly for the support of his contention.

There are six colonial statutes bearing upon the question in controversy. Two of them—"The Supreme Court Judges Act, 1858," and "The Supreme Court Act, 1882"—are directly concerned with the constitution of the Court and the Judges' tenure of office; the other four—*i.e.*, the series of Civil List Acts—are money Bills, providing for, amongst other services, the Judges' salaries. The controversy turns wholly, or almost wholly, on the question whether these money Bills, which in some, though not in all, cases specify the number of Judgeships

provided for, are to be read as limiting the number of Judges to be appointed. It will be necessary to examine these Acts in detail.

The earliest in date is "The Supreme Court Judges Act, 1858," by which, for the first time, it is provided that the commissions of the Judges shall be during good behaviour; there being nevertheless reserved to the Governor by a separate section power to provide for temporary exigencies by the appointment of Judges holding office during pleasure only. By section 2 it is enacted as follows: "The Supreme Court of New Zealand shall consist of one Judge, to be appointed in the name and on behalf of Her Majesty, who shall be called the Chief Justice, and of such other Judges as His Excellency, in the name and on behalf of Her Majesty, shall from time to time appoint." The language is identically the same, so far as concerns the present question, with that of clause 10 of the ordinance of 1844, which section 2 replaces. It is observable that the Legislature has had distinctly in view the question of number. There is to be only one Chief Justice. This seems to make the absence of limitation in the case of the Puisne Judges significant of an actual purpose that their number should be left to the discretion of the Executive, subject, of course, to the same practical control as is exercised by the Legislature, through the power of the purse, with respect to other services. Section 6, however, is relied upon by the informant as controlling the plain language of section 2. The words are, "A salary equal at least in amount to that which at the time of the appointment of any Judge shall be then payable by law shall be paid to such Judge so long as his patent or commission shall continue and remain in force." Clearly this language indicates that the framers of the Act, knowing the general purpose of the Legislature to make permanent provision for all Judges, took it for granted that a legally-fixed salary would *at the time* of his appointment, or (what for the purpose of the section would be the same thing) *as from the time* of his appointment, be payable to every permanent Judge. No one can suppose that it was ever contemplated that a Judge should remain without title to such a salary. The direct purpose of the section, however, is to secure the Judge from reduction of salary; and it is unduly straining an incidental expression to interpret the reference to a salary "payable by law at the time of the appointment" as wholly altering the effect of section 2 and the previous law of the colony. Surely, if it had been intended to require the prior consent of the Legislature to every increase in the number of Puisne Judges (for that is what it comes to), so important a purpose would have been expressed in the principal clause, and not have been left to be inferred from language used primarily with another object. In any case the argument raised on section 6 cannot be of much weight, as the section is repealed by "The Supreme Court Act, 1882," and the substituted provision (which, as regards the protection of the Judges, is an improvement on the former one) affords no similar ground of argument.

In the same session of Parliament (1858) a Civil List Bill passed both Houses, and was reserved for Her Majesty's assent, providing, amongst other things, for the increase of the salary of the Chief Justice, and for the salaries of two Puisne Judges. It briefly enacts that there shall be payable to Her Majesty the several sums mentioned in the schedule, in lieu of the sums mentioned in the schedule to the Constitution Act. Amongst the services and sums specified are—"Chief Justice, £1,400; first Puisne Judge, £1,000; second Puisne Judge, £1,000." Hereupon first arises the contention that by the grant of these sums the number of the Judges is limited to the three provided for. Sir Robert Stout argues that the Civil List Acts, so far as they relate to the Judges' salaries, are *in pari materie* with the Act just examined and with "The Supreme Court Act, 1882." This I cannot concede. The Civil List Acts are money Bills, and do not affect the constitution of the Court. That they are pure money Bills may be tested by a familiar parliamentary criterion, of which this Court may take notice. For I think it may be stated without doubt that under "The Privileges Act, 1865," as interpreted by the Law Officers of the Crown in England, in an opinion cited to us for another purpose by Sir Robert Stout, the House of Representatives might have treated any amendment of those Acts by the Legislative Council as a breach of privilege. The House of Representatives by such Acts says in effect to the Executive Government, "We will pay so many Judges, and so much to each." It is not in accordance with proper principles of construction to give that the additional meaning, "And you shall appoint no more than we have provided for." No one would suppose that a grant for the salaries of twenty Resident Magistrates, or twenty Collectors of Customs, precluded the appointment of a greater number. The payment of salaries to the additional officers would require authorisation, but that necessity would not affect the validity of the appointments. The case of a Judge of the Supreme Court is not, in principle, different. The appointment

is more important because of the dignity and permanence of the office, and also because it ought to be provided for by a permanent grant. There is greater reason, therefore, for consulting the Legislature beforehand upon the subject. This, however, is no ground for attributing to a grant for a judicial service any extraordinary significance and effect as limiting the powers of the Executive Government.

The Civil List Acts of 1862 and 1863 come next in order of date. By the former the grant for Judges' salaries is increased to a gross sum of £6,200, and by the latter further increased to a gross sum of £7,700, at which it still stands. Both grants are in lump sums, under the monosyllabic heading, "Judges." In point of fact the number of the Puisne Judges was increased in 1862 to three, and in 1863 to four; but these Civil List Acts specify neither the number provided for nor the rate of the salaries. This evidently strengthens the argument that the Civil List Acts are not to be regarded as defining the number of the Judges.

I come to "The Civil List Act 1863 Amendment Act, 1873," which is made a strong point of by the prosecution. After reciting, amongst other things, "that it is expedient that the sum of £7,700 granted to Her Majesty by 'The Civil List Act, 1863,' for defraying the salaries and expenses of the Judges of the Supreme Court should be more definitely appropriated to such service," the Act separates that sum into grants of £1,700 for the annual salary of the Chief Justice, and £6,000 for the annual salaries of four Puisne Judges of the Supreme Court—each £1,500—this division corresponding with the actually existing apportionment of the aggregate grant of £7,700. This measure reasserts the control of the Legislature over the detail of the expenditure of the grant for Judges' salaries—a control which had been abandoned by the grant of lump sums in 1862 and 1863. Clearly the Act limits, as the Civil List Act of 1858 had done, the expenditure of the grant to the payment of definite salaries to a definite number of Judges; but, for the reasons already given by me in reference to the Civil List Act of 1858, it is not to be considered as limiting the number of Judgeships. Had it been meant to alter in this respect the constitution of the Court as it has existed since the foundation of the colony, the only proper method would have been to amend section 2 of "The Supreme Court Judges Act, 1858." I cannot take this Act of 1873 as an implied amendment of that enactment, which would be out of place in a money Bill.

This view of the matter is strongly supported by the terms of "The Supreme Court Act, 1882," re-enacting without material alteration section 2 of the Act of 1858; as that statute had re-enacted the provision of the ordinance of 1844. Sir Robert Stout's attempt to read into the Act of 1882 the limitation of the number of Puisne Judges to four, which he finds, as he supposes, in the Civil List Act of 1873, is no more feasible than it is to control "The Supreme Court Judges Act, 1858," by the contemporary Civil List.

Frequent reference was made in argument to various provisions of the statutes as showing it to be clearly contemplated that every permanent Judge of the Court should have a salary provided for him from the date of his appointment. No doubt that is so; but, as I have already observed in commenting on section 6 of "The Supreme Court Judges Act, 1858," it is pushing the matter too far to say that incidental references of this kind imply the existence of a positive inhibition—positive, yet nowhere expressed in the statute-book—of all appointments prior to the grant of a salary. It may well have been supposed that the Executive Government and the Legislature would, without the check of positive law, never act otherwise than in concert in such a matter—that the Executive Government would never, without proved and undeniable necessity, and a practical certainty as to the consent of the Legislature, add to the number of permanent Judges; and that the Legislature would never capriciously refuse to make good the engagements of the Executive as to salary. If the present case should prove the futility of this expectation, it will be a matter profoundly to be regretted; but it cannot vary the legal conclusion that the possibility of such a conflict of opinion and authority has never yet been provided against.

It was fairly acknowledged, as the logical result of the position taken by the prosecution, that all appointments to a Judgeship, even though made with the approval of the House of Representatives, are void if previous provision has not actually been made by statute for the salary; so that an increase in the Civil List made next session to meet the salary of Mr. Edwards would not validate his commission. As it is the fact that several previous commissions have been issued which, though substantially unobjectionable, are technically open to this objection, the Court should be slow to admit its validity. To make the position still more alarming, Sir Robert Stout cited to us the case of Gahan *v.* Lafitte (3 Moore, P.C., 382), which is supposed to show that the judicial acts of a Judge *de facto sed non de jure* are void.

The grounds of that decision are not stated in the very brief judgment delivered by Lord Brougham. This is not the time accurately to examine the case, but it is in the highest degree improbable that the Judicial Committee meant to depart from the long line of authorities, beginning with Bagot's case (9 Edw. IV., folios 1 and 9), which have established that the acts of persons *de facto* exercising judicial functions in the State, from the King downwards, are valid, notwithstanding the defective title of the person exercising the office.

For the foregoing reasons I am of opinion that the informant's objection to the validity of the patent is not well-founded, and that judgment must be for the defendant.

JUDGMENT OF WILLIAMS, J.

The question we have to determine is whether the power of appointment of Judges of the Supreme Court given to the Crown by section 5 of "The Supreme Court Act, 1882," is limited to the number of Judges whose salaries have been provided for by law, and whether the circumstance that at the time of the appointment of a Judge no salary has been thus provided for him renders his appointment in excess of the powers vested in the Crown and void. Section 5 of "The Supreme Court Act, 1882," is a re-enactment, with a slight variation, of section 2 of "The Supreme Court Judges Act, 1858," which itself re-enacts substantially the provisions of section 10 of "The Supreme Court Ordinance, 1844," so far as they relate to the power of the Crown to appoint Judges. Section 10 of the ordinance of 1844 enacts that "the Court shall consist of one Judge, who shall be called the Chief Justice of New Zealand, and of such other Judges as Her Majesty shall from time to time be pleased to appoint." The section goes on to provide that the Governor may appoint Judges provisionally until Her Majesty's pleasure be known, and that the Judges shall hold office during Her Majesty's pleasure. The provisions of the Act of Settlement as to the tenure of office of Judges and the ascertainment of their salaries were therefore not in force in this colony at the time it became a separate colony. As it was then, and remained until the coming into operation of the Constitution Act, a Crown colony, the Crown had full power to take such order in the matter as seemed advisable, and by the ordinance the provision of the Act of Settlement as to the tenure of the judicial office was expressly disregarded. The circumstance mentioned in the argument, that the practice in Crown colonies was not to remove a Judge except for cause, although his appointment was during pleasure, shows only that the Crown in exercising the power of removal looked at the provisions of the Act of Settlement not as a law by which it was bound, but as a salutary rule which it was desirable to follow. The provision of section 10 of the ordinance of 1844 is little more than a declaration of the power which the Crown in a Crown colony would have had, apart from the ordinance, to erect a Supreme Court and appoint Judges. The section rather assumes that the power of appointing Judges belongs to the Crown than confers upon the Crown the power of appointing them. The Crown could have appointed any number of Judges it might deem expedient, and, in so far as it had the control of the revenue, could have found the money to pay their salaries. The colony ceased to be a Crown colony when the Constitution Act passed by the Imperial Parliament (15 and 16 Vict., c. 72) came into operation. The 1st section of that Act provides that the ordinances previously made, amongst which was the ordinance of 1844 above mentioned, should be held valid. The 64th section of the Act provides that there shall be payable to Her Majesty, out of the revenues of the colony, the several sums mentioned in the schedule for defraying the expenses of the services mentioned in the schedule. The 65th section provides that the General Assembly may by any Act or Acts alter all or any of the sums mentioned in the schedule, and the appropriation of such sums to the purposes there mentioned, and that until and subject to such alteration the salaries of the Judges shall be those respectively set against their offices in the schedule. The section goes on to provide that it shall not be lawful for the General Assembly by any Act to make any diminution of the salary of any Judge to take effect during the continuance in office of any person being such Judge at the time of the passing of any such Act. In the schedule referred to the salary of the Chief Justice is fixed at £1,000, and of one Puisne Judge, £800. Sections 64 and 65 are among those which the General Assembly is debarred from altering, and are still law (Constitution Amendment Act—20 and 21 Vict., c. 53, s. 2). I see no reason why the prohibition in section 65 against diminishing the salaries of Judges during their continuance in office should not continue to the present day, and apply to the existing Judges. By the 66th section of the Act the net revenue of the colony, after providing for the sums made payable to Her Majesty for the above-mentioned services, is subject to be appropriated by

the General Assembly. By this Act, therefore, the Crown has been secured a certain sum for the payment of the fixed salaries of a Chief Justice and of one Puisne Judge, while the appropriation of the rest of the revenue, after deducting this sum and other fixed charges, is left to the General Assembly. It is material to consider what is the effect of this legislation on the power of the Crown to appoint Judges—mentioned in the 10th section of the ordinance of 1844. One most important effect it certainly had—viz., that, as it appropriated certain specific sums for the payment of Judges, and as the appropriation of the rest of the revenue was left wholly to the General Assembly, the Crown had thenceforth no power, express or implied, by contract, promise, or otherwise, to pledge for the payment of the salaries of any additional Judges the revenues the control over which it had parted with. It would be wholly in the discretion of the General Assembly as to whether or not such Judges should be paid. There was nothing, however, to take away the general power of the Crown, expressly recognised by the ordinance of 1844, to appoint such Judges as it thought fit, in the same way as it could appoint any other officers whose office was determinable at pleasure—subject, of course, to the power of the Assembly to refuse to provide for them. The grant of a Constitution to the colony would prevent the Crown erecting a new Court, but could not prevent the Crown from appointing additional Judges, subject as above mentioned. As the Judges were then removable at pleasure, the exercise of this power, even if the Assembly refused to provide salaries, would have led to no sensible inconvenience. So things remained until the passing of "The Supreme Court Judges Act, 1858." That Act repealed section 10 of the ordinance of 1844, and enacted, by section 2, that the Supreme Court should consist of one Judge, to be appointed in the name and on behalf of Her Majesty, who should be called the Chief Justice, and of such other Judges as His Excellency, in the name and on behalf of Her Majesty, should from time to time appoint. This, therefore, is simply a re-enactment of that part of section 10 which relates to the appointment of Judges, with the alteration that the appointments, instead of being made directly by the Queen, are to be made by the Governor on her behalf. The 3rd section, however, made the important alteration that the commissions were to continue in force during good behaviour, instead of being determinable at pleasure, as they were under the ordinance of 1844. The 6th section of the Act provided that a salary equal at least in amount to that which at the time of the appointment of any Judge should be then payable by law should be paid to such Judge so long as his patent or commission should continue and remain in force. The 7th section provided for the appointment of temporary Judges, to hold office during pleasure, and that every such Judge shall be paid such salary, not exceeding the amount payable by law to a Puisne Judge of the Court, as the Governor may direct. The Act of 1858 must, of course, be construed with reference to the law as it then existed—that is to say, to sections 64 and 65 of the Constitution Act, and the schedule thereto. Specific provision had therefore been then made by law for the payment of a Chief Justice and one Judge. If the power which the Crown originally had to appoint Judges is now limited, it must first have become limited by virtue of "The Supreme Court Judges Act, 1858." Did, then, this Act limit the pre-existing power? The 2nd section expressly re-enacts the 10th section of the ordinance of 1844. The material alteration in the law made by the Act of 1858 was to render the judicial office tenable during good behaviour instead of during pleasure. The Legislature, therefore, having that main object clearly in view, deliberately reconferred upon the Crown the same power, word for word, to appoint Judges to hold office on this tenure as it had when the appointments to the judicial office were held at pleasure. If, then, it be sought to limit the power by a mere implication from subordinate sections of the Act, the implication must be absolutely irresistible. If the Legislature had intended to limit the power, nothing would have been easier than to have said so in plain words. It is sought to limit the power by the provisions of the 6th and 7th sections. Section 6 is evidently intended as a re-enactment, in a slightly different form, of that part of section 65 of the Constitution Act which prohibits the salary of a Judge being diminished during his term of office. The words of the section assume, no doubt, that, at the time of the appointment of a Judge, a salary will be payable to him by law. The words of section 7 assume only that a salary will be payable to a Judge by law, but not necessarily that the fixing of the salary will precede his appointment. I do not think the assumption which might appear from the peculiar wording of section 6 is sufficient to control the general power given to the Crown by section 2, and to prescribe affirmatively that it was a condition precedent to an appointment that the salary should, at the time of the appointment, have been made payable by law. Section 11 of the Act of 1882, however, alters the language of section 6 of the Act of 1858,

and prescribes merely that the salary of a Judge shall not be diminished during the continuance of his commission, and omits the reference to a salary payable by law to a Judge at the time of his appointment. At the time of the passing of the Act of 1858 there was provision made by law for a Chief Justice and one Judge. The Court, by section 2, is to consist of a Chief Justice and not only such other Judge, but such other Judges, as the Crown shall from time to time appoint. It would be a very strong thing to hold that the 6th and 7th sections so limited the powers given by section 2 as to prevent more than one Judge being appointed before a Civil List Act had been passed to provide for his salary. The provisions of the Supreme Court Act of 1882 on the subject of judicial appointments and the tenure of the judicial office are nothing more than a re-enactment in slightly different terms of the provisions of the Act of 1858. "The Civil List Act, 1873," stands in the same relation to "The Supreme Court Act, 1882," as sections 64 and 65 of the Constitution Act stood to the Act of 1858. If, as I think, the power of appointment of Judges is not controlled in the earlier Act, neither is it controlled in the later. The same words being used, the intention to confer the same powers must be presumed. Against the intention of the Legislature to make the fixing a salary to the office by law a condition precedent to the appointment to it, the course of legislation from 1862 to 1873 may be invoked as a further argument. The Civil List Acts in force during that period did not affix any salary to the office of a Judge, but simply granted to the Crown a lump sum for the payment of Judges. The appointments of Mr. Justice Richmond in 1862, and of Mr. Justice Chapman in 1863, were both made before the law came into force which affixed a salary to their office. The appointments of Mr. Justice Gillies and myself in 1875 were made about a month before the gazetting of the resignation of Mr. Justice Gresson and Mr. Justice Chapman. The provisions of the Act of Settlement as to fixing and ascertaining the salaries of Judges are not in force as law in the colony. Even if they were, the Act does not prescribe that the salary of a Judge must be absolutely fixed and ascertained by statute at the instant of his accepting office. Where not directly enforced by statute the provisions of the Act of Settlement can only be looked at here as embodying a salutary constitutional principle which it is desirable to follow. It cannot be suggested that there was a real infringement of any constitutional principle in the circumstances of any of the appointments above mentioned. In the case of Mr. Justice Richmond and Mr. Justice Chapman, it would have been only in the very remotely improbable case of the Crown declining to assent to the Acts providing for their salary that any difficulty could have arisen. Both Houses of the Legislature had previously sanctioned their appointments by doing all they could without the concurrence of the Crown to fix their salary. It would only be by inserting in the Act of 1858, under which these appointments were made, a provision which it does not contain—viz., that the attaching by law a salary to the office of Judge shall be a condition precedent to the appointment—that these appointments could be invalidated. The proviso to the 5th section of the Act of 1882 appears to me to operate not as the confirmation of doubtful appointments, but as a recognition of the original validity of the appointments. The proviso may therefore be invoked to show that the construction which the plaintiff seeks to place upon the Act of 1858, and which would have made these appointments, as well as the appointment of Mr. Justice Edwards, originally invalid, is not the correct one. It was said that to hold that the Crown has power to appoint Judges without limit would be destructive of the independence of the Bench. The answer to that is, first, that, whether that be so or no, we cannot mould legislation to suit our own views; and, secondly, that there are checks against the abuse of the power which in most cases may, as I shall endeavour to show, be trusted to work efficiently—viz., the power which the General Assembly has over the public revenue, and the power of the Crown to remove on an address of both Houses. It is quite clear that the Crown has no power by any contract, promise, or engagement to pledge the credit of the colony to the payment of a salary for life to any Judge beyond the number provided for by the Civil List Act. The Legislature has by that Act granted a specific supply for judicial purposes, and has also given by the Supreme Court Act express power to pay a salary to a temporary Judge. These provisions of themselves negative the implication of any power to further pledge the public credit for the payment of Judges. Apart, however, from these provisions, no such power could be implied. The power to make appointments of any kind must always be subject to the right of Parliament to refuse to provide funds for the payment of the appointee if Parliament considers the appointment unnecessary. Take, for instance, the case of an office held during pleasure. If the Crown in its discretion thought it necessary to appoint, say, another Resident Magistrate for whose salary no appropriation had been made, the course of proceeding would be as follows: The

Crown would appoint to the office, and arrange provisionally with the appointee what salary he was to receive. Until Parliament met, the Crown would pay the arranged salary either out of a sum for contingencies already voted and available for the purpose, or out of "Unauthorised expenditure." When Parliament met, the salary of the officer would appear upon the estimates, and it would be in the absolute discretion of Parliament either to refuse to vote the sum proposed, or to reduce the amount. Nothing that had previously taken place between the Crown and the appointee could in the least fetter that discretion, nor could the appointee complain of a breach of faith on the part of Parliament if Parliament refused to vote his salary, because Parliament had never undertaken to pay any salary. If Parliament refused to vote the salary, the natural consequence would be that the appointee would resign his office. If he did not, and if the Crown considered it undesirable that he should continue to perform the duties of his office without salary, the Crown could remove him. Until resignation or removal, however, he could legally perform those duties. If the Crown appointed to an office tenable for life, but determinable on misbehaviour or by the Crown on the address of both Houses, without any salary having been previously appropriated to the office by Parliament, the Crown in like manner would have no power to fetter the discretion of Parliament as to whether it should appropriate any salary, or the amount of such salary, or whether it should pass an Act providing for a salary out of the Civil List, or whether it should simply vote a salary for the current year. The appointee could not complain of any course the Parliament thought fit to take, because Parliament had made no bargain with him, and had not authorised the Crown to make any bargain. If Parliament thought the appointment an unnecessary one, or disapproved of it on any ground—and of its right to disapprove Parliament is the sole judge—the refusal to provide funds is the legal and constitutional method of giving effect to the opinion of Parliament. The power of the purse is the substantial check on acts of the Executive which, in the opinion of Parliament, are either unnecessary, or improper, or contrary to the conventions of the Constitution. In an ordinary case where the Crown appointed to an office tenable for life, and involving onerous duties, the appointee, if Parliament refused to provide a salary, might be expected to resign. If, however, he did not do so, then, no doubt, the Crown could not, of its own motion, and in the absence of misbehaviour, remove him, as the office is for life. Apart, however, from the question of misbehaviour, the office is determinable by the Crown on the address of both Houses. If, therefore, Parliament considered it to be unseemly that a Judge should hold office after Parliament had expressed its disapproval of his appointment by refusing to provide him with a salary, Parliament might address the Crown to remove him on that ground, and if the Crown concurred in the opinion of Parliament the Crown could remove him, though he had been guilty of no misbehaviour. No doubt the ordinary practice of the Crown on an address is to remove only if misbehaviour is proved; but the power is not confined to that, and if the address showed a valid reason for removal there is little doubt but that the power would be exercised. The whole matter, therefore, would rest with Parliament. If, as is generally conceded, it is desirable in the public interest to maintain the independence of the judicial Bench, we have no right to assume that Parliament, whose business it is to protect the public interest, will not act so as to maintain that independence. If Parliament thinks fit to appropriate a salary to Mr. Justice Edwards, why should it not carry out the policy which has been carried out in the past, and make that salary independent of annual appropriation? If, indeed, it did not do this, but made an appropriation for the current year only, the neglect to make a similar appropriation in subsequent years would, by the 11th section of "The Supreme Court Act, 1882," which provides that the salary of a Judge shall not be diminished, be a breach of public faith which we cannot suppose Parliament would be guilty of. It may be said that, if Parliament does not think fit to appropriate a salary, and the office is not vacated by resignation, a Judge continuing to hold office without a salary, and waiting for something to turn up in the future, is in a great deal less independent a position than a Resident Magistrate whose salary is subject to annual appropriation, and who is removable at pleasure, and that the continuance of such a state of things is a menace to the independence of the Bench. The answer is that, if such a state of things is improper and ought not to be allowed to continue, Parliament has the power of putting an end to it by an address to the Crown. In the present case, until such time as the matter may be finally dealt with by Parliament, the position will undoubtedly remain most unsatisfactory. The Judge is absolutely dependent upon the Ministry of the day for the payment of any salary, and has to come before Parliament as a suppliant to ask that a salary be given him. It is difficult to conceive a position of greater dependence. No Judge

so placed could, indeed, properly exercise the duties of his office. One of these duties, for instance, is the trial of petitions against the return of members to Parliament. How could a Judge in this position be asked to take part in such a trial? Against the occurrence of such a state of things obviously neither the power of the purse which Parliament has, nor the power of removal by address, can be a sufficient protection. Certainly Parliament never could have supposed that a Judge would be placed in this position; but the question is whether it has so legislated as to prevent his being thus placed. For my own part, I deeply regret that it has not. If the Crown exercises its power of appointment without a previous appropriation, or without having in some way or other ascertained the mind of Parliament in the matter, the occurrence of such a state of things may not unreasonably be anticipated. I think our judgment must be for the defendant.

JUDGMENT OF CONOLLY, J.

I do not think it necessary to add much to the judgment delivered by the Chief Justice, with which I agree.

A great number of papers have been printed and laid before us, in addition to the statement of claim and statement of defence. The reason for printing all these papers I have not been able to discover; for, with the exception of two or three letters, they were not referred to on either side by counsel, and have apparently no bearing upon the questions to be decided. Those questions are, Was the defendant legally appointed a Judge of the Supreme Court? and, if so, was he by such appointment entitled to the salary and allowances the same as those paid or allowed to the other Judges?

In dealing with these questions, it appears to me to be desirable first to consider the Acts as to the appointment and salaries of Judges as they were when the defendant's commission as a Judge was issued; then to refer to previous legislation within the colony upon the same subjects; and, lastly, if necessary, to view this legislation by the light thrown upon it by the principles established with respect to the appointment and tenure of office of Judges in England.

The only Act dealing with the appointment of Judges of the Supreme Court which was in force within the colony at the time when the commission of the defendant was issued was "The Supreme Court Act, 1882." This Act must be read as a whole; for if the words in a single clause are taken by themselves, they might lead to a conclusion not to be justified if other parts of the Act are allowed their due weight. We find by section 5 that the Court shall consist of one Judge, to be appointed by His Excellency the Governor in the name and on behalf of Her Majesty, who shall be called the Chief Justice of the said Court, and of such other Judges of the said Court as His Excellency the Governor, in the name and on behalf of Her Majesty, shall from time to time appoint; and 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.

Now, if this section is read irrespective of any other part of the Act, it would be apparently an authority for the appointment of an unlimited number of Judges; and it must be the defendant's contention that the number of Judges of the Supreme Court holding office during good behaviour at any one time is a matter entirely in the discretion of the Governor, acting, of course, by the advice of his Executive Council. This, however, is not necessarily the only construction to be put upon this section even if it stood alone; for the appointments to be made by the Governor from time to time might be as vacancies occurred. This is, I think, the proper construction of the section.

But section 8 provides that the Chief Justice and Judges shall be appointed during good behaviour; section 11, that the salary of a Judge shall not be diminished during the continuance of his commission; and section 13, that under certain circumstances every Judge holding office during good behaviour shall be entitled to a superannuation allowance in proportion to the amount of his annual salary.

It appears to me that section 5 cannot be read without reference to these sections, and that they clearly contemplate that every Judge appointed during good behaviour must have his salary previously ascertained and established, and not liable to diminution during the continuance of his commission.

Ex parte Griffith *in re* Wilcoxon was cited on behalf of the defendant. In the headnote it is stated that in determining whether a transaction amounts to a fraudulent preference the Court ought to regard simply the statutory definition in a certain section of the Bankruptcy Act; but nowhere in the judgments in that case will be found anything to the

effect that other clauses in the Act may not be compared if necessary. On the contrary, Jessel, M.R., says the case is within the very words of "the statute," and Lindley, J., says that he protests against old decisions being substituted for "the statute."

But, as cases in which one part of a statute was invoked to interpret another part, we were referred to Colquhoun *v.* Brooks (14 Appeal Cases, 499), in which not only the words of the statute directly applying to the matter in hand, but the words of other statutes *in pari materiâ*, were considered and commented upon as explaining words which yet, when read by themselves, had a distinct meaning.

So, in Moyle *v.* Jenkins (51 L.J., Q.B. Div.,112), the Court held that, although one section of an Act, if it stood alone, would support a certain contention, yet that another section must be read with it as explanatory. It was distinctly laid down as incorrect to rely upon one section as an argument.

In Cox *v.* Hakes and Another (15 Appeal Cases, 506), Lord Herschell puts the proposition in very plain terms: "It cannot, I think, be denied that for the purpose of construing any enactment it is right to look not only at the provision immediately under construction, but at any others found in connection with it which may throw light upon it, and afford an indication that general words employed in it were not intended to be applied without some limitation."

Treating this proposition as being settled law, I can arrive at no conclusion but that a Judge of the Supreme Court, when appointed during good behaviour, should have a fixed salary, even if I confine my attention to "The Supreme Court Act, 1882;" and the next step is to inquire whether the Legislature have been mindful to make proper provision in the matter.

This I find to be the case by "The Civil List Act 1863 Amendment Act, 1873," which distributes the sum of £7,700, granted by "The Civil List Act, 1863," for defraying the expenses of the salaries of the Judges of the Supreme Court, by applying it to the payment of the annual salary of the Chief Justice, £1,700; and the annual salaries of four Puisne Judges, each £1,500; thus disposing of the whole sum which had been appropriated to Judges under "The Civil List Act, 1863," among those who were in office at the time of the commencement of "The Supreme Court Act, 1882."

Thus those Judges and their successors had their salaries ascertained and determined, while there was no provision for any Judge who might be appointed during good behaviour in excess of the number then in office. Clearly, the Legislature never contemplated such a thing as the appointment of a Judge without a salary. Such a construction of the Act was not foreseen; and, even in the appointment of a temporary Judge, provision was made by section 12 of "The Supreme Court Act, 1882," and previous Acts for his salary.

Since the passing of "The Civil List Act, 1863," there has been no difference in the amount paid to each of the Judges, although previously to 1873 it was voted in a lump sum; and, although it would appear that in 1875 the appointments of Mr. Justice Gillies and Mr. Justice Williams were made some three or four weeks before the resignations of their predecessors were gazetted, the permanent number of Judges holding office during good behaviour has always since 1863 been one Chief Justice and four Puisne Judges.

And, going farther back, to "The Supreme Court Judges Act, 1858," I find the same words as in "The Supreme Court Act, 1882"—that the Court shall consist of a Chief Justice and of such other Judges as the Governor, in the name and on behalf of Her Majesty, shall from time to time appoint.

The law ever since that date, until the appointment of Mr. Edwards, has been held to apply to a limited number of Judges. As to whether there was any technical irregularity in the appointment of any of the Judges who were in office in 1882, I do not think it necessary to give any opinion. If, in fact, mistakes were made in any of them, it is no argument in favour of the validity of the appointment which is now under review; and all such previous mistakes, if any, were, as to the Judges in office, in my opinion cured by the Act of 1882, since there could be no question as to the persons who were referred to in that Act as being in office at the time of the commencement of that Act. The individuals are as clearly indicated as if they had been named.

My opinion as to the invalidity of the appointment upon consideration of the colonial statutes alone being so decided, it is perhaps hardly necessary for me to invoke the constitutional principle, now long recognised, that the Judges should be independent of the Executive Government. It would indeed, in my opinion, be a gross scandal, greatly to be deplored, if, while five of the Judges of the Supreme Court held this independent position, assured of their places and of their salaries so long as they were not guilty of any misbe-

haviour, another Judge or other Judges should equally hold office during good behaviour, but be dependent on the will of the Government of the day or of a majority of the House of Representatives for the time being for the amount of their salary, or for any salary at all. The possibility of such being the case, if section 5 of the Supreme Court Act gave the Governor the power to appoint an unlimited number of Judges, is, to my mind, a strong argument that such could not be the proper construction of the section. If the words are doubtful, I prefer to think that the Legislature did not intend that they should be so interpreted as to bring about such a constitutional scandal, and that such an interpretation would be wrong when another is possible. There is really nothing in the contention that there was a contract for payment of the salary of a Judge, either made verbally with the Premier or by the letters. No such contract could be made to bind Parliament, and apart from Parliament there could be no funds to pay a salary.

I am therefore of opinion that the commission issued by the Governor on the 2nd March, 1890, appointing the defendant to be a Puisne Judge of the Supreme Court of New Zealand during good behaviour, was made without authority of law, and ought to be cancelled.

JUDGMENT OF DENNISTON, J.

I am satisfied that the sole power of fixing and establishing the salary of a Judge is in the Legislature, and that it never intended to delegate, and never has delegated, any part of such power. I also think that the whole course of legislation, past and present, in the colony shows that the Legislature never contemplated the appointment of a Judge of the Supreme Court before his salary was either established or arranged for.

It would be justified in so thinking by the consideration that every appointment will be made by the Governor by the advice of his Responsible Advisers, and the improbability, to say the least, that any Ministry would propose, or any person accept, such appointment without the preliminary sanction of the Legislature, such sanction of course involving the provision of a salary. Nevertheless, the Legislature in set terms and apt language has enacted that the Supreme Court shall consist of such Judges as His Excellency the Governor, in the name and on behalf of Her Majesty, shall from time to time appoint. The only restriction is that the person appointed must be of not less than seven years' professional standing. In pursuance of this power the Governor has, by a commission issued in the name and on behalf of Her Majesty, appointed the defendant, who possesses the necessary qualification, to be a Judge of the Supreme Court of New Zealand.

I do not think this Court can challenge such commission. The Governor has not been deceived or misled by the appointee. If the result of the appointment is a judicial scandal, and the possibility of its repetition a menace to the independence of the Bench, the remedy is, I think, with the Legislature, which can provide a salary, or can reverse the appointment; and can, if it think fit, prevent a repetition in the future.

It is suggested that by an elaborate collation of other statutes, past and present, and the aid of certain constitutional maxims, one may arrive at an intent of the Legislature other than that apparent by the words of the Act. I do not dispute that the consequences of a literal construction may compel violence to the words of a statute. But this canon of construction is, I think, one to be invoked as seldom as possible. It leads not seldom to a judicial assumption that the Legislature must be taken to have said what it does not say, because of the inconvenience of holding it to have said what it did say. I do not think that in this case the natural or necessary consequences of construing the statute in its plain terms require any such drastic judicial remedy.

In this Court, at least, one long and distinguished judicial career began and ended with admittedly no better title than that conferred on Mr. Edwards.

I think judgment should be for defendant.

[*Approximate Cost of Paper.*—Preparation, nil; printing, including corrections, &c. (1,600 copies), £150.

By Authority: GEORGE DIDSBURY, Government Printer, Wellington.—1891.