

No. 1912.

COPY C.

In the Supreme Court of New Zealand, }
 Otago and Southland District. }

IN BANCO.

Between James McKenzie and William Cain, trading under the firm or style of
 “James McKenzie and Co.,” Plaintiffs,

and
 James Alexander Robertson Menzies, sued as Superintendent of the Province of Southland, Defendant.

Tuesday, the twenty-third day of May, 1865.

Upon hearing, Mr. Prendergast, of counsel for the above-named defendant, and upon reading the two several affidavits of John Robert Cuthbertson respectively sworn herein on the twelfth and thirteenth days of April last; the two several affidavits of Gibson Kirke Turton, respectively sworn herein on the fifteenth day of April aforesaid, and the 22nd day of May instant, the affidavit of John Parkin Taylor, sworn herein on the nineteenth day of April aforesaid, and the affidavit of James McKenzie, sworn herein on the 24th day of April aforesaid, together with the exhibits annexed to the said affidavits: It is ordered that the plaintiffs, upon notice of this rule to be given to them or their solicitors, do shew cause to this honourable Court, on Tuesday the thirtieth day of May instant, why the alias writ of *feri facias*, issued herein on the seventh day of April aforesaid, and all proceedings thereunder, had, and taken, should not be set aside, with costs, upon the grounds:—

1. That a writ of execution does not lie against the Superintendent of a Province when sued in his official capacity.

2. That under a writ of *feri facias* issued against the Superintendent of a Province, *ex officio*, no property is subject to seizure; and in the meantime, and until this Court shall otherwise order, let all proceedings herein be stayed.

Upon the motion of Mr. Prendergast.

L. S.
 Seal of the Court.

By the Court,
 ROBT. CHAPMAN,
 Registrar.

COPY D.

CAPTAIN ELLES TO THE SHERIFF OF SOUTHLAND.

M'Kenzie and another v. Menzies, Superintendent.

SIR,—

Superintendent's Office, Southland, 20th December, 1864.

I have the honor to inform you that the property of which you have this day taken possession by your bailiffs under a writ of *feri facias* issued out of the Supreme Court of New Zealand in this cause, was with all the other property of the Provincial Government of Southland on the twenty-second day of November last, by deed assigned and transferred to her Majesty the Queen, her successors, and assigns, and possession of the said property was on the twenty-second day of November given to me on behalf of her Majesty, and further take notice that such deed of assignment was duly registered in the Supreme Court Office, Invercargill, on the 10th day of December current. The fact of your having taken possession of this property will be forthwith communicated to the General Government who will doubtless take such steps for the protection of this property as they think fit.

I have, &c.,

A. J. ELLES,
 Colonial Sub-Treasurer.

To the Sheriff of the District of Southland.

MEMO.—The letter referred to from the Superintendent was to the same effect.

L. P.

COUNSEL'S OPINION.

M'KENZIE v. MENZIES.

I think the Sheriff has acted upon a mistaken view of his duty, in circumstances of considerable difficulty. When he found the goods seized out of his custody, his proper course was to have applied to the Court for attachments against the wrongdoers, and the Court would have protected its own officer (*Cooper v. Asprey*, 8, Law T., W.S., p. 355, 2B., May, 1863). The goods were in the custody of the law, and any person meddling with them would have been liable to attachment. No attachment against the Sheriff would have, issued under the circumstances, for refusing to sell. The Sheriff is not bound to sell under circumstances which render