CORRESPONDENCE

RELATIVE TO A

JUDGMENT DELIVERED BY MR. JUSTICE WARD

IN THE CASE

REGINA *v.* STRODE AND FRASER,

(relative to the admission of Mr. Smythies to practice in the Supreme Court).

Return to an Order of the House of Representatives, of Friday, the 8th day of July, 1870.

That there be laid upon the Table of this House—"Copies of all Correspondence between Acting-Judge Ward, of the Supreme Court, and the Colonial Secretary, relative to certain proceedings in the Court of Appeal; also, all Correspondence between the Hon. Mr. Fox and the Colonial Secretary on the same subject."

(*Mr. Creighton.*)

WELLINGTON.

1870.

CORRESPONDENCE RELATIVE TO A JUDGMENT DELIVERED BY MR. JUSTICE WARD IN THE CASE "REGINÆ *v.* STRODE AND FRASER."

No. 1.

Copy of a Letter from Mr. Justice WARD to the Hon. the PREMIER.

SIR,— Supreme Court, Dunedin, 22nd March, 1870.

I have the honor herewith to forward a correspondence which has taken place between His Honor the Chief Justice and myself. I do so on the ground that I am advised that in censuring, by an official letter, a Puisne Judge for acts done or words spoken by him in discharge of the duties of his office, the Chief Justice has exceeded the authority vested in him by the Legislature, and has sought to infringe and to restrict that of another Judge.

I have, &c.,
C. D. R. WARD,
Acting Puisne Judge.

The Hon. W. Fox, Premier.

Enclosure 1 in No. 1.

Chief Justice Sir G. A. ARNEY to Mr. Justice WARD.

SIR,— Wellington, 15th November, 1869.

Various circumstances and considerations, on which it is needless at the present moment to enlarge, have led me to defer addressing you upon the subject of this letter until the present time. The matter, however, is one which, in my opinion, and in the opinion of the other permanent Judges of the Court now present in the Colony, cannot be suffered to pass without notice on our part. You will readily understand that I advert to the remarks made by you in delivering judgment at Dunedin on the application of Mr. Smythies to quash the conviction obtained against him under "The Law Practitioners Act Amendment Act, 1866." In the observations which I shall have to make, I shall assume the substantial accuracy of the report of the case contained in the New Zealand *Sun* newspaper of the 12th of January last.

The first ground taken by Mr. Smythies on his own behalf was as follows:—"The 3rd section of the Law Practitioners Act Amendment Act is absurd." You must permit me to say that no lawyer could, for one moment, deem such a proposition worthy of notice. No arguable point was raised by it. I am satisfied that as to this, your opinion must coincide with my own. Yet, in giving judgment, you made this utterly untenable point the ostensible subject of a discussion, plainly intended to demonstrate the impropriety of admitting Mr. Smythies as a solicitor of the Court. It is on the concluding sentences of this portion of your judgment, apparently a written one, that I feel bound to comment. These sentences are reported as follows:—

"Next we come to the application of Mr. Smythies for admission. In this he admitted his conviction of forgery, and this admission is, of course, the strongest point in his favour. After a considerable delay, it was agreed by all the Judges that he should be admitted; and admitted he was, accordingly, by Mr. Justice Chapman, no mention whatever being made, at the time, of his previous conviction. No members of the legal profession appear to have opposed this admission, but this may probably be accounted for by the fact that those who were aware of the circumstances connected with the application, knew also that those circumstances were fully within the knowledge of the Judges when the case came before them for decision. Of that decision, however strongly I dissent from it, I wish to speak with all possible respect; but it is much to be regretted that the utmost publicity should not have been given by the Judges to their reasons, which I presume were most admirable, for adopting a course apparently so completely at variance with both the letter and the spirit of English law. Of their powers in the matter there can be no question; but there can be as little question, from the action afterwards taken by the Legislature, that it was intended that those powers should be exercised according to the spirit of English precedents. The result of this assent of the Judges here to the application in this case was, that of all the realms ruled by the law of England, New Zealand became the solitary spot where, by a solemn decision of the Judges, the roll of solicitors, the Bar, and consequently the Judicial Bench, were opened as a *locus penitentiæ* to the forgers and felons of Great Britain.

"The third section of the Law Practitioners Act Amendment Act supplies the comment of the Legislature on this decision, and I fail to see the injustice or absurdity thereof, as contended for (by) the appellant."

I think I am not judging you unfairly when I say that, under colour of discussing an absurd objection, which required no answer, you sought occasion to pen these sentences. I now wish to point out to you, speaking for myself and my brother Judges now in New Zealand, on what grounds we deem your expressions highly censurable.

In the first place, we are well satisfied that, whenever the case of Mr. Smythies is examined with candour, and with adequate legal knowledge and accuracy, it will be recognized as presenting exceptional features, tending greatly to extenuate the guilt of his act. All the circumstances of the prosecution, and the light measure of the punishment ultimately inflicted, show that the offence was not regarded by the authorities in England as an ordinary case of forgery. This stamps as rhetorical

exaggeration your sweeping statement that our solemn decision, as you term it, opened the Bar and Bench of this Colony "to the forgers and felons of Great Britain." Your account of what took place on the admission of Mr. Smythies is also so imperfect, not to say incorrect, as to be injurious to all the Judges concerned. When, at last, after a delay of many years, Mr. Smythies was allowed to apply for admission, special publicity was designedly given to his application. It was adjourned by the Judges at Dunedin for the express purpose of facilitating objections, and when ultimately granted, the admission took place with the knowledge and acquiescence of the whole Dunedin Bar, including the present Attorney-General and those gentlemen who have since taken the most active part against Mr. Smythies.

But the exaggeration of its language, and the unfairness of its statements, are not the principal grounds of our objection to your judgment. You speak of our action in Smythies' case as a decision. This it was not, in the proper sense of the term. No legal question was raised. Our act was not a decision, but the exercise of an administrative discretion vested in us. The distinction is of importance, because, in your strictures upon our action, you are not expressing a difference of opinion upon a legal point, but are pretending to censure the Supreme Bench of New Zealand for an abuse of its functions.

Lest I should be thought to over-state the effect of your remarks, I will cite the comment which your judgment elicited from a member of the New Zealand Bar, who commends the course which you have taken. I extract the following sentences from a letter signed "William Fox," published in the *Wellington Independent* of 2nd February last. The letter addressed to the Editor of the paper begins thus: "Sir, a most grave judicial scandal, for I can call it nothing else, has been ventilated in the Supreme Court at Otago; and as I do not think that the Colony has by any means heard the last of it, I propose to invite the attention of your readers to the transaction, in order that they may be the better able to follow it through its present stages."

The writer, after giving his own account of Smythies' admission, and the proceedings against him, goes on to say:—"How far, in this case, they (the Judges) may have had exceptional grounds for allowing Mr. Smythies to don the garb of an honest man, will perhaps appear when they produce 'those most admirable reasons' by which, as Mr. Justice Ward with grim irony insinuates, they must have justified their act, but which they have hitherto failed to put on record. Whatever their reasons may have been, the public will, I think, concur in Judge Ward's summing up, when he says that 'the result of the admission of Mr. Smythies has been, that of all the realms ruled by the law of England, New Zealand has become the solitary spot where, by a solemn decision of the Judges, the roll of solicitors, the Bar, and, consequently, the Judicial Bench, have been opened as a *locus penitentiæ* to the forgers and felons of Great Britain!'" The writer then proceeds to say:—"The Act of 1866, however, if enforced, will render unavailing the sympathies of the Judicial Bench for forgers and felons. But when I look at the array of technical objections which Mr. Smythies urged before Mr. Justice Ward, and which the latter most properly overruled, I cannot help fearing that some 'most admirable reasons' may yet present themselves to the mind of the Court of Appeal, which may enable 'felons and forgers' to drive their coach and six through its clauses. That the public and the legal profession, jealous of its own character, will watch the proceedings in this case I have no doubt. It rests with the Judges of the Supreme Court, by the manner in which they may succeed in vindicating the course hitherto and hereafter to be pursued by them, to restore or destroy the confidence of the public in the Bar of the Colony, and, I hesitate not to say, in the Court itself. The course pursued by Mr. Justice Ward, and his very able handling of the case, to say nothing of the unsparing sarcasm which he launches at the heads of his brother Judges, render it impossible that they can avoid meeting the difficulties of the position face to face. They must 'have it out' with Mr. Justice Ward, with Mr. Smythies, and with the profession, and the latter, I feel confident, will look on, no disinterested spectators."

Without adopting the whole of Mr. Fox's description of your style, I quote his letter as evidence that your judgment has conveyed to him at least, as no doubt it has to others, the same impression as to ourselves, namely, that you assume the attitude of a censor towards the Judges of the Court, and pretend to denounce from our own Bench, as a scandalous abuse, a past act of our administration, the propriety of which never came, nor ever could come, under your judicial cognizance. To state such pretensions as these is to refute and condemn them. Her Majesty, on address of the Houses of Assembly, is the sole authority to which the permanent Judges of this Court are amenable for official misconduct. To fair outside criticism, indeed, the Judges, like all other public functionaries, are in a sense properly amenable; but it is a hitherto unheard of thing that a Judge of the Supreme Court should undertake publicly to review and censure, not their opinions, but the past official acts of the other Judges. It is an impropriety which, if not aggravated, is certainly not lessened by the fact that the Judge who has alone ventured on such a proceeding is the junior of the whole Bench, who has only sat for a short time under a temporary commission.

I observe that Mr. Fox has expressed his opinion that the Judges of the Court must, as he puts it, "have it out" with yourself: in other words, he looked forward to your judgment as certain to provoke an open altercation of the Judges, when, at the present sitting of the Court of Appeal, they should be called upon to adjudicate upon Mr. Smythies' petition. What Mr. Fox seems to have considered both a necessary and a desirable result of the mode in which you have expressed yourself, furnishes, in our view of the matter, its strongest condemnation. It is precisely because such language tends to disturb the harmony, and, by disturbing the harmony, to impair the dignity and efficiency, of the Bench, that it is gravely censurable. More especially as the matter was one likely to become the subject of further litigation, it was a plain duty to abstain from the use of language calculated to excite feelings of angry partizanship.

There is but one mode in which the terms of your judgment could have become the subject of public comment by us. Seeing that the letter which I have just cited unmistakably imputes to us sympathy with crime, together with the desire, and probable intention, to give effect to that sympathy by wilful mis-interpretation of the law of the land; seeing, moreover, it threatens the independence of our legal judgment, and constitutes an attempt to interfere with a then pending litigation, we might

have called upon the writer to show cause why he should not, in default of a full and public apology, be struck off the rolls of the Court, or at least be suspended from practice. We should, without hesitation, have taken this course, feeling confident that it would have received the approval of the Privy Council, had we not been withheld by considerations of the public interest. After anxious deliberations we came to the conclusion that we should ill correct the scandal which your judgment and the comment thereon may have occasioned, by proceeding against a high political functionary in the mode which we have pointed out. We came to the conclusion that we ought not to be the means, could we, with any due regard to our own honor, avoid it, of presenting to the world the spectacle of a community in which the constituted authorities would occupy a relative position so strange and disgraceful. It is in the absence of any fit public opportunity for taking notice of your judgment that, in concert with the other Judges, I have adopted this mode of expressing our common sentiments.

The Judges desire to make some further comment on one part of your judgment. In speaking of their right to grant admission to Mr. Smythies, you are reported as saying, "Of their powers in the matter" (*i.e.*, of the Judges' powers), "there can be no question, but there can be as little question, from the action afterwards taken by the Legislature, that it was intended that those powers should be exercised according to the spirit of English precedents." Hereby you affirm, in substance, that the Legislature, by the Act of 1866, has not merely annulled the Act of the Judges in admitting Mr. Smythies, but has, in effect, recorded its censure of the proceeding as a virtual abuse of their discretionary powers. We conceive that you are not justified in putting such an interpretation on the Act of the Legislature, or in construing the 3rd section of the Act as more, at the utmost, than the expression by the Legislature of a mere difference of opinion as to the expediency of the course taken by the Judges. The Legislature, in our opinion, neither has expressed, nor is competent to express, such a censure of our act as you attribute to it, and seek to enforce by your own added comments. The power of the General Assembly to modify rights and duties by retro-active legislation is unquestionable, but we do not admit the doctrine that it can so declare the law, retrospectively, as to reverse, or vary, as ill-decided, the judgments of the Supreme Court, or to stigmatize the acts of the Judges as in excess of their just authority. The same reasoning would lead to the conclusion that the General Assembly may overrule and censure the Privy Council. In enacting what the law shall be deemed to have been, the Legislature expresses its will for the future; but, as regards the past, does not make the law different from what the Judges have declared it to be, so as to render their past decisions erroneous in law, or to condemn their acts as improper. The Assembly at any given time is not empowered to declare what former Assemblies actually meant by their Legislative acts, although it may enact what they shall, for the future, be deemed to have meant. The interpretative power, as regards this Colony, belongs exclusively to the Courts of Judicature, the power of the General Assembly, as derived from the Constitution Act, being purely legislative. Your implied doctrine on this head is, in our opinion, as erroneous in law as it is derogatory to the Court.

Recurring for a moment to a topic already adverted to, I think that you cannot fail to have remarked, in the intercourse which we have enjoyed at our present meeting, to how great an extent the efficiency of the Court depends upon the maintenance amongst the Judges of free and friendly, yet courteous and mutually respectful, relations. You must also, I think, have felt how totally impossible it would be to maintain such relations amongst men who seek out occasions to bring one another into public contempt. Nor would I suppose you so insensitive as not to have observed that you have placed both the other Judges and yourself in a false relative position, for which there has been no remedy. On our parts, at least, we have felt compelled, by a sense of public duty, to abstain from marking our personal disapprobation in the manner which, as private gentlemen, we might have chosen to adopt.

It only remains that I should glance at some of the reasons which have induced me to delay this communication. On reading your judgment, it at once became apparent to me that the Judges could not allow it to pass without some kind of notice. In a matter so strongly concerning all the members of the Court, I did not feel justified in acting until we should have had an opportunity of personal consultation. The pending of the appeals presented by Mr. Smithies was another ground for delay. Lastly, I felt very strongly that the effective discharge of the general business of the Court of Appeal might be impeded by the personal explanations unfortunately made necessary by what has occurred.

I have, &c.,
GEORGE ALFRED ARNEY,
Chief Justice.

His Honor Mr. Justice Ward.

Enclosure 2 in No. 1.

Mr. Justice WARD to Chief Justice Sir G. A. ARNEY.

SIR,— Dunedin, 18th December, 1869.

I beg to acknowledge the receipt of a letter, referring to my judgment in the case of *Regina* v. *Strode and Fraser*, written by you on behalf of yourself and of Judges Johnston, Gresson, and Richmond. It is dated 15th November, and was not delivered to me, as you probably anticipated, until after your departure for Auckland.

I regret that more important business should have delayed my answer, but as your letter is the result of nine months' reflection, and extends over thirty pages of foolscap, I trust that you will not deem my delay unreasonable.

Passing over without comment, for the present, the peculiar course you have chosen to adopt in addressing to a Judge whose jurisdiction is equal to your own, a letter of censure on a judgment which not one of you ventured to gainsay in open Court, when it was laid before you as a decision against which it was sought to appeal, I shall briefly reply, *seriatim*, to the charges you bring against me.

Your first complaint alleges, that whereas the first ground taken by Smythies, on his own behalf, in the before mentioned case (*Regina* v. *Strode and Fraser*) was "utterly untenable," I "made this point

the ostensible subject of a discussion plainly intended to demonstrate the impropriety of admitting Mr. Smythies as a solicitor." My answer to this is, that in disposing of such a case as this, a review both of the facts and of the law involved was not only permissible but inevitable, and it could make little difference at what part of the judgment that review was inserted.

You next quote a passage from my judgment, describing the application and admission of Smythies, and the consequent action of the Legislature; and you inform me that you deem the "expressions" used by me "highly censurable" on three grounds, namely, "the exaggeration of the language, the unfairness of the statements," and the fact that I "speak of your action in Smythies' case as a decision," which you declare that "it was not, in the proper sense of the term." As you further impliedly state this last fact to be "the principal ground of your objection to my judgment," it may as well be disposed of first. In your letter of 27th July, 1864, addressed to Smythies, and laid by his request on the table of the House of Representatives (a copy of which is herewith enclosed), I find the following passage:—"Meanwhile, I suggest to you the course which appears to me proper for you to pursue. I think you should lay a connected statement of your case, with the documentary evidence attached, before the Judges assembled in conference. I think it will be better such statement should be verified by affidavit. You would thus obtain the judgment, so to speak, of the full Court upon the merits of your application, and this I think would be more satisfactory to you, whether the decision is favourable to you or the reverse." That which you thus term "the judgment and decision of the full Court," you deem "highly censurable" in me to style and to comment on as "a solemn decision of the Judges." You must surely have forgotten these expressions in your letter to Mr. Smythies.

Turning to the first ground stated, you complain of "the exaggeration of the language" of that part of my judgment in which it is said that, by your act, "the roll of solicitors, the Bar, and, consequently, the Judicial Bench, were opened as a *locus penitentiæ* to the forgers and felons of Great Britain," for the following reasons, to use your own words:—"We are well satisfied that whenever the case of Mr. Smythies is examined with candour, and with adequate legal knowledge and accuracy, it will be recognized as presenting exceptional features tending greatly to extenuate the guilt of his act. All the circumstances of the prosecution, and the light measure of the punishment inflicted, show that the offence was not regarded by the authorities in England as an ordinary case of forgery."

What the extenuating features in this case may be you refrain from stating, and I confess that I can discover none. As to the "circumstances of the prosecution," it has always seemed to me that the question in this and similar cases should refer rather to the nature of the crime committed than to the motives for, or manner of, the prosecution of the criminal. The light measure of punishment awarded —twelve months' imprisonment in Newgate—was probably due, in great part, to the well-known fact that Smythies' conviction for forgery rendered it impossible for him to practice his profession in England, and consequently deprived him of his means of livelihood; all which, in fact, constituted a part of his punishment. But there are certain exceptional features in the case which by no means tend to extenuate the guilt of the convict, and to these I now propose to refer. In my judgment it is stated that Smythies, in his application for admission, admitted his conviction for forgery. I was led to this conclusion from the memorandum of conference of the Judges (of which a copy is herewith enclosed), in which his "conviction in 1849" is mentioned; and, also, from the account of his conviction in 2 *Carrington and Kirwan's Reports*. Every document in the case—even the original petition and affidavit of verification—had been forwarded to Smythies by the Registrar of the Court of Appeal, with a copy of the memorandum of conference above mentioned, and I had, therefore, no opportunity of examining the original petition at the date of my judgment. But, after the receipt of your letter, I took an opportunity of perusing, for the first time, the documents laid, at Mr. Smythies' request, before the House of Representatives. Among these was a copy (as he avers) of his petition to the Judges for admission, and in this petition I find the following statements, viz.:—1. That at his trial, he being charged both with forgery and uttering, a "verdict of guilty was recorded on the second count for uttering." 2. That "there exists no impediment to his practising in England on renewing his certificate in the usual way." 3. That "he has sworn to the truth of his petition."

He refers the Judges, it is true, to the report of his case in *Denison's Crown Cases*, knowing perfectly well, in all probability, that neither at Dunedin nor at Wellington were those reports in the Court Library at the date when his petition was presented.

From the office copy of the record of his conviction filed in this Court, it appears that there were nine counts in the indictment, charging both forgery and uttering, and that on the whole of these counts a verdict of guilty was recorded. The entire omission from his petition of the very important, nay, fundamental, fact that he was convicted of forgery;—the *suggestio falsi* contained in the allegation that he was convicted on the second count for uttering, and the insertion of the false allegation that no impediment exists to his practising in England, are obviously due to his fear lest the Judges should refuse to admit him on the ground that the Act 12 Geo. I., c. 29, imposes a penalty of seven years' transportation on all convicted forgers venturing to practice as attorneys. As all the best known modern text books on criminal law cite *Regina* v. *Smythies* as a leading case on forgery, and as the full report on this case (in 2 *Car. and Kir.*) was brought before the Judges at Dunedin previous to the convict's admission, it is not difficult to estimate the adequacy of the "legal knowledge and accuracy" brought to bear on this case by yourself and "the other permanent Judges," when such an impudent *suppressio veri*, so glaring a fraud upon the Court, passed your searching scrutiny undetected.

You next complain of the unfairness of my account of Smythies' admission. I stated that, "after considerable delay, it was agreed by all the Judges that he should be admitted, that he was admitted accordingly, and that no members of the profession appear to have opposed this admission." Your account is, that when he was "allowed to apply for admission, special publicity was designedly given to his application; that it was adjourned by the Judges at Dunedin for the express purpose of facilitating objection; and, when ultimately granted, the admission took place with the knowledge and acquiescence of the whole Dunedin Bar, including the present Attorney-General and those gentlemen who have since taken the most active part against Mr. Smythies."

With respect to special publicity, I believe it to be true that notices of Smythies' intention to apply for admission were put up at the offices of the various Registrars of the Supreme Court; but as these notices gave no hint of his former conviction, they were simply worthless as giving publicity to the intended application as that of a convict. The further facts of the case are as follow:—Shortly after the receipt by Smythies of the memorandum of conference authorizing his admission, application was made on his behalf in open Court on the 5th January, 1866. Eleven of the profession had signed a protest against his admission, and one of them, Mr. James Smith, applied for and obtained an adjournment to the 16th January. In the interim, the memorandum of conference, placed by you at Smythies' disposal, was industriously circulated by him; and when it was fully ascertained that he had already obtained in his favour "the judgment and decision of the full Court" (as you term it), without an opportunity of opposing him having been afforded to a single member of the legal profession, the Bar simply withdrew from opposition as hopeless, supposing that the Judges at Dunedin would, as a matter of course, uphold their previous decision, and that, as the Judges of the Court of Appeal had already privately prejudged the case, an appeal would simply be an expensive farce. If the course adopted by the Judges had been specially selected with the view of stifling opposition, it could not have been more effectual. But I have the authority of the Attorney-General, Mr. James Smith, Mr. James Macassey, and Mr. George Cook (four of the highest names of the Colonial Bar), for informing you that your allegation of their acquiescence (and of that of the great majority of the profession in Dunedin) in Smythies' admission is utterly without foundation, and in this statement Mr. Harvey, who moved the order of admission, fully concurs. The Attorney-General, as a fact, was not in Otago at the time the order was applied for. It appears to me that before cavilling at the fairness of my statements you would have done well to be assured of the accuracy of your own.

Your next tangible allegation with respect to my judgment is, that it is said therein, with reference to Smythies' admission, "of their (the Judges) powers in the matter there can be no question; but there can be as little question, from the action afterwards taken by the Legislature, that it was intended that those powers should be exercised according to the spirit of English precedents." This statement you affirm to be "as erroneous in law as it is derogatory to the Court."

The facts are plain, and require slight comment. In November, 1860, Mr. Justice Johnston, in his judgment in *re* Henry Bunny, thus stated the law on this subject:—"The duty of this Court is two-fold. It has first to see that the applicant has some one of the necessary technical qualifications under the different laws of the Colony; and, secondly, to take care that he is of such fair fame and character as to be fit to be invested by the Court with the privileges of a solicitor, and to be held out to the public as worthy of confidence in the most intimate fiduciary relations. And I must remark that the exercise of the most vigilant care in the latter respect may be specially looked for from the Supreme Court of a young Colony." And in another part of the same judgment the learned Judge proceeds to state that in these matters the Court "is to be governed by the spirit and general principles on which the English decisions have been based." This judgment was approved of, on appeal, by the Privy Council, and may therefore be taken to be good law. Relying on the "vigilant care to be specially looked for from the Supreme Court," the Legislature, when remodelling, in 1861 and 1862, the law respecting legal practitioners, left most ample discretionary powers to the Judges on the subject of admissions to practice, and these powers remained unrevoked until 1866, the year in which Smythies was admitted; but when it became known that the Chief Justice of the Colony, in correspondence with a convicted forger, had instructed him how to "obtain the judgment, so to speak, of the full Court on the merits of his case," without the possibility of a single member of the Bar being heard against him;—when, the opposition of the Bar having been stifled by the judgment so obtained, the Judges proceeded, in direct contravention both of the spirit and of the letter of the law of England, to admit this man, rendered infamous according to English law by his conviction for a *crimen falsi*, and liable to seven years' transportation if he ventured to practice as attorney in England;—then the Legislature, deeming it time to interpose, by "The Law Practitioners Amendment Act, 1866," prohibited from practice, without one dissentient voice, the *protége* of His Honor the Chief Justice, and forbad all admissions of similar criminals in future. Seldom has a more direct and deliberate censure been pronounced by a Legislative Assembly: never has one been more thoroughly deserved. No such insult has ever before been offered by a Colonial Bench to a Colonial Bar as that which forced the convict Smythies into the reluctant ranks of the legal profession of New Zealand; and no decision has ever been given more calculated to shake the public confidence in the honor and integrity of the Supreme Court itself, than that which declared that even a conviction for forgery was not sufficient to prevent the convict from being accredited to act as one of its officers.

I now turn to that part of your letter which refers to one written by the Hon. Mr. Fox, in the *Wellington Independent*, ten months ago. I am at a loss to understand why you should have gone out of your way to arraign Mr. Fox's conduct in your letter to me; but as you have done so, I shall exercise my right to comment upon what you have written on the subject.

The first thing to be remarked here, is the want of common courtesy and of common justice displayed by you in bringing such charges and uttering such threats as those made and held out by you against the Premier of the Colony in a letter to a third person, leaving him dependent on the will of that third person for even the chance of a reply. For the rest, it is chiefly characterized by the peculiar disregard, both of facts and of law, which has marked your dealing with this case. You affirm that Mr. Fox's letter "imputes to you sympathy with crime, and desire and intention to give effect to that sympathy by wilful misinterpretation of the law;" that "it threatens the independence of your legal judgment, and constitutes an attempt to interfere with a then pending litigation;" and you proceed to state that if Mr. Fox had not been a high political functionary, you would have struck him off the rolls or suspended him from practice unless he had made a full and public apology. As at the time the letter was published, and for about six months afterwards, Mr. Fox occupied no political office, the reason given for your quiescence is not entitled to great weight. As for the first interpretation you put on his letter, I have merely to observe that his words will not bear the meaning you attempt to fix on them. He attributes to you sympathy, not with crime, but with criminals; and

no one will doubt that you have shown it in this case. No charge of projected misinterpretation of the law can fairly be inferred from his words. The allegation that he attempted to interfere with a then pending litigation is met by the simple fact that no litigation was pending at the date of his letter, viz., 2nd February, 1869. On the 11th January the judgment to which it refers was given; on the 13th January leave was given to Smythies to appeal, on terms. Those terms were never complied with, and the matter was, therefore, at an end, until the presenting of Smythies's petition to the Court of Appeal, many months afterwards; but the intention of Smythies to present this petition did not constitute a pending litigation.

It would be difficult to observe, with suitable gravity, on your threat of striking Mr. Fox off the rolls, or of suspending him from practice, and on your confidence that this course would receive the approval of the Privy Council, were it not for the regret that must be felt by every member of the Bar at hearing such a proposition seriously stated as law, not by "the junior of the whole Bench," but by the Chief Justice of the Colony, and concurred in by "the other permanent Judges." That you would arrogate to yourselves this power is very possible, but there can be no question that you would be sharply reproved for it, and your order in the matter at once discharged, by the Privy Council. A similar course was pursued some four years ago by the Supreme Court of Nova Scotia, towards a barrister who had written what was really a most insulting letter to the Chief Justice of that Colony, on the subject of a then pending litigation, and their order of suspension was forthwith discharged by the Privy Council. Lord Westbury, in delivering judgment, thus laid down the law:—"When the offence was not one which subjected the individual committing it to anything like general infamy, or an imputation of bad character, so as to render his remaining in the Court as a practitioner improper, we think it was not competent to the Court to inflict upon him a professional punishment for an act which was not done professionally." (N. S. Moore's P.C., vol. 4, p. 157.) Mr. Fox's letter was simply a protest (couched, I grant, in most brilliant and vigorous language, and in terms of the most cutting sarcasm,) against the insult which he, in common with the immense majority of the Bar of New Zealand, justly deemed to have been inflicted on the legal profession by Smythies' admission.

At the close of your letter you state that you "abstained from marking your personal disapprobation in the manner which, as private gentlemen, you might have chosen to adopt," apparently fearing that "the general business of the Court of Appeal might be impeded by the personal explanations unfortunately rendered necessary by what has occurred."

You and the whole of the other "permanent Judges" did not scruple to accept the hospitality of the Premier, while debating in secret conclave whether or not to strike him off the rolls! You met me daily on terms of courtesy during the month's session of the Court of Appeal, while in constant consultation over the letter to which I am now replying! What your notions of gentlemanlike conduct may be, therefore, it cannot be worth my while to inquire; but if there be any further "personal explanations" on this matter to which you deem yourself entitled, I shall be ready to afford them both to yourself and to "the other permanent Judges," collectively or *seriatim*, at any time and in any manner you may request.

Lastly, I have to remark, that though I trust during my tenure of office to bow with becoming deference to the opinions of "the permanent Judges," when given in due form, on purely legal points, yet, where the honor of the Bar is in question, I ask for no advice and I defer to no dictation. And when those to whom the guardianship of that honor has been entrusted by the Legislature have neglected their trust;—when, conscious of this, they have not ventured to utter one word in open Court in criticism or condemnation of the judgment that pointed out their fault, on its being laid before them as a decision against which leave was sought to appeal;—when they have flinched even from a face to face explanation in private, and have preferred, without either precedent or authority, to address an official letter embodying their injured feelings to a judge whose powers are co-ordinate with their own,—it can scarcely be expected that any deep reverence will be paid to so peculiar a communication.

I have, &c.,

His Honor the Chief Justice. C. D. R. Ward.

Sub-Enclosure 1 to Enclosure 2 in No. 1.

Conference, 27th October, 1865.

Re Smythies.

Resolved.—The Judges assembled in conference are of opinion, after reading the petition and the documents annexed, (which have been furnished in consequence of a memorandum of the Chief Justice after last conference,) that the Judges at Dunedin, being satisfied with the examination of the petitioner, may admit him, notwithstanding his conviction in 1849, on motion that the admission shall be in open Court, and that there is no necessity for discussing the merits of the case in open Court unless opposition be offered.

True extract,
Robert Strang,
Acting Registrar of the Court of Appeal.

Sub-Enclosure 2 to Enclosure 2 in No. 1.

Chief Justice Sir G. A. Arney to H. Smythies, Esq.

Sir,— Supreme Court, Auckland, 27th July, 1864.

I have to apologize for delaying till now my further reply to your letter of the 24th April, 1864. The same, with original documents, is kept secure in the Registrar's iron safe, and shall be returned to you by any post by your desire.

Meanwhile, I suggest to you the course which appears to me proper for you to pursue. I think you should lay a connected statement of your case, with the documentary evidence attached, before the Judges assembled in conference. I think it will be better such statement should be verified by

affidavit; you would thus obtain the judgment, so to speak, of the full Court upon the merits of your application, and this, I think, would be more satisfactory to you, whether the decision is favourable to you, or the reverse.

The Conference will probably assemble in October, upon the occasion of the holding of the Court of Appeal.

I have, &c.,
GEORGE ALFRED ARNEY, Chief Justice.

Henry Smythies, Esq., Dunedin.

Sub-Enclosure 3 to Enclosure 2 in No. 1.

Chief Justice Sir G. A. ARNEY to H. SMYTHIES, Esq.

DEAR MR. SMYTHIES,— Nelson, 10th November, 1865.

Probably before this letter comes to your hands you will have been informed officially, through the Registrar of the Court of Appeal, of the resolution to which the Judges came respecting your pending application to be admitted a Solicitor of the Supreme Court. I hope it will meet your own wishes and expectations, while it acquits the Judges of their duty, and will remove all pretence for future insinuations (if any such could be made) that you had not offered every opportunity to the public and to the profession of being heard before the Supreme Court.

Certainly the course resolved upon, if carried out, will establish your professional position in a manner in which it could not be established if you were admitted on a day and at a place which were not previously ascertained.

In your letter to myself you mention that the admission in open Court would be exceptional. That is true; but the Judges are informed that although that course is exceptional at present in New Zealand, it is the common course in some of the Australian Colonies, and one which may very probably become the practice, ere long, in New Zealand.

I have not had the opportunity of thanking you as I now do for your letters to myself, for my time was engrossed by judicial work at Wellington.

I wish you all the success that you can desire in your profession, and remain,

Yours truly,
G. A. ARNEY.

H. Smythies, Esq., Dunedin.

Enclosure 3 in No. 1.

Chief Justice Sir G. A. ARNEY to Mr. Justice WARD.

SIR,— New Plymouth, 1st February, 1870.

Your letter of the 18th ultimo arrived when I was engaged in the business of an unusually heavy civil sittings at Auckland, and I could not reply to it at the time. Moreover, as my former letter to yourself embodied the common protest of the Judges whom you had wronged, I certainly desire first to receive from them the expression of their views upon your answer to that protest. Not having heard from them on the subject before I was compelled to leave Auckland for this place on circuit, I will not longer defer such notice of certain parts of your letter as I deem incumbent on me to answer. I allude to those passages which relate more immediately and personally to myself.

In mentioning, for you seem hardly to dispute the position taken by the Judges concerned, that their action in Smythies' case was not, in the proper sense of the term, a legal decision of the Court, you quote expressions from my letter to Mr. Smythies, of the 27th July, 1864. You cannot seriously mean to imply that those expressions could give to the action of the Judges in Smythies' case a legal character that was not its own; but if so, it may be worth while to remark that the qualifying words used by me show that I never deemed that action to constitute a decision in the proper sense of that term, and as distinguised from an exercise of administrative discretion.

But it is said that in delivering judgment on the case of Smythies, a review both of the facts and of the law involved in the case was not only permissible but inevitable. Permit me to remind you that the facts and the law affecting the propriety of the admission of Smythies were not involved in the case, and, further, that if they had been so involved, they might have been reviewed without irony or censure upon the Judges whose discretion you might have doubted or impugned. I turn to the only other points in your letter which demand present notice from me.

In alluding to the admission of Mr. Smythies having taken place with the knowledge and acquiescence of the Dunedin Bar, I could only write from information given to me by others. If the respected Attorney-General was not at Dunedin, or had withdrawn his opposition to that admission, I regret that I did not except him in my mention of the subject. But, after reading your statement, I fail to perceive that my remark was not substantially true. Those gentlemen who, you inform me, had protested against the expected admission, may have been misled, and may have withdrawn from their opposition in consequence of their having formed the view which you say they had formed upon the subject, and if they say they did so, it is doubtless true; but, even so, they acted under a misconception (as it seems to me) as well of the nature and object of the preliminary inquiry by the Judges into the *prima facie* claim of the candidate to be admitted, as also of the motives which led the Judges to require that, notwithstanding their inquiry, and the resolution they had thereon formed, the application should be made upon motion in open Court. For, although I had been led to suppose the admission would not be opposed, I always understood that if opposition were offered the grounds thereof and the whole matter of admission would be reserved to be further considered by all the Judges. But, in truth, the circumstance that the admission passed unopposed was mentioned in my letter to yourself with no view to impute laches to the Dunedin Bar, nor with any other motive than because the Judges felt that your mode of dealing with that fact in your judgment was imperfect and unfair. That it was so is apparent when we look to the practice by which the admission of solicitors was regulated, as established before I came to this Colony, the consideration whereof brings me to your statement that I had instructed Smythies how to obtain the judgment, so to speak, of the full

Court on the merits of his case—to your speaking of him as the "*protége*" of the Chief Justice, and so forth.

In 1858, I found established a practice in dealing with the applications of persons to be admitted, which has, at least in the Northern District, prevailed to the present hour. By that practice, all the preliminary inquiries into the antecedents of an applicant were cast upon, and conducted by, the Judge. The intending applicant first sought an interview with the Judge, and asked to be informed whether at all, and if so, then after the fulfilments of what conditions, he might apply to be admitted to the rolls. In ordinary cases, involving mere formal proofs, the case would soon be sent to the Registrar, be entered by him, and the application for admission would be made, in the presence of Judge and Registrar, at Chambers. If the intending applicant found that the Judge declined to sanction his intended application on the ground, *e.g.*, that he had not the requisite professional qualifications to be admitted in this Colony, or that the Judge was not satisfied with his antecedents and required further explanation, the intending applicant would withdraw from his attempt, and his case might not even be mentioned in the Registrar's books. If, however, after all inquiries, and after the applicant had satisfied the Judge that his claim to be admitted was *prima facie* established, but the Judge was informed that such claim might be opposed, the candidate was required to apply in open Court, in order that opposition, if intended, might be offered. Accordingly, on one occasion, after an inquiry I had found no cause to reject the applicant, but was about to admit him, I received information which led me to direct that the application be made in open Court, on a day appointed, whereupon affidavits were filed, and (opposition being made) the candidate has never been admitted. But in all cases, and whether the applicant was first introduced by the Registrar or not, these preliminary inquiries were carried out, of necessity, by the Judge, through the medium of personal interviews or direct correspondence between the Judge and the intending applicant. Even to this day, it rarely if ever occurs, in the Northern District, that the candidate does not, as a first step, seek a personal interview with the Judge. Having now a Secretary within call, both at Chambers and when on Circuit, or at the Court of Appeal, the Judge's interviews with candidates can be differently regulated, and his correspondence is sometimes saved by the Secretary giving messages instead; at other times, when necessary, it is conducted in a more strictly official form.

One of those who thus called on me at the place which I occupied as my "Chambers" was Mr. Smythies, as far back, possibly, as 1858. On his disclosing the fact of his previous conviction, I told him it would be useless for him to apply to be admitted, and he forebore from any further attempt, until on, I believe, two subsequent occasions, and at considerable intervals of time, he again called on me, and begged that his case might be considered, which he represented to be of exceptional character; but as at that time I deemed his conviction (under any and whatever circumstances obtained) to be a permanent bar to his admission, I made no further inquiry, while Smythies narrated his story, but produced no documentary evidence in support of it, because informed by me that such evidence would be useless. Henceforth I supposed that he had resigned all hopes of admission. He went to live at Dunedin, and, to the best of my recollection, I heard no more of him until, years afterwards (the Court of Appeal having been meanwhile established), he desired that his case might be considered by the Judges in conference. The case was accordingly mentioned, with a view first to ascertain whether any application by Mr. Smythies, be the circumstances attending his conviction ever so exceptional, could at all be entertained. Upon its being considered that his application might be received, thereupon the duty devolved upon me to place myself in communication with the intending applicant, as if he had been resident within my own judicial district; but this, the applicant residing at Dunedin, could only be effected through written correspondence. Except as above mentioned, I never held any kind of communication or correspondence, nor had any acquaintance with Mr. Smythies. During the time that he remained at or near Auckland, I indeed heard him mentioned as having acquired a character for integrity, albeit suffering much distress; but I am not aware that I ever was under the same roof with Mr. Smythies except when he has pleaded before me in open Court, or when, at Auckland, he waited on me in Chambers, as above mentioned, to beg that I would sanction his offering himself as a candidate for admission, and to find that sanction refused; nor am I aware that I have ever been in the presence of any member of his family.

To the greater portion of your letter I feel it my duty to offer no reply, for I cannot presume to submit the rest of the Bench of Judges to the judgment of any single member of the Bench who may assume the right to arraign and censure their conduct; nor is it desirable that I should enter upon arguments which could end in no other result than increased irritation. There are, however, two remarks at the close of your letter which deserve notice. It is said that the Judges flinched from a face to face explanation in private (I presume with yourself), and that they have not ventured to utter one word in open Court in criticism or condemnation of the judgment that pointed out their fault, but have preferred embodying their injured feelings in a letter to a Judge whose powers are co-ordinate with their own. But, be it remembered, the Judges could not shrink from an explanation that was never offered. They had shown, by word or deed, no other demeanour but one of respect towards yourself, and had therefore nothing to explain. They felt that it was yourself who had wronged them; and I feel assured that if ever the time should come when it may be possible for you to look upon this matter more impartially, you will be conscious that a face to face explanation, if any, should have come from yourself. I must add, that unless you could have resigned the office of censor for a while, and have condescended to terms of equality with your brother Judges, a personal explanation could only have resulted in irreconcilable difference.

As to their not criticizing or condemning your judgment, two things are to be remarked. First, that the course which you had felt it your duty to adopt prevented the judgment to which your censure was appended from being brought under the review of the Court of Appeal at all; and, secondly, that even if it had been brought under review, the Judges could not have converted the Bench into an arena for personal altercation with yourself, upon matters extraneous to the question before the Court, without rendering themselves at least as censurable as their accuser. Your co-ordinate authority they neither dispute nor seek to infringe, but it is to be regretted that you should not have

regarded their authority as co-ordinate with your own. Upon every subject that has ever been brought under consultation with us, we have always sought your advice, and received your opinions with deference. We shall continue to do the same, but while conceding to you that entire independence which is the right of every Judge, freely and ever so shrewdly, to criticise those opinions of his fellows that may come under his judicial cognizance, the Judges still could not but protest earnestly though (I trust) respectfully, and in the only way that seemed open to them, against the attitude which you had assumed towards them.

I have, &c.,

His Honor Mr. Justice Ward. GEORGE ALFRED ARNEY, Chief Justice.

Enclosure 4 in No. 1.

Mr. Justice WARD to Chief Justice Sir G. A. ARNEY.

SIR,— Supreme Court, Dunedin, 17th March, 1870.

I have the honor to acknowledge the receipt of your letter of the 1st February, referring to our correspondence on the subject of the convict Smythies. It calls for few remarks from me, as you avoid answering most of the arguments contained in my letter of the 18th December last, on the plea that you have not had time to consult with the other Judges on the subject. I shall endeavour to answer, as briefly as possible, the few points you have now raised.

With respect to your complaint touching the words used by me in reference to the judicial memorandum authorizing Smythies' admission, I have merely to remark that inasmuch as you, in an official letter to that individual, prospectively termed the determination of the Judges in his case "the judgment of the full Court on the merits" thereof, it does not lie in your mouth to complain of its being termed "a solemn decision of the Judges."

But you state that "the facts and the law affecting the admission of Smythies were not involved in the case; and, further, that had they been so involved they might have been reviewed without irony or censure on the Judges."

In the first place, I have to remark that in my opinion the facts and the law above mentioned were involved in the case; that a review of them was inevitable; and that nothing that I have heard from you has in the slightest degree altered my views on the subject. Secondly, even assuming your contention with regard to irony and censure to be correct (to which assumption I by no means incline), you must permit me to observe that, in the opening letter of this correspondence, you assumed the right to censure, both with and without irony, my action in a case which, according to your own statement, was never under your judicial cognizance. I am unable to perceive by what right you claim immunity for yourself from that which you dispense so freely to another.

I turn now to your statement that the remark in your first letter, to the effect that the Attorney-General and the whole of the Dunedin Bar acquiesced in Smythies' admission, "was substantially true." In reply to this, I have to observe that the great majority of the Bar of Dunedin declare it to be without a vestige of foundation as far as they are concerned. The two speakers on the occasion were Mr. James Smith and Mr. Cook. The following extract from a letter written to me on this subject by Mr. Smith shows what was the meaning of the words then used by him, and I may observe that all the accounts I have received from others of the Bar agree with his:—

"In conclusion, I beg to state most emphatically that nothing was further from my intention than to signify my acquiescence in the motion. My object was to elicit from their honors an intimation that their foregone conclusion was open to reconsideration at the instance of the Bar, and, failing such an intimation, to let it be clearly understood that all responsibility in the matter would rest with them."

The greater part of the remainder of your letter is devoted to an account of your intercourse with Smythies, which you, in substance, affirm to have been purely official; and to an explanation that the Dunedin Bar "acted under a misconception of the nature and spirit of the preliminary inquiry by the Judges into the claim of the candidate to be admitted."

Three specimens of your so-called official communications with Smythies' are now before me. The first is a letter (of which a copy is herewith enclosed) published by Smythies in the *Otago Daily Times* of 12th May, 1866, commencing "Dear Mr. Smythies," assuring him that you have "every disposition to assist him," and ending "yours faithfully." The other two are those forwarded with my last letter; the first couched in official form, certainly, but instructing Smythies how to "obtain the judgment of the full Court on the merits of his case," without the Bar having a chance of being heard against him. The last (dated 10th November, 1865) commences, "Dear Mr. Smythies;" announces the resolution of the Judges in his case; expresses a hope that it will meet his wishes; and ends by wishing him "all the success that he can desire in his profession." These are strangely-worded communications coming from a Chief Justice to a convict; but something more than strange, when the relative situation of the parties at the time, as Judge and suitor, is taken into consideration.

In England, and in every other British Colony, the strictest impartiality is maintained by the Judges during the proceedings preceding a questionable admission between the applicant and his probable opponents; and when an application for admission which is likely to be opposed is made, the whole proceedings are conducted with the utmost publicity, and every document on which the applicant bases his claim is open to inspection and scrutiny by members of the legal profession. In New Zealand the Chief Justice assures the convict applicant that he has "every disposition to assist him;" instructs him how to proceed; brings the matter privately before the Judges in conference, instead of in open Court—as would be directed by English practice; obtains a resolution from the Bench stating that, after the perusal of certain documents, the Judges are of opinion, not that the convict may be "allowed to apply for admission," as you term it in your letter of 15th November last, but that he may be admitted; and ends his share in the business by writing to his *protege* a letter of congratulation. And although the resolution directs that the admission shall take place in open Court, yet this appearance of affording the Bar an opportunity for opposition is shown to be a mere pretence by the course specially directed by the Chief Justice, who orders all the documents on which the Judges based

their resolution, together with the original petition, to be returned to the convict, thereby preventing the Bar from pointing out the frauds and falsehood contained in them—frauds and falsehoods so glaring that their exposure must at once and for ever have prevented the scandal of his admission. It appears to me impossible to see how, in the face of that resolution of the Judges, of your letters to Smythies, and of the facts above stated, the Dunedin Bar could regard the proceedings of conference as a mere preliminary inquiry. It is much to be regretted that the English practice with respect to opposed admissions should not have been adhered to in this instance, as far as possible; it is still more to be deplored that if, as you now state, you understood that the whole proceedings in conference were merely preliminary, and that "the whole matter of admission would," in case of opposition, "be reserved to be further considered by all the Judges," you should have addressed such a letter as that of the 10th November, 1865, to Smythies while his application for admission was still pending.

You complain next of my statement that the Judges flinched from a face to face explanation with myself, and declare that they "could not shrink from that which was never offered."

You have stated repeatedly in the course of this correspondence that I had "wronged the Judges," and that "personal explanations were unfortunately rendered necessary by what had occurred." When one man complains that another has wronged him, states that the wrong inflicted renders personal explanations necessary, and subsequently meets the person of whose conduct he complains, and remains on terms of perfect courtesy with him,—without once mentioning his alleged wrong,—during a daily intercourse of four or five weeks; retaining, nevertheless, his pristine sense of injury in full force, and leaving a letter of complaint behind him to be delivered after his departure, he may fairly be said to flinch from a face to face explanation. It is for him who requires such an explanation to demand it; not for him who deems that he has merely discharged his duty to offer it.

There is but one point more in your letter to which I need advert, namely, your statement "that the course I had felt it my duty to adopt prevented the judgment to which my censure was appended from being brought under the review of the Court of Appeal at all."

As a fact, that judgment formed part of the case laid before the Court of Appeal by Smythies. As to the course adopted, it was simply the ordinary one in similar cases. Smythies had been convicted before the Magistrates of an offence against "The Law Practitioners Act Amendment Act, 1866," and had been fined £500, with the alternative of three months' imprisonment in case of non-payment. The rule *nisi* obtained by him for quashing the conviction was discharged, and he asked leave to appeal from my decision. Leave was granted on the usual terms, namely, on his finding security, first for the costs of the appeal in an amount to be fixed by the Registrar; and secondly, for the payment of the penalty, or in default thereof, for his surrendering to undergo his imprisonment, in the amount of the penalty itself. Had I refused leave to appeal, it would have appeared harsh, inasmuch as he would in that case have probably been compelled to pay the fine or to undergo his imprisonment before his appeal could be heard; while to grant such leave without ordering him to find the usual security would have been a most improper and unusual proceeding. Neither his character here, nor his previous conviction for forgery, offered any reason for deviating from the usual course

Having now disposed of the points raised by you in your last letter, I turn to the question of your right to address to me such a communication as the first, dated 15th November last.

When Judges are so unfortunate as to disagree on points connected with the discharge of their official duties, there are two courses open to them, according to English practice and precedent. The first is to settle the dispute by a statement or explanation in open Court;—the course lately taken by Chief Justice Cockburn and Mr. Justice Blackburn, in the recent Jamaica case. The second is to treat the matter as a simple difference between private gentlemen. The fact that my judgment formed part of the case laid before the Court of Appeal by Smythies, offered ample ground for the adoption of the first of these courses. But it is a thing hitherto unheard of, that the Chief Justice, either with or without the concurrence of certain of his juniors, should presume to censure, by an official letter, any Puisne Judge for acts done or words spoken by him in discharge of the duties of his office. I can only regard it as a most improper attempt to restrict that freedom of speech and action which the Legislature has secured to every Judge on the Bench;—as an endeavour to institute a secret tribunal, with yourself as President, for the purpose of overawing by threats of censure, equally unprecedented and unauthorized, any Judge who may venture to express opinions at variance with your own. It is true that the experiment has not proved successful, but that does not palliate its impropriety. I deem it my duty to forward the whole of this correspondence to His Excellency's Ministers, in order that, should they deem it advisable, the Houses of Assembly may have an opportunity of expressing their views on the subject.

I have, &c.,
C. D. R. Ward,
Acting Puisne Judge.

His Honor the Chief Justice.

Sub-Enclosure 1 to Enclosure 4 in No. 1.

Dear Mr. Smythies,— Auckland, 6th May, 1864.

I have only time at present to assure you that the original documents sent by post from yourself to me are safe, and that I will give them my earliest attention, with every disposition to assist you.

I am,
Yours faithfully,
G. A. Arney.

Henry Smythies, Esq., Dunedin.

No. 2.

Copy of a Letter from the Hon. W. Fox, to the Hon. the Colonial Secretary.

Sir,— Wellington, 6th April, 1870.

Being aware that Mr. Justice Ward has forwarded to you a correspondence between himself and His Honor Chief Justice Arney, in which the latter has made some very serious allegations affecting myself, and the former has offered some comments in reply, I conceive it my duty to myself not to allow the case, so far as it affects myself, to rest upon a correspondence with third parties. I have myself corresponded with Sir George Arney on the subject, and I now do myself the honor to enclose a copy of my correspondence with him, in order that it may be placed on record in the same manner as that between Sir George Arney and Judge Ward, so that, in case of any official notice being at any time taken of the subject, I may have the advantage of stating my own case.

I have, &c.,

The Hon. the Colonial Secretary (Law Branch). William Fox.

Enclosure 1 in No. 2.

The Hon. W. Fox to Chief Justice Sir G. A. Arney.

My dear Sir George Arney,— Wellington, 10th December, 1869.

The course which you have adopted in reference to myself in connection with the Smythies case, places me, and I think your Court also, in a false position.

In friendly private intercourse between you and myself, on the 21st of October last, you intimated to me that it would probably become the official duty of yourself and several of the Judges of the Court of Appeal to animadvert upon certain proceedings with which my name had been connected. What those proceedings were you did not hint. I waited patiently till the termination of the session of the Court, when, not having heard of any animadversions which concerned me, I requested you in a private note to inform me what you had alluded to. In reply, you told me that you had sent a letter to His Honor Mr. Justice Ward, on behalf of yourself and the other Supreme Court Judges, and that, "if he should think fit to communicate it to me," I would be informed as fully as I could be by any letter from yourself. On my applying to Judge Ward, he obligingly, and as a private favour, permitted me to read your letter to him. It was with unfeigned astonishment that I found ten foolscap pages of it occupied with unsparing criticism of my conduct and opinions, and the most serious personal threats directed against myself. All this was placed on record in an official document addressed to your brother Judge, and signed by you as Chief Justice.

I will not, my dear Sir George, undertake to instruct the Chief Justice of the Supreme Court and Court of Appeal in the courtesies of private life; but I have a right to complain that such an attack should have been made upon me, behind my back, in an official letter, addressed to a third person, which, in the ordinary course of events, I might never have seen or heard of, and that I should not even have been supplied with a copy. Of the very serious charges and threats thus levied against me I know nothing at this moment but from the private courtesy of Mr. Justice Ward, and I cannot but feel that a very great wrong has been done to me. Your censure and threats are placed on official record, while I have no standing ground from which I can repel the attack, except that of addressing you as a private person in a private letter. In doing so, however, allow me to state that you are at perfect liberty to make any use of this letter that you please, and that I shall consider myself in the same position.

But I have much worse to complain of than mere private discourtesy or the breach of official etiquette. You have condemned me, and decided on the sentence due to my alleged offence, without my having any opportunity of defending myself. We are told that, in the days of heathen mythology, the Judge of a certain "Court below" used to follow this order of proceeding: *Castigat que, audit que dolos, subiget que fateri.* But you surely do not seek for precedents in that Court. In these upper regions, and in these latter days, it is usual for every tribunal which pretends to impartiality, particularly when it is a party interested, to hear first and decide after. It is a thing that I have never heard of before, that the Judges of an English Court of Law should make up their minds upon the merits of a case behind the back of the accused party, without affording him an opportunity of being heard; without the issue of any legal process; without any technical proofs; without trial of any sort; and then proceed to place on official record, in a document beyond his reach except through private courtesy of a third party, the sentence which they considered appropriate to his offence, but which from motives of policy they thought proper to keep suspended over his head.

These, however, are preliminary matters. The principal point on which I wish to remark in your letter is the threat held out in the following words:—"We might have called upon the writer to show cause why he should not, in default of a full and public apology, be struck off the rolls of the Court, or at least be suspended from practice. We should, without hesitation, have taken this course, had not we been withheld by considerations of a public interest."

I will consider this threat, first as to its manner, and secondly as to its matter.

1. I never myself threaten unless I intend to carry my threat into execution. I never threaten a man with what I *would* do did not some motive of policy prevent me. If I threaten a man at all, I do it openly to his face, and not behind his back in a letter addressed to a third party which he may never see at all, and can only see by sufferance. In all these particulars your practice appears to differ from mine. Which is the most manly course, and the most consistent with self-respect, I need not stop to inquire.

2. As regards the matter of the threat, you seem to me entirely to over-estimate the power of your Court. I do not perceive exactly how the case could have been brought before it as regards my alleged action, and several preliminary technical difficulties must be apparent to yourself. But suppose these overcome, and that you were *rectus in curiâ* in the matter, you would call upon me to "make a full and

public apology." Even if prepared to do so under other circumstances, I certainly would not under the alternative threat which you hold out of my being struck off the rolls. No man with the smallest feeling of self-respect would submit to apologize under pressure of a threat, and I can only express my great surprise that gentlemen filling the high position which you and the concurring Judges do, should for one moment contemplate proposing such an alternative to one who is your equal in social rank and in a nice sense of honor. Then you proceed to say that if I should have declined to make such an apology you would have struck me off the rolls. Have you considered the powers of your Court? It cannot make law to suit its own convenience. It can only declare and enforce the law as established by precedents in the Courts of Westminster Hall—the great parent of common law. You will find no precedent which would justify you in so violent and peremptory a course. The cases in which barristers have been disbarred, or solicitors struck off the roll, have been all cases of professional "malfeasance," in the strict sense of the word, or cases of conviction, after trial and sentence, for some felony or high misdemeanour. I am not acquainted with a single precedent which would justify the exercise of the power which you claim in a case where the offence consists simply in a barrister, out of Court, and having no connection with any case pending in Court, criticising in a newspayer (whether with undue severity or not) the discretion or judgment of a Court. I think that no instance of either disbarrer or removal from the rolls in such or any analagous case can be cited. It is true that, under conceivable circumstances, such criticism might amount to a contempt of Court; but it does not follow that, because there is a contempt of Court, it can be visited with the extreme penalty which you propose. You appear to have confounded a contempt of Court with professional or criminal misconduct—two things entirely different in themselves, and involving entirely different consequences. It may appear to be presumptuous in a single member of the Bar to oppose his opinion to that of four occupants of the Bench, but I have no hesitation in saying that I believe you and your brother Judges to be in error. Your position, I venture to think, is "not law;" and, notwithstanding your prophetic assurance to the contrary, I think it need only be proposed to the Privy Council to insure its immediate negation.

But suppose that your Court, disregarding the absence of precedents, or creating one *pro hac vice*, should decide to fulminate against me the extreme sentence which you threaten; would that vindicate its outraged dignity, or make it more respectable before the public? You would, for a few offensive words, have disbarred a man of unblemished professional, public, and private character, with, I may venture to say, all the antecedents of a gentleman; and you would have admitted to practice a person convicted of forgery at the Old Bailey and who has undergone a twelvemonth's imprisonment in Newgate. If by any possibility such a course could have vindicated the honor of your Court, it certainly would not have added to the respectability of the New Zealand Bar, or made it attractive to any but that class which have "left their country for their country's good;" and not only would the credit of the Bar have thus suffered by your act, but, as the Bench is recruited from the Bar, you might some day have found yourself hailing as your "Brother Judges" men whom you have at previous periods sentenced in the dock as felons and misdemeanants. Such would have been the possible result of the precedent you would have created. What would your Court have gained?

To most lawyers the threat you have held out would, if executed, involve personal ruin for life. In my case my connexion with the Bar is now little more than honorary. I take pride in belonging to a profession which stands deservedly high in public esteem, and I watch with much interest whatever concerns the welfare of the young branch of it which exists in this Colony. I should be truly sorry to see it degraded by the act of those who ought to be most zealous for its purity and honor.

And now, my dear Sir George, I am about to be extremely frank with you. You have spoken of me in no measured terms in your letter to Judge Ward, and I must claim the reciprocal privilege of speaking to you in an equally plain manner. Excuse me for saying that, after having thoroughly studied this case, the conclusion which is forced upon me is that you have yourself personally been the principal cause of this unfortunate "scandal." I have read all the papers laid by Mr. Stafford on the table of the House of Representatives in 1868. The documents exhibit, among others, private correspondence between yourself and Mr. Smythies, ("My dear Mr. Smythies,") and make reference to private interviews between you and him on the subject of his admission. It is clear to me that, but for the encouragement given to him by you in private and before he came openly before the Court, he would, probably, not have persevered in his attempt to re-enter the ranks of the profession. I have no doubt that Mr. Smythies found it to his advantage to work upon your good nature. That you should sympathize with a fallen professional brother, whom you perhaps believed to be penitent and reformed, was creditable to your heart, but you should have remembered the interests of the profession of which you were yourself a member. What greater wrong could be done to it, what greater insult offered, than to admit to its ranks a person convicted of forgery, without, as far as I can discern, one single extenuating circumstance. Your amiable sympathies for the individual closed your eyes to what was due to the profession into which you introduced him, and you did him a kindness at its expense.

But I observe that you attempt, in your letter to Judge Ward, to palliate your admission of Mr. Smythies by the allegation that it took place with the knowledge and acquiescence of the whole Dunedin Bar, including the present Attorney-General and the gentlemen who have since taken the most active part against Mr. Smythies. This is scarcely a fair statement of the facts, on which you appear to have been imperfectly informed. I am told that the leading men of the Dunedin Bar were quite prepared, and had taken preparatory steps, to oppose Mr. Smythies' admission, when their breath was taken away, so to speak, by the production by him of a memorandum with which he had been furnished by yourself in a letter dated 10th November, 1865, which caused them to believe that the case was decided beyond recall. As to the Attorney-General, whose name you have used, I believe he was not even at Dunedin at the time, and never acquiesced in any way. I cannot learn that half a dozen persons, certainly not out of Dunedin, knew anything of Mr. Smythies' antecedents or of his application for admission. The profession at that date, as you are aware, was wholly without organization in every part of the Colony, and the only persons who could be considered charged with the guardianship of its honor and interests were the Judges of the Supreme Court. It has now (fortunately) been organized by Act of the Legislature, and its honor and interests will henceforth be in its own

keeping, so that no such case as that of Mr. Smythies is ever likely to occur again. But I submit that under these circumstances it is hardly fair to talk of the acquiescence of the Bar. The opinion of the Dunedin Bar is really shown by the petitions from all its leading members, presented to the General Assembly during the last session, deprecating the repeal of the law which that body had found it necessary to pass to remedy the evil of your admission of Mr. Smythies, by practically overruling what your Court had done, and preventing your doing it again.

In conclusion: as a member of the same bar as yourself, and, I hope I may still say, as a personal friend, will you allow me to suggest that you should ask Judge Ward's permission to withdraw the letter which you have written to him. As far as I am concerned, I would willingly give my consent to your doing do. It would have been better if it had never been written. You have no precedent for addressing a brother Judge in such a manner. When Chief Justice Cockburn and Judge Blackburn (*Magna componere parvis*) had a far more serious personal difference, they "had it out" in open Court, before bar, suitors, and the public. It is sure to provoke a correspondence which can only end in the results which you so much deprecate, and which you profess to have sought to avoid by not dealing with the case openly in Court. It does not in the least improve your position. Even if Judge Ward or myself had been guilty of indiscretion, or undue severity, in criticising the acts of your Court, the case rests on so unsound a foundation that no exposure of our fault can cover yours. The "*teterrima causa belli*," the fact that you had admitted a person who was known by you to have been convicted of forgery and to have undergone a year's imprisonment in Newgate, to the privileges of the Bar of New Zealand, cannot be got over. The action of the Legislature and the decision of the Court of Appeal, which, under your presidency, felt itself practically obliged to support Judge Ward's ruling, while secretly it resented his rebuke, leaves the matter in a position in which, I submit, it would be wise for the Court to leave it. If this opportunity be lost, and the necessity of replying to your letter is left upon Judge Ward, I fear there will be an end to "the maintenance among the Judges of those free and friendly relations," which you state to be essential to the efficacy of your Court. If I can be instrumental in obviating such an unhappy result by the exercise of friendly offices between yourself and Judge Ward, it will give me great pleasure to do so.

I have only to add that I shall be obliged by your permitting the "other Judges" who concurred with you, to see the contents of this letter.

I have, &c.,

Chief Justice Sir G. A. Arney. WILLIAM FOX.

Enclosure 2 in No. 2.

Chief Justice Sir G. A. ARNEY to the Hon. W. Fox.

MY DEAR SIR,— Auckland, 15th January, 1870.

When your letter dated the 10th ultimo reached my hands, I was engaged in the business of an unusually heavy "civil sittings" (just finished), and I have been unable to give further attention to your letter than by making copies, and thus communicating the contents to the Judges whom you desired me to inform thereon. Perhaps, even now, I ought to await the answers of those Judges before I presume to answer your letter; but, as there are portions of it which especially concern myself, and other portions which indicate that you consider yourself wronged by my letter to His Honor Mr. Justice Ward, I will not longer delay the offering to you such answer, and, where necessary, explanation, as appear to me due to yourself.

And first, I thank you for the expression of your willingness still to hold me in your friendship. Whatever mistakes I may have made, or may, during the short residue of my judicial career, still make, I hope that I shall not forfeit your friendship.

I wish, indeed, that you had allowed your kindly nature to exert its influence over your criticism, and temper its severity. I think it might reasonably have been supposed that the Judges who concurred in the admission of Mr. Smythies might not have acted from such motives, that they would, unless over-awed and restrained by some manifestation of public opinion, give effect to those motives by a wilful misinterpretation of the law. Whatever personal sympathies or private interest you may impute to myself, I think that Mr. Justice Johnston, for instance, whose views of the qualifications and disqualifications of candidates for the legal profession, as expressed in another case, have been repeatedly quoted, might, by a fair critic, have been deemed likely to act from some principle, and upon some view of the facts, which he and the other Judges in consultation with him considered obligatory. But the summary jurisdiction typified by the Court of classic legend to which you allude, has, in your sweeping condemnation, been applied by yourself to the Judges, not by them to yourself; and I cannot but think that if a little of that spirit of inquiry into both sides, which you so eloquently express, had been shown towards us, some at least of the censure, and much of the comment personal to myself, would have been spared.

You complain of discourtesy on my part in this, that, but for the private courtesy of Judge Ward, you would have been left in ignorance of the remarks which the Judges, in their letter through me, had made upon your own letter. I hope I may, without disrespect, say that this is not a correct view of my communications with yourself. Had it indeed been so, I think the Judges and I, in writing to Judge Ward on their behalf, would have been justified. Your strictures upon us connected themselves with, and were based upon, the extra-judicial remarks of the Judge whom we addressed; your letter adopted, commended, those remarks, and challenged the Judges to resent them in the way which it dictated in such sort, that the writer of that letter, if called upon to answer for its harshest imputations, might have appealed to the terms of the judgment to palliate, if not to justify, those imputations. But you may remember that you first wrote to me for explanation of my note of the 21st October on the morning of my leaving Wellington. I could only reply to you in a hurried manner, being engaged with the Registrar, at "Chambers," in winding up the business of the Court of Appeal, up to the moment when I was summoned to hasten on board the steamboat. Knowing that Mr. Justice Ward was a guest at your house, it was I who first expressed my willingness that he should, if he thought

fit, communicate to you the contents of my letter to him. But, if I am not mistaken, I wrote two hurried notes to you, in one of which I intended to, and I think I did, assure you that I would, if requisite, write to you more fully from Auckland; and it can scarcely be suggested that one who volunteers his assent to a gentleman reading an original letter, would decline to communicate to the same gentleman so much of the contents of that letter as it might concern him to know.

But you complain that the Judges threatened you. We neither threatened nor meant to threaten. All thought of proceeding "*in pœnam*" we discarded, and all action by the Court of Appeal, or by the Judges of the Supreme Court, was treated as out of the question. It thus became unnecessary to discuss either the technical impediments or the more substantial difficulties which might beset any formal proceedings by the Court. Possibly, however, if the Court should ever be constrained to act in such a case, it would so frame its process as to embrace every phase of that case, and would so limit its judgment as not to exceed its jurisdiction. But in the present instance the Court did not prejudge the result of its supposed possible action. Of course the spontaneous action of any Court of Justice taken to maintain its integrity by vindicating the character of its Judges must always, as in the case of a private individual complaining of a libel, imply that the mover assumes a wrong to have been done, and must thus far of necessity lay the Court open to the imputation of prejudging its own case. This was one of the considerations of public policy which influenced my own conclusions herein: but surely such considerations, with the embarrassments which beset judicial officers in attempting to vindicate themselves, might induce some little moderation in those critics who thoroughly appreciate them. Indeed, the Judges called the attention of Mr. Justice Ward to your letter more especially with two objects, namely, firstly, as proving that they had not mistaken the drift or over-estimated the effects of his remarks; and, secondly, because the indignity which he had (in their opinion, wantonly) put upon his brother Judges was aggravated by their consciousness that they had no legitimate opportunity either to answer his censure or to resent the letter which his censure had elicited.

You indeed again suggest that the Judges might, and (I suppose) ought to, what you term "have it out," I presume, on the Judicial Bench, with their fellow Judge, and with this view you refer me to the difference of opinion, which was expressed in open Court, between the Lord Chief Justice of England and Mr. Justice Blackburn, in Governor Eyre's case. I have no memorandum or report of that case, but, if my memory serves me, it was something like the following:—Blackburn, J., I think in addressing the Grand Jury, stated his view of the law on a great question both of constitutional and of municipal law, at the same time giving his hearers and the public to understand that those views, connected as they were with the disputed powers of the Crown and its officers acting under a proclamation of martial law, coincided with the views of the Lord Chief Justice and his fellows, and that he, Blackburn, was authorized to say so. He had previously consulted the other Judges, but had entirely mistaken their views of the law. The Lord Chief Justice, on reading the report, found that his views had been erroneously quoted, which, had he anticipated it, he would have corrected by himself attending and expounding his own opinions; and this circumstance affected him the more because he had on a previous occasion connected with the same subject matter, and the same Governor Eyre, published his charge to the Grand Jury in an elaborate report. The Lord Chief Justice, therefore, with perfect courtesy and respect towards Blackburn, J., stated in open Court his own views of the law; whereupon Mr. Justice Blackburn expressed his regret that he had misunderstood his brother Judges, and so had been led to quote them erroneously. This, I think, was about the course which that case took. If so I am unable to discover the slightest analogy between it and our own case. There had been no censure by Blackburn, J., of his brethren on the Bench. There was no retaliation or recrimination by those brethren. If Mr. Justice Blackburn, some years after an administrative act of his fellow Judges which he condemned, had, upon that act coming incidentally under his notice on the Bench in a case to the decision whereof remarks on the act of his fellow Judges were not necessary, yet gone out of his way, not merely to guard himself from being supposed to assent to such act, but further to censure those Judges, to treat their act and themselves with "grim irony," and, while avowing ignorance of the reasons of those Judges for their act, had yet held up those reasons (whatever they might be) as well as themselves to public scorn; and had the Lord Chief Justice and the other Judges, on first meeting Mr. Justice Blackburn many months afterwards in open Court, there commenced and carried out an interchange of complaint and rebuke with him, it is difficult to say which side the English public would have deemed most censurable,—whether the assailant Puisne Judge or the Chief Justice and his fellows. It seems to me that such conduct in the Chief Justice and his fellow Judges would have presented to us a rock of offence to be shunned, not a precedent to be followed. Yet in no other way, and on no other condition, as it appears to me, could the remarks of Mr. Justice Ward have been reviewed in Court by those whom he had assumed to censure. Even if the Smythies' appeals could have been heard, the propriety or impropriety of his admission could not have been brought under review. In truth, however, those appeals could not be heard. In regard to one of the petitions for leave to appeal to the Court of Appeal, in connection wherewith Smythies might have attempted to relate the circumstances attending this admission, Smythies had been placed under terms to find security, which he swore he was unable to find in fulfilment of the condition imposed. Under the circumstances, and for reasons stated in open Court, the Judges did not feel themselves justified in overruling this statutory act of discretion of Mr. Justice Ward in putting Smythies under terms, and so his appeal could not be heard, and no question was raised before the Court, under mask whereof the Judges could, though even by something like an abuse of their judicial office, have "had it out" with Mr. Justice Ward. Indeed, you seem, from one of your observations, to be conscious of this; for you intimate your opinion that the Court of Appeal,—that is, I presume, the Judges whom Mr. Justice Ward took on himself to censure,—ought, while secretly resenting his rebuke, yet to leave the matter in the position in which it was thus placed by Smythies being left without appeal.

Before leaving this part of the subject I wish to notice your remarks about the Court seeking an enforced apology from yourself. Speaking for myself, and I believe I may say the same for the other Judges, nothing could be further from my wish than to see the dignity of your high position in this Colony, both social and political, at all impaired. Of course, if you had felt that, in censuring the

public acts of myself and the other Judges, you had exceeded fair criticism, and chose to say so, well; but, in my case, if I know anything of my own mind and heart, I can truly assert that anything which subjected yourself to humiliation would impart no other feeling but one of pain to me.

My allusion to the admission of Smythies taking place with the acquiescence of the Dunedin Bar was made, as it could only be made, upon information received from others. If the respected Attorney-General was absent from Dunedin at the time, and had not authorized the withdrawal of that opposition which I am led to believe he had signified, I regret that I did not except him out of my allusion to assent. And in regard to the alleged acquiescence of the Dunedin Bar generally, I alluded to it, not in complaint of those gentlemen, but because I am certain that the Judges concerned never contemplated the admission of Smythies at all events, and notwithstanding their opposition. True, indeed, it is, that we had been informed the admission would not be opposed; but I always understood that, if opposed, the propriety thereof would be reserved by the Judges at Dunedin for further consideration by the Judges in conference. It may well be that the Dunedin Bar may have been misled by the supposed import of a memorandum or resolution, or both, either of myself or of the Judges; but I think that if the course of practice preparatory to the admission of a solicitor, established before I came to the Colony, and, so far as I know, still followed, had been duly considered, the application for admission, insisted upon to be in open Court, would have been taken, especially when adjourned from day to day at the hearing, as a sincere invitation to all persons concerned to come in and oppose. The practice which I found established was, and is, that the candidate applies, his credentials are examined, and if, *prima facie*, such as to give him a claim upon admission, he is permitted to apply formally to the Judge in Chambers, and is admitted without mention thereof in open Court. But this inquiry into his credentials is preliminary only in case of opposition. Since I came to the Colony I have had only one application in open Court. After satisfying myself upon the claims of the candidate, I received through the Registrar notice that those claims were questionable. I immediately ordered that the application be made in open Court, and caused notice to be published of a day and hour for that purpose. Affidavits were filed in opposition, and in the end the candidate was not admitted. In mentioning, therefore, the absence of opposition to the admission of Smythies, I did so, not as imputing laches to the bar, but because the Judges believed that the circumstances attending the application for admission were in all probability known to the Judge who reproached us, and, if so, that they might have been considered worth notice by one who seemed, at least to us, to select those facts only which might tend to support his censure.

And this brings me to the topic in your letter which concerns myself personally and specially, viz., to the inference which you have drawn from some papers and correspondence, that the perseverance of Mr. Smythies in his attempts to re-enter the ranks of the profession was attributable to the encouragement given to him by me in private, at private interviews, and by private correspondence. Never was an imputation more unfounded. I know not what papers or letters are alluded to, nor does it matter. If I had lived in any kind of social relations with Mr. Smythies or his family I would not now repudiate him in his ruin. That I received him to personal interviews at the place which I used to occupy as, and which was called, my "Chambers," is true. Even now, seldom a candidate gives notice for examination preparatory to admission in this judicial district, until he has first asked an interview with myself; and I never refuse it. Now, I have a Secretary, and these requests are generally made through him by persons who come for the purpose of learning direct from myself whether they can be admitted, and on what conditions. But I do not consider that I am holding private interviews with persons who come to me in my official capacity, on official business, though that business may concern themselves individually. Neither are my letters private letters which relate solely to such topics in connection with such business and nothing else, even though a letter may, on one or more occasions, even unwisely, have been commenced or concluded not according to official form. In the days of Mr. Smythies' first applications to myself especially I had no clerk, and unless the business to which the application related were "in Court," and on the Registrar's book, such application was commonly made to me direct. The place which formed my "Chamber" opened by one door into a public thoroughfare and by another into the Court, and through that Court into Queen Street; and any comer could knock and enter my chamber, and people of all classes did so, without communicating with the Registrar, supposing him to be in his own room. Even when some applicant was introduced by the Registrar, that officer at times had his Registrar's work to transact and would retire. And I need hardly add that, when on circuit or attending the Court of Appeal, a Judge who had no clerk with him would sometimes be attended by applicants, as the Judges are in England at lodgings. Whatever interviews I ever held with Mr. Smythies were on public business only. To the best of my recollection I never have been in the same room with Mr. Smythies, except when either he has come to me on public business (which may or may not have concerned himself individually) or was pleading for himself or others in open Court; while (I may add) I am not aware that I have ever been under the same roof with any member of his family. And I recollect that before Mr. Smythies left Auckland he did not always even recognize me, if we met and passed each other in the street. And now what was the encouragement given by me to him to persevere? I believe that on three occasions (the first being certainly on the Registrar's introduction) Mr. Smythies applied to me, at considerable intervals of time, asking me if he might entertain any hope of being admitted, assuming that he proved his case to be of a character so exceptional as he represented. It is true that he and his family were known to some persons of high respectability in this district; that he had, as I heard, endured the extreme of poverty, even to want; that he had, I understood, earned under these trials a character for integrity; and that by reason of his sufferings I pitied him, while for the character I heard of him I respected him. But I refused on each occasion to encourage his application. It was a painful business, and I retain a vivid recollection of his earnest remonstrances against being punished by a life-long punishment, as well as of my resorting to that subterfuge of answer, viz., that I did not *punish*, but declined to indorse on his application that he was especially qualified (and so on, mentioning some of the confidential relations which arose between solicitor and client). I believe it was because he found his attempts hopeless that he finally left this district for

Otago, and I heard no more of him until, if I remember aright, he, relying upon the greater lapse of time and the character of his then recent employment, requested that his case should be brought under the notice of the Judges in conference. The Judges, I found, did not decline to entertain his application, and I presume it must have been after this intimation of opinion that I, as the organ of communication with Mr. Smythies, was brought into more frequent correspondence with him. Whether the Judges were likely to have bent their wills to mine on such a subject I may leave even to yourself to estimate from our individual characters respectively.

I have written the above explanations on matters in which explanation appeared to me not inconsistent with the position which the Judges take upon this question. They feel that it cannot be the right of any one Judge to assume the censorship over his fellow Judges, and to exercise that office through the medium of irony, insinuation, and contempt. They could not meet with and confer with the Judge who so treats them on terms of independence, and yet secretly harbour towards him a sense of wrong, and perhaps resentment. They therefore, having no legitimate public opportunity for remonstrance, resolved to offer that remonstrance through me in the letter which I wrote to Mr. Justice Ward. We have ever treated, and shall still treat, him with courtesy, and his opinion with respect; and so long as any Judge who differs from the opinions or disapproves the administrative acts of all or any of the Judges, thinking it his duty to guard himself against being supposed to agree with them, avails himself of the opportunity, when such opinions or acts come (incidentally even) before him judicially, temperately to express his differing from them, I, for one, should never think of resenting it. Every Judge has the most perfect independence in his office. But it cannot be right for any Judge so to deal with the rest of the Court as on the occasion complained of; and you must forgive me for adding that, so long as you continue to approve of that Judge's dealing with us, we cannot regard you as an impartial judge or mediator on the subject.

In regard to your own censure, and to certain allusions contained in your letter to myself, I will not debate them, because, so long as I continue to hold a judicial office, I cannot commit myself to either a public controversy or a private quarrel. All I would ask is this;—not that you spare Judges because they are Judges, or a friend whom you so regard, but that, when you attack a judicial officer through the columns of a newspaper, you would consider that the officer is helpless to defend himself. He cannot, like one of your political opponents, enter the lists of controversy, backed by his partisans in support, nor can he meet you, either by himself or his friends, on the floor of the Legislature: his character and his peace of mind lie much at the mercy of his censors. The press of New Zealand generally seem to appreciate our position in this respect, and for myself, conscious as I am that, in the difficult and manifold duties of my office, I must have made many, many mistakes which have been passed over, I have ever felt at once grateful and encouraged by the forbearance which I have received. I certainly am not conscious that either I or the Judges affected with me have deserved the imputations which you have cast upon us, or I should not ask your permission to remain still,

Yours sincerely,

The Hon. William Fox. G. A. Arney.

P.S.—Be pleased to attribute the look of this letter to the fact that my time is engrossed by judicial work; so that I have been obliged to write *titubante calamo*, without the opportunity to make a fair copy.

Enclosure 3 in No. 2.

The Hon. W. Fox to Chief Justice Sir G. A. Arney.

My dear Sir George Arney,— Wellington, February, 1870.

I have to acknowledge your obliging letter of the 15th January, in reply to mine of the 10th December. Having already placed on record my opinions and remonstrances in reference to that part of your letter to Judge Ward which affects myself, I have no desire to trouble you with any further correspondence on the subject. Your reply does, I confess, seem to me rather to avoid (I will not say evade) than answer my remarks, and invites rejoinder on many points, from which, however, I abstain, except on one point on which it is essential there should be no misunderstanding.

You say, "that you neither threatened me, nor meant to threaten me." The expressions in your letter to Judge Ward, of which I complained as a threat, were these:—"We might have called upon the writer to show cause why he should not, in default of a full and public apology, be struck off the rolls of the Court, or at least suspended from practice. We should, without hesitation, have taken this course, feeling confident that it would have received the approval of the Privy Council. . . . After anxious deliberation we came to the conclusion that we should ill correct the scandal which your judgment may have occasioned, by proceeding against a high political functionary in the mode which we have pointed out." So far from this not being a threat, I can only regard it as the most offensive form in which a threat can be couched. It is of the same class as saying to a minister of religion, "Your cloth protects you;" or to an aged man, "I would punish you but for your grey hairs;" which may be called a threat enforced by contempt. So strongly did I feel it to be a threat of the most offensive sort, that had I stood toward your Court in any position from which I could have addressed you officially, I should at once have challenged you to waive the alleged impediment, put your threat into execution, and give me the opportunity of "having it out" with your Court before the Privy Council, to which you hypothetically invited me. And what seemed to me to increase the impropriety of the threat was, that you proposed to have inflicted upon me a punishment due only to the commission of criminal or professional malfeasance, and in no way applicable to, what at most existed in my case, a mere contempt of Court. As the Supreme Court could not be supposed to be ignorant of the law as decided by the Privy Council, "In *re* Wallace, 4 Moore, P.C., N.S., 140," I could only infer that, without any judicial inquiry, it had thought proper to decide that I had committed an offence of that higher order to which alone such severe penalties are attached: an offence which, if

committed, would have left a stain equally on my character as a member of the Bar and as an individual.

As, however, you now are kind enough to say that no threat was intended, I am, of course, ready to accept that explanation of this part of your letter to Judge Ward; to consider it, in fact, as withdrawn, so far as it was justly interpreted by me to contain a threat.

In conclusion, I have to express my sense of the courtesy of your reply, and to request that, as you have communicated to the other concurring Judges my previous letter, you will oblige me by letting them see the contents of this also.

I have, &c.,

Chief Justice Sir G. A. Arney. WILLIAM FOX.

Enclosure 4 in No. 2.

The Hon. W. Fox to Chief Justice Sir G. A. ARNEY.

MY DEAR SIR GEORGE,— Wellington, 6th April, 1870.

Mr. Justice Ward has forwarded to the Colonial Secretary the correspondence between you and himself, and it consequently becomes an official record. Affecting, as it does, my own position, I cannot, of course, allow my defence to rest on Judge Ward's correspondence, but consider that the correspondence between you and myself ought to be added to it. I have, therefore, forwarded copies of it to the Colonial Secretary, requesting him that it may be placed on the official file of papers relating to Smythies' affair.

I have, &c.,

Chief Justice Sir G. A. Arney. WILLIAM FOX.

Enclosure 5 in No. 2.

Chief Justice Sir G. A. ARNEY to the Hon. W. FOX.

MY DEAR SIR,— Auckland, 4th May, 1870.

Your note, dated the 6th April, arrived while I was absent from Auckland, and only came to my hands on my return.

In that note you are pleased to inform me that you have forwarded copies of your correspondence with myself to the Colonial Secretary, to be placed on an official file of papers.

As my first letter to His Honor Mr. Justice Ward conveyed the common protest of myself and other Judges then in New Zealand who were interested in the subject matter of that letter, after being settled, as early as practicable, under their counsel and advice, but as those Judges have had no opportunity of considering the whole, or even of reading some, of the correspondence which has since passed between yourself or Mr. Justice Ward and myself, and especially as I deemed it not consistent with my duty to enter upon any discussion of certain matters contained both in your own letters and those of Mr. Justice Ward, I will bring the same under the review of those Judges at the earliest opportunity, in order that they may determine whether they should, either individually or through me as representing them, express any opinion thereon.

I have, &c.,

The Hon. William Fox, Wellington. G. A. ARNEY.

No. 3.

The Hon. W. FOX to the Hon. the COLONIAL SECRETARY.

SIR,— Wellington, 6th July, 1870.

Observing that a Member of the House of Representatives (Mr. Creighton) has given notice of his intention to move for the production of the correspondence between Chief Justice Arney, Mr. Acting-Judge Ward, and myself, I beg to enclose further papers in the case which are referred to in the correspondence and necessary for its being fully understood, viz.:—1st. Letter from myself to the Editor of the *Independent* newspaper. 2nd. Report of a case, Regina *v.* Strode and Fraser, decided in the Supreme Court, Dunedin; and 3rd. Report of trial of Henry Smythies before Mr. Justice Erle, in the Central Criminal Court, London.

I shall be obliged by your adding these documents to the official file.

I have, &c.,

WILLIAM FOX,

The Hon. the Colonial Secretary. Barrister-at-Law.

Enclosure 1 in No. 3.

WILLIAM FOX, Esq., to the EDITOR of the *Independent* Newspaper.

(To the Editor of the *Independent*.)

SIR,—

A most grave judicial scandal, for I can call it nothing less, has been ventilated in the Supreme Court at Otago, and as I do not think that the Colony has by any means heard the last of it, I propose to invite the attention of your readers to the transaction, in order that they may be the better able to follow it through its present stages.

By an Act of the Colonial Parliament, passed in the year 1866, it was enacted, "that if any person who has or shall have been convicted, in any part of the British dominions, of forgery, or perjury, or

subornation of perjury, shall be enrolled, or shall practice as a barrister or solicitor of the Supreme Court of New Zealand, such person shall be liable to pay a penalty of five hundred pounds."

A certain Mr. Smythies, who, I believe, had been a practising solicitor in England, was convicted of forgery before his resort to the Colony. Some time after his arrival in New Zealand, and before the passing of the above Act, he applied to be admitted to practice as a barrister and solicitor in the Supreme Court. The Judges of that Court appear to have had full knowledge of his former delinquency, but nevertheless, after some deliberation, they permitted his enrolment, and Mr. Smythies proceeded to practice both branches of his profession in the Courts of Law at Otago.

For some reason or other which does not appear in the proceedings before the Court, Mr. John Jones, of Dunedin and Waikouaiti, thought proper to lay an information against Mr. Smythies for practising contrary to the provisions of the above-cited Act. The Magistrates before whom the case was heard, Messrs. Strode and Fraser, convicted Mr. Smythies, and awarded the full penalty, which they had no power to mitigate. Mr. Smythies appealed from their decision, and moved Mr. Justice Ward to quash the conviction. Of the fact of Mr. Smythies having been convicted of forgery there was no doubt, for he confessed it; and the fact of his having practised since the Act was passed was equally patent. He rested his appeal on grounds of a purely technical character, and these having been overruled by Mr. Ward, the conviction was sustained. It appears by later arrivals from Dunedin that Mr. Smythies has since been suspended from practice, and has appealed to the Court of Appeal against the ruling of Mr. Justice Ward. The Colony, I hope, will watch with no small anxiety, the future proceedings in the case. That a person previously convicted of forgery within the knowledge of the Judges of the Supreme Court, should have been permitted by them to assume the functions of a barrister and solicitor, and to clothe himself with those testimonials of integrity and respectability which are usually supposed to attach to members of the legal profession, has something not a little startling in it. If there is a crime which peculiarly disqualifies a man for enrolment in the honorable profession of the law, it is precisely that of which Mr. Smythies has been guilty, because it is precisely that to which a needy, unscrupulous, or unprincipled lawyer would be likely to be tempted, and its consequences are such as might most readily result in ruin to those who, confiding in the character implied by an admission to practice as a lawyer, might have entrusted their property or their rights to his professional management. The honor of the profession and the safety of the public are both placed under the guardianship of the Judges, to whose discretion and watchfulness the highly responsible duty of keeping the profession pure is entrusted.

How far in this case they may have had exceptional grounds for allowing Mr. Smythies to don the garb of an honest man, will perhaps appear when they produce "those most admirable reasons" by which, as Mr. Justice Ward with grim irony intimates, they must have justified their act, but which they have hitherto failed to place on record. Whatever their "reasons" may have been, the public will, I think, concur in Judge Ward's summing up when he says that "the result of the admission of Mr. Smythies has been, that of all the realms used by the law of England, New Zealand has become the solitary spot where, by a solemn decision of the Judges, the roll of solicitors, the Bar, and, consequently, the Judicial Bench, have been opened as a *locus penitentiæ* to the forgers and felons of Great Britain."

The Act of 1866 however, if enforced, will render unavailing the sympathies of the Judicial Bench for "forgers and felons." But when I look at the array of technical objections which Mr. Smythies urged before Mr. Judge Ward, and which the latter most properly overruled, I cannot help fearing that some "most admirable reasons" may yet present themselves to the mind of the Court of Appeal, which may enable "felons and forgers" to drive their coach and six through its clauses. That the public and the legal profession, jealous of its own character, will watch the future proceedings in this case I have no doubt. It rests with the Judges of the Supreme Court, by the manner in which they may succeed in vindicating the course hitherto and hereafter to be pursued by them, to restore or to destroy the confidence of the public in the Bar of the Colony, and, I hesitate not to say, in the Court itself. The course pursued by Mr. Justice Ward, and his very able handling of the case, to say nothing of the unsparing sarcasm which he launches at the heads of his brother Judges, render it impossible that they can avoid meeting the difficulties of the position face to face. They must "have it out" with Mr. Justice Ward, and Mr. Smythies, and with the profession, and the latter, I feel confident, will look on no disinterested spectators.

I enclose the substantial part of Mr. Justice Ward's judgment, as I find it reported in the *Otago New Zealand Sun*, omitting only some discursive matter which ensued between Mr. Smythies and the Court after it was delivered.

As a member of the English and Colonial Bars, and one of the senior members of the legal profession in the Colony, I have considered it my duty to invite the attention of the public and of the profession, here and elsewhere, to this most important matter. And I beg to place upon record my own protest, as a member of the profession, and as a colonist of New Zealand, against the unjustifiable leniency which has led the Supreme Court to throw open the Bar of the Colony to convicted felons and forgers.

I have, &c.,

WILLIAM FOX,

Barrister of the Inner Temple and Supreme Court, N.Z.

Enclosure 2 in No. 3.

REPORT of the Trial of HENRY SMYTHIES, before Mr. JUSTICE ERLE, at the Central Criminal Court, London, on the 22nd August, 1849, on charges of Forgery and Uttering.

1524. *Henry Smythies* unlawfully forging and uttering a paper-writing, purporting to be a consent of Richard Soden to be the next friend to the infants in a certain Chancery suit, with intent to defraud the said Richard Soden: other counts, varying the manner of stating the charge.

Mr. Serjeant Byles, with Messrs. Bodkin and Huddleston, conducted the prosecution.

Frederick Bull:—I am managing clerk to Mr. Meyrick, who was the London agent of the firm of James and Smythies, attorneys, at Aylesbury. I attended to the conduct of a suit of Miles *v.* Miles in the Court of Chancery. Mr. Smythies, the defendant, was the attorney for the plaintiffs in that suit. Mr. James, his partner, did not interfere in the management of that suit in the slightest. In October last year the plaintiff's solicitor was changed. This is the order of the Court for the change; it is dated 10th October, 1848. (*This was produced by James Fluker, managing clerk to Mr. Kirk, who was the attorney substituted for Mr. Smythies.*) After the change of attorneys took place, a bill of costs was prepared by Mr. Smythies, and carried into the Master's office. This is it (*produced*). It is made out to Mr. Richard Soden, as debtor to Mr. Henry Smythies. The amount is £355 5s. 11d., and is signed Henry Smythies. It is the handwriting of Mr. Smythies. An action was brought against Mr. Soden for the recovery of that bill of costs. This is the *nisi prius* record in that action (*produced*). A bill of particulars is annexed. The writ was issued on Friday, 16th February, 1849. The plea was "Never indebted." An order was afterwards made for taxing the bill. This is it (*produced*). In pursuance of that order an appointment was made before Mr. Baines, the Taxing Master, on 3rd April: the bill of costs was then laid before the Master. Mr. Fluker (Mr. Kirk's managing clerk), Frederick Miles, myself, and Mr. Smythies attended, and another assistant clerk of Mr. Kirk's, at the Master's chambers in Staples Inn. There is a charge in the bill of costs for taking the retainer of Mr. Soden in writing. There are no dates to the items. This date of 29th May, 1847, in the margin, is Mr. Smythies' writing. The item is, "Attending you when you consented to become next friend, and taking your consent in writing, 6s. 8d." When the Master's attention was drawn to that item, the retainer was handed to the Master; that was in consequence of the Master's asking when that consent was given, because on that consent Mr. Soden would only become liable from the date of that consent. Mr. Smythies produced the retainer to the Master. The date was fixed as 29th May, 1847, by Mr. Smythies, and in consequence of that, the item of journey to town to consult with counsel, three guineas, and rail and expenses, one guinea, was taken off by the Master, as being antecedent to the retainer. The Master, in my presence, marked the retainer as a document produced before him. These are his initials on it, and the date, "3rd April, 1849." Mr. Smythies did not give any account of it when he produced it, that I recollect; he merely handed it in. Some observation was made by the Master as to the proof of the retainer being a question in the cause, and not to be decided by him there at chambers. Mr. Fluker had an opportunity of seeing the retainer; either I or the Master handed it immediately to him. Mr. Fluker handed it to Frederick Miles, and they both read it, and the assistant clerk also. At that time I was not at all aware whether there had been a written retainer or not. A letter of Mr. Soden's was also produced to the Master by Mr. Smythies. I do not know the date of it. On the back of the retainer there is endorsed "Richard Soden's consent to be next friend," in Mr. Smythies' writing. The body of the retainer is in his writing. The action stood for trial in the Exchequer on Thursday, 26th April. The record was withdrawn on that day. I attended a consultation of counsel with Mr. Smythies, and it was after that that the record was withdrawn. The papers in the suit and action were taken from Mr. Meyrick's office on Monday morning, 7th May, about ten o'clock, by Mr. Smythies. The retainer was among those papers. Mr. James afterwards came to our office—I think on the same day; he was then told of the removal of the papers. The letter that was produced to the Master by Mr. Smythies was, I believe, dated 12th May, 1847.

Cross-examined by Mr. W. H. Cooke:—Do you remember, when that letter was produced, the Master saying, "Why, this letter is sufficient consent of Mr. Soden, without troubling you any further?"—No; I do not remember that. I do not remember any observation of the Master's with reference to the letter. To the best of my belief it was handed to Mr. Fluker without any comment of the Master. It was first produced and shown to the Master, and by the Master handed to Mr. Fluker. We did not get the letter admitted by Mr. Soden's attorney to be his handwriting; we gave notice to admit, but I do not think this letter was amongst them. Mr. James was a clerk to Mr. Duncan, solicitor to the Eastern Counties Railway. I believe he acted under Mr. Duncan as long as Mr. Duncan continued there. I do not know that it was on 12th May that Mr. Duncan ceased to be connected with the Company. I do not at all know when it was; I think it was in May. Mr. Meyrick is brother-in-law of Mr. James. I do not know in what way Mr. James was connected with the Eastern Counties Railway; he acted with Mr. Duncan, and was there for some years, but I do not know at all in what respect. The business at Aylesbury was all transacted by Mr. Smythies; Mr. James lived in Palace Yard; he went down occasionally, but seldom. I remember Mr. Smythies on one occasion, I do not know when, saying something about having lost the retainer. I should say that was before we went to the Master to tax, but I do not know. I think in consequence of that I searched among the papers for such a document. It may have been the same day we went before the Master that he told me he had lost the retainer, or it may have been during the suit. The suit was going on for nearly a year and a half. I cannot give any nearer notion. I do not remember his wishing me to search; I remember a general conversation about a retainer being missing; my attention was not then called to it. I do not remember searching, or anything being done upon it, except a general observation about the retainer being missing. This retainer was produced by Mr. Smythies, as I thought at the time, to fix the date. It was produced before the Master as evidence of a date. The result of the change of attorneys was to lead to Mr. Kirk being the person to act on the part of the infants in the cause. I do not know that the papers were removed on 7th May, to be handed to Mr. Kirk by previous agreement. I know Mr. Smythies took them away, but for what purpose I do not know. He asked me for the papers in the suit of Smythies and Soden, and I handed him the bundle. I have not seen those papers

since in the possession of Mr. Kirk. He is now conducting the suit. I think the business at Aylesbury was rather more than in the elder Mr. James' time; the business that we had in London increased, at least we had more these two years than we had had prior to that. I did not sort the papers out before Mr. Smythies took them away on 7th May. I had kept the London papers distinct from the country ones. I handed him the bundle. I had tied up all the papers in the cause of Miles *v.* Miles, and Smythies *v.* Soden, in different bundles; the London bundle he would not want. He applied to me for the papers, and I handed them to him in the bundle that I had already made up. These are the notices to admit. There is no notice to admit this consent-paper. This is the letter that was produced before the Master; it is dated 17th November, 1847. (*Read.*) "Castle Thorp, 17th November, 1847.—Dear Sir,—I was from home yesterday when your letter came, and did not get home till it was too late for post. I do not exactly understand whether you meant two securities for £100 each, or two for £1,000 each. If you meant for £100 each, Mr. Golby, of Stoney Stratford, and Mr. Wilson, of Old Stratford, would become security; but as for £1,000, I should not like to ask anybody to be bound for that sum, for it is a difficult matter now-a-days to say who is worth £1,000. I am very willing to do all I can for the family, but if it cannot be done without my giving security for £2,000, I shall give it up altogether, and remain, Sir, yours truly, Richard Soden." I see by the Master's initials that this is the letter that was produced; there was only one letter produced. Mr. Smythies got up the evidence in the cause of Smythies *v.* Soden. I should have been the witness to prove the work done. Mr. Smythies would have provided the necessary evidence to prove the retainer. Mr. James was to be called as a witness to prove that he was not a solicitor in Chancery, and therefore had no interest as partner in the Chancery proceedings. (*The retainer was here read as follows*—"In Chancery: Miles *against* Miles—I hereby consent to be next friend to the infants for the purposes of this suit. Richard Soden."—Endorsed "Richard Soden's consent to be next friend.")

Richard Soden:—I am an innkeeper at Castle Thorpe, Buckinghamshire, and am uncle, by marriage, to the plaintiffs in Miles *v.* Miles. In May, 1847, they were infants. The signature to this retainer is not my writing. I never signed that or any instrument to that effect, or authorized any person to sign it. This signature is very like my writing. Mr. Smythies was solicitor for the plaintiffs in the Chancery suit. I believe the first day I saw Mr. Smythies was on 29th May, 1847, at his office at Aylesbury. I went there in consequence of a note I had from one of my nieces. My nephew, Frederick Miles, accompanied me: he introduced me to Mr. Smythies. I told him I should have no objection to his making use of my name as next friend, to serve the children. I was very willing to do all I could to serve the children as far as my advice and time went, but I would not lay myself responsible for any costs. He said, "You will not be called upon for that." I did not sign any paper. I frequently saw Mr. Smythies on subsequent occasions. I never signed any document on any of those occasions, nor was the subject of costs mentioned between us. An action was afterwards brought against me, which I defended. (*Looking at letters.*) Those letters to Mr. Smythies are my writing.

Cross-examined by Mr. Cooke:—Were the Miles' the children of your sister, or your wife's sister?—My wife's sister. At the death of the father there was not only an estate, but the farming business to be provided for. The father had an estate which he farmed himself. He left a quantity of stock. He left a number of debtors. He had eight children; several were sons. One of the objects of the suit was to keep the farm going on, if they could, for the benefit of the family. A proposal was made to sell; I certainly approved of that: Mr. Smythies said it was necessary, and advised the sale. Some of the family objected to the sale, and employed Mr. Kirk. I employed him afterwards, and it was agreed on by the family that he should take the place of Mr. Smythies. I am released by Mr. Kirk from the costs. Before I had that conversation with Mr. Smythies I had seen or heard from one of my nieces. I had never, before the morning I went to Mr. Smythies, been asked to act the part of next friend. I understood Mr. Smythies wanted me to be next friend, and I went to see him in consequence of a communication on the subject. I understood that the costs would come out of the estate. I said I would not be responsible for the costs, and I did not say any more about them. I was not told that the costs would come out of the estate. I always understood so from the family. It was an understood thing that Mr. Smythies' costs would be paid by the estate: I was only lending my name. I should think on that occasion, in May, I was at his office twenty minutes or half an hour. I was not an hour there. I have been at his office several times about this suit, and wrote several letters. I always said I would assist all in my power as far as my advice and time went. I came up to Mr. Merrick's office in Furnivals Inn with the Messrs. Miles. I tendered them every assistance I could. I did not attend the consultation. I never spoke to Mr. James until I attended at Bow Street. I had never seen him till a day or two before. I went to him in consequence of his sending for me. I was applied to, to be prosecutor against Mr. Smythies at Bow Street. Mr. James had never been my solicitor before that. Mr. James did not apply to me himself. He did not speak to me at Aylesbury. I had a letter on the Monday night about coming to London. I came, and saw Mr. James. He said it would be necessary for me to be in London. I was examined as a witness at Bow Street. I represented myself as the prosecutor when the summons was taken out. I did not hear myself mentioned as being the prosecutor. I do not think I should have prosecuted. I was glad to get out of it. I have written to Mr. Smythies in the progress of the cause. The letters are here. I pledge my oath I never signed any paper at the office at Aylesbury. I all along felt satisfied I had never signed any paper. I was asked if I had signed the retainer, and I said I had not the slightest recollection of signing anything. I was so far positive as that. I do not recollect saying, "I do not recollect having done so; I may have said so." It is so long ago I cannot charge my memory. I never told Mr. Kirk that. I did not tell Mr. Kirk's clerk that I was not certain whether I had signed it or not, it was so long ago. I said I never recollected signing anything, and it was an extraordinary thing that I should have signed it and not know anything of it. I said I never signed anything to make myself liable for costs. I never recollect having any doubt about it. I never signed any paper to that effect. I have not the slightest doubt. I did not at first feel that my memory was doubtful in consequence of the time that had elapsed. The suit is not over yet. Mr. Kirk still carries it on for the family. The action that was brought by Mr. Smythies has been arranged on the part of the family by Mr. Kirk, and he has given me a release.

The family employed Mr. Kirk to defend the action. That was on the ground that I had never consented to act as next friend. I never intended to dispute that I meant to act as next friend. I was willing to render assistance and advice, and the family were willing to give such costs as he was entitled to out of the estate.

Mr. Huddleston:—When was that conversation with Mr. Kirk?—I do not recollect the day; it was after I was before the Master. Mr. Kirk told me that before the Master he had seen a document produced which purported to be in my handwriting. That was when I made the observation. My solicitors, Messrs. Few and Hamilton, wrote to me before I went to Bow Street. They are my solicitors still. I do not recollect that I wrote any other letters than those produced. I did not make copies of them all. I remember seeing Mr. James at Aylesbury when the charge was made against him by Mr. Smythies. I first saw Mr. James on this business at the Magistrate's rooms at Aylesbury on the Saturday that it was heard. I know Ezra Miles; I had before that sent him to Mr. James. (*Several letters passing between Mr. Soden and Mr. Smythies were here read, chiefly relating to the management of the farm.*)

James James:—I am an attorney of the Court of Queen's Bench. I am not an attorney of the Court of Chancery. I have practiced at Aylesbury three years, where my father and grandfather carried on business before me. I was previously in the office of Crowder and Maynard. Mr. Smythies became my partner in the September following my father's death, September, 1846. There was a Chancery suit in our office, Miles *v.* Miles, the management of which Mr. Smythies had entirely. I was aware that there was an action pending, after the change of attorneys, by Mr. Smythies against Mr. Soden. I heard the record in that action was withdrawn, or intended to be withdrawn, on 26th April; Mr. Smythies came to me in Palace Yard and explained to me the reason of his withdrawing it. I asked him how it was, after having given me such decided opinions as to Mr. Soden's liability to pay the costs, he should withdraw the record at the last moment. He had breakfasted with me that morning, and left me to go to the consultation. He came back and told me that the record was withdrawn; that he told Mr. Hill that Fluker was to be called as a witness, and that Mr. Hill knew Fluker to be so great a blackguard that it would not be safe to allow him to go into the box. I said, "Well, but Mr. Hill could cross-examine him." He said, "Oh, they will be asked it all before." I then said, "You had better settle." Not a word was then said about the retainer. On Saturday, 5th May, at Aylesbury, I asked him how he came to withdraw the record, and he then said he had lost the retainer. I said, "But there was a retainer produced before the Master." He said that was a copy. I asked him who made it. He said he did; he re-wrote it from memory. I asked him if he signed Mr. Soden's name to it; he said he did. I asked him if he imitated the signature; he said he did. I made use of an oath, and said, "It is forgery, Smythies; it is forgery!" He said, "You may call it so if you please." I said, "It is the first time such a thing has ever been done in this office, and I will take good care it is the last," and I left him without speaking another word. That evening I went into Oxfordshire, and next morning I wrote him this letter. (*Read.*) "Sunday morning.—Dear Smythies,—I regret, beyond expression, that, after having passed the most uneasy night I ever had, in reflecting upon the facts which our conversation of yesterday disclosed, that I feel myself imperatively called upon to tell you, without disguise, that the feelings of regard and esteem which I bore towards you have undergone a total change. From our first acquaintance, I placed myself entirely in your hands with the greatest confidence; there was nothing I concealed from you; even any private letters were opened by you at my request. The business and its connections, which I avoided representing even at £800 a year, turned out to be double that amount; and as the returns came in slowly I allowed you to take your share, whilst I spent the money which I had earned elsewhere, and which I ought, in justice to myself, to have invested. Everything in the shape of money was under your control, almost exclusively; in fact, I treated you more like a brother than a stranger; and how have you repaid this confidence? After involving me and two of the oldest friends the office has in the meshes of that infernal Chancery suit, you, in order to secure the costs, substituted a retainer in your handwriting for the original, which you had lost. Now, was this honest between you and the client, or proper conduct towards me? I will not, Smythies, in memory of what has passed between us during the last two years, characterize such conduct in the terms it deserves. Your own character you may value as you please, and part with it how you please; but whilst you were connected with me you had no right to compromise it, and thus reflect upon mine. For myself, I value honor more than life. In God's name what have I done that I and my sisters should be recklessly ruined without my having an opportunity of averting the disaster? For even when you found that the plot had miscarried, and that you had fallen into your own snare, you deceived me, and the true state of the case was carefully concealed from me. But although I could write pages on the subject, it is more than I can bear. But I cannot conclude without saying that the trust and confidence which I placed in you, relying upon you as a man of prudence and honor, is lost, irretrievably lost. The course I shall pursue will depend upon the advice my friends may give me; but I do not see that there can be two opinions on the subject. The only difficulty I feel is, in having to make so humiliating a statement to any man. I shall leave for town by the ten o'clock train from Aylesbury to-morrow; and remain, yours, &c., J. JAMES." The two oldest friends alluded to there were Mr. Henry Hayward, who was to be receiver, and Mr. Neale, steward to Lord Carrington, who was one of the sureties. Lord Carrington is a client of mine; he is lord-lieutenant of the county. At the time I wrote this letter I did not know that Mr. Soden had denied giving any retainer at all. By the expression "the true state of the case was carefully concealed from me," I meant that when he found it was necessary to withdraw the record, to prevent the exposure of the document being a false one, that he had told me an untruth about Mr. Hill and Mr. Fluker; I meant to express that. I received from him a letter which crossed mine of the same date. This is it; it is his writing. (*Read.*) "Aylesbury, 5th May, 1849.—My dear James,—I think it due to you and myself to say that I agree in your remarks respecting the retainer, and have felt ashamed of the act ever since it occurred. I might, by stating the circumstances out of which it occurred, extenuate the act; but it was certainly wrong, and ought not to have been done. It is very difficult not to do wrong sometimes, particularly under great provocation. I feel the more upon the subject because, as partner, you are somewhat compromised by what I do. I will, however, be more careful for the future, and trust you will never again

have occasion to be dissatisfied with me. Very truly yours, HENRY SMYTHIES." I received this other letter from him, and I suppose it was in answer to mine of 5th May. (*Read.*) "Aylesbury, Sunday evening, 6th May.—Dear James,—I have just received your letter of this morning, which I must say was not wholly unexpected. I have long perceived that you were discontented, and I anticipated your taking this opportunity of expressing your feelings. It is not my wish to deny that, in some respects, your behaviour towards me has been kind and gratifying, particularly with regard to pecuniary affairs. You remind me that you left me the entire control of the business, but you omit to state that you avoided every occasion of advising with me, and that when I have fallen into unforeseen error, you reproached me without mercy and without consideration. When you state that you valued the business at not more than £800 a year, that was the average of the business during your father's time; and if during my time the business has doubled, surely you are in some measure indebted to my care and attention for it, and must admit that I have ever acted with the strictest integrity, and not abused the confidence you placed in me. I have always considered, and so consider, that your charges against me relative to the suit of Miles *v.* Miles are most unjust and ungenerous. Neither you nor your two friends have been injured in the slightest degree, nor are you likely to be so. You imagine evil, and then upbraid me as the author. You speak of the revelations made during an interview yesterday, but you were informed of everything by my brother three days since. You came into the office, knowing the whole facts, and you talked upon indifferent subjects. You left the office, returned, and again talked upon indifferent subjects, and this whilst you were meditating your attack. At length you entered upon the subject, proving by your questions that you were fully informed upon every point, and then gave vent to your indignation in terms of unsparing severity. How am I to understand this? I wrote a letter yesterday, addressed to you in town, so totally at variance with the spirit of yours, that I am under the necessity of recalling it, and shall expect it to be unopened. I shall also go to London to-morrow to have this matter fully investigated. I shall expect you at Furnivals Inn at half-past twelve. Yours, &c., HENRY SMYTHIES."

Had there been, that you are aware of, any discontent exhibited by you towards Mr. Smythies previous to this letter?—Yes, there had. I complained of his commencing the suit and altogether, and his conduct with reference to the articled clerk. I had not received any premium from him when we entered into partnership. I had been led to suppose that this was a copy. In May last I received a communication on the subject from Mr. Soden, through Ezra Miles; it was on the afternoon of the day upon which I gave Mr. Smythies notice of dissolution, on 15th May. Before that I had no knowledge or suspicion that there had not existed an original retainer. In consequence of what I learnt from Ezra Miles, I went down to Aylesbury to seize the papers. I took a Mr. Aubertin with me. I broke open Mr. Smythies' desk, and removed every paper of every description almost in the office. I found this retainer in his desk, and also these seven letters. Five of them were tied up together with a piece of green tape, and the other two were in the corner of the drawer. In the retainer the signature "Richard" has the small "d" after "Rich," and also in the five letters, but not in the two. In consequence of my breaking open the desk, I appeared before a Magistrate. I was not taken into custody; a warrant was issued. I came down to Aylesbury, and the officer came, and Mr. Huddleston insisted on his taking me into custody, and thereupon I walked to the Magistrate. The Magistrate at once dismissed the charge. I received this letter, dated 12th May, from Mr. Smythies, on the 13th. It was sent to me. A draft of it was found in the drawer. (*Letter read.*) "Aylesbury, 12th May, 1849. Dear James,—I confess myself at a loss to understand the principle upon which you are acting towards me." (*The following passage here occurred in the draft, but was omitted in the letter:* "I know it is not your nature to act unjustly to anybody, and I cannot think you would mark me out for a different course of treatment.") "I suspect you are not acquainted with the facts, I will therefore state them. Doubtless you recollect telling me to sue all the Miles' party for our costs, and that if we got only sufficient to pay agents' costs, it would be better to get clear of the matter. I proceeded to do so, and, upon looking up the evidence, I discovered that I had mislaid the retainer. Fully expecting to find it, and the wording of it being fresh in my memery, I re-wrote it, and laid the duplicate, together with the other papers, before my brother, to advise upon evidence. Upon the taxation, Kirk's clerk asked to see the retainer. I might have refused to show it him, for he had no right to see it; but as I had no cause for concealment, having the duplicate among the papers, I gave it to him, making no remark; he copied it, and returned it to me. Having failed to find the original, the document was left out of the brief, upon which my brother told me of the omission, and I said it was omitted purposely, I having lost the original. The circumstance was mentioned at the consultation, but Mr. Hill being called into Court, the consultation was adjourned. Afterwards, and after I saw you, my brother advised me to withdraw the record. I thought we could do without the retainer, as we had other evidence, but nevertheless took his advice, and after making terms with the defendant, and getting a positive assurance from him that the suit should be continued, and the costs paid out of the first moneys realized, I withdrew the record. You charge me with having concealed from you the fact of my having lost the retainer. Call to mind the remarks you made to me when you only suspected me of trifling, and ask yourself what I had to expect if I informed you of so careless an act as losing a retainer; and can you be surprised at my not telling you? Having no papers in the suit in the office when I took the retainer, I no doubt put it somewhere by itself, and so it was mislaid. You wish me to dissolve the partnership; be it so, I consent to sell out, and leave Aylesbury altogether. You may say that having come in for nothing, I ought not to expect to sell. I reply, when you took me into partnership, you could not get any desirable person not only to purchase, but to take it as a gift. I have heard I was the last of sixty applicants; perhaps there is nothing to sell now; if so, I leave the business as I found it; but if there is anything to sell, it must be through me that it is so; and as you will not be prejudiced, you ought not to object to my reaping the full benefit of my own exertions; nor would you, I think, wish to send me into the world without giving me the chance of providing a fund to establish myself elsewhere. Of course I shall not sell to any one objectionable to yourself. I have not yet received my recalled letter. I am, yours, &c., HENRY SMYTHIES."

Was there any foundation that there were at least sixty applicants for the business?—I had shown

the books to one gentleman besides Mr. Smythies; he was the second. There were applications out of number. Mr. Smythies had no connection at Aylesbury. It was entirely mine.

Cross-examined by Mr. Cooke:—Had you upwards of sixty applicants for the business?—The letters were not addressed to me, but to my agent, and I really do not know; there were a great number. I did not see them all. I was clerk under Mr. Duncan, in the Eastern Counties office. I was paid according to what was done; there was no fixed sum. I think in 1848 I received more than £800; I dare say in 1847 it was more. I went into Mr. Duncan's office in 1846. I was not there at the time I offered this partnership to the professional world. I wished to come to London to practice, and told Mr. Duncan my intention. I was with him about a month or six weeks before Mr. Smythies came to Aylesbury. From that time I devoted my week days to Mr. Duncan. I was down at Aylesbury sometimes. I never passed a week there. I went to my own house, which is attached to the office. I sometimes went on Tuesday, Thursday, or Saturday. I have passed two consecutive days there in every month. The arrangement was that I should be there as much as I could, especially on Saturday. Saturday was the great business day. I understood that Mr. Smythies practiced in Monmouthshire before he came to Aylesbury. He told me so. I have no doubt of it. His father is a Clergyman and a Magistrate of the County of Essex. He is married, and has a family. I went down to seize the papers on Thursday, 16th, I believe. I had not received notice of dissolution of partnership from Mr. Smythies on the 14th. I received it on the 15th. I believe I was writing my notice at the time it came. Mr. Meyrick brought it, and was present while I was writing mine. I knew that Mr. Smythies was in London transacting business for the office when I went down to Aylesbury to seize the papers, or I should not have done it. I did not make any appointment for him to come to London that day; I had nothing whatever to do with it. I did not know until after the afternoon of the 15th, after Mr. Smythies had given me notice, that he was going there. I took possession of every single paper. I searched out all the strictly private papers and sent them up to Mr. Meyrick's office, with his diaries and everything useful to his defence, and instructed him to inform Mr. Baines, his London agent, that they were there. The papers were chiefly bills. I looked them through before I parted with them. The letters that have been read were what I kept as essential to the prosecution. Mr. Smythies had a warrant against me for breaking into his office. I took Mr. Huddleston down to Aylesbury as my counsel. He came into the room and found me with the officer. He said, "Have you taken him into custody?" He said, "Certainly not, and I do not mean to. Mr. Huddleston said, "You had better take him." I know Frederick Miles; I have seen him twice, I think. He is here. I have had frequent communications with Ezra Miles. I left Mr. Duncan six months ago. It was after my return from the Continent last year. It must have been in September. I was living in Palace Yard from September to May, at Mr. Duncan's office. I continued in his office till he left the Eastern Counties. I did not continue in his service, I rented the office of him. I carried on business there exclusive of Mr. Smythies. I have that office now. I assisted Mr. Duncan up to the time he left the Eastern Counties. I have scarcely done anything with him since. I have done something for him. I have had some French business in hand.

Did you offer to take Mr. Smythies as your managing clerk if he would only retire from being your partner, after you discovered this forgery?—Yes; after I discovered the forgery, no. I proposed it to Mr. John Smythies, who was the barrister in the cause. It was before the 15th of course, because that was my *ultimatum*. It was after the letter which I got on the Sunday morning. Excuse me, but I have not given you a correct answer to that question; I offered Mr. Smythies to continue in partnership with him on one condition only,—that he should instantly sign an agreement to enable me to go down to Aylesbury at any moment, and without any notice to say, "Mr. Smythies, you are my partner no longer." That was refused. An agreement was entered into when we first became partners, and a deed was prepared but not signed. The agreement was signed. I told Mr. Smythies, the barrister, that I should dissolve the partnership, and he said, "You can't, there is an agreement." I did not, on that, say, "Then I will give him into custody." I said I would have him struck off the rolls. I do not recollect saying, "I will make a charge of forgery against him." I told him it was forgery. I told Mr. John Smythies I should have him struck off the rolls for that forgery. I was not at Bow Street when the case was heard before Mr. Henry. I was close by; I did not come into the Court. I know that the case was dismissed. I believe Mr. Kirk was applied to to prosecute Mr. Smythies. I never had any communication with him. I do not know whether he was applied to with my advice. I left it entirely in Mr. Humphreys' hands. I never wrote a letter to Mr. Kirk or Mr. Fluker in my life. I think it is very likely that I recommended Mr. Humphreys to apply to Mr. Kirk. I do not recollect. I employed Mr. Humphreys to conduct the prosecution. I said that I never applied to Mr. Kirk or Mr. Fluker to prosecute. I must correct myself; I have not the slightest recollection in the world of ever having written a letter either to Mr. Fluker or Mr. Kirk, but it is possible.

Mr. Serjeant Byles:—You have said that after the letter of the 5th you offered to take him as a managing clerk?—Yes; I did not make that offer or anything of the kind after I had had the communication from Mr. Soden through Ezra Miles, nor after I knew there was no original retainer. The latter part of the case I left entirely with Mr. Humphreys.

Frederick Miles:—I accompanied Mr. Soden to Mr. Smythies' office, in May, 1847. I cannot remember that there was any document signed by Mr. Soden. Mr. Smythies asked him to become next friend to the infants. My uncle told him he would do all he could for us, as far as advice and time went, but he would not be liable for any costs. Mr. Smythies said he did not wish him to.

Cross-examined by Mr. Robinson:—Do you recollect when this was?—In the spring of 1847. I have been twice with my uncle to Mr. Smythies' office. I went in with him every time. The last time uncle went I believe he was there before I was. That was not in the spring of 1847. I can undertake to swear that in the spring of 1847 I stayed the whole time my uncle did. I have had conversations with my uncle about this business. He has always said he never signed any paper. I do not know that my uncle signed a paper at any of the meetings. I have said I thought it was very likely he did do such a thing; I thought he would have signed one, and I inquired of my uncle, and he said he never did. I never saw him do it.

Court.—You mean your uncle is a kind relation, and you think it likely he would sign what was wanted for you?—Yes; I said I thought it was likely he might.

Mr. Crooke, *with* Mr. Robinson, *contended that the charge of uttering with intent to defraud, was not made out, no fraud having been perpetrated in consequence of the uttering. Mr. Soden having already given a verbal consent to act as next friend (see the Queen v. Bolt, 2 Car. and Kir., p. 604); and that as to the forgery, there was no proof that it was committed within the jurisdiction of this Court, or that the defendant was in custody within the jurisdiction, he not having surrendered until the moment of trial, which would not satisfy the terms of the Act of Parliament.* Mr. Serjeant Byles *submitted that the surrender of the prisoner to take his trial would be a sufficient custody to give the Court jurisdiction. The* Court *was of opinion that there was evidence for the Jury both of forging and uttering with intent to defraud, but the question of jurisdiction should be reserved.*

The Jury *found the following special verdict:* "Guilty *of uttering the forged document with intent to defraud; and* Guilty *of the forgery with intent to defraud, but we find no proof of the forgery being committed within the jurisdiction of this Court."—To enter into his own recognizance in £100, and find one surety in £50, to appear and receive Judgment when called upon.*

Enclosure 3 in No. 3.

[Taken from the *New Zealand Sun* of the 12th January, 1869.]

REGINA *v.* STRODE AND FRASER.

THE following judgment was delivered by Mr. Justice Ward on a rule obtained by Mr. Smythies, calling upon Messrs. Strode and Fraser (the convicting Justices) to show cause why a conviction obtained against him for illegally practicing as a barrister should not be quashed:—

The Judge: This is a rule obtained by Henry Smythies, calling upon Alfred Chetham-Strode and Thomas Fraser to show cause why a conviction obtained against him, on the information of John Jones, for an offence against the 3rd section of the Law Practitioners Act Amendment Act, should not be quashed on the following grounds:—

1. The 3rd section of the Law Practitioners Act Amendment Act is absurd.
2. The Act does not apply to any person admitted to practice before the Act came into operation; and the conviction is therefore bad, as not alleging the admission of the defendant after the Act came into operation.
3. The Act applies only to persons convicted before it came into force; and therefore the conviction is bad for not alleging that the defendant was admitted since that time.
4. The penalty cannot be recovered by any person other than the Attorney-General.
5. The conviction is bad for not negativing the pardon of the defendant.
6. The conviction is bad for giving costs to the informer.
7. The conviction is bad for awarding imprisonment.
8. The same Magistrates did not hear and determine the case.

With respect to the first ground, it may not be amiss to consider what is the law of England on this subject, and what, prior to the application for admission of Mr. Smythies, had been deemed to be the law of New Zealand.

The law of England is contained, first in an Act of Parliament, 12 Geo. I., c. 29, made perpetual by 21 Geo. II., c. 3 and 6; and second, in the case *Ex parte Brounsall* (2, Cowp. 829). The section of the Act of Parliament is as follows:—

"That if any person who hath been or who shall be convicted of forgery, or of wilful or corrupt perjury, or subornation of perjury, or common barratry, shall act or practice as an attorney, or solicitor, or agent, in any suit or action brought, or to be brought, in any Court of Law or Equity within that part of Great Britain called England, the Judge or Judges of the Court where such suit or action is or shall be brought, shall, upon complaint or information thereof, examine the matter in a summary way in open Court, and if it shall appear to the satisfaction of such Judge or Judges that the person complained of, or against whom such information shall be given, hath offended contrary to this Act, such Judge or Judges shall cause such offender to be transported for seven years to some one of His Majesty's colonies or plantations in America."

As to the case *Ex parte Brounsall*, it is reported:—

"This was an application to the Court to strike the defendant off the roll of attorneys, he having been convicted of stealing a guinea, for which offence he received sentence to be branded in the hand, and to be confined in the House of Correction nine months. Mr. Solicitor-General, who showed cause, stated that the conviction which was the groundwork of the motion was at least four or five years ago, since which time no misconduct whatever could be imputed to the defendant; and he argued that the defendant, having received the benefit of clergy, and having been branded in the hand, it operated as a statute pardon: therefore, to comply with the application would be to punish the defendant a second time for the same offence. . . . . Lord Mansfield: This application is not in the nature of a second trial or a new punishment. But the question is, whether, after the conduct of this man, it is proper that he should continue a member of a profession which should stand free from all suspicion. Suppose he had been a Justice of the Peace, the conviction itself would not remove him from the commission; but could there be a doubt that he ought to be struck out of the commission? As at present advised, I am of opinion, without any doubt, that the rule should be made absolute. But as it is for the dignity of the profession that a solemn opinion should be given, we will take an opportunity of mentioning it to all the Judges."

On a subsequent day, Lord Mansfield said:—

"We have consulted all the Judges upon this case, and they are unanimously of opinion that the defendant's having been burned in the hand is no objection to his being struck off the roll. And it is upon this principle,—that he is an unfit person to practice as an attorney. It is not by way of

punishment; but the Court, in such cases, exercise their discretion, whether a man whom they have formerly admitted is a proper person to be continued on the roll or not. Having been convicted of felony, we think the defendant is not a fit person to be an attorney. Therefore, let the rule be made absolute."

Thus stands the law of England; and thus it has stood, without a shade of deviation, for the last ninety years.

With respect to the law of New Zealand, the principal reported judgment in point is that of Mr. Justice Johnston, in the case of Henry Bunny—a judgment entitled to great weight, inasmuch as the Lords Justices of the Privy Council expressed their approval of it, when the case came before them on appeal. It appears from this judgment that Henry Bunny applied for admission under circumstances justifying suspicion, but, although opposed, was admitted by Mr. Justice Johnston to the roll of solicitors, upon his swearing that no charges had been made, or were pending against him, in his character of attorney, in England. It was subsequently proved to the Court that charges of fraud, in the nature of forgery, and of moral guilt equal to forgery (to use Judge Johnston's words), had been made against him upon oath, in the most solemn manner, and that a decree of the Court of Chancery had been made, upon the assumption that those charges had been proved to be true. Thereupon, forasmuch as the sworn statement by which he had obtained admission was proved to be utterly false, he was, after an interval of suspension from practice, struck off the roll of solicitors, Mr. Justice Johnston stating that the Court was entitled to require from every applicant for admission, affirmative proof that he was of fair fame; also, that the existence of such charges as the foregoing against an applicant unrefuted, except by his denial of them, would most assuredly prevent his admission; and lastly, that in these matters the Court ought to be guided by the spirit of the English decisions.

This judgment, as I have already observed, was specially approved of by the Lords Justices, on confirming the decree in this matter; and we may, therefore, take it that the above-quoted dicta carry with them the authority not only of Mr. Justice Johnston, but also of the Privy Council.

Next, we come to the application of Mr. Smythies for admission. In this he admitted his conviction for forgery, and this admission is, of course, the strongest point in his favour. After a considerable delay, it was agreed by all the Judges that he should be admitted, and admitted he was accordingly, by Mr. Justice Chapman, no mention whatever being made at the time of his previous conviction. No members of the legal profession appeared to have opposed this admission; but this may probably be accounted for by the fact that those who were aware of the circumstances connected with the application, knew also that those circumstances were fully within the knowledge of the Judges when the case came before them for decision. Of that decision, however strongly I dissent from it, I wish to speak with all possible respect. But it is much to be regretted that the utmost publicity should not have been given by the Judges to their reasons—which I presume were most admirable—for adopting a course apparently so completely at variance with both the letter and spirit of English law. Of their powers in the matter there can be no question, but there can be as little question, from the action afterwards taken by the Legislature, that it was intended that those powers should be exercised according to the spirit of English precedents. The result of this assent of the Judges here to the application inthis case was, that of all the realms ruled by the law of England, New Zealand became the solitary spot where, by a solemn decision of the Judges, the roll of solicitors, the Bar, and, consequently the judicial Bench, were opened as a *locus penitentiæ* to the forgers and felons of Great Britain.

The 3rd section of the Law Practitioners Act Amendment Act supplies the comment of the Legislature on this decision, and I fail to see the injustice or absurdity thereof, as contended for the appellant. He argues that unless his interpretation be correct, to the effect—as stated in the second and third grounds on which it is sought to quash the conviction—namely, that the Act applies only to persons convicted but not admitted before it came into force, it would interfere with what he terms his vested right to practice, and would be an unjust and *ex post facto* law. I can force no such construction upon the plain words of the Act. The simple meaning of it is, that if any person who has been, or may be at any time thereafter, convicted in manner specified, shall, after passing of the Act, be enrolled, or admitted, or shall practise—three clearly distinct offences—he shall pay a penalty of £500 for each offence. It is obviously not an *ex post facto* law; but with respect to the alleged interference with vested rights, there can be no doubt that, assuming the appellant not to have received a pardon, the Act does deprive him of the right to practice conferred upon him by the Judges, and does, so far, lean heavily upon him. But private considerations must necessarily give way to public policy; and, after all, I do not sit here to decide on the propriety of passing a Statute, but on the meaning thereof after it has passed. It is probable that an offence is seldom created by Statute without interference with the private profits of some members of the population; moreover, I find no reservation of vested rights to practice on behalf of persons convicted of forgery, and then practicing, in the above quoted Acts of Geo. II., which probably served as a precedent for the legislation now in question.

There is one consequence arising out of the Act, which may be mentioned here, namely, that if it were proved to the Court that any person convicted as specified in the Act, had been enrolled or admitted since it came into operation, he would be at once struck off the roll, on motion by any member of the profession. Or, if it were shown that a person enrolled before the passing of the Act of 1866, had previously been so convicted, such person would, on a similar motion, be forthwith suspended from practice, unless he could prove that he had received a free pardon.

I now come to the fourth ground—The penalty cannot be recovered by any one other than the Attorney-General. It is here contended for the appellant, that the penalty inflicted by the Act of 1866 is simply a debt to the Crown, and that the Act of 1868 could not change its nature, but only prescribed a new method for its recovery. Had the Act of 1866 specially directed that the penalty should be sued for, this argument would be entitled to some weight. Notwithstanding the previous decision, I am not, however, prepared to say that an indictment under that Act might not have been

successfully preferred against the appellant; but it is unnecessary to decide that point or raise that question now. The 16th section of the Act of 1868 must, in my opinion, be looked upon as declaratory of the previously doubtful intent of the Legislature in the Act of 1866, and must be read as if incorporated in it from the first. Read thus, the Act creates an offence punishable upon conviction before any two Justices of the Peace, and clearly gives authority to any one to prosecute who shall choose to intervene, as the offence is not against an individual—as in cases cited on this point by the appellant—but the matter being one of public policy.—*Cole* v. *Colton* (27, *L.J.*, M.C. 125).

I now come to the fifth ground—The conviction is bad, for not negativing the pardon of the defendant. It was alleged by the appellant, that, forasmuch as the proviso declaring that the Act of 1866 should not apply to any person convicted as specified, who had received a free pardon, was contained in the same section that inflicted the penalty, it ought to be negatived by the conviction. In support of this contention, several cases were cited; but in each of those cases the exception was incorporated in the enacting clause, either by being originally introduced there, or by words of reference. The rule as laid down in Paley "On Convictions" (231), is as follows:—"All circumstances of exemption and modification, whether applying to the offence or the person, that are originally introduced into or incorporated by reference with the enacting clause, must be distinctly enumerated and negatived; but such matters of excuse as are given by other distinct clauses or provisos, need not be specifically set out or negatived. It is not necessary to notice the proviso merely because it is placed in the same section of the printed Act, unless it is also a part of the enacting sentence." To use the words of Lord Denman, in *Charter* v. *Greame* (13, Q.B. 226), "What are and what are not the same sections, depends upon the way in which Statutes are printed; what is in the same clause, depends on the frame of the sentence." Here, the prohibition is general, and the penalty is inflicted on breach; then follow two distinct provisos, the one now in question being the last. It is clearly not within the enacting clause; and, therefore, if the appellant desired the benefit of it, he should have pleaded it before the Justices of the Peace.

The sixth ground—The conviction is bad for giving costs to the informer—is at once disposed of by section 31 of "The Justices of the Peace Act, 1866," which empowers the Justices to award costs in all cases of summary conviction.

With respect to the seventh ground—The conviction is bad for awarding imprisonment—the case *Reg.* v. *Barton* (18, *L.J.*, M.C. 56), was cited, but is not in point. The 38th section of "The Justices of the Peace Act, 1866," specially provides that, where no direction in respect to imprisonment is contained in the Act inflicting the penalty, such imprisonment may be for any time not exceeding one month for every £5 of penalty and costs inclusive; which at once settles this contention.

The last ground—The same Magistrates did not hear and determine the case—is completely disposed of by Mr. Strode's affidavit. In the case cited for the appellant, *Reg.* v. *the Inhabitants of Darton*, the order appealed against was quashed, because it did not appear that the Justices who made it had even heard the evidence on which it was founded. Here, it appears from Mr. Strode's affidavit, firstly, that the information was read over to the appellant on the day when the case was heard, about half-past 11 a.m., when he was sitting alone on the Bench, and that the hearing was thereupon adjourned; secondly, that prior to the case being heard, on the same day, another Justice, Mr. Fraser, came on to the Bench; next, that when the case was called on, he (Mr. Strode) asked if the appellant wished to have the information read over again, and on his answering "No," required him to plead, and thereupon he pleaded; evidence was heard, and the decision given by Messrs. Strode and Fraser, who were the only two Justices of the Peace who took part in it. This is clearly a sufficient compliance with the requisition of section 20 of "The Justices of the Peace Act, 1866."

Forasmuch, therefore, as all the grounds alleged in support of the rule have proved insufficient, it will be discharged.

[Taken from the *New Zealand Sun* of 23rd January, 1869.]

In re SMYTHIES.

THE following judgment was delivered by Mr. Justice Ward when making absolute a rule *nisi*, obtained by Mr. Macassey to suspend Mr. Smythies from practicing as a Barrister of the Supreme Court:—

The Judge: Upon the 13th January a rule was obtained by Mr. Macassey, a barrister and solicitor of this Court, calling on Mr. Henry Smythies, also a barrister and solicitor, to show cause why he should not be suspended from further practicing in the above capacities, on the ground following, to wit—That he had been convicted of forgery before the passing of "The Law Practitioners Act Amendment Act, 1866," and had not at any time received a free pardon for the crime whereof he had been so convicted. In support of the application for this rule, an affidavit was filed by Mr. Macassey, appended to which, as exhibits, were a certified copy of the record of proceedings and conviction of the said Henry Smythies, at the Central Criminal Court, London, and also his conviction before the Resident Magistrate's Court at Dunedin, on the 1st December, 1868, for a breach of the third section of "The Law Practitioners Act Amendment Act, 1866." Mr. Macassey's affidavit also shows that, on the hearing of the last-mentioned case, Mr. Smythies stated in Court that he had petitioned Her Majesty for a pardon, but that such petition had not been granted. Under these circumstances, forasmuch as in the affidavit filed by Mr. Smythies he does not plead a pardon in bar of this application, it will be assumed by the Court that he has not received one. The copy record of conviction produced, sets forth the circumstances of Mr. Smythies' case as follows:—A suit of Miles *v.* Miles, wherein the plaintiffs were infants, was about to be commenced by Mr. Smythies in the Court of Chancery, but it being necessary to obtain a person to act as "next friend" to the infant plaintiffs, it was arranged between Mr. Smythies and the uncle of the said plaintiffs, one Richard Soden, that Mr. Soden should allow his name to be used in the suit, but should not be personally liable for any costs or expenses. No written authority was given by Mr. Soden, and the suit proceeded without it. After some time, one Thomas Kirk was substituted for Henry Smythies, as solicitor in the suit; and there-

upon Mr. Smythies forthwith sent in his bill for £335 to Mr. Soden, and commenced proceedings against him for the recovery of that sum. The action was defended by Mr. Soden, and in order to make it appear that he was liable to pay the above costs, notwithstanding the above-mentioned arrangement on the subject, Henry Smythies then forged a written consent by Mr. Soden to act as next friend, and uttered the forged consent, by tendering it at the taxation of his bill of costs.

The jury found Mr. Smythies guilty both of forging and uttering, but a point of law having been raised at the trial, he was released on bail until after its decision. The conviction having been unanimously upheld in the Exchequer Chamber, Henry Smythies surrendered to judgment on the 26th November, 1849, and was thereupon sentenced to one year's imprisonment in Newgate.

An affidavit has now been filed by Mr. Smythies, setting forth at length his account of the circumstances of his conviction, denying that he had committed the crime charged against him, and alleging that the evidence given by three of the witnesses at his trial was utterly false, two of them, Miles and Soden, having, according to his statement, been suborned to commit perjury by the third, one Mr. James, formerly in partnership with Mr. Smythies. In support of this allegation he embodies in his statement an affidavit made on the 27th November, 1849, by a person named Fluker, managing clerk to Mr. Kirk, already mentioned as having been substituted as solicitor in lieu of Mr. Smythies in the suit of Miles *v.* Miles. The only points in this affidavit that appear to raise any doubt as to the guilt of Mr. Smythies are, that in an interview with Mr. Soden and the adult members of the Miles family, he (Mr. Fluker) states that he treated the existence of a written authority from Mr. Soden to Mr. Smythies, in the suit of Miles *v.* Miles, as an admitted fact; that J. Miles, in a letter dated 24th April, 1849, stated his belief that Soden had signed a paper to that effect; and that there were existing certain quarrels between Messrs. James and Smythies. Against this, however, stand the facts, also set out in Mr. Smythies' statement, that on the trial Soden positively swore that he had signed no such paper, and J. Miles swore that he had never seen one signed, and also that Mr. James appears to have had a direct and very considerable pecuniary interest in disproving the alleged forgery. Moreover, it does not appear that any means were taken to prosecute them for the alleged perjury, nor does it seem that the affidavit of Fluker, though made the day after Mr. Smythies received sentence, was then deemed sufficient ground even for an application for a remission of any part of the imprisonment awarded. Mr. Smythies further relies on his own statement that, owing to an interview between the Secretary of the Incorporated Law Society and himself, inquiries were made by the Committee of that Society which resulted in their deciding to take steps to strike him off the roll of solicitors at home. It must be observed, however, that this statement is wholly uncorroborated, except by the fact of Mr. Smythies' name remaining on the roll, inasmuch as no minutes of any such interview or inquiries, nor any other proof of their having taken place, are produced from the records of the Society, or from elsewhere. And it is by no means unusual for the Society to allow the name of a solicitor to remain on the roll, notwithstanding his being liable to be struck off, and only to apply to strike him off in the event of his attempting to renew his certificate to practice, which Mr. Smythies does not appear to have done after his conviction. Mr. Smythies then sets out the resolution of the Judges to admit him, notwithstanding his conviction, the circumstances attending his admission, and a series of facts upon which he grounds an allegation of malice against Mr. Macassey, who obtained the rule.

It is much to be regretted that no reasons whatever have been given by the Judges for their decision in the matter. The resolution is in the following words:—

"*Re* SMYTHIES: *Resolved.*

"Conference, 27th October, 1865.

"THE Judges assembled in Conference are of opinion, after reading the petition and the documents annexed (which have been furnished in consequence of a memorandum of the C.J. after last conference), that the Judges at Dunedin, being satisfied with the examination of the petitioner, may admit him, notwithstanding his conviction in 1849, on motion; that the admission shall be in open Court; and that there is no necessity for discussing the merits of the case in open Court unless opposition be offered."

"True extract. "ROBERT R. STRANG,

"Acting Registrar of the Court of Appeal."

It would appear, from the last words, that the Judges deemed it advisable that no discussion of the merits should take place if it could be avoided. It seems, however, that there are only two grounds upon which they could possibly have proceeded. The first is, that it was deemed that Mr. Smythies had established his innocence; the second, that his punishment or exclusion from practice should not be perpetual. As Mr. Smythies contends that the proceedings can only be regarded in the light of an appeal from the order admitting him, and alleges that he has now laid before the Court the grounds of his admission, it may not be out of place to discuss them now. It appears from the English cases that the Courts at home, in dealing with similar applications, accept the facts as found by the Jury, saving only in cases where a free pardon has been granted, or a conviction or a judgment reversed. They will examine into the facts as found, in order to see whether the crime charged is one which renders an attorney an unfit person to remain on the roll. But those facts are deemed to have been established by the conviction, and it is not necessary, in applying for a rule to strike a convict off the roll, to allege that he committed the crime, but merely that he was convicted thereof. Nor will the Courts take notice of affidavits filed by the convict in support of his innocence, inasmuch as the question of his guilt is considered to have been determined by the judgment of the Criminal Court. If, however, that judgment has been reversed, or a free pardon granted, then, and then only, as far as I am able to ascertain, will the Court examine into facts *dehors* the record, and admit affidavits in exculpation of the accused. A free pardon, I may observe, would be granted at any time, as a matter of course, upon proof of the innocence of the party convicted.

If the foregoing rules prevail in the Courts of England, surely it would be most unwise for Colonial Courts to disregard them, and to proceed to what in fact would be, in the present case, a new trial of a criminal charge disposed of in England, depending for their judgment solely upon affidavits and other documents furnished by the person convicted, under circumstances which afford complete practical immunity from any prosecution, either for perjury or forgery.

With respect to the second ground, that it was deemed advisable that in Mr. Smithies' case punishment should not be perpetual, it appears to me that the sole question should have been whether, according to the spirit of the English Acts and decisions, a person convicted of forgery is a proper person to be accredited by the Supreme Court to act as a solicitor. Upon this head the 12th Geo. I., c. 29, s. 4, is directly in point. That Statute is as follows:—

"And for avoiding the great mischief and abuses which arise from infamous and wicked persons already convicted of wilful perjury or forgery practicing as attorneys or solicitors in Courts of Law or Equity, be it enacted that if any person who has been, or who shall be, convicted of forgery, or of wilful and corrupt perjury, or subornation of perjury, or common barratry, shall, after the said four-and-twentieth day of June, practice as an attorney, or solicitor, or agent, in any suit or action, brought or to be brought in any Court of Law or Equity within that part of Great Britain called England, the Judge or Judges of the Court where such suit or action is or shall be brought, shall, upon complaint or information thereof, examine the matter in a summary way in open Court; and if it shall appear, to the satisfaction of the said Judge or Judges, that the person complained of, or against whom such information shall be given, hath offended contrary to this Act, such Judge or Judges shall cause such offender to be transported for seven years," &c.

If the letter of that Statute be not applicable to the circumstances of this Colony, this Court should at least be guided by the spirit of it. Before the present case, there does not appear to be a single instance on record of an application for admission to practice as an attorney on the part of a person against whom there stood an unreversed and unpardoned conviction for forgery. When an English legal practitioner applies to the Supreme Court in New Zealand for admission, *ad eundem*, his *locus standi* for the application wholly depends upon his *status* before the Courts in England. If, as in this case, the applicant has been convicted of a most grievous crime; if he never attempted to practice in England after his conviction, knowing that his doing so would be under a penalty of seven years' transportation—then his *status* in England is clearly gone, and the *locus standi* for his application to this Court has gone with it. The simplest answer to the request of Mr. Smythies for admission would have been, "Regain your former *status* before the Courts in England, by proving your innocence there, and by renewing your certificate to practice in that country, before you apply for admission in New Zealand."

If, therefore, the rule now applied for had been to strike Mr. Smythies off the roll, on the ground of his conviction in England, I should probably, on the grounds above stated, have reserved the question for the Court of Appeal, though some difficulty might have arisen from the fact that the Judges were fully aware of his conviction when they admitted him. But this application is merely for suspension from practice, on the ground of the prohibition contained in the third section of "The Law Practitioners Act Amendment Act, 1866." That section is in the words following:—

"No person who has, or shall have been, convicted in any part of the British dominions, of forgery, or perjury, or subornation of perjury, shall be enrolled or admitted to practice, or shall practice as a barrister or solicitor in New Zealand; and if any person who has or shall have been so convicted shall at any time hereafter practice as a barrister or solicitor of the Supreme Court of New Zealand, such person shall be liable to pay a penalty of five hundred pounds for every such offence. Provided always, that nothing herein contained shall, except as herein specially provided, be deemed to alter or affect the existing powers of the Supreme Court, or any Judge thereof, to refuse to enrol or admit to practice as a barrister or solicitor, any person whomsoever, or to affect the summary jurisdiction of the said Court, or any Judge thereof, over barristers and solicitors. Provided also, that nothing herein contained shall apply to any person who has obtained a free pardon for such forgery or perjury."

The sixteenth section of "The Interpretation Act, 1868," must also be read as incorporated with it:—

"All fines, penalties, forfeitures, or sums of money, which, under or by virtue of any Act now or hereafter to be in force, are or shall be authorized or directed to be imposed on any person, shall and may, where no other form or mode of procedure is or shall be prescribed by such Act for the recovery of the same, be recovered in a summary way, before any two Justices of the Peace, in the manner provided by "The Justices of the Peace Act, 1866," so far as the same relates to summary convictions, or by any Acts repealing or amending the same, or for like purposes."

Mr. Smythies contends, first, that the Act of 1866 does not apply to him, his case being excepted under the first proviso. But the wording of the section is perfectly clear on this point; the proviso in question having probably been inserted, at least in part, to prevent the inference being drawn, that because certain criminals were specially prohibited from admission, it was intended that others should be admitted. He also contends that no steps should be taken against him, except for the penalty imposed. On this head, I have to observe that the two sections above cited, which must, in my opinion, be read together, declare practicing as a barrister or solicitor, by a person convicted of forgery, to be a crime punishable by fine—and, in default of payment of the fine, by imprisonment—before any two Justices of the Peace. It can scarcely be expected that this Court will not take notice of any open and scandalous breach of the law by one of its own officers, when it is proved, upon affidavit, that he has been convicted thereof. Moreover, the Legislature has impliedly decided, by these Acts, that persons convicted as above are unfit to act, and are prohibited from acting, as legal practitioners; and the Court is bound, when called upon, to give effect to that decision.

The next contention on the part of Mr. Smythies is, that the Court has no power to suspend a barrister; but this point is completely disposed of by the case, *In re the Justices of Antigua* (1 Knapp, 267), in which it is clearly laid down by Lord Wynford, that the power of admitting to practice as a barrister involves the power of suspending from practice. It is next contended that, as Mr. Smythies denies the commission of the crime with which he was charged, there is no evidence that he has committed any act which renders him an unfit person to practice. On this head, I have already referred at length to the English rules, and it is unnecessary to recapitulate them a second time.

It is scarcely necessary to advert to the next argument, namely, that as Mr. Smythies has paid the sum of £4 4s. to the Registrar, for a certificate authorizing him to practice until the 10th January next, that amounts to a contract with the Government that he should be allowed to practice until that date,

with which contract this Court has no power to interfere. Of course, were this correct, no legal practitioner could ever be suspended from practice, or struck off the roll, during the currency of his certificate—a self-evident absurdity.

The statement that the case is *res judicata*, is an error, inasmuch as "The Law Practitioners Act, 1866," was not passed until after the admission of Mr. Smythies.

Lastly, I come to the allegation that the present application is made maliciously by Mr. Macassey. Now, even if the allegation of malice were supported by facts, the Court would not refuse to make the rule absolute, on good grounds shown. But no facts sufficient to support the charge of malice are set forth in the affidavit. It is much to be regretted that some such body as the English Incorporated Law Society should not be in existence here, as it is always an unpleasant task for private members of the profession to bring such cases as the present before the Court. But when a gentleman comes forward, as Mr. Macassey has done in this instance, to vindicate the honor of the bar at his own risk, he deserves the thanks of the Court, of the legal profession, and of the community at large, for the course thus taken.

For the foregoing reasons, the rule will be made absolute with costs. If, at any time hereafter, Mr. Smythies should be able, by proving his innocence of the crime whereof he was convicted, to obtain a free pardon from Her Majesty, he may thereupon apply to have the rule rescinded.