1879.

NEW ZEALAND.

MR. BARTON'S CHARGES AGAINST JUDGES OF THE SUPREME COURT.

(PAPERS RELATIVE TO.)

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

No. 1.

Mr. G. E. BARTON to the Hon. the COLONIAL SECRETARY.

SIR,— Parliament Houses, 26th October, 1878.

I have the honor to enclose a copy of the address* to the House of Representatives which I made in reply to the letter of Mr. Justice Richmond. I desire to add that it is a correct report of what I said on that occasion.

I am ready to substantiate by proof the charges I have therein made.

I have, &c.,

The Hon. Colonel Whitmore, Colonial Secretary. GEORGE ELLIOTT BARTON.

No. 2.

The Hon. the COLONIAL SECRETARY to Mr. G. E. BARTON.

SIR,— Colonial Secretary's Office, Wellington, 29th October, 1878.

I have the honor to acknowledge the receipt of your letter of the 26th instant, with enclosure.

After carefully considering the report of your speech, the Government are of opinion that no inquiry should be made into any charges against Judges or other persons unless the charges are particularized and specified. This the report of your speech does not do.

I have, &c.,

G. E. Barton, Esq., M.H.R., Wellington. G. S. WHITMORE.

No. 3.

Mr. G. E. BARTON to the Hon. the COLONIAL SECRETARY.

SIR,— Parliament Houses, 31st October, 1878.

I have the honor to acknowledge the receipt of your letter of the 29th instant, and will supply you with the details required on my return from Auckland, for which place I leave this afternoon. I will return in about a week.

I have, &c.,

The Hon. the Colonial Secretary. GEORGE ELLIOTT BARTON.

No. 4.

The Hon. the COLONIAL SECRETARY to Mr. G. E. BARTON.

SIR,— Colonial Secretary's Office, Wellington, 4th November, 1878.

I have the honor to acknowledge the receipt of your letter of the 31st ultimo, stating that on your return from Auckland you will supply the details required in my letter of the 29th October, 1878.

I have, &c.,

G. E. Barton, Esq., M.H.R., Wellington. G. S. WHITMORE.

* See *Hansard* of 18th October, 1878.

No. 5.

Mr. G. E. Barton to the Hon. the Colonial Secretary.

Sir,— Brandon Street, Wellington, 5th November, 1878.

I have now the honor to reply to your letter of the 29th October, in which you inform me that the Government are of opinion that "no inquiry should be made into any charges against the Judges, &c., unless they are particularized and specified," and you add the statement that the *Hansard* report of my speech fails to do this.

In reply, I would submit that it is scarcely possible to set out with greater fullness and accuracy than that of my address (and the *Jurist* report therein referred to) the occurrences in the cases of Spence *v.* Pearson and Gillon *v.* Macdonald, leading up to my imprisonment. The same answer would equally apply to my charge of judicial misconduct in making Gillon a bankrupt, and also to my charge as to the untruthfulness and unfairness of Mr. Justice Richmond's letter, laid on the table of the House of Representatives. The facts of my imprisonment, and its illegality, are long since public, and are set forth in affidavits filed in the Court in the several motions made respecting that imprisonment.

I therefore presume that the charges the Government wish to be specified and particularized are those referred to in the closing paragraphs of my address. Those charges I will now refer to, and will number them for the purpose of future reference.

Charge 1.—That on one occasion "the Chief Justice so rudely attacked me, and assailed my honor and veracity, that I was incapacitated from further defending my client on a charge of attempt to murder." That occasion was the trial of Jacob Pune, before the Chief Justice, on the 3rd October, 1876. I, at the time, wrote a letter to the Colonial Secretary, dated 3rd October, 1876, complaining of the conduct of the Chief Justice, and demanding an inquiry.

Charge 2.—That "because I wrote him a letter informing him, as a matter of due courtesy, that I had sent to the Government a complaint of what he had done, the Chief Justice brought me up for contempt, and led the public to believe that I had sent him an anonymous letter, although it was signed with my name in full; and, to carry out the fiction, he even asked the officer of the Court, publicly, 'whether he had ascertained the name of the writer?'"

This occurred during the proceedings on the motion for contempt in October, 1876. I may state that Mr. Prendergast has been for years acquainted with my handwriting, and I am therefore unable to account for his pretending that he had received an anonymous letter, except by assuming a desire on his part to induce the public to believe that I had written him a letter of which I was ashamed to avow the authorship.

Charge 3.—That the Chief Justice untruly "charged my firm with 'laying a trap' for the officers of the Court."

This charge was made by the Chief Justice at the opening of the trial Clayton *v.* Isaacs, January 24th, 1878. The accusation was made before any evidence had been given, and was entirely without foundation. No evidence was afterwards given of any misconduct whatever; and Mr. Travers (the opposing counsel) acknowledged that what had been done by the firm of Barton and Fitzherbert in no way differed from the ordinary practice of solicitors in Wellington. I, at the time, requested, as a matter of justice, that the Chief Justice should retract his remark, or apologize for having made it. He declined to do either, saying that it was "no part of his business to give a character to any lawyer," or words to that effect.

Charge 4.—That the Chief Justice charged me and my firm with want of "common honesty."

This took place on the hearing of a motion in Chambers in the case of Cole *v.* McKirdy. The facts are fully set forth in the petition presented by me to Parliament in August, 1877, and also in a letter of complaint forwarded at the time by me to the Government.

Charge 5.—That the Court has been in the habit of using improper expressions to me. These have occurred in almost every case in which I have appeared, and in many instances are reported in the newspaper reports of the Supreme Court trials in which I have been engaged.

Charge 6.—That the Judges have corruptly favoured my opponents, and refused and delayed justice to clients in my hands.

As instances I refer to the cases—Corporation of Wellington *v.* C. W. Schultz; Gillon *v.* Macdonald; Peters *v.* Joseph; Joseph *v.* Peters; and Pole *v.* Tonks.

Charge 7.—That the Judges "have acted as counsel against me, and have worked earnestly to defeat the right whenever my client was the possessor of that right." As instances I refer to the cases of Gillon *v.* Macdonald, Peters *v.* Joseph, Joseph *v.* Peters, Leach *v.* Johnston, Doherty *v.* Education Board, Buckridge *v.* Wardell.

Charge 8.—That the Chief Justice, while I was in gaol, signed an order purporting to be made "by consent," to which, within his knowledge, I had never consented. I refer to an order made by the Chief Justice in the case of Peters *v.* Joseph. It was an order granting leave to the defendants to strike out the whole of the pleas and issues on which they had been defeated at a then recent trial, and allowing them to substitute a new defence—a plea of payment into Court of £10 in full satisfaction of plaintiff's claim.

The injustice of this order will be apparent from the following statement:—

Peters had just obtained a verdict against Joseph and Co. for £500 damages in excess of all demands of Joseph and Co. against him. Joseph and Co. applied to the Court for a new trial on the ground that this verdict was unjust and contrary to the evidence, and the new trial was granted on all the issues, the Court declaring that nominal damages only could be recovered, and reserving the question of costs until after the result of the new trial should be known.

Thus Peters was being forced to a new trial to settle the question of costs: If he should lose he would have to pay the costs of the action. If he should win he would escape costs, but could only recover £10 (instead of the £500 the first jury gave him). And if he still resolved to seek substantial damages he would have to bring another action in some different form not pointed out by the Court.

Such was his unfortunate and nearly hopeless position; but it was now to be rendered utterly hopeless by the "order by consent" of which I have complained above. That order was obtained thus: The defendant's solicitor, while I was in prison, issued a summons calling upon the plaintiff to show cause why the defendants should not have leave to strike out all their pleas, admit the truth of the plaintiff's declaration, and pay £10 into Court to satisfy the nominal damages which the Court by their judgment above mentioned declared the plaintiff was limited to. My clerk, Mr. Barratt, resisted the granting of this summons as being manifestly unjust, because if it were granted the plaintiff must either lose the second trial, or else discontinue his action altogether, and in either event he would have to pay the costs of the action. The Chief Justice reserved his decision, and on a subsequent day made an "order by consent," granting the application of the defendants. He made no other variation in the former rule for a new trial of the original issues, but left the costs of the former trial and proceedings still "to abide the event"—an event now no longer capable of an alternative.

After my release from gaol I applied to set aside this "consent" order on strong affidavits denying that the plaintiff, or any one on his behalf, had ever "consented" to it, and also on the ground of its manifest injustice.

The Chief Justice delivered a written judgment, refusing to set aside the order or vary it in any way. He admitted that such an order could not be made without my consenting on plaintiff's behalf; but he upheld the order, and thus averred that such "consent" had been given. This averment, as well as the carefully-worded implication of consent contained in the Chief Justice's judgment, is untrue, and I can prove it to be so. I enclose, annexed to this letter, a slip from the *New Zealander*, 29th May, 1878, in which I publicly contradicted the Chief Justice's statement respecting my consent, and also stigmatized his order as fraudulent.

CHARGE 9.—That Mr. Justice Richmond "violated the truth from the Bench, for the purpose of sustaining an order which, but for that statement, could not have been sustained."

Mr. Justice Richmond granted to Mr. Travers privately, in Chambers, an injunction restraining the Corporation of Wanganui from carrying out certain waterworks, which, it was alleged, would render the waters of a certain lake foul and unfit for use.

I, on behalf of the Corporation, moved to set aside the order, upon evidence that showed conclusively that such statements were untrue. Thereupon Mr. Travers, on behalf of his client, filed fresh affidavits, setting forth new facts, and making an entirely new and different case from that made on the affidavits on which the *ex parte* injunction had been granted; and he admitted in Court that the proposed works would not deteriorate the waters of the lake. The law laid down by the English Courts (and followed by the New Zealand Courts) is that, under such circumstances of concealment and misrepresentation, an *ex parte* injunction should be dissolved.

In answer to my argument for so dissolving the injunction, Judge Richmond (to uphold the injunction) declared from the Bench, in open Court, that the plaintiff had not been guilty of any concealment or misrepresentation, inasmuch as Mr. Travers had *verbally* stated these additional facts when he was originally applying for the *ex parte* injunction. Afterwards, I took occasion to speak to Mr. Travers on the subject, and he denied that he had made any such verbal statement to Mr. Justice Richmond when applying for his *ex parte* injunction.

Mr. Travers, when making that denial, evidently felt that the granting of an *ex parte* injunction to him privately, in a closed room, not on the sworn affidavits, but on his "verbal" statements, would be a proceeding so discreditable that he did not choose to be mixed up in it. An *ex parte* order for an injunction purports to be granted "on reading the affidavits," and the opposite party is entitled to conclude that the statements in the affidavits are the basis of the order, and that he must confine his reply to those statements. It is therefore not to be wondered at that Mr. Travers shrank from acknowledging such a transaction with the Judge.

CHARGE 10.—That the Court tied up a defendant till his opponent should get the benefit of a statute of limitations, and then, loosening his bonds, declared that they had never bound him.

This refers to the case of the Corporation of Wellington *v.* Schultz, in which Mr. Justice Richmond granted to Mr. Travers privately, and *ex parte*, an order *nisi* for a writ of injunction to restrain Mr. Schultz and an arbitrator named James Richard Davies (whom he, Mr. Schultz, had appointed under "The Lands Clauses Consolidation Act, 1863,") from proceeding to award the amount of compensation payable to Mr. Schultz for abstraction of water from his mill at Kaiwarra.

I will here remark, parenthetically, that the mere making of an award could itself do no harm to any one, and that the utmost interference that ought to have been contemplated by a Court should have been to restrain any action consequent on such award.

The order *nisi* for injunction, under the signature of Mr. Justice Richmond, was served by Mr. Travers on Mr. Schultz, and also on the arbitrator, who, in consequence, refused, so long as that order was pending, to summon the parties before him, or to proceed further with the arbitration. The order was framed in ambiguous terms, so that it might afterwards, in case it were made absolute, be construed as having amounted to a restraining order from the date of its service; while, on the other hand, in case it should be discharged, it might be construed by the Court as having never at any time amounted to a restraining order. The difficulty in which this ambiguity placed Mr. Schultz was, that, if the arbitrator had, while the order was pending, proceeded to make his award, he would be liable to be attached for disobedience to the Court; while, on the other hand, if he abstained from making any award, the three months limited by the Statute within which it must be made might elapse before the motion was argued.

Presuming, as I was bound to do, that the ambiguity in the wording of the order was unintentional on the part of Mr. Justice Richmond, I applied to him to clear up the ambiguity, and inform me whether the rule was or was not intended by him to tie up the hands of the arbitrator until it was argued. To this request I could obtain no answer whether or not we were at liberty to proceed while the order *nisi* was pending, and accordingly the arbitrator did not dare to proceed.

When at last the rule *nisi* came on for argument, the grounds which Mr. Justice Richmond had thought sufficient for granting an *ex parte* order were deemed by the same Judge so palpably unrea-

sonable that the rule was discharged. I then asked the Court to declare that it had amounted to an injunction while it lasted, in which case the three months' limitation in the Statute would not have run during that period. The Court refused to do anything of the kind, stating that the arbitrator's hands had *never been tied*, and that, whatever evil consequences might result to Mr. Schultz from not proceeding with the award, it was my duty to have avoided those consequences by advising him correctly as to the meaning of the order.

CHARGE 11.—That "the Court tied up another client who had obtained a verdict of a jury in his favour until his opponent had time to issue, and did issue, a writ in a cross-action for matter decided by that verdict, and until that opponent got judgment against him, and he finally became a bankrupt."

This occurred in the cases of Peters *v.* Joseph and Joseph *v.* Peters. I may add that in a previous case (that of Pole *v.* Tonks) the Chief Justice was guilty of causing similar hindrances to Mr. Pole, until Tonks was enabled to make away with his property, and the successful plaintiff, Pole, became a bankrupt.

I charge that the Chief Justice so acted with the object of depriving Pole of the fruits of his verdict; and the same Judge afterwards upheld a fraudulent deed of Tonks', contrary to such clear principles of law that I cannot but believe that he was actuated by corrupt motives.

CHARGE 12.—That, when Judge Richmond found that a person really, though not ostensibly, a defendant, had sat on a jury to decide in his own cause, he refused to set aside the verdict, although that verdict was based upon a quibble, and was manifestly against the moral right and equity of the case.

This was the case of Leach *v.* Johnston, in which Mr. Charles Johnston, who was interested in the property the right of possession of which was in dispute, and who would have to contribute to any costs and damages recovered, sat on the jury.

The conduct of Mr. Justice Richmond throughout that trial, and afterwards, on the motion to set aside the verdict, was such as, in my opinion, affords proof that he was acting corruptly, and not from mere error of judgment.

The juryman referred to, and a fellow-juryman, acting by his direction, next day following the verdict, induced the plaintiff, an illiterate woman over seventy years of age, to sign an agreement by which she settled (as she thought) the action for £400, and on certain other terms. All this was shown to Judge Richmond, on the motion I made to set aside the verdict, and prevent the defendant from entering up judgment against her in the teeth of his own agreement to pay her £400. But Mr. Richmond not only refused to set aside the verdict, but did so without a word of reprobation for such conduct, leaving the poor woman a helpless victim in the hands of a judgment creditor who, on his own acknowledgment, is really her debtor for £400.

I am prepared to prove all these charges, and I shall also be prepared to show, by numerous examples, the systematic misconduct of the Judges towards my clients, and that they have abused their powers with the evident purpose of driving me from the profession.

To enable me to do this, however, it will be necessary to include in the investigation the conduct of the Registrar and Deputy Registrar of the Court, whose acts towards me can only be accounted for by assuming them to have taken no step but in concert with the Judges, and in some instances under their direct orders.

I have, &c.,

The Hon. the Colonial Secretary. GEORGE ELLIOTT BARTON.

(Enclosure.)

[From *The New Zealander*, May 29, 1878.]

PETERS *V.* JOSEPH.

TO THE EDITOR OF "THE NEW ZEALANDER."

SIR,—Mr. Peters' bankruptcy having terminated his litigation, leaves me at liberty to review the Chief Justice's judgment, published last week.

Were I addressing an audience of lawyers, instead of the general public, I could prove the Chief Justice's judgment to be as unsound in law as it is in morality. But I shall not here discuss it from a lawyer's point of view, but on broad principles of justice and common sense, so that every man who can discern right from wrong may judge for himself.

Those who have read the argument you so fully reported last week will no doubt have noticed that whenever I attempted to inform the Court of the facts elicited at the trial, the Chief Justice hurriedly stopped me. I now find, to my surprise, that in his judgment on Friday he makes the freest use himself of the materials he shut me out from using. He appears to have ransacked Mr. Justice Richmond's notes of the trial to support his argument in this carefully-worded and twice-reserved judgment, and he also uses the evidence of a witness whom the jury must have entirely discredited. He says: "The debt, as found by the jury, was £908; while the value of the goods seized was, on the evidence of one of the plaintiff's witnesses, £514. His (plaintiff's) own evidence, put the value higher, but less than the debt secured."

Now, there is no rule of law better established than that which declares the evidence not credited by the jury shall not be afterwards credited by a Judge. According to the passage quoted above the Judge credits a witness who swore that Peters' whole stock-in-trade only amounted to £514. The public will be surprised when I inform them that the testimony of the plaintiff himself placed the value of his stock at £1200 at the least, and although much of it was damaged and broken in removal, and sold as it lay in undistinguishable heaps, it fetched, at what may be called a slaughter sale, £452 14s. 4d. The public will also be surprised to learn that the learned Judge has not even correctly ascertained the amount of the debt, when he states it at £908. All the jury found respecting the debt was that at the time Joseph and Co. seized Peters' goods the debt they were then entitled to demand amounted to

£908, but they did not find—for Judge Richmond excluded all evidence which would have enabled them to find—the amount of the debt as reduced by the slaughter sale of the goods seized, and by the collection of Peters' book-debts by Joseph and Co.

Thus it will be seen that neither of the two items of £908 and £514—treated by the Chief Justice as the sole factors in the verdict of the jury—are correct. Not only are they incorrect, but they were not the sole factors in the verdict. It was proved to a demonstration that the unlawful seizure and sale of Peters' stock-in-trade, accompanied as it was by the locking up of his shop and premises, entirely destroyed a thriving and daily-increasing business; and it was further proved that after emptying Peters' shop and premises, of which he had a five years' lease (and upon which the rent had been fully paid up beyond that date), the defendants, without any right or authority, delivered up the keys to the landlord, who re-let the premises, and removed and sold a workshop, built by Peters at a cost of £70 or £80. In short, it was proved beyond question that the man was reduced to a helpless condition, and stripped of everything, even of his working tools. In the face of such facts, I confess myself at a loss to understand how his Honor could treat the value of the goods as the sole basis of plaintiff's damages, nor how he can assert that the value of the goods seized was proved to be below the amount of the debt due at the time of the trial.

And now as to that part of the judgment referring to the alleged "consent" given by the plaintiff to the Judge's order, and to my imputations of fraud and misconduct in the drawing up of that order, which charges both the Judges pronounce to be entirely unsupported.

Referring to the "consent," the Chief Justice uses the following words:—"This portion of the order is not an order at all, but a reservation, by agreement of the parties, of particular questions to be dealt with thereafter by the Court. This course, I am disposed to think, needed the consent of both parties; *hence it was so minuted by me*, and being so minuted was drawn up, and properly so. It may be that the words by agreement of parties would more accurately have expressed what I intended by my minute. I think the words used are substantially the same. It is objected that the order is drawn up by consent, whereas no consent was given." Surely, the Chief Justice cannot think I would waste my time objecting to an order because it used the word "consent" instead of the words "agreement of parties." My contention was that there was neither "agreement" nor "consent," nor anything of the kind. Putting the above quotation into logical order, it seems to amount to neither more nor less than this:—"I (the Chief Justice) had no power to make such an order except 'by consent'—it was therefore right that I should minute a 'consent,' and having minuted a 'consent' the order drawn up on that minute must be right even though such consent was never given." The judgment avoids saying that any "consent" was ever given, but leaves the careless reader to assume that it was given. I ask any person who attentively reads the above quotation from the words of the Chief Justice, whether his Honor does not by them unreservedly admit that no such minute ought to have been drawn up unless he was satisfied that both parties were entirely agreeing to it, and, also, whether he does not admit by implication that there was no such agreement.

I will now proceed to show that the whole materials before the Court on the late motion to set aside the Chief Justice's order, showed irresistibly that no such consent was ever given.

The order was originally applied for by Mr. Travers while I was locked up in the gaol. I, in writing, directed my clerk, Mr. Barratt, to oppose Mr. Travers' application, and to inform the Judge that his instructions were to consent to nothing. After the argument on the motion, Mr. Barratt reported to me at the gaol that he had "consented to nothing." Subsequently Mr. Barratt, for the purposes of this present motion, swore an affidavit that he informed the Chief Justice that he could "consent to nothing," and that affidavit stands to this hour uncontradicted by the Judge or any one else. After Mr. Barratt had so informed the Judge that he could "consent to nothing," the Judge took time to consider what order he would make. When the Judge on a subsequent day pronounced his decision, he at the same time made a minute of his intended order, and of that minute my late partner, Mr. Henry Fitzherbert, made a copy from the Judge's dictation, and that copy contains the words "by consent of defendants." Whatever these words may mean it is plain they cannot mean the "consent of the plaintiff." This minute is set out verbatim in an affidavit sworn by Mr. Henry Fitzherbert, and nobody has denied, or could truthfully deny, his statement. Not one word in that minute goes to show that anything was done "by the agreement of both parties." Not only is this fact verified by the sworn statements of Mr. Barratt and Mr. Fitzherbert, but it is confirmed by the further statement of Mr. Barratt that when the order was served on us Mr. Barratt went straightway to Mr. H. H. Travers and complained of the words "by consent," and it is not disputed that Mr. H. H. Travers on that occasion admitted that the plaintiff had not "consented," but at the same time refused to take any step to alter the order. In addition to all this, Mr. H. H. Travers, in his affidavit (which the Chief Justice stated that he had read), also admits that there was "no consent" on the part of the plaintiff. Thus the Chief Justice had before him three sworn statements, all agreeing that there was "no consent," and yet he now, in his judgment, upholds his order, saying that his "minute was read out to the parties without objection." His minute is sworn to have mentioned "by consent of the defendants," but even if it did not, how could such omission justify the upholding of an order in which the consent is treated as the consent of both parties, when both parties agree that there was no consent?

Now, as to the imputation of fraud and misconduct, which both the Judges pronounce to be entirely unsupported, my argument was that the order was equally improper in the manner of drawing it up, and in the object for which it was so drawn up; and that it was drawn up in such way as to render it impossible for the plaintiff to advance without losing his damages for ever, or to retreat without being mulcted in very heavy costs. In my argument I characterised the proceeding as similar to the gambling trick—"Heads I win; tails you lose," and I showed that the introduction into the order of the words "by consent," would necessarily preclude Peters from alleging at any future time that he had not himself "consented" to such a state of things. I showed, I thought conclusively—and I would here point out that both the judgments give the go bye to these arguments—that if Peters proceeded to a second trial, narrowed to one question as it was to be, he must infallibly fail,

and would have to pay the costs of that trial, and ultimately, in all likelihood, the costs of the first trial, left for the present in the discretion of the Judges. On the other hand, I showed (I thought conclusively) that if, instead of going to trial, Peters elected to take the £10 paid into Court in satisfaction of his claims, and that I applied to the Court to give him his costs, I should do so in the teeth of the Chief Justice's decision in the recent case of Wallace *v.* Crawford, in which he refused his certificate for costs, stating that he and Mr. Justice Richmond had "consulted together and come to the resolution" that in no case, except under very special circumstances, would they certify for costs when the sum recovered was less than £100.

The result brought about by this order is, that a man who has obtained from a jury a verdict of £500 was left in doubt whether to abandon it and become bankrupt, or to proceed with a second trial with no result but to increase the amount due to his creditors; in fact, whatever step he took could have but one result. "Heads! (by consent) Peters loses. Tails! (by consent) Joseph wins."

Sir, the two learned Judges declare that they see no ground for any imputation upon such an order as that; but with all due respect to their Honors, I see no reason to change my opinion. Is it no fraud to place on the records of the Court, signed by the hand of the Chief Judge, a statement that a party "consented" whom nobody now pretends has ever "consented," and who is by the filed affidavits of at least three persons, sworn never to have "consented?" I most humbly take leave to think such an order is a fraud; and I think, too, that if such an order is to lie on the files of the Court, side by side with its triple contradiction, then the sooner Parliament abrogates the law that treats records of the Court as "absolute verity" the better. Is it no fraud to perpetuate as against Peters an order of a Judge, the truth of which the present law prevents him from disputing, although it states what is undeniably untrue?

Is it no fraud that an order professing to leave open all fair questions between the parties should be so drawn up that one of the parties can neither move hand or foot but to his own destruction?

Is it no fraud that the verdict of a jury for £525 should be thrown to the winds, and the case set down, nominally for a second trial, but really with the foregone conclusion that the plaintiff cannot recover more than the £10 paid into Court, and yet that the order should compel him to go to the second trial which he *must* lose, to entitle himself to payment of the costs of the first trial, which he had already won?

Having failed in my attempts to upset this order, I could see no way to extricate the case from its enlargement, or to burst through these impenetrable obstacles. I am reminded of the curiously constructed American log-fence, called a pig-puzzler. The logs are laid in triangles, and these are so contrived that no matter where a pig gets in, he nevertheless finds himself still outside the garden; the pig at last gives it up.—I am, &c., GEORGE ELLIOTT BARTON.

No. 6.

The Hon. the COLONIAL SECRETARY to Mr. G. E. BARTON.

SIR,— Wellington, 12th December, 1878.

I have the honor to acknowledge receipt of your letter of the 5th November, in reply to mine of the 29th October, in reference to your charges against their Honors the Chief Justice and Mr. Justice Richmond. I have to regret that so long a delay should have occurred in replying to your letter, but it has been occasioned mainly by the Government making a searching inquiry into your charges, and by the time that was necessarily spent in obtaining the documents and papers relating to them.

In former correspondence (17th June, 1878) you have expressed the opinion that it was the duty of the Government to make a full preliminary inquiry into any charge brought against a Judge of the Supreme Court, so that, if they thought the charge proved a serious one, steps might be taken in Parliament to deal with the charge and with the Judge. The Government have followed this course. I may state that the Government have not thought it necessary to communicate with any of the Judges, nor to submit a copy of your letter of the 5th November for their consideration. The various charges have been dealt with on the reported judgments and evidence, and on the various documents filed in the Supreme Court. I now proceed to deal with your charges.

CHARGES 1 AND 2.—These charges may be taken together. They appeared in your petition to the House of Representatives in 1877, and the House affirmed a resolution that your petition could not be considered. The resolution was in these terms:—

"*Ordered*, That the order made on the fourteenth day of August, one thousand eight hundred and seventy-seven, 'That the petition of George Elliott Barton be received,' be read and discharged, on the grounds that the allegations contained in the petition are, for the most part, not sufficiently specific to call for inquiry, and that the specific charges, even if proved, are not of a character to justify any interference on the part of this House."

Under these circumstances the Government would be bound to refuse an inquiry which Parliament had declined to sanction. There is, however, another objection to the Government dealing with these charges. They have been practically the subject of judicial investigation and decision. It is true that this investigation was held before the Chief Justice; but he expressed his willingness, and almost urged you, to have the matter dealt with before the full Court of Appeal. This you declined, preferring an immediate decision to waiting for the Court of Appeal to meet. At the conclusion of the Chief Justice's judgment, you said,—

"Allow me to express my thanks to the Court. I came here this morning without any hope or expectation of a judgment such as your Honor has just delivered. It is true your Honor has observed of my defence made before your Honor that it was perhaps out of taste. Without intending the slightest disrespect to your Honor, you will permit me to say that, so far as my own mind is concerned, whatever may be the actual fact, I am not conscious that I have been guilty of bad taste. At the same time allow me to say this, your Honor, that I now openly and in Court say that if I

have caused your Honor the slightest mental pain, it is a matter of the deepest regret to me. I hope, your Honor, that I shall always be found to be one of those who will use the utmost endeavours to maintain the dignity of this Court, both while inside and out of it. With these words, I again thank your Honor for the view you have taken of my case, which shows that your Honor's mind has approached this subject in a spirit of perfect justice and propriety."—(*New Zealand Times*, 14th October, 1876.)

How the Government could grant an inquiry, after your own admission that the Chief Justice had approached the subject "in a spirit of perfect justice and propriety," I am at a loss to understand. Your statement disposes, if the Parliament had not disposed, of those charges. I put in Appendix A to this letter a copy of his Honor's judgment.

CHARGE 3.—You must be labouring under some misapprehension as to this charge, and must have forgotten what occurred. In the *New Zealand Times* of the 25th January, 1878, the following paragraph appeared:—

"During the hearing of the case Clayton *v.* Isaacs, in the Supreme Court yesterday, Mr. Travers complained that he could not get certain information from Mr. Campbell (of Beauchamp, Campbell, and Co.), a witness, whereupon his Honor remarked that it was highly improper for a witness to keep back information. Mr. Barton, counsel for defendant, examined witness, with a view of showing that neither he nor any member of his firm had withheld information asked for by plaintiff's solicitors. From what further transpired, his Honor said it appeared as though Mr. Barton was trying to lay a trap for the Registrar of the Supreme Court. Mr. Barton asked his Honor to withdraw the remark, and said that he had cast improper imputations both on Messrs. Beauchamp, Campbell, and Co., and Messrs. Barton and Fitzherbert. His Honor said he would not express an opinion until after hearing the evidence."

The Chief Justice, however, on the day that paragraph appeared, made the following statement in Court:—

"I desire to say, with reference to a paragraph in the *New Zealand Times*, that the reporter misreported what took place. No observation was made as to Mr. Barton or to Mr. Fitzherbert having led the Registrar into a trap. My observations were made with reference to a system and the abuse of it. The law provides that the Registrar may go to an auctioneer, arrange for sale, and conduct sale of land by mortgagees. It appears to be the practice that the mortgagee's solicitor suggests an auctioneer; the same solicitor prepares conditions, which are approved by the Registrar. If under these circumstances the solicitor is to be called the solicitor of the Registrar, that is leading the Registrar into a trap. The Registrar is not under the impression that the mortgagee's solicitor is his solicitor under such circumstances. I reiterate over and over again that my observations were general, and had no reference to any particular person. No imputation was made against Messrs. Beauchamp and Campbell except this, that there was great difficulty in getting proof of matters from them about which there should have been no difficulty whatever."—(*New Zealand Times*, 26th January, 1878.)

This statement was published in the *New Zealand Times* of the next day. If it were, therefore, the duty of the Government, which it is not, to inquire into the truth of every allegation that a Judge may make, or every reprimand he may utter, in this case the Chief Justice's statement clearly shows that your firm was not charged as you allege. I believe that when you penned this charge you had forgotten what had occurred on the 25th January last.

CHARGE 4.—This charge was, as you state, made in your petition to the House in 1877, and, on that ground alone, could not be dealt with by the Government. You, however, seem to forget that, in a letter to the Colonial Secretary, the Chief Justice explained the manner in which the phrase that you complain of was used, as follows:—

"Mr. Hart urged that the Supreme Court was a Court of equity, and that it was only equitable that the deduction should be made: to that I replied that I thought that I could, nevertheless, not make the order. Thereupon Messrs. Barton and Fitzherbert's clerk at once asked me to fix the amount of costs to be paid to the plaintiff. I said I had not yet decided that he was to have costs, and that I did not so decide. Thereupon he made some observation about the action being a common law action,—the observation I supposed to be directed to Mr. Hart's contention that, as it was only equitable that the deduction should be allowed, the order should be made. I believe that I then observed that it might as well be said that there was no such thing as common honesty in a common law action."

This explanation disposes of your charge; and the remarks I have made on charge 3 are applicable.

CHARGES 5, 6, AND 7.—These charges are not specific, and cannot therefore be dealt with. As you have referred to various cases, and have in other charges named occurrences in these cases as proof of corruption on the part of the Judges, I shall show that, in the occurrences you have named, neither you nor your clients have any just cause of complaint.

CHARGE 8.—This charge refers to an occurrence in the case of Peters *v.* Joseph, a case that you cite as proving charges 6 and 7. It has been the subject of judicial decision. You moved, as you had the undoubted right to do, to set aside the following order:—

"In the Supreme Court of New Zealand, Wellington District, between Carl Peters, plaintiff, and "Joseph Joseph and Walter Isaac Nathan, defendants.

"On Friday, the twenty-second day of February, 1878.

"ON hearing the solicitors for the parties, and on reading the summons herein, dated the thirteenth day of February instant, I do order that the defendants do have leave to withdraw the pleas pleaded by them to the second count in the declaration in this action, and to pay into Court the sum of ten pounds, and to plead such payment in satisfaction of the plaintiff's claim under the said second count, and that the defendant be at liberty to give notice in mitigation of damages under the said second count.

"And I do further order that the costs of, and incidental to, this order, and the costs of the amendment, be plaintiff's costs in the cause in any event; and I do also further order, by consent, that the

question as to payment of the costs of the first trial of the issues raised on the second count, and of the costs of the rule for a new trial as affected by this application, be reserved for the consideration of the Court at the time of the disposal by the Court of the questions as to costs which are reserved by the rule for the new trial: the defendant also undertaking not to proceed in the meantime with the taxation of the costs granted by the said rule.

"JAMES PRENDERGAST."

This application was heard by the Chief Justice and Mr. Justice Williams, and against the latter you have made no charge. Their judgments I put in Appendix B. I need hardly point out that you are in error in stating that the order was "by consent" generally. The only question that was dealt with by consent was one of costs—viz., that the question as to payment of the costs of the first trial of the issues raised in the Supreme Court, and of the costs of the rule for a new trial as affected by the application, be reserved, &c. Ordinarily, when a new trial is granted, the person against whom the rule was obtained pays the costs. In this case the Judge granting a new trial ordered the plaintiff so to do. This order therefore in holding over the paying of the costs was a direct benefit to your client. Had this order not done so, the defendant could have taxed his costs under the rule absolute, and issued execution against your client. But, had it been otherwise, your client had the right of appeal against the decisions of the Chief Justice and Mr. Justice Williams, and he did not avail himself of that right. I am also advised that the judgment of the Chief Justice and Mr. Justice Williams could not have been successfully appealed against.

CHARGE 9.—Your proof adduced against Mr. Justice Richmond amounts to this: that Mr. Justice Richmond said one thing publicly in Court when Mr. Travers was present, and that Mr. Travers told you another thing out of Court. This is certainly most peculiar proof to show that a Judge "violated the truth from the Bench." Mr. Travers has, however, informed the Government that his recollection is diametrically opposed to your own. The whole papers in the action Hair *v.* Borough of Wanganui have been obtained by the Government, and I find that the following are the facts:—

Mrs. Hair began an action on the 23rd March, 1877, against the Mayor, Corporation, &c., of Wanganui. The declaration, pleas, replication, affidavit, order, and injunction, are all in Appendix C.

Briefly stated, they show the following: Mrs. Hair was in lawful possession of land covered with water, known as Virginia Lake. The Corporation threatened to construct an aqueduct from Westmere Lake to her land, Virginia Lake; and she prayed for an injunction to prevent this being done. On an affidavit included in Appendix, she obtained an *ex parte* injunction, and you, on behalf of the Corporation, moved to set it aside, on the grounds which are stated in the Appendix.

And after argument a judgment was pronounced, refusing your motion. The judgment is in Appendix C. The only thing that might call for remark is that the Judge should not have ordered your clients to have paid costs on this unsuccessful motion.

Against this judgment your clients did not appeal, and I am advised that an appeal must have been unsuccessful. To show, however, that your clients knew they had no defence to the action, and that the injunction which was granted was properly granted, they afterwards consented to the injunction being made perpetual with costs. (*See* copy order in Appendix.) I may point out that the objection to the *ex parte* injunction raised by you as to impurity of the water was really of no importance, for, whether pure or impure, the plaintiff undoubtedly had a right to prevent her land being injured by the defendants unlawfully pouring water on it. As to the other point, of the land being taken under "The Municipal Corporations Waterworks Act, 1872," the notice of Mr. Borlase (*see* paragraph 4 of the affidavit of Mrs. Hair, dated 19th June, 1878) disposed of that objection.

A perusal of the whole of the documents will, I believe, make you withdraw this charge, and regret that you should have made it.

CHARGE 10.—This charge specifies, I presume, what was unspecified in charge 6, as this case —Schultz *v.* Wellington Corporation—is mentioned in charge 6. The following rule *nisi* was obtained by the Wellington Corporation:—

> "In the Supreme Court of New Zealand, Wellington District. Between the Mayor, Councillors, and Citizens of the City of Wellington, plaintiffs, and Charles William Schultze, defendant, on Friday, the twenty-eighth day of September, one thousand eight hundred and seventy-seven.
>
> "ON reading the writ and declaration in this action, the affidavit of service thereof filed herein on this twenty-eighth day of September, one thousand eight hundred and seventy-seven, and the several affidavits of William Hester and William Thomas Locke Travers, filed herein on the twenty-seventh day of September, one thousand eight hundred and seventy-seven, and on hearing Mr. Travers of counsel for the plaintiffs, it is ordered that the defendant do, at the first sitting in Banco of this Honorable Court which shall take place next after the next circuit sittings of this Court to be holden at Wellington, show cause why a provisional injunction should not issue restraining the defendant and James Richard Davies, of the City of Wellington, civil engineer, respectively, from proceeding under the several notices dated the eleventh day of July and the sixth day of September, one thousand eight hundred and seventy-seven, and under the appointment of the said James Richard Davies as arbitrator, dated the twenty-fifth day of September, one thousand eight hundred and seventy-seven, respectively, in the declaration in this action set forth pending the trial of this action.
>
> "Firstly, on the grounds that the claim of the defendant was not made within the time prescribed by 'The Wellington Waterworks Act, 1871,' and, secondly, that the defendants in the year eighteen hundred and seventy-six, brought an action in this Court against the plaintiffs for damages alleged to have been sustained by him by reason of the alleged diversion, and that judgment in the said action passed against the defendant.
>
> "By the Court."

The points raised in this rule were well worthy of argument, and the Government cannot see that any objection could possibly have been made to the granting of the rule *nisi*. Your complaint is that the Judges did not inform you what the rule *nisi* meant. Surely that was no part of the Court's

function. It was a rule to show cause why an injunction should not issue, and there was no statement or order in the rule staying proceedings in the arbitration. Nor was it a rule in an action in which Davies was acting as arbitrator. The rule was obtained on the 28th September, 1877, and discharged on the 12th of November, 1877: no great delay therefore occurred in disposing of it, and the Government cannot see the slightest impropriety in anything the Judges did.

CHARGE 11.—This charge is not specific. As there is a reference to the cases of Peters *v.* Joseph, Joseph *v.* Peters, and Poll *v.* Tonks, I may as well state how far these cases were "tied up." Your client Mr. Peters obtained a verdict in the case of Peters *v.* Joseph, but certain points were reserved at the trial, and a rule absolute in the following terms was made:—

"In the Supreme Court of New Zealand, Wellington District, between Carl Peters, plaintiff, and
"Joseph Joseph and Walter Isaac Nathan, defendants.

"On Tuesday, the eighteenth day of January, one thousand eight hundred and seventy-eight.

"UPON reading the rule *nisi* granted herein on the seventeenth day of November, one thousand eight hundred and seventy-seven, and on hearing Mr. Barton of counsel for the plaintiff, and Mr. Travers of counsel for the defendants, it is ordered that the verdict found for the plaintiff on the issues under the second count of the declaration be set aside, and that a new trial of the issues upon the said second count be had, and that the costs of and incident to the first trial of this action do abide the further order of this Court, and that the plaintiff do pay to the defendants the costs of and incident to this rule. "By the Court."

The judgment is in the Appendix B, and I am advised it was a proper judgment, and could not have been successfully appealed against.

Poll *v.* Tonks was tried on the 24th January, 1878, and a verdict of £270 given for your client. At this trial also certain points in favour of defendant were raised, and a rule *nisi* was obtained on the 2nd February, and discharged on the 14th March.

The Government cannot see anything improper in the Judge's conduct in either of these cases. Unless, indeed, you are prepared to contend that whenever one of the clients for whom you appear obtains a verdict from a jury, his opponent is not to be at liberty to raise any points of law, the Judges could not have acted otherwise than they did. If, as you say, the cross action, Joseph *v.* Peters, was improper or unfounded, your client could have defended it. The fact that judgment went against him shows that he was in the wrong. The charges you have made under this head, I must say, are not only unsupported by the documents filed in Court and by the judgments, but these show that you must have been labouring under a serious misapprehension when you made your complaint.

CHARGE 12.—This charge is specific, but the undoubted facts show that you must have overlooked them when you made it. Your motion was, "For a rule *nisi* to show cause why plaintiff should not be allowed to discontinue without costs to be paid by the plaintiff, and costs of the trial and of this motion be paid by defendant, and why defendant should not furnish to the plaintiff a duplicate of the agreement for the settlement of this action."

The affidavits filed are in the Appendix D. Your complaint is that Mr. Justice Richmond did not set aside the verdict on the ground that one of the jurymen was interested. No doubt if one of the jurymen was interested that may have been good ground for a new trial, but you did not ask for such. You desired that the plaintiff should have leave to discontinue the action without paying costs, and you also asked that the agreement made should be carried out. The agreement could not therefore have been considered by you an improper one. If the agreement was valid, then the plaintiff could have sued the defendant for any breach. In reference, however, as to whether Mr. Charles Johnston was interested or not, it seems to the Government that the judgment of Mr. Justice Richmond disposed of such an objection when he said,—

"That in this case a very serious allegation had been made against a juror in the late case of Leach *v.* Johnston. After giving what consideration he could to the matter, he was of opinion that Mr. Charles John Johnston was not actually interested in the late action for trespass against Dr. Johnston. Nevertheless, the degree of connection he had with Dr. Johnston might have given cause for a new trial, and if a rule *nisi* for a new trial had been asked for he thought he would have granted it. However, no jury, in his opinion, could have given a verdict more favourable to the plaintiff, without having given what is called a perverse verdict. If the plaintiff had any right for a rule it was for a new trial on the ground that an interested party was upon the jury. As to the production of the alleged agreement, the plaintiff's right was plain; but he did not approve of the method in which the agreement was sought in the present case to be obtained—by rule *nisi*. The proper course would have been to have given notice of motion. Therefore, he would make no rule in this case."—*New Zealander*, 8th August, 1878.

I have now dealt with the various charges you have made. I have placed in the Appendix the various documents referring to the cases, for more ready reference. After a careful and calm review, I am bound to say that I regret that you should have made the charges, and I feel assured that you will yet acknowledge that they were made either under some temporary irritation, or without due consideration.

There is one misapprehension under which you seem to labour, which I think it necessary to dispel. It is not the function of the Executive of the Colony to act as an appellate tribunal. If the Judges decide contrary to law, ample machinery has been provided to have their decisions reviewed. It cannot be right that men who may not have been trained as lawyers should sit in judgment on the decisions of the Supreme Court. It is only when clear evidence is produced of corruption or incapacity that the Executive is called upon to interfere. Were the Executive to interfere with Judges whenever a disappointed litigant invoked their aid, the due administration of justice would be impeded.

I have the honor to be
Sir,
Your obedient servant,
G. S. WHITMORE.

G. E. Barton, Esq., M.H.R.,

Appendices to No. 6.

APPENDIX A.—Charges 1 and 2.

SUPREME COURT—IN BANCO.

Friday, 13th October, 1876.
(Before His Honor the Chief Justice.)

Contempt of Court.

There was a sitting of the Supreme Court in Banco at 10 o'clock.

His Honor delivered judgment as follows in the case of Mr. Barton:—

On the fourth day of October instant, during the criminal sittings of this Court, I took notice in open Court that I had on the previous day received a letter.

I directed the Registrar to obtain evidence as to the person who had written and caused that letter to be delivered to me, and I stated that an order of the Court would be made for such person to attend before the Court to answer for his contempt.

On the seventh of the same month, at a sitting of the Supreme Court in Banco, Mr. Wilmer, the Deputy Registrar, produced an affidavit by himself, proving that the letter was in the handwriting of Mr. George Elliott Barton, a barrister and solicitor of this Court, practising in this judicial district, and also proving facts that satisfied me that Mr. Barton had caused that letter to be delivered to me.

The letter was as follows:—

"Sir,— "Brandon Street, 3rd October, 1876.

"I have written to the proper authority, the Government, complaining of your treatment of me this morning, and ever since I first appeared before you in Wellington.

"I am not aware of any misconduct on my part justifying such hostility on yours.

"I think it right I should inform you that I have asked the Government for an inquiry,—

"Your obedient servant,

"His Honor the Chief Justice." George Elliott Barton.

I expressed my opinion that the writing and sending the letter was a contempt of Court, and ordered that Mr. Barton should personally attend the Court on Monday then next, to answer for contempt of Court by writing and causing to be delivered the letter in question, and then and there to show cause why he should not be punished and dealt with as the Court should think fit for such contempt. Personal service of the order was directed.

Accordingly on Monday last Mr. Barton appeared in compliance with the order, and showed cause. At that time no affidavits had been filed by him.

Mr. Barton addressed the Court at some length on that day, but before the conclusion of his argument the matter was at his instance adjourned to the following day, the object being that, as certain facts which he desired to rely upon were not in evidence before the Court, he should have the opportunity of obtaining such evidence.

As it appeared that Mr. Barton did not admit the offence, I expressed to him my strong desire that the matter should not be proceeded with before me alone, but should be postponed for a month, when all the Judges would be assembled here for the holding of the Court of Appeal, and I asked Mr. Barton if he could urge any reason why this course should not be taken. I felt that as the matter before me involved not only the question whether the letter was such an insult to me as Judge, but also what punishment should be allotted to the offender, there was (as observed by Mr. Justice Blackburn, in Skipworth's case, 9 L.R., Q.B. 238) "a risk that his (the Judge's) feelings might cause him to be vindictive, but there is a very much greater risk that, from his anxiety that his feeling should not lead him to give an excess of punishment, he would be too lenient, and consequently it is very desirable that the matter should be tried and adjudicated upon by persons who are influenced by no such feelings."

Mr. Barton, however, objected to the postponement on the ground that he felt that while the matter was in suspense he could not be the accuser in a parliamentary inquiry. He meant thereby a parliamentary inquiry into alleged conduct of mine as a Judge of this Court.

I then stated that, if Mr. Barton claimed that I should at once dispose of the matter, I would do so. To that he replied in the affirmative, and I accordingly determined to proceed with the matter, though necessarily sitting alone.

Mr. Barton contended that the letter was not a contempt, because it was not written either with intent to libel, or to affect my judgment in any matter pending before me.

In Skipworth's case, 9 L.R. Q.B., p. 232, Mr. Justice Blackburn, in giving the judgment of the Court says, "The phrase 'Contempt of Court' often misleads persons not lawyers, and causes them to misapprehend its meaning, and to suppose that a proceeding for contempt of Court amounts to some process taken for the purpose of vindicating the personal dignity of the Judges, and protecting them from personal insults as individuals. Very often it happens that contempt is committed by a personal attack on a Judge, or an insult offered to him; but, as far as their dignity as individuals is concerned, t is of very subordinate importance compared with the vindication of the dignity of the Court itself; and there would be scarcely a case, I think, in which any Judge would consider that, as far as his personal dignity goes, it would be worth while to take any steps." With these observations I concur.

For the purpose of supporting his contention that the letter was not written with intent to insult, and to show that he had in fact written to the Colonial Secretary complaining of alleged conduct of mine, and had in fact asked for an inquiry, Mr. Barton at the adjourned hearing produced a number of affidavits, among others one by himself.

Several of these affidavits profess to detail an occurrence at the sitting of this Court on Tuesday, the 3rd instant. I shall not refer to that occurrence, except by stating that on that occasion I—whether with or without cause, and whether in a becoming or unbecoming manner, it is not my intention here to discuss—addressed observations to Mr. Barton relative to the fact that, in consequence of his absence from Court, the Court had been kept waiting for him for some time, and that he had not offered to the Court an excuse.

I say I do not discuss here the question of my conduct on that occasion, for as Mr. Barton has called in question the propriety of and motives which actuated my conduct on that and other occasions, it is not seemly that I should say one word which might appear that I was here defending myself against his complaint. That this is the proper position for a Judge of the Supreme Court to assume on such an occasion, I have already more than once pointed out during this proceeding. Mr. Justice Blackburn, in the case already referred to, makes observations pertinent to the same subject:—

"There have been vituperation and attacks made concerning what the Lord Chief Justice is supposed to have said or done. It is not right that a Judge, or a person occupying the position of Lord Chief Justice, when personal attacks are made upon him, should come forward and meet and explain them; and that is well known to those who make the attack, and certainly that knowledge does, in my mind, render the conduct of those who attack a Judge in that way, to use the mildest term, neither just nor decorous. We say nothing whatever consequently about the imputations."

The letter written by Mr. Barton to myself is the only matter now before the Court. Until he himself proved that he had written a letter to the Colonial Secretary in his official character as a Minister of the Crown, though marked on the outside as private, this Court was not aware that such a letter had been written; the terms of that letter nor its contents are in proof before the Court, and I may say that the Colonial Secretary has not seen fit to make any communication to me of the contents of that letter, or of any kind with reference to it.

The letter addressed to myself states that Mr. Barton had complained of my treatment of him that morning, meaning the occasion when the Court was delayed, and ever since he (Mr. Barton) had appeared before me in Wellington. It will be observed that the nature of the treatment is not here specified; but it is clear that the language implies treatment by me, as a Judge, of him as barrister or solicitor. But the letter goes on to state that he, the writer, was not aware of any misconduct on his part to justify "such hostility as yours."

From this paragraph appears the nature of the treatment complained of—hostile treatment by the Judge to the barrister or solicitor on an occasion named, and habitually during a period.

I know not what more damaging statement as to the administration of justice in the Supreme Court could be made than this—a charge that justice is administered in that Court with habitual hostility to the practitioner. If such charge be well founded, not only the interests of the practitioner but those of his clients must be habitually sacrificed to the enmity which the Judge entertains and is actuated by. Surely not the Judge's personal dignity alone, but the dignity of the Court is here involved. Surely this is a scandalous reflection on the administration of justice in the Court.

Mr. Barton contends that this letter was no more than fair intimation that he had made a complaint against the Judge personally. He assures me that no insult was intended to me personally as Judge or at all, or to the Court, and that his sole object was to inform me of the fact that he had a complaint against me personally, and had asked for an inquiry.

I say that no one could have doubted that if Mr. Barton had in Court uttered to me, when listening as Judge, the words he has written and caused to be delivered, that a gross insult was offered and intended; and it seems to me no less clear that to convey the words by letter makes no difference. I say that, in my opinion, even if Mr. Barton's letter went not beyond a bare intimation of a complaint having been made to the proper tribunal, such a letter to a Judge relative to his conduct as Judge in the administration of the law was, under the circumstances, not only insulting and offensive to the Judge, but scandalous of the Court and the administration of justice therein, and a great contempt of Court. I say that, to my mind, under no circumstances can a person be justified in writing to a Judge of the Supreme Court and informing him that he has complained of his conduct. Let him make his complaint, and it will reach the Judge, if it ought to do so, in due course of time. But this letter is not confined to such an intimation, and the complaint is not stated to have been made, and was not in fact made, to the proper quarter; and, as now appears from Mr. Barton's affidavit, the inquiry asked for was of an illegal and unconstitutional character.

With reference to Mr. Barton's statement in his letter as to his own conduct, I desire to interpolate here that up to the time of the receipt of the letter I was not aware of any misconduct of Mr. Barton's in any matter in which he had appeared before. I desire to say this from the fear that an inference unfavourable to Mr. Barton may be drawn from his own letter.

The conclusion at which I have arrived at is, that, after deliberate and earnest consideration of the arguments addressed to me, I have been unable to form any other opinion than that the letter was offensive, disrespectful, insulting, and a contempt of Court, and that the fact, as asserted by Mr. Barton, that he did not actually intend to be insulting or offensive, does not nevertheless prevent it from so being.

I regret also to be obliged to say that the manner in which Mr. Barton conducted the proceedings when showing cause has, to my mind, very much aggravated his original offence.

Nevertheless, I feel greatly impressed with the fact that Mr. Barton repeatedly assured the Court that if the letter was insulting he did not intend it, and that if the Court was, notwithstanding his arguments, of opinion that it was insulting, he was ready to submit himself to the Court. I therefore accept Mr. Barton's assurance that he intended no disrespect to the Court, or to myself as Judge of the Court.

The rule is therefore discharged.

APPENDIX B.—Charges 8 and 11.

Peters *v.* Joseph and Another.—*Charge* 8.

In the Supreme Court, New Zealand, Wellington District, between Carl Peters, plaintiff, and Joseph Joseph and Walter Isaac Nathan, defendants.

We, Henry Samuel Fitzherbert, in the City of Wellington, in the Colony of New Zealand, solicitor, and James Barratt, of the same place, law clerk, make oath and say as follows:—

And I, the said James Barratt, for myself say,—

1. The said Henry Samuel Fitzherbert is the solicitor in this cause for the above-named plaintiff, Carl Peters, and I am the managing clerk of the said Henry Samuel Fitzherbert, and have attended to the conduct and management of this cause.

2. On the fifteenth day of February last, I attended the summons herein (a copy of which is annexed hereto, and marked "A") before his Honor the Chief Justice in chambers. I then opposed the application on certain grounds, and I submitted, if any order were made, the whole question of all the costs of the action must be then dealt with by his Honor; and I stated that I had instructions to consent to nothing. His Honor adjourned the application for further consideration, and the adjournment was to no fixed day.

3. On the twenty-sixth day of February last, I was informed that his Honor was about to make an order on the said summons, and I at once attended at his Honor's chambers, where I found Mr. Fitzherbert in attendance, and his Honor made an order reviewing certain costs for the consideration of the Court, and stated, "I make it a condition, by consent of the defendants' solicitor, that the defendants shall not raise the point that these costs should be now applied for at the time of this application; and if the Court shall be of opinion that the payment of these costs ought properly to have been made a condition of the leave to withdraw pleas and to pay money into Court, then the plaintiff to have their costs, even though the Court would not have given them under the question reserved, and notwithstanding that, as to the costs of the rule, they are thereby ordered to be paid to the defendants." And Mr. H. H. Travers, the solicitor for the defendants, said, "I consent, and undertake not to raise the objection;" but nothing was said about any consent on the part of the plaintiff to any order, and no such consent was given in my presence."

4. On the twelfth day of March instant, a copy of an order (a copy of which is hereunto annexed and marked "B") was served at the said Henry Samuel Fitzherbert's office in the afternoon, and next morning I called upon the said Henry Hamersley Travers, and pointed out to him that the said order was wrongly drawn up, and the consent mentioned in it should have been restricted to the defendants' solicitor; and the said Henry Hamersley Travers admitted that there was no consent on the part of the plaintiff to the said order; and I then informed the said Henry Hamersley Travers that the said order and pleas delivered thereunder would not be recognized by the plaintiff, and that an application would be made to set the said order aside.

5. On the sixteenth day of March instant, between the hours of twelve and four o'clock in the afternoon, I served a notice of trial (a copy of which is hereunto annexed and marked "C") on a clerk of the said Henry Hamersley Travers, at his office, in the City of Wellington aforesaid, and on the twenty-eighth day of March instant I entered this action for trial at the next sittings of the Supreme Court at Wellington aforesaid, with the Registrar of the said Court at Wellington aforesaid.

And I, the said Henry Samuel Fitzherbert, for myself say,—

6. On the twenty-sixth day of February last, I attended before his Honor the Chief Justice in chambers, at the Supreme Court, Wellington, on the said summons referred to by the deponent, James Barratt, when his Honor the Chief Justice made an order on the said summons; and I now state that no consent was ever given by me to any order being made thereon, and I was never asked to give any consent to the said order.

H. S. Fitzherbert.
James Barratt.

Sworn by the above-named James Barratt and Henry Samuel Fitzherbert, at the City of Wellington, in the Colony of New Zealand, this twenty-eighth day of March, one thousand eight hundred and seventy-eight, before me,—
Th. Hutchison,
A Solicitor of the Supreme Court of New Zealand.

In the Supreme Court of New Zealand, Wellington District, between Carl Peters, plaintiff and Joseph Joseph and Walter Isaac Nathan, defendants.

I, Henry Hamersley Travers, of the City of Wellington, solicitor, swear—

1. That I am solicitor for the defendants in this action.

2. That, on Wednesday, the thirteenth day of February, one thousand eight hundred and seventy-eight, I took out a summons in this cause, calling upon the plaintiff to show cause why the defendants should not be at liberty to withdraw the pleas pleaded to the second cause of action herein and pay money into Court in satisfaction of the plaintiff's claim under the second count, and to plead such payment, and to give evidence in mitigation of damages.

3. That, on the fifteenth day of February, one thousand eight hundred and seventy-eight, the said summons was heard before his Honor the Chief Justice, when he took time to consider his judgment.

4. That, on the twenty-second day of February, one thousand eight hundred and seventy-eight, his Honor the Chief Justice delivered his judgment on the said summons, and minuted the same in the words set forth in the paper writing hereunto annexed and marked "A."

5. That, on Friday, the twenty-second day of February, one thousand eight hundred and seventy-eight, I drew up an order in accordance with the terms of the said minute and produced the same to and for the approval of his Honor the Chief Justice, and for his signature, and his Honor the Chief Justice thereupon, after making certain verbal alterations therein, signed the same, and I then caused a copy thereof to be delivered to the plaintiff's solicitor. And I say that I drew up the said order in good faith, and with no intention unduly to interfere with the rights of the defendants in this action.

6. That the said order so amended as aforesaid is hereunto annexed and marked "B."

7. That at the time his Honor gave his judgment on the said summons, I, as defendants' solicitor, consented that the question as to payment of the costs of the first trial of the issues raised on the second count, and of the costs of the rule for a new trial, as affected by this application, be reserved for the consideration of the Court at the time of the disposal by the Court of the questions as to costs, which was reserved by the rule for the new trial.

8. That the plaintiff's solicitor fully understood that it was only the consent of the defendants' solicitor that was meant by the terms of the said order.

9. That the plaintiff's solicitor called upon me and requested me to amend the said order by inserting the words "of the defendants' solicitor," after the word consent, in the said order; but I informed him that I could not myself alter the said order, but, if he applied to his Honor the Chief Justice to amend the said order by adding the above-mentioned words, I would attend and consent to the said alteration.

10. That no notice of any application to amend the said order was ever served upon me, nor, as I am informed, and verily believe, was any application made to his Honor the Chief Justice for that purpose.

HENRY H. TRAVERS.

Sworn at Wellington aforesaid, this ninth day of May, 1878.
before me,—

J. G. ALLAN,
A Solicitor of the Supreme Court of New Zealand.

"A."

I GRANT the application to withdraw the pleas to the second count, and to pay £10 into Court on the second count, and be pleaded, and to give with plea a notice in mitigation of damages.

The costs of this application, and the costs of an amendment, to be the plaintiff's costs in the cause in any event.

As to the payment of the costs of the first trial of the issues raised on the second count and the costs of the rule for a new trial, this question, by consent, to be reserved for the consideration of the Court at the time of the disposal by the Court of the question as to costs by the rule of the new trial; and if the Court should be of opinion that the payment of those costs ought properly to have been made a condition of the leave to withdraw pleas and pay money into Court, then the plaintiff to have those costs, even though the Court would not have given them under the question reserved by the rule, and notwithstanding that, as to the costs of the rule, they are ordered thereby to be paid to the defendant.

The defendant undertaking not to proceed on the taxation of the costs of the rule in the meantime, and until the Court shall otherwise order.

SUPREME COURT.—IN BANCO.

PETERS *v.* JOSEPH and ANOTHER.

Judgments herein of their Honors the Chief Justice and Mr. Justice Williams were delivered on 24th May, 1878.

The Chief Justice:—

In this case a rule *nisi* was on the 29th March last granted by Mr. Justice Richmond, on the application of Mr. Barton, on behalf of the plaintiff, calling the defendants to show cause why an order made by myself on the 22nd February last in chambers, on a summons taken out by the defendants, should not be rescinded.

The object of the summons was to obtain liberty to withdraw the pleas to the second count of the declaration, and to pay money into Court, and plead such payment to the second count.

The order made on this summons was as follows:—

"On hearing Mr. Travers for the parties, and on reading the summons herein, dated 13th February instant, I do order that the defendants do have leave to withdraw the pleas pleaded by them to the second count of the declaration in this action, and to pay into Court the sum of £10, and to plead such payment in satisfaction of the plaintiff's claim under the said second count, and that the defendants be at liberty to give notice in mitigation of damages under the said second count; and I do further order that the costs of and incidental to this order and the costs of the amendments be plaintiff's costs in the cause in any event; and I do also further order, by consent, that the question as to payment of the costs of the first trial of the issue raised on the second count, and of the costs of the rule for a new trial, as affected by this application, be reserved for the consideration of the Court at the time of the disposal by the Court of the question as to the costs which are reserved by the rule for a new trial, the defendants also undertaking not to proceed in the meantime with the taxation of the costs granted by the said rule.

And the grounds on which the rule *nisi* had been granted were—

1. That the said order, dated the 22nd day of February, 1878, was not served upon the plaintiff or his solicitor until the 12th day of March, 1878, and was abandoned by the defendants.

2. That the said order in effect varies and alters the rule of this Court, dated the 17th day of October, 1877, made in this action for a new trial of the issues joined in the action.

3. That the said order improperly reserves the question as to the payment of the costs of the first trial of the issues raised on the second count, and of the costs of the said rule for a new trial.

4. That the said order purports to be made by consent, meaning thereby by the consent of all parties to the action, and no consent was ever given on behalf of the plaintiff to the said order.

5. That the said order was drawn up so as to deprive the plaintiff of all costs of this action, and force him either to go to trial upon an issue which the Judge would direct the jury against him, or would force him to allow himself to be nonsuited, or to abandon his action, and pay all costs.

In this suit, at the time when the summons for leave to withdraw the pleas was made, there had been a trial, and as to the issues raised on the second count of the declaration the defendants had obtained a rule absolute for a new trial. By that rule the Court gave to the defendants the costs of the rule, and reserved the question of the costs of the first trial.

That rule was not appealed against by the plaintiff. On the contrary, the plaintiff had endeavoured to force the defendants to the new trial at the January sittings, but had failed for reasons unnecessary to refer to.

This Court, in its judgment on making absolute the rule for the new trial, had decided that the damages awarded by the jury on the second count were excessive, and in effect that in such a case as the present the damages were nominal.

The second count was for trespass on a shop and premises, and conversion of goods. The defendants held a bill of sale over the goods to secure advances, and the bill of sale gave powers of entry on the premises, and of seizure and sale of the goods, upon default of the payment on demand in writing. The defendants in their pleas justified the entry and seizure and sale of the goods on the ground that the plaintiff had made default of payment on demand. The entry and seizure appearing to have been made immediately, without any interval whatever of time after the demand, this Court, on the authority of English decisions, concluded that the justification failed as an absolute answer, but concluded, also on the authority of English decisions (amongst others Brierley *v.* Kendall and others, 21 L.J., Q.B., 161), that in such a case the measure of damages is the loss which the plaintiff has really sustained by being deprived of his possession of the goods too soon; and, further, that in this case the damages which could proverly be given for such deprivation were nominal. The debt with which the goods were charged was as found by the jury £908, while the value of the goods seized was, on the evidence of one of the plaintiff's witnesses, £514. His own evidence put the value higher, but less than the debt secured.

The defendants, by their summons on which the now impeached order was obtained, appear to have determined to act upon the decision to give up the pleas of justification, and admit their liability to some damages, and pay those damages into Court, and for that purpose took out a summons already mentioned.

There can be no question of the power of a Judge at chambers to grant such an application at any stage of a suit; such an application has been granted at the trial or even later after a rule for a new trial.

The 289th of the rules of the Court, of 1856, is as follows: "Even after the defendant has pleaded, a Judge's order may be obtained to withdraw the plea, in order to pay money into Court and plead such payment."

Such an order is made on terms. The terms are the payment of the costs of the application and the payment of the costs of the amendment; and, in order to avoid the delay and expense of an interlocutory taxation, the payment of such costs, like the payment of the costs of other amendments, may, instead of being made a condition precedent to the withdrawal of pleas and amendment, be made payable to the plaintiff in any event, but to stand over till the conclusion of the suit.

See Day's Common Law Procedure Act, 1878, p. 3, where he says, "Some Judges, in order to avoid interlocutory taxation, direct the costs to be the costs of the party (not amending) in the cause in any event, and this, which is a growing, is generally the most beneficial, practice."

In Jones v. Williams, 42 L.J., Q.B., p. 48, which was a case of an order for leave to pay into Court after a trial and new trial ordered, so free of objection are such terms that in that case the order was made by consent.

See an earlier case, Harold v. Smith, 29 L.J., Exch., p. 141, where an order for leave to amend was granted, and to pay into Court after plea pleaded, notice of trial given, and only five days before the first day of the sittings of the Court where the trial was to be held. In that case there had not been a trial, and the order was not by consent; but the payment of the costs of the application and the amendment was not made a condition precedent; but the order made was, "The defendant be at liberty to amend by the payment into Court of £79, the costs to be plaintiff's costs in the cause at all events;" and Bramwell, B., at p. 144, as to this portion of that order, says, "Which order was not in the usual terms, that the defendant had liberty to amend upon payment of the costs in the order, but in substance it amounted to the usual order to amend upon payment of the costs of the amendment. There was something not quite of course in the order, but in substance it amounted to the usual order to amend upon payment of costs occasioned by the amendment."

The order made in the present case as to these costs, the costs of the application and amendment, is in conformity with these precedents, and is, I think, beneficial, convenient, and just to both parties.

The plaintiff, under such an order, would have the benefit of those costs, whatever may be the result of the suit, even though the plaintiff should be nonsuited. It is true they are not taxable immediately, and if the defendants should recover any costs in the suit against the plaintiff, such costs may be set off against the costs of the amendment, but this is manifestly only just.

But it is, as I understand, contended that an order to amend and pay money into Court after a rule absolute for a new trial is improper, or, if made, that the payment of the costs of the first trial and of the costs of the rule for the new trial should be made a condition of the granting of such order.

There is no authority for either contention; the authorities and precedents are the other way (*see* Archbold's Queen's Bench Practice, Vol. ii, p. 1304, citing an anonymous case from Tidd, 672): "Money has been allowed to be paid into Court even after granting a new trial."

I have already referred to Jones *v.* Williams. In that case the plaintiff had a verdict at the first trial; the defendant obtained a rule absolute for a new trial on the ground that the damages were excessive and the verdict against the weight of evidence; the costs of the first trial were by the rule to abide the event. The cause was set down for the new trial on the 24th May, and on the 16th May the defendant obtained an order to amend his pleas by adding a plea of payment into Court of £5. In that case no condition was imposed in the order to amend as to the payment of the costs of the rule for the new trial or of the first trial; indeed, as already pointed out, the order was a consent order. This case, then, is an instance in which the order was made after a rule for a new trial, and without imposing terms as to the costs of the first trial.

It has not, so far as precedents show, been the practice to make the payment of the costs of a first abortive trial a condition in the somewhat analogous case of permitting a defendant after a rule for a new trial to withdraw pleas for the purpose of letting judgment go by default, or that of permitting a plaintiff to discontinue after a rule for a new trial, and this is so both where the costs of the first trial have been ordered to abide the event and where the rule is silent as to such costs; but in the present case the Court has not yet decided as to the costs of the first trial.

In Peacock *v.* Harris, 5 Ad. and Ellis 454, there was a verdict against defendant. He obtained a rule for a new trial, nothing being said therein as to the costs of the first trial, and then withdrew his pleas, suffered judgment by default, and on a writ on inquiry damages were assessed, but it was held that the costs of the first trial were not part of the costs in the cause to be paid by him. It was argued that by withdrawing his pleas he showed that the first verdict was right on the merits, and that he had no defence to the action. In that case he must have obtained a Judge's order for leave to withdraw his pleas. Yet it is evident that the condition of paying the costs of the first trial and the rule was not imposed upon him.

So in the case of a new trial obtained by plaintiff, and afterwards leave to discontinue granted, such leave is granted without imposing the condition of paying the costs of the first trial, if the rule far the new trial is silent as to these costs. (*See* Gray *v.* Cox, 2 Dowl, 220; Daniel *v.* Wilkin, 22 L.J., Exch. 73.)

The reason being that where there has been an abortive trial from the fault of neither party, neither party is to be mulcted in the costs of such a trial; not even that party, whether plaintiff or defendant, who by his subsequent acts shows that he ought not to have sued or defended as the case may be.

In the present case there is the additional reason why the order for leave to amend should have been granted without imposing any condition as to the costs of the first trial and the rule; that reason is, that the rule gave the costs of the rule to the defendant, and reserved the costs of the first trial for the consideration of the Court itself.

It is therefore, I think, plain that the order for leave to amend ought not to have given the costs of the first trial to the plaintiff, nor ought it to have given him the costs of the rule, nor ought it to have taken away those costs from the defendants.

The order was, I think, right in leaving those costs quite unaffected, as it does. But it was beneficial to the plaintiff to have the question of his right to those costs left open for future argument, and that the order does; hence the insertion of the concluding part of the order. This concluding part does, I think, substantially contain what I minuted on the summons, though it is not exactly the same. What was minuted was as follows:—

"I grant the application to withdraw the pleas to the second count, and to pay £10 into Court on the second count, and to plead it, and to give with plea a notice in mitigation of damages.

"The costs of this application and the costs of the amendment to be the plaintiff's costs in the cause in any event. As to the payment of the costs of the first trial of the issues raised on the second count, and the costs of the rule for a new trial by consent, this question to be reserved for the consideration of the Court at the time of the disposal by the Court of the question as to costs, which was reserved by the rule for the new trial; and if the Court should be of opinion that the payment of those costs ought properly to have been made a condition of the leave to withdraw plea and pay money into Court, then the plaintiff to have those costs, even though the Court would not have given them under the question reserved by the rule, and notwithstanding that as to the costs of the rule they are ordered thereby to be paid to the defendant

"The defendant undertaking not to proceed in the taxation of costs of the rule in the meantime, and until the Court shall otherwise order."

This portion of the order is not strictly an order at all, but is a reservation by agreement of parties of particular questions to be dealt with thereafter by the Court. This course, I am disposed to think, needed the assent of both parties. Hence it was so minuted by me, and being so minuted was so drawn up, and properly so. It may be that the words "by agreement of parties" would have more accurately expressed what I intended by my minute. I think the words used are substantially the same.

It is objected that the order is drawn up by consent, whereas no consent was given.

With regard to that it is unnecessary for me to refer to what took place before me in chambers further than this: That the clerk from the plaintiff's solicitor's office who appeared to oppose the summons offered no arguments, and gave no reasons why the application should not be granted. He stated simply that he opposed the application. I took time to consider the application, and on the occasion when I stated that I was prepared to make the order Mr. Fitzherbert (plaintiff's solicitor) requested that the question as to the costs of the rule should also be reserved as well as the question as

to the costs of the first trial. To this I assented, and required the defendants' undertaking not to tax the costs under the rule in the meantime.

The order conforms to the minute made by me, and read out to the parties at the time more than once without objection.

If it is alleged that there was no intention to assent to this reservation, the proper course was for the plaintiff's solicitor to have brought the matter before me in chambers. See Hall *v.* West, 13 L.J. Exch. 31, 1 D, and L.J., C. P., 412. There an order was drawn up as by consent; on an application by rule to set it aside on the ground that it was improperly drawn up as a consent order, the Court refused to entertain that objection, for that, if it was not correctly drawn up in that respect, he ought to have gone to the Judge who made it, and that the Court would assume it was right. Alderson, B. says, "You should have come to me to set it right before you came here." The rule was discharged, with costs.

If this were alleged as a misunderstanding, it should have been represented to me in chambers. If it had been then it is manifest, for the reasons above given, I must have refused to give to the plaintiff either the costs of the first trial or of the rule, and the order would have been silent as to them, as it in effect is—that is, it does not give them to either one side or the other, but leaves them as they were before the order.

The whole of this portion of the order is plainly beneficial to the plaintiff, and he has, from the date of the order till the present time, had the benefit of the defendants' undertaking not to tax or enforce the costs which the rule for the new trial gave him. The provision of the Resident Magistrates Act as to cost of actions in the Supreme Court has been given as a reason why the order ought to have contained a special order as to the costs of the cause. No instance has been pointed out; I have found none where such a provision has been made in such an order. While on the other hand, though the same necessity has existed, similar orders are found in the reports without any such provision. See Jones *v.* Williams, *supra;* see Waylett *v.* Windham, 33 L.J., Exch. 172, in which it is clear that no such provision had been imposed when leave was given to amend. I find no mention in any book of practice of the imposition of such a condition in such an order.

Even if I were of opinion that the effect of that provision in the Resident Magistrates Act is that contended for by the plaintiff, where money has been paid into Court and taken out, I should, nevertheless, be of opinion that it was not a matter to be considered when granting leave to pay the money into Court. If the Legislature has in such cases, intentionally or not, deprived the plaintiff of his costs, it is not for this Court or any Judge of it to defeat by his order provisions of the law. Mr. Travers contended on showing cause that the provision applied only to the case of a recovery after trial, and not to the case of judgment by default, or judgment without a trial. If that be so, as I think it is, and the money paid into Court be taken out in satisfaction, then the plaintiff will get the costs of the cause, without any order of a Judge.

He would get those under the general rules relating to the payment of money into Court; and it is for that reason that no provision is, so far as I can find, ever made, in orders for the payment of money into Court, as to the costs of the cause.

When the order of the present case was made no question as to the operation of the provision of the Resident Magistrates Act was raised, nor did it occur to me; but being now raised I state that the inclination of my opinion is that the provision applies only to the case of a recovery after trial. I am disposed to think that the words at the end of the provision, "unless the Judge before whom the case is tried shall certify that the case was a proper case to have been so tried," may be held to reflect back, to use the words of Mr. Justice Coltman, on the former part of the section, and show that it applies only to cases where a trial of the cause has taken place, and does not apply to the case of a judgment by default, or judgment for a sum paid into Court without a trial. To use the language of Mr. Justice Coltman in Reed *v.* Shurbsole, 18 L.J., C.P., p. 225, "the effect would be very serious if any other construction were adopted: great embarrassment would be introduced, and plaintiffs would frequently be most unjustly deprived of their costs." This opinion was pronounced by him, and the majority of the Court (J. Cresswell only dissenting) on the construction of a very similar provision in the first English County Court Act. This decision was approved in Slates *v.* Mackie, 19 L.J., C.P. 89, in which case, on its being mentioned at the bar, with regard to Reed *v.* Shurbsole, that Cresswell dissented, J. Maule said, "Reed *v.* Shurbsole shows how strong the opinions of the majority of the Court must have been when they decided contrary to the view taken by my brother Cresswell."

In the judgments given by the Judges other than Coltman, the same stress is not laid upon the effect of the addition of the words providing for the certificate of the Judge at the trial.

See also per Williams, J., in Prew *v.* Squire, 20, L.J., C.P., 175, as to Reed *v.* Shurbsole.

If this be the true construction of the provision in the Resident Magistrates Act, then, if the plaintiff takes the money out of Court, he is entitled to the costs of the cause up to the time of the money being paid into Court.

However, the point has not, I believe, been heretofore decided; it was scarcely argued at the argument of the rule; Mr. Travers stating that his view was that the provision in the Resident Magistrates Act would not take away the costs, and consented, as I understand, to have the order varied or amended, so as to put the question beyond doubt. The Register informs me that the practice in this district has been to tax costs in such cases, on the supposition that the Resident Magistrates Act does not apply. This being so, I feel myself at liberty to concur with my Brother Williams that in this case the order may be amended so as to put the question in this case beyond doubt. I ought not to omit to observe that this amendment ought to have been asked for by the plaintiff of the Judge who made the order, for until he had decided that question it was, I think, improper to appeal to the Court, and had that objection been raised by Mr. Travers I should have felt bound to consider whether this Court could properly by its rule sanction a practice which I am disposed to think improper. Such a practice is calculated to increase the cost of litigation. There should be no appeal to the Court till it is ascertained that the Judge at chambers has decided the point.

The only remaining objection is one not to the order itself, but to the defendants' delay in the drawing up and service of it.

The order was obtained in vacation, and the defendants seem to have assumed that, as no pleadings are deliverable during vacation, in this case the plea of payment into Court could not be delivered till after the vacation, which expired on the 10th of March. Whatever the reason may have been, the order was not served until the 12th March.

It was contended that the mere non-service for this is an abandonment or waiver of the order.

I am inclined to think that this is not the result of the authorities or the meaning of the rule which exists as to the matter. I think that, if the party who obtains an order does not serve it forthwith and if the other side has a step to take within or at a particular time, then, if the order which would have prevented or stayed that step is not served before that time, the step may be taken, and stands valid; but if, though there be a step to be taken, yet there is no fixed time for the taking it, then, if the order is served before taking the step, the opposite side has lost his opportunity of treating the order as waived, and if he takes the step afterwards the step is invalid if the order would have made it so if it had been served forthwith after it was made. *See* Charge v. Farhall, 4 B. and C., 866; Kenny v. Hutchinson, 9 L.J., N.S., Exch. 60.

I find no case of an order having been set aside on the ground of not having been served forthwith. The questions as to whether an order may be treated as waived because of delay in service have arisen on applications by the party who obtained the order to set aside a step taken by the opposite side. The only case I have found where delay in service was urged as a ground for setting the order aside was Landford v. Alcock, 12 L.J., Exch. 40; but the order was held valid and subsisting on the ground that the opposite side could not have taken another step. At the argument of this rule I asked for a case in which an order had been set aside on the ground of delay in service, but none was pointed out to me.

It seems to me that, as the plaintiff took no steps between the making the order, and the service was not prejudiced by the delay, he cannot use each delay as a ground for setting aside the order, and that his steps taken subsequent to the service are not valid. I also think that there was delay not accounted for in taking steps to set aside the order. Inasmuch as the plaintiff was enjoying the advantages of the defendants' undertaking to suspend his right to enforce the costs of the rule of the new trial, his application to the Court ought to have been without any delay.

As to the imputations of fraud and misconduct that have been so freely made, I think that they deserve no further remark than that they are, in my opinion, entirely unsupported.

The rule is made absolute for amending the order by the addition of the following terms:—

If the plaintiff shall take out of the Court the sum paid in in satisfaction of the claim in respect to which it is paid in, he shall be entitled to such costs up to the time of payment into Court as he would have been entitled to if the cause of action in reference to which the money paid into Court were one not within the jurisdiction of the Resident Magistrate's Court.

Each party will pay his own costs of this rule.

Mr. Justice Williams delivered judgment as follows:—

In this case the plaintiff brought his action on a declaration containing two counts.

At the trial the plaintiff obtained a verdict on the first count for a trifling amount, and on the second for the sum of £500. The defendants subsequently obtained a rule *nisi* to enter a verdict for the defendants on the first count, and for a new trial on both counts.

The rule was made absolute for a new trial of the issues raised on the second count, but the verdict on the first count was left undisturbed.

It was ordered by the rule absolute that the costs of an incident to the first trial should abide the further order of the Court, and that the plaintiff should pay to the defendants the costs of and incident to the rule. The rule was made absolute on the 8th January, and on the 15th February the defendants took out a summons asking for leave to withdraw the pleas to the second cause of action, to pay into Court the sum of £10, in respect of it to plead such payment into Court, and to be allowed to add to the plea a notice that they would give in evidence in mitigation the matters set forth in the plea proposed to be withdrawn. On the 22nd February a Judge's order was made on the terms of the summons. The order also provided that the costs of and incidental to the order and the costs of the amendment should be plaintiff's costs in the cause in any event. The order then proceeded in these terms: "And I do also further order, by consent, that the question as to payment of the costs of the first trial of the issues raised on the second count and of the costs of the rule for a new trial, as affected by this application, be reserved for the consideration of the Court at the time of the disposal by the Court of the questions as to costs which are reserved by rule for the new trial, the defendants also undertaking in the meantime not to proceed with the taxation of costs granted by the said rule." This is the order that the plaintiff now seeks to set aside. There can be no doubt as to the power of a Judge at any time to make an order allowing a defendant to withdraw a plea and pay money into Court. The interests of a plaintiff are protected by the rules which give him his costs up to the time of the payment of the money into Court if he choose to accept the amount paid in satisfaction. If he declines to accept it he declines at his own risk, and if he fails to recover more than the amount paid in he has to pay the defendant's costs incurred subsequently. If the defendant pays money into Court he admits the cause of action, and the plaintiff is freed from the necessity of leading any evidence in support of his claim except such as tends to show the amount of damage he has sustained. *Primâ facie* therefore it is for the advantage of a plaintiff that at any stage of the proceedings the defendant should be allowed to pay money into Court, as by so doing he admits a wrong done to the plaintiff, and leaves open only the question of how much the plaintiff is entitled to recover. It was suggested by the plaintiff inthe present case that, as the Court, had decided on the rule for a new trial that on the second count the plaintiff would be entitled to recover only nominal damages, he was prejudiced by the leave given to the defendants. If the Court has in effect so decided, no doubt a Judge at *nisi prius* would be bound by such decision, and it would have been his duty in case the

plaintiff, instead of taking the money out of Court, had replied damages ultra, to have directed the jury accordingly, and the plaintiff would therefore gain nothing by a second trial, although, if the plaintiff considered the law as to the measure of damages untenable, he could have come to the Court to review the Judge's direction, and reconsider their own decision. Suppose, however, that the record had remained unaltered, still the law as to the measure of damages being the same the Judge would have been equally bound to follow such direction. The extraordinary argument used by Mr. Barton, that if the record had been left unaltered he might have induced the jury to defy the direction of the Judge, and to give a verdict contrary to law, is, of course, no reason for allowing the defendant to withdraw his pleas. Such an unfortunate contingency might, moreover, happen with equal probability with the record in its altered as well as in its unaltered state. Another objection urged was, that it took away from the plaintiff the power to apply to amend by adding a count. Clearly it does nothing of the kind. I can only say that if the plaintiff had wished to amend it is strange he has not long ago made an application for the purpose.

Apart, therefore, from any effect the 28th section of the Resident Magistrates Act may have, the first part of the order is unobjectionable, unless it is rendered objectionable by something inserted in the latter part of the order, or from the omission of some condition which should have been imposed by the order on the defendants. It seems to me that the latter part of the order which purports to be by consent has practically no effect at all. It leaves in *statu quo* the question of the costs of the rule and of the first trial, and so far as it has any operation it operates in favour of the plaintiff, as it suspends the issuing of execution by the defendant for the costs he had obtained by the rule. If this part of the order is stated erroneously to have been made by consent, it is clear that the Judge who made the order should have been resorted to, so that any doubt as to what actually took place on the making of the order should be set at rest, and the order, if necessary, amended. The Court will not now interfere with the order on the ground of this mistake, if mistake it be, unless it also appears that the order is impeachable by reason of some condition not having been imposed on the defendants which ought to have been imposed. Ought, then, any condition to have been imposed on the defendants either as to paying the costs of the first trial, or as to abandoning the costs he had obtained by the rule for a new trial. The order leaves both these matters as they were left by the Court, and does not prevent the Court hereafter from giving the plaintiff the costs of the former trial if it thinks fit to do so. I see no reason why the order should have imposed any such conditions. When a defendant upon being defeated at his first trial obtains a rule for a new trial, and then withdraws his pleas and suffers judgment by default, he has not to pay to the plaintiff the costs of the first trial (Peacock *v.* Harris, 5 A. and E., 454). So also when a plaintiff defeated at the first trial obtains a rule for a new trial and then discontinues, he has not to pay the defendant the costs of the first trial (Jolliffe *v.* Mundy, 4 M. and W., 502). Why, therefore, when a defendant, after having obtained a rule for a new trial, pays money into Court, must it be made a condition of his doing so that he should pay the costs of the first trial? These costs fall to the ground unless some mention of them is made in the rule for a new trial. In the present case the costs were reserved for the subsequent decision of the Court. It would have been manifestly wrong for the Judge to have adjudicated upon the question, and thus have prevented the Court from exercising the power it had reserved to itself. It would have been also wrong for the Judge to have interfered with the costs of the rule that had been given by the Court. It by no means follows that because the defendant pays money into Court he was not justified in moving for a new trial; and, unless it were made pefectly clear to the Judge that the rule had been altogether futile, there is no reason why the defendant should have been made to waive the costs the Court had given him.

The question in the case which has given me the most difficulty is as to the effect of section 28 of "The Resident Magistrates Act, 1867," in depriving plaintiff of his costs. There is no need on the present occasion to decide the precise effect of that section. The construction placed upon it by Mr. Barton may or may not be the correct one, but at any rate a great deal of argument could be adduced favourable to Mr. Barton's view. If Mr. Barton's view on this point is correct, and if it is necessary in any action brought in the Supreme Court, where the plaintiff has recovered a less sum than he might have recovered in the Magistrate's Court, that in order to entitle him to any costs there must be a trial and a certificate of the presiding Judge, then it might follow in the present case that if the plaintiff took out of Court the money paid in he would be entitled to no costs at all. I think that if the defendants obtained the concession of being allowed to pay money into Court it would have been a fair condition; that the plaintiff should not run the risk of being possibly deprived of his costs by a side wind. The question, however, of the construction of the Magistrates Act was not raised before the Judge who made the order, and the plaintiff has therefore himself to thank if any reference to it was omitted in the order. It was admitted, as I understood, by Mr. Travers, that, according to his construction of the order and of the Magistrates Act, it was neither the intention of the order nor the effect of the Act to deprive the plaintiff of these costs. As this is so, though there may be some doubt as to whether it is strictly right to vary the order in this particular, yet it does not seem unreasonable that the Court should now so amend the order that the doubt might be set at rest.

I think that the order might be amended by making it an express term of the order granting leave at so late a stage to the defendant to withdraw his pleas, that if the plaintiff should take out of Court the sum paid in in satisfaction of his claim, the defendants should pay to the plaintiff such costs of the action up to the time of payment into Court as they would have had to pay if the action had been one which could not have been brought in the Magistrate's Court. This would, of course, leave untouched the question of the costs of the first trial and of the rule for a new trial.

As to the question of the order becoming abandoned by delay, I agree with what has been already said by the Chief Justice. With respect to the charges of fraud that were made at the hearing, I can only say that there is not the slightest evidence before the Court to support them.

PETERS *v.* JOSEPH AND ANOTHER.—*Charge* 11.

JUDGMENT of their Honors the Chief Justice and Mr. Justice Richmond, delivered on Tuesday, 8th January, 1878:—

In this case the defendants obtained a rule *nisi*, in accordance with leave reserved at the trial, to enter the verdict for them on the first count, on the ground that all the goods proved to have been taken by the defendants were comprised in the bill of sale.

The question is, whether the expression "stock-in-trade," where used in the bill of sale, comprises tools used by the plaintiff in his trade as a cabinetmaker; if such tools are not so comprised, then the plaintiff is entitled to recover damages in respect of the taking of them under the first count, which is for conversion.

The bill of sale was, as appears from the recitals therein, given by the plaintiff, who was a cabinetmaker, to secure the defendants in respect of goods supplied by them to him for his business as a cabinetmaker.

It assigns all his stock-in-trade on premises mentioned, or other premises occupied or used by him in his business.

We think that there is a clear distinction between stock-in-trade and utensils or tools in trade; and that the first expression does not include what are tools of trade unless there be something in the context extending the expression beyond its ordinary meaning. The stock-in-trade would ordinarily include goods for sale and materials to be worked up into articles for sale; but under neither head would the implements for use in the manufacture of the articles for sale be included. As there is nothing in the bill of sale in this case which does extend the ordinary meaning of the expression stock-in-trade, we think that the defendants did not acquire the tools under it, and consequently that they were guilty of the conversion of the tools, and not entitled to have the verdict on the first count entered for them.

The defendants also obtained a rule *nisi* for a new trial on three grounds. First, that the findings of the jury on the second and third issues were against the weight of evidence, and against the direction of the Judge.

The declaration contains two counts. The first for conversion of the stock-in-trade and tools; the other for trespass on the premises, and the taking and converting the same stock-in-trade and tools.

The first and second issues seem to have been framed so as to be applicable to both counts so far as they aver a conversion of plaintiff's stock-in-trade and tools.

At the trial, and at the instance of the defendants, and against the contention of the plaintiff, the plaintiff was compelled to elect to limit his claim under the first count to the tools, and to proceed under the second count for the conversion of the stock-in-trade; and the jury were directed to deal with the first count as limited to the claim for the conversion of the tools, and they, in consequence, separated the damages, and gave £15 as damages under the first count.

The first and second issues were answered by the jury in the affirmative generally, and the defendants contend that there should be a new trial of the whole record, because of this general finding.

But the contention was based on a misunderstanding. The learned counsel for the defendants argued as if the jury had found that for the purposes of the first count the defendants had, against the direction of the Judge, converted the stock-in-trade as well as the tools, but, inasmuch as the jury were directed to deal separately with each count, limiting the first count to the tools, and the second to stock-in-trade, and to assess damages on each count separately, and as they did assess damages separately, we think, that it does not follow from the general affirmative finding on the first and second issues that therefore they found for the plaintiff under the first count that the defendants converted the stock-in-trade. On the contrary, we think that so much of the first and second issues as applies to the first count limited to the claim for conversion of the tools, is separable from the rest of these two issues, and that the findings upon these issues may be distributed; consequently that the defendants are not entitled to a new trial of these issues on the ground contended for.

The second ground on which a new trial was moved for was that the Judge at the trial misdirected the jury in directing them that the defendants' entry upon the plaintiff's premises and the seizing the goods under the bill of sale were unlawful, because such entry and taking too promptly followed the demand of payment made on behalf of the defendants. It appeared from the evidence that the demand, though made on the plaintiff personally, was made by one who did not show to the plaintiff that he had authority to receive payment, and that the seizure was made instantly after the demand without any interval whatever. This being the case the plaintiff had no time whatever allowed to comply with the demand by seeking the defendants and paying them. For this reason the entry and seizure were too promptly made, for there was no default until the plaintiff had had a reasonable time under the circumstances to comply with the demand; therefore there was no misdirection.

The last ground urged was that the damages given on the second count were excessive. The second count was for trespass on the plaintiff's premises and seizure of his goods, with a claim for special damage. The defendants pleaded a general denial, and justified under the bill of sale already referred to.

The justification failed by reason of the entry and seizure before default, inasmuch as the defendants entered and seized too soon after demand.

It appeared from the evidence that both the plaintiff and the defendants carried on business in Wellington, and within a very short distance of each other, consequently but a short time would under the circumstances have been reasonably sufficient for the plaintiff to seek the defendants.

If the plaintiff had been able to pay and had required time to get the money from his bank or other place of deposit, he might have been entitled to a reasonable time for that purpose; but it is manifest from the evidence that he was utterly unable and unprepared to pay.

The debt with which the goods were charged was, as found by the jury, £908. The value of the goods sold, if calculated on the basis of Diamond's valuation and the plaintiff's own evidence as to subsequent transactions, was £514. The evidence of the plaintiff put it higher, but we think it manifest that the weight of evidence was that the value of the goods was less than the amount of the debt. It

may be that the goods were misused in the course of the seizure, and that the sale was improperly conducted; but the defendants are not responsible for such misconduct if there were such in this action.

The action, though for trespass and conversion, yet is not a case of bare tort. The complaint of the plaintiff really is that the defendants in breach of the terms of the bill of sale entered and seized without allowing a reasonable time to elapse between demand and entry and seizure. We think that in such a case the measure of damages is the loss which the plaintiff has actually sustained by being deprived of the possession of the goods during the interval between demand and the expiration of such a time thereafter as was under the circumstances reasonable for permitting the plaintiff to comply with the demand.

In Brierly *v.* Kendall and others, 21 L.J., Q.B., 161, the Court, leave being reserved, reduced the damages to a nominal amount. That was an action of trespass and conversion for an entry and seizure under a bill of sale, without sufficient notice. In Chinnery *v.* Viall, 29 L.J., Exch. 184; Johnston *v.* Stears, 33 L.J., C.P., 132; and Donald *v.* Suckling, 38 L.J., Q.B., 240, per Shee, J., the principle of the decision in Brierly *v.* Kendall is explained as being that though the action was for a trespass, yet it was in substance for a breach of contract, and that in such a case the measure of damage is the loss which the plaintiff had really sustained by being deprived of the possession of the goods. See also Toms *v.* Wilson, 32 L.J., Q.B. 33, per Blackburn, J., where he intimates that in such a case as the present the damages must ordinarily be only nominal. In Brighty *v.* Norton, 32 L.J., Q.B. 39, where the jury gave about the value of the goods as damages, no question was raised as to the measure of damages, or as to the amount given by the jury.

In Massey *v.* Sladen, 38 L.J., Exch. 34, the Court apparently were of opinion that, but for the agreement at the trial as to the amount of damages, it would have been difficult to establish a right to more than nominal damages.

In the present case nominal damages were perhaps all that the jury should have given.

If, indeed, the jury had given somewhat more than nominal damages we should not have been disposed to disturb the verdict, but the amount found by the jury on the second count is so excessive that we think there must be a new trial of the second count. This will involve a new trial of all the issues framed thereon and on the pleadings, thereby including the first and second issues, so far as they apply to the stock-in-trade.

No objection was made by the defendants on the ground that the bill of sale contains no stipulation for quiet enjoyment by the plaintiff of the stock-in-trade till default. We therefore give no opinion whether, in the absence of such a stipulation, the plaintiff had such an interest in the stock-in-trade as to enable him to recover damages for the seizure of them by the defendants.

The question of the costs of the first trial must be reserved till after the new trial, but, as the defendants have succeeded in this rule, the plaintiff must pay the costs of the rule.

APPENDIX C.—Charge 9.

Hair *v.* Borough of Wanganui.

Between Jane Hair, plaintiff, and the Mayor, Councillors, and Burgesses of the Borough of Wanganui, defendants.

Declaration.—On Friday, the 23rd day of March, 1877.

The plaintiff, by Henry Hamersley Travers, her solicitor, saith,—

1. That she is in the lawful possession of a parcel of land covered with water, forming part of Sections numbered respectively 16 and 17, in the Wanganui District, in the Provincial District of Wellington, on the right bank of the Wanganui River, and commonly known as Virginia Water, and which is surrounded by other parts of the said Sections numbered respectively 16 and 17, a plan of which said land so covered with water is hereunto annexed.

2. That at a distance of about two hundred and three chains from Virginia Water aforesaid is a lake named Westmere, the waters of which flow to the sea without passing into Virginia Water.

3. That the water of Virginia Water is pure and wholesome water, but the water of Westmere Lake is foul and impure, and is resorted to by horses, cattle, and swine, and other animals.

4. That the defendants have threatened to construct an aqueduct from Westmere Lake aforesaid to Virginia Water for the purpose of carrying water from Westmere Lake aforesaid into Virginia Water, whereby the level of Virginia Water will be much increased in height, and the water thereof will be polluted.

5. That the defendants have prepared specifications for the construction of such aqueduct, and have, by advertisement published in newspapers published and current in the Town of Wanganui, called for tenders for the execution of the said works, and the following is a portion of the specification for public tender by the defendants:—

"The work required to be done consists of the forming and filling in of a channel from a peg on the southern bank of the Westmere Lake, about a chain east of its outlet, to one on the edge of Virginia Water at its south-eastern extremity, a total distance of two hundred and three chains, and laying a line of six-inch glazed socket pipes therein.

"He will have to commence the work within three days after notice that the first lot of tiles are ready, and must complete the work within sixty days from the date of the commencement, under a penalty of five pounds for each week or part of a week during which he fails to complete the work. Should the work be completed within the sixty days a bonus of two pounds per day will be paid for every day within the time above mentioned.

"The pipes for the work will be supplied by the Wanganui Borough Council, and will be delivered to the contractor at the Corporation Wharf or other place in town determined by the Council."

6. That the plaintiff has not granted to the defendants any right, title, license, or authority whatsoever to bring or run the waters of the Westmere Lake, or any other waters, into Virginia Water,

and avers that the bringing and running of the waters of Westmere Lake into Virginia water will greatly damage the plaintiff.

Wherefore the plaintiff claims that the defendants may be restricted by the injunction of this honorable Court from running the waters of Westmere Lake aforesaid into Virginia Water, and for uch further and other relief as to this Court shall seem meet.

Affidavit of the Plaintiff.

I, Jane Hair, of Wanganui, in the Provincial District of Wellington, swear,—

1. That I am in the lawful possession of a piece of land covered with water, forming part of sections numbered respectively 16 and 17, in the Wanganui District, in the Provincial District of Wellington, on the right bank of the Wanganui River, and commonly known as Virginia Water, and which is surrounded by other parts of the said Sections numbered respectively 16 and 17, a plan of which said land so covered with water is hereunto annexed and marked "A."

2. That at the distance of about two hundred and three chains from Virginia Water aforesaid is a lake named Westmere, the waters of which flow to the sea without passing into Virginia Water.

3. That the water of Virginia Water is pure and wholesome water, but I believe the water of Westmere Lake is impure, and is resorted to by horses, cattle, and swine, and other animals.

4. That the defendants have threatened to construct an aqueduct from Westmere Lake aforesaid to Virginia Water for the purpose of carrying water from Westmere Lake aforesaid into Virginia Water, whereby the level of Virginia Water will be much increased in height and the water thereof will be polluted.

5. That the defendants have prepared specifications for the construction of such aqueduct, and have, by advertisement published in newspapers published and current in the Town of Wanganui, called for tenders for the execution of the said works, as the following is, as I verily believe, a portion of the specification of the said works as prepared and submitted for public tender by the defendants:—

"The work required to be done consists of the forming and filling in of a channel from a peg on the southern bank of the Westmere Lake, about a chain east of its outlet, to one on the edge of the Virginia Water at its south-eastern extremity, a total distance of two hundred and three chains, and laying a line of six-inch glazed socket pipes therein.

"He will have to commence the work within three days after notice that the first lot of tiles are ready, and must complete the work within sixty days from the date of the commencement, under a penalty of five pounds for each week or part of a week during which he fails to complete the work. Should the work be completed within the sixty days a bonus of two pounds per day will be paid for every day within the time above mentioned.

"The pipes for the work will be supplied by the Wanganui Borough Council, and will be delivered to the contractor at the Corporation Wharf or other place in town determined by the Council."

6. That I never granted to the defendants any right, title, license, or authority whatsoever to bring or run the waters of Westmere Lake, or any other waters, into Virginia Water; and I verily believe that the bringing and running of the waters of Westmere Lake into Virginia Water will cause me very great damage.

7. That I do not know upon what grounds the defendants justify, or pretend to justify, the act proposed to be done by them as aforesaid.

8. That I verily believe that, unless forthwith restrained by the injunction of this honorable Court, the defendants will conduct the waters of Westmere Lake to, and pour the same into, Virginia Water as aforesaid.

JANE HAIR.

Sworn at the Town of Wanganui, this third day of April, 1877, before me,—

SAML. F. FITZHERBERT,
A Solicitor of the Supreme Court of New Zealand.

Affidavit of Mr. H. Travers.

I, Henry Hamersley Travers, of the City of Wellington, solicitor, swear,—

1. I have been informed and verily believe that workmen employed by the defendants in the execution of the works mentioned in the declaration have already commenced cutting a drain near to Virginia Water, for the purpose of conveying the waters of Westmere Lake into Virginia Water, before the expiration of the time given to the defendants to plead to this action, unless the defendants be at once restrained by the injunction of this honorable Court from proceeding therein.

HENRY H. TRAVERS.

Sworn at the City of Wellington, this seventh day of April, 1877, before me,—

J. G. ALLAN,
A Solicitor of the Supreme Court of New Zealand.

Order for Provisional Injunction.

ON Saturday, the seventh day of April, 1877.

On reading the writ and declaration in this action, and the affidavit of John Bates of the service thereof, and the affidavits of the plaintiff and of Henry Hamersley Travers, all of which were filed in this Court on this seventh day of April, one thousand eight hundred and seventy-seven, it is ordered, that a provisional injunction be issued under the seal of this Court, restraining the defendants, pending the further order of this Court, from running the waters of Westmere Lake into the waters of Virginia Water.

(L.S.) By the Court.

WRIT OF INJUNCTION.

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland, Queen, to the Mayor, Burgesses, and Councillors of the Borough of Wanganui, their servants, agents, and workmen.

WHEREAS Jane Hair, of Wanganui, in the Provincial District of Wellington, widow, hath brought an action against you the said Mayor, Burgesses, and Councillors, in our Supreme Court of New Zealand, wherein she complains that you threaten and are about wrongfully to run the waters of a certain lake near Wanganui aforesaid called Westmere Lake into a certain lake there called Virginia Water, the land covered by the waters of which is in the lawful possession of the said Jane Hair: We therefore do strictly enjoin and command you the said Mayor, Burgesses, and Councillors, and all and every the persons before mentioned, under peril of the further process of the said Court, that you and every of you do absolutely desist from running the waters of the said lake near Wanganui aforesaid called Westmere Lake into the said lake there called Virginia Water, the land covered by which is in the lawful possession of the said Jane Hair, and from committing any further or other waste or spoil upon the said land covered by the waters of Virginia Water until our said Court shall make order to the contrary hereof.

(L.S.) Witness, Christopher William Richmond, a Judge of the Supreme Court of New Zealand, at Wellington, this seventh day of April, 1877.

Affidavit of John Bates.

I, John Bates, of Wanganui, in the Provincial District of Wellington, law clerk, make oath and say,—

That I did, on Wednesday, the eleventh day of April, one thousand eight hundred and seventy-seven, at the Town of Wanganui, in the Provincial District of Wellington, personally serve William Hogg Watt, Mayor of the Borough of Wanganui, in the said provincial district, with a true copy of the writ of injunction hereunto annexed marked "A," which writ of injunction appeared to me to have been regularly issued out of this honorable Court.

JOHN BATES.

Sworn at Wanganui, in the Provincial District of Wellington,
this fourteenth day of April, 1877, before me,—
GEORGE HUTCHISON,
A Solicitor of the Supreme Court of New Zealand.

I admit service this day upon me of the above writ.—CHAS. H. BORLASE, Borough Solicitor, Wanganui.—11th April, 1877.

This is the writ of injunction marked "A" referred to in the annexed affidavit of John Bates, sworn before me this fourteenth day of April, 1877.—GEORGE HUTCHISON, a Solicitor of the Supreme Court of New Zealand.

PLEAS.

The following pleas were delivered on the twenty-third day of May, one thousand eight hundred and seventy-seven:—

The twenty-third day of May, one thousand eight hundred and seventy-seven, the defendants, by Charles H Borlase, their solicitor, say,—I. They deny all the material allegations of the plaintiff's declaration. II. And for a further plea they say,—

1. At the time of the commission of the alleged grievances by the defendants the said Virginia Water was and still is a small lake situated partly upon the land of the plaintiff and partly upon other land not the property of the plaintiff nor in her possession.

2. Before and at the time of the commission of the alleged grievances, a portion of the water of the said lake called Virginia Waters, were lawfully conducted through a certain aqueduct to the Borough of Wanganui, for the supply of the inhabitants thereof with pure and wholesome water.

3. By reason of such water supply to the said borough, the water of the said lake called Virginia Waters became lowered from its usual and proper level, so that watering places theretofore used by persons having lawful right to use the same were taken away and interrupted, and the waters of the said Virginia Water had also become insufficient to supply the lawful requirements of the said borough.

4. In order to restore the waters of the said lake called Virginia Water to its usual and proper level, and thereby render it sufficient for the supply of the said Borough of Wanganui with water, and also for the purpose of preventing injury to the persons entitled to water-rights and easements as aforesaid, the defendants obtained from the owner of the said Westmere Lake leave and license to divert a sufficient portion of the said Westmere Lake into the said lake called Virginia Waters, to restore and keep the waters thereof to the usual and proper level.

5. Thereupon the defendants prepared the specifications and called for the tenders mentioned in the fifth paragraphs of the plaintiff's declaration for the purpose and with the intention of introducing into the Virginia Waters from the said Westmere Lake a regulated supply of water sufficient to restore and keep the water of the said Virginia Waters to its usual and proper level, and for no other purpose whatsoever, which are the alleged grievances in the plaintiff's declaration mentioned.

6. The waters of the said Westmere Lake are, and before and at the time of the commencement of this action were, equal in quality to the water of the said Virginia Water, and the said proposed aqueduct from Westmere Lake to Virginia Water will, when completed, introduce into the said Virginia Waters a regulated supply of water, equal in quality as aforesaid to the water of the said Virginia Waters, and not more than sufficient to restore such level as aforesaid, and those defendants deny that the waters of the said Westmere Lake are foul and impure, and they also deny that they ever threatened or intended to increase the height of the said Virginia Waters beyond its usual proper level, or to pollute the waters thereof in any manner.

7. The defendants have not entered or trespassed upon any portion of the plaintiff's lands, nor have they ever threatened nor do they intend so to do, for the purpose of the construction of the said proposed aqueduct nor will the said aqueduct or any portion thereof be constructed upon any portion of plaintiff's land.

8. The defendants deny that the bringing of the said regulated supply from the said Westmere Lake into the said Virginia Waters will cause any damage whatsoever to the plaintiff.

9. "The Municipal Corporations Waterworks Act, 1872," has been duly brought into operation in the Borough of Wanganui, Province of Wellington, by an Ordinance of the Superintendent and Provincial Council of Wellington, made and passed in the twenty-sixth session of the said Council, and being numbered three of the Acts of the said session.

10. The said Virginia Waters are situated within a district duly taken within the meaning of the said "Municipal Corporations Waterworks Act, 1872," for the purposes of the water supply of the said Borough of Wanganui, before the commission of any of the said alleged grievances, and said works complained of by the plaintiff in this action were being executed in pursuance of the powers conferred by the said Act.

11. In the exercise of the powers given to the defendants by the said Act, it was the duty of the defendants to do as little damage as can be, and in all places where such could be done to restore or otherwise provide for the use of adjoining lands watering-places, in place of such as had been taken away and interrupted by the defendants in the carrying out of the undertaking to supply water to the said Borough of Wanganui.

12. Before the commission of any of the alleged grievances by the defendants set forth in the declaration, the defendants, in the carrying out of the said undertaking, had taken away and interrupted watering-places then being lawfully used for adjoining lands, and the restoration of the said Virginia Water to its usual and proper level would restore such watering-places so taken away and interrupted as aforesaid, and would diminish or entirely remove all damage to persons having lawful rights and easements in the waters of the said Virginia Water.

Replication.

The following replication was delivered on the 29th day of May, 1877:—

The plaintiff, by Henry Hamersley Travers, her solicitor, says,—

I. As to the defendants' first plea—1. That she takes and joins issue thereon.

II. As to the defendants' second plea—

1. That she denies that any part of the land covered by the waters of the lake called Virginia Water was, at the time in the second plea mentioned, the property or in the possession of any other person than the plaintiff.

2. That she admits that, before and at the time in the second paragraph of the second plea mentioned, a portion of the waters of Virginia Water was being conducted to the Borough of Wanganui, but she denies that the same were lawfully so conducted.

3. That she admits that, by reason of the taking of the waters from Virginia Water, as in the second plea alleged, the waters of the said lake became lowered as in the third paragraph of the third plea alleged.

4. That she denies that any persons other than herself had any lawful right to use, or lawfully used, watering-places in connection with the waters of the said lake either for adjoining lands or otherwise.

5. That she denies all other material allegations in the second plea.

Application for Dissolution of Injunction.

The following notice of motion to dissolve injunction was delivered on the 28th day of May, 1877:—

In the Supreme Court of New Zealand, Wellington District. Between Jane Hair, plaintiff, and the Mayor, Councillors, and Burgesses of the Borough of Wanganui, defendants.

Take notice that, on Tuesday, the nineteenth day of June, one thousand eight hundred and seventy-seven, or as soon hereafter as counsel can be heard, the defendants will move the Supreme Court, at the Supreme Courthouse, Wellington, at eleven o'clock in the forenoon, that the injunction granted in this cause *ex parte*, on the seventh day of April last past, may be dissolved, and that the order or rule of Court granting the same may be discharged, with costs of this motion to be paid by the plaintiff, on the following grounds:—

1. That the plaintiff has no equity.

2. That the plaintiff has not shown any urgency in the case sufficient to justify an *ex parte* application for injunction.

3. That no such urgency in fact existed.

4. That the plaintiff concealed from the learned Judge who granted such injunction material facts, which ought to have been disclosed to him.

5. That the plaintiff should have set forth, in her declaration, the facts showing that her alleged lawful possession of the said parcel of land covered with water was lawful.

6. That the plaintiff misrepresented to the Court material facts, by falsely stating or implying that the said Virginia Water is surrounded by plaintiff's land, whereas in fact said water is only partially on land in the possession of the plaintiff.

7. That the plaintiff improperly concealed from the Court that the defendants were acting in the premises under and in pursuance of statutory powers which they are not alleged to have in any way misused.

8. And upon the grounds set forth in the affidavit of William Hogg Watt, sworn in this cause the twenty-eighth day of May, one thousand eight hundred and seventy-seven.

Dated this twenty-eighth day of May, A.D. 1877.

To the plaintiff, Mrs. Jane Hair, and to F. M. Betts, Esq., her Solicitor.

Chas. H. Borlase,
Solicitor for the above-named defendants.

THE following affidavit was filed by the defendants in support of intended motion:—

Affidavit of W. H. Watt.

I, William Hogg Watt, of Wanganui, in the Province of Wellington, merchant, make oath and say,—

1. On the fourth day of April last passed I was served with a true copy of the writ and declaration in this action, a copy of which declaration marked "A" is hereunto annexed (but which said copy writ is not in my possession), and on the eleventh day of April last past I was served with a copy writ of injunction, a copy whereof is also hereunto annexed marked "B."

2. At the time of the service of the said writ and declaration I held, and still hold, the office of Mayor of the said Town of Wanganui.

3. "The Municipal Corporations Waterworks Act, 1872," has been duly brought into operation in the Borough of Wanganui by an Ordinance of the Superintendent and Provincial Council of Wellington passed in the twenty-sixth session of the said Council, and being numbered three of the Acts of the said session.

4. The said Virginia Waters are situate within a "district" which, I am advised and believe, was, before the commencement of any waterworks by the defendants, duly taken within the meaning of the said "Municipal Corporation Waterworks Act, 1872," for the purpose of the water supply of the said Borough of Wanganui; the waterworks complained of by the plaintiff in this action were, until restrained by the injunction of the Supreme Court, being carried out under and pursuance of the powers vested by the said Act in the Council of the said Borough of Wanganui.

5. The Virginia Water mentioned in the declaration is a small lake situate partly on the land claimed by the plaintiff in the declaration and partly upon other land not the property of the plaintiff nor in her possession.

6. Some time since a portion of the waters of the said Virginia Water were, under the powers conferred by the said Act, conducted from the said lake through a certain aqueduct to the said Borough of Wanganui for the supply of the inhabitants thereof with pure and wholesome water.

7. By reason of such water supply to the said borough the said Virginia Lake has lately become much lowered from its usual and proper level, so that watering-places theretofore used by persons having lawful right so to do were taken away and interrupted, and the waters of the said Virginia Water had become insufficient to supply the lawful requirements of the said borough, and also to supply such watering-places.

8. In order to restore the said lake to its proper level, and thereby render it sufficient for the supply of the said Borough of Wanganui with water, and also for the purpose of preventing injury to the persons entitled to the water-rights and easements aforesaid, the defendants obtained from me leave and license to divert a sufficient portion of the waters of Westmere Lake, which is a piece of water situate upon lands my property, into the said Virginia Water, to restore and keep the original level thereof.

9. The waters of the said Westmere Lake are pure and wholsome, and of good quality.

10. The Council of the said Borough of Wanganui, upon obtaining my leave and license so to divert the Westmere Lake, caused the specifications to be prepared and the tenders to be called for mentioned in the fifth paragraph of the plaintiff's declaration.

11. In pursuance of the said call for tenders a contract was, on the twenty-seventh day of March, one thousand eight hundred and seventy-seven, made by the said Council with one James Donovan.

12. The said works would, I am informed and believe, have taken about sixty days to execute, and it would have been necessary to complete the execution thereof before any water could have been introduced from Westmere Lake into Virginia Water by the defendants.

13. The influx of water from the one lake into the other was and is intended to be duly regulated so as to keep the waters of the said Virginia Water to their proper and original level and no more.

14. It is not necessary, for the purpose of constructing any part of the proposed aqueduct, or of constructing any of the proposed works, to enter upon the lands in possession of and claimed by the plaintiff, nor will the said aqueduct or works, or any part thereof, be constructed upon any portion of the said lands.

15. I do not believe that the said regulated supply would or will cause, or is at all likely to cause, any damage or injury whatever to the plaintiff in or to the said Virginia Water, but, on the contrary, the said regulated supply would preserve uninjured the water-rights and easements of the plaintiff, as the same had existed before the level of the said Virginia Water had been lowered as hereinbefore mentioned.

16. The continuance of the said injunction is causing injury to the Borough of Wanganui and to the contractor who has contracted with the defendants for the making of the said aqueduct from Westmere Lake to Virginia Water.

17. No Crown grant has yet been issued to any person of the said Sections numbered respectively 16 and 17, in the Wanganui District, in the Provincial District of Wellington, in the plaintiff's declaration mentioned.

W. H. WATT.

Sworn at Wanganui aforesaid, this twenty-eighth day of May, 1877, before me,—

SAML. S. FITZHERBERT,
A Solicitor of the Supreme Court of New Zealand.

AFFIDAVITS of Jane Hair, F. M. Betts, and H. H. Travers, filed for the purpose of showing cause.

Affidavit of Plaintiff.

I, Jane Hair, of Wanganui, in the Provincial District of Wellington, widow, swear,—

1. I am the plaintiff in this action.

2. I admit that "The Municipal Corporations Waterworks Act, 1872," was duly brought into operation in the Borough of Wanganui, as in the third paragraph of the affidavit of William Hogg Watt, filed herein on the nineteenth day of June, one thousand eight hundred and seventy-seven, mentioned.

3. I deny that the land covered with water, and constituting the lake called Virginia Water, in the said affidavit mentioned, was taken for the purpose in the fourth paragraph of the said affidavit of the said William Hogg Watt mentioned.

4. I believe that, on or about the twenty-seventh day of January, one thousand eight hundred and seventy-five, a notice was published in the *New Zealand Gazette*, and also in a newspaper published and current within the Borough of Wanganui, of which the following is a copy:—

"Notice is hereby given that the Council of the Borough of Wanganui has caused plans showing by metes and bounds all lands intended to be taken by the said Council for the purpose of supplying the said borough with water, and the locality from which the supply of water is intended to be derived, and all lands to a reasonable extent intermediate between the place of supply and the places to be supplied, and all lands included within the circuit of such last-mentioned places, together with a book of reference, to be deposited in the office of the Council.

"Dated this twenty-seventh day of January, one thousand eight hundred and seventy-five.

"CHAS. H. BORLASE,

"To Jane Hair, of Wanganui, Widow." "Solicitor to the Borough of Wanganui.

5. A copy of the said notice was served upon me on or about the said twenty-seventh day of January, one thousand eight hundred and seventy-five.

6. On or about the said twenty-seventh day of January, one thousand eight hundred and seventy-five, a notice was also served upon me, of which the following is a copy:—

"Notice is hereby given that the Council of the Borough of Wanganui require to purchase or take certain lands for the purpose of supplying the said borough with water, and you are hereby required to state the particulars of your estate and interest in the said lands and of the claims made by you in respect thereof. And that the lands so required to be purchased or taken as aforesaid comprise so much of the Sections numbered 16 and 17, in the Wanganui District, on the right bank of the Wanganui River, as is shown by metes and bounds in the plans and referred in the book of reference deposited at the office of the said Council. And that the Council is willing to treat for the purchase thereof and as to the compensation to be made for the damage that may be sustained by reason of the execution of the works.

"CHAS. H. BORLASE,

"Dated this 27th day of January, 1875. "Solicitor to the Borough of Wanganui.

"To Jane Hair, of Wanganui, Widow."

7. I believe that, on or about the ninth day of February, one thousand eight hundred and seventy-five, my solicitor, Mr. Francis Matthew Betts, of Wanganui, wrote and caused to be delivered to the Solicitor for the Borough of Wanganui a letter, of which the following is a copy:—

"Wanganui, 9th February, 1875.

"DEAR SIR,— "*Municipal Waterworks.*

"I am instructed by Mrs. Jane Hair to communicate with you in reference to proposed purchase of certain lands, part of country Sections 16 and 17, on the right bank of the Wanganui River. Mrs. Hair is the absolute owner of an estate and fee-simple in possession in the whole of the lands proposed to be purchased or taken, and is desirous of being informed at what time the Council intend to fence off the said land from her adjoining property. I may add that my client takes exception to the plan deposited at the Council Office in accordance with the provisions of section 4 of 'The Municipal Corporations Waterworks Act, 1872,' as insufficient, in that the boundaries of the land are not therein distinguished in such a manner as to show what land is really proposed to be taken. This has particular reference to a swamp shown on part of the north-western boundary line, and to several parts of the eastern boundary line.

"Requesting that this communication may be brought under notice of the Council, and a reply forwarded at your earliest convenience, "I have, &c.,

"Chas. H. Borlase, Esq., "F. M. BETTS.

"Solicitor to the Borough of Wanganui."

8. I believe that, on or about the twentieth day of March, one thousand eight hundred and seventy-five, my said solicitor received from the Solicitor of the Borough of Wanganui a letter, of which the following is a copy:—

"Wanganui, 30th March, 1875.

"DEAR SIR,— "Re *Waterworks.*

"The plan is now complete, and I understand you waive any right you may have to take advantage of the fact that fresh notices may be technically necessary. I am instructed by the Council to tender Mrs. Hair £500 as compensation for the land taken from her. Probably a formal tender will not be necessary, as in conversation you led me to believe that the above amount would not be accepted. "I have, &c.,

"F. M. Betts, Esq., Solicitor, Wanganui." "CHAS. H. BORLASE.

9. I believe that, on the thirtieth day of September, one thousand eight hundred and seventy-five, my said solicitor wrote and caused to be delivered to the said Solicitor for the Borough of Wanganui a letter, of which the following is a copy:—

"Wanganui, 30th September, 1875.

"DEAR SIR,— "*Municipal Waterworks.*

"I have at length received instructions from Mrs. Jane Hair to forward to you her claim in respect of the land proposed to be taken by the Municipal Council, and for damage to her property arising from the constructions and maintenance of the waterworks.

"Mrs. Hair claims from the Council the sum of £10,000 by way of compensation, and for such damage the Council have offered only the sum of £500. It will, I presume, become necessary to

ascertain the amount to be paid in manner provided by the Act of 1872 and the other Acts to which it refers, and I shall be obliged by your making arrangements therefore at your earliest convenience.

"I have, &c.,
"F. M. Betts.

"C. H. Borlase, Esq.,
"Solicitor to the Municipal Council, Wanganui."

10. I believe that, on or about the twenty-ninth day of October, one thousand eight hundred and seventy-five, my said solicitor received from the Solicitor of the said Borough of Wanganui a letter, of which the following is a copy:—

"Wanganui, 29th October, 1875.

"Dear Sir,— "Re *Waterworks.*

"I am instructed by the Borough Council to inform you that, at a Committee meeting held yesterday afternoon, it was determined not to continue the proceedings to acquire from Mrs. Hair the land upon which the Virginia Lake rests. It is proposed to carry the water-pipes into the lake within that portion thereof which is included within the road area, and not to carry them beyond. By doing this it is thought that Mrs. Hair's property will suffer very little, if any, damage.

"Yours faithfully,
"Chas. H. Borlase.

"F. M. Betts, Esq., Solicitor, Wanganui."

11. Except the said notice of the twenty-seventh day of January, one thousand eight hundred and seventy-five, referred to in the fourth paragraph of this my affidavit, I believe that no notice of the intention of the Council of the said borough to construct waterworks for the said borough has ever been published, and I am advised, and believe, that the plans deposited by them, as stated in the said notice, were incomplete and irregular.

12. Except the said notice of the twenty-seventh day of January, one thousand eight hundred and seventy-five, mentioned in the sixth paragraph of this my affidavit, no notice to treat was ever served upon me by or on behalf of the said borough, and I am advised that the said notice of the twenty seventh day of Jauuary, one thousand eight hundred and seventy-five, is irregular and invalid.

13. I deny that any part of the land covered by the waters called Virginia Waters belongs to any other person than myself; and I deny that any person or persons has or have ever acquired, or is or are now entitled to, any easement in respect of the said waters, or of the land covered by the same, or any part thereof.

14. I verily believe that all the works undertaken and executed by the Council of the Borough of Wanganui for supplying the said borough with water, so far as the same affect my land and Virginia Water aforesaid, were illegal, and I say that the same have caused me much damage and injury.

15. I believe that all the works undertaken by the said Council for the purpose of carrying the waters of Westmere Lake into Virginia Water, and the consent of the said William Hogg Watt to the performance of the said works, have been done and given since the first day of January, one thousand eight hundred and seventy-seven; and I believe that the same works cannot be carried out without doing me much damage.

Jane Hair.

Sworn at Wanganui, this nineteenth day of June, one thousand eight hundred and seventy-seven, before me,—
George Hutchison,
A Solicitor of the Supreme Court of New Zealand.

Affidavit of F. M. Betts.

I, Francis Matthew Betts, of the Town of Wanganui, solicitor, swear,—

1. I am the solicitor for the plaintiff in this action.

2. I have read the affidavit of the plaintiff sworn this day before George Hutchison, solicitor, and I say that the allegations therein contained, so far as they relate to me, and the correspondence between me and the Solicitor for the Borough of Wanganui therein contained, are true.

F. M. Betts.

Sworn at Wanganui, in the Provincial District of Wellington, this nineteenth day of June, 1877, before me,—
George Hutchison,
A Solicitor of the Supreme Court of New Zealand.

Affidavit of H. H. Travers.

I, Henry Hamersley Travers, of the City of Wellington, solicitor, swear,—

1. I am agent for Francis Matthew Betts, the present solicitor for the plaintiff in this action.

2. On or about the twenty-third day of May, 1877, the defendant delivered a plea in this action, of which a copy is hereunto annexed and marked "A."

3. On or about the twenty-ninth day of May, 1877, I caused to be delivered to the defendants a replication, of which a copy is hereunto annexed and marked "B."

Henry H. Travers.

Sworn at the said City of Wellington, this twenty-second day of June, 1877, before me,—
W. B. Edwards,
A Solicitor of the Supreme Court of New Zealand.

Tuesday, 10th July, 1878.

(Before his Honor the Chief Justice and his Honor Mr. Justice Richmond.)

Judgment.

The Chief Justice delivered judgment in this case, as follows:—

This is a motion to dissolve an injunction granted by Mr. Justice Richmond *ex parte* on the 7th April last. The plaintiff claims to be the owner of a small lake, known as Virginia Water, situate near the Town of Wanganui, from which the defendants have for some time past been drawing a supply of water for the town. The level of the lake having been lowered by the operations of the defendants, they have proposed to restore it, and to increase the supply of water, by leading into Virginia Water the waters of another pond or lake at a higher level, called Westmere; and they have begun to lay pipes for the purpose between the two lakes. The injunction restrains the defendants from bringing the waters of Westmere into Virginia Water. The motion was argued before Mr. Justice Richmond and myself on Wednesday and Thursday, the 27th and 28th ultimo, and the Court took time to consider its judgment on one or two points. The plaintiff asserts a right to the whole bed of Virginia Water, with, perhaps, the exception of a very small portion included in the old road reserve known as the Waitotara Line. The plaintiff's title to some part of the lake bed is admitted by the defendants. A public road runs for a short distance along the margin. The defendants claim to be entitled, under the powers of "The Municipal Corporation Waterworks Act, 1872," to draw water from the lake for the supply of Wanganui, and being so, as they say, entitled, it was argued before us that they were further entitled to maintain the proper water-level by bringing in water from other sources. This contention was founded upon the 8th section of the Act of 1872. It is not material to consider whether that enactment could have been capable of the meaning which, on behalf of the defendants, it was attempted to put upon it, because it turns out that the whole Act is repealed by "The Municipal Corporations Act, 1876," as from the 1st January last. The question of legal right presents, therefore, no difficulty whatever; because, even if it could be established that the Corporation acquired the exclusive property in the waters of Virginia Water (though it is impossible on the evidence to come to any such conclusion), it is still apparent that the right to these waters does not include, or carry with it, the entirely different right to use the bed of the lake as a reservoir for the waters of Westmere. Upon one point there was a serious difference between the case made for maintaining the injunction, and that on which it was in the first instance granted. It was originally stated that the waters of Westmere were less pure than those of Virginia Water. This ground is now abandoned. The Court has taken time to consider whether, having regard to the public interests involved, and to the nature and extent of the apprehended injury, and having regard especially to the variation from the case originally made by the plaintiff, the injunction ought to be continued until the hearing. There are several grounds for the interference of a Court of equity to restrain the apprehended infringement of a legal right in a case like the present. The aggressors are a corporate body, acting under colour of a compulsory statutory power to enter upon and take lands, and to acquire property in streams, springs, and running waters. It is well settled that the proceedings of such bodies, when of illegal character, or of doubtful legality, will be restrained by injunction; and the Court has not only jurisdiction to interfere, but is almost bound to do so. (*See* the cases collected by Mr. Kerr, in his work on Injunctions, p. 295, 1867.) In such cases, if there be any doubt, the construction will always be against the corporate body. (Simpson *v.* South Staffordshire Waterworks Company, 34 *Law Journal*, c. 380.) And it is altogether in favour of such interference that the party whose rights are menaced is a private individual; for if the complainant were a public body the Court might balance one kind of public convenience against another. But even a minute infringement of the legal rights of an individual will not be allowed. (Wandsworth Board of Works *v.* South Western Railway Company, 31 *Law Journal*, c. 855.) Nor is the Court moved by any argument of expediency grounded on the magnitude of the public interest represented by the defendant Corporation. "It is a matter of almost absolute indifference," says V.C. Sir W. Page Wood, in Attorney-General *v.* Council of Borough of Birmingham, 4, Kay and J. (judgment), pp. 539 and 541, "whether the decision will affect a population of 250,000, or a single individual carrying on a manufactory for his own benefit. . . . . If they cannot drain Birmingham without invading the plaintiff's private rights, they must apply to Parliament for power to invade his rights." There exists also in the present case another well-known ground for the interference of an English Court of equity—viz., that the plaintiff's right can (or rather, under the old practice, could) only be asserted at law by an indefinite series of actions. (*See* the judgment of the Vice-Chancellor in the last cited case.) The same ground exactly cannot be taken in this colony, because the Supreme Court unites to the powers of a Court of equity those of a Court of law, and, as a part of the latter jurisdiction, possesses the power (under R.G. 447, 448, and 449, taken from "The Common Law Procedure Act, 1854") of inhibiting the repetition of an injury for which an action of trespass has been brought. Nevertheless, we are of opinion that where the legal right is indisputable the plaintiff ought not to be obliged to commence an action of trespass, but may, upon a proper occasion, at once invoke the equitable jurisdiction of the Court, without awaiting the commission of an actual trespass. In fact the plaintiff has done better to apply before the completion of the works of which she complains, inasmuch as parties who stand by and see moneys expended in the construction of public works are in peculiar danger of losing their right to call upon the Court for its summary interference. Then, has the plaintiff disentitled herself to relief by departing from her first representation respecting the quality of the Westmere water? Whether pure or impure, she has, it is plain, a legal right to object to its being poured on to her land; but if there had been any intentional concealment from the Judge who had granted the *ex parte* application, that would be a reason for discontinuing the injunction. There is, however, no such feature in the case. The quality of water can often be determined only by nice scientific experiment. It seems that further information upon the subject has been obtained; but it is not asserted by the defendants that the Court has been intentionally deceived. Some little stress, however, was laid upon the allegation that the affidavits in support of the injunction did not disclose that the defendants were rightfully using the waters of Virginia Water for the supply of the town. But the defendants have not now shown that they possess any such right; and, even had they done so, that would not affect the present question. On the whole we are of opinion that this motion must be refused. The plaintiff's costs to be costs in the cause.

INJUNCTION MADE PERPETUAL.

In the Supreme Court of New Zealand, Wellington District. Between Jane Hair, plaintiff. and the Mayor, Councillors, and Burgesses of the Borough of Wanganui, defendants. On Wednesday, the twenty-fourth day of July, 1878.

UPON hearing Mr. Travers of counsel for the plaintiff, and Mr. Izard of counsel for the defendant, and by consent, this Court doth decree that the injunction granted herein on the seventh day of April, one thousand eight hundred and seventy-seven, be made perpetual, and that the defendants do pay to the plaintiff the costs of this action when taxed by the Registrar.

By the Court. H. C. WILMER, Deputy Registrar.

APPENDIX D.—CHARGE 12.

LEACH *v.* JOHNSTON.

Affidavits in the Case.

In the Supreme Court of New Zealand, Wellington District, between Mary Leach, plaintiff, and Alexander Johnston, defendant.

WE, George Elliott Barton, of Petone, near Wellington, solicitor, and Mary Leach, of Polhill's Gully, settler, jointly and severally make oath, and say; and I, George Elliott Barton, do for myself first say:—

1. I am the solicitor for the plaintiff in this cause.

2. Robert Port, of Wellington, merchant and commission agent, and Charles John Johnston, of Wellington, merchant, sat as jurymen on the recent trial of this cause held on Monday, the twenty-second day of July, one thousand eight hundred and seventy-eight.

3. On the second day following the said trial the said Robert Port informed me, George Elliott Barton, that Charles John Johnston was an interested party in this cause—he being trustee under the will of the late Adam Burnes, the co-lessee of the land in question in this action with Alexander Johnston, the defendant; the said Charles John Johnston also being agent acting on behalf of the widow of the said Adam Burnes in respect of the said land.

4. And I, Mary Leach, say that on the day following the said trial the said Robert Port called at my residence at Polhill's Gully and informed me that he could settle this case on my behalf with the defendant, Alexander Johnston, and with Charles John Johnston; and asked me if I would accept one hundred and fifty pounds in full for my interest in the land leased to Somerville. This offer I refused, whereupon he offered two hundred pounds, and finally he offered me three hundred pounds, which last sum I agreed to accept for Somerville's piece of twenty-five acres. Subsequently the said Robert Port informed me that the said Charles John Johnston objected to the said sum of three hundred pounds as excessive, and the said Robert Port, on the following day, finally induced me to agree to accept four hundred pounds from the defendant and the said Charles John Johnston in settlement of all my rights of action and of this action, and in consideration thereof to agree, on my part, to deliver up to them, in six months after payment of the said four hundred pounds, the whole land contained in the lease dated the twenty-fifth day of July, one thousand eight hundred and sixty-two, made to John Leach, but retaining my interest in the parcel of land known as the "hay-paddock," demised to me by lease dated the twelfth day of July, one thousand eight hundred and seventy-two, exhibited in evidence at the said trial; and I also having the right to remove, at any time within the said six months, my house and stockyard, fences, and all other improvements in connection with my homestead, from the first-mentioned leasehold premises to the said hay-paddock; and, at the request of the said Robert Port, I signed an agreement, with my mark, in his presence and in that of his clerk, which agreement, the said Robert Port then informed me, was an agreement to carry out the said arrangement.

5. And I the said George Elliott Barton say that the said Robert Port informed me that the aforesaid terms were the terms of the said arrangement made by him, and that an agreement, in writing, which the said Robert Port represented to the plaintiff as securing to her the aforesaid terms, was signed by the said Mary Leach with her mark, she being an illiterate person, in the presence of the said Robert Port and his clerk, and was afterwards signed by the defendant, Alexander Johnston, and was delivered by the said Robert Port to Messrs. Brandon and Son, solicitors for the said Alexander Johnston, and for the said Charles John Johnston and Mrs. Burnes.

6. From the statement made to me by the said Robert Port and by his said clerk of their recollection of the contents of the said memorandum of agreement, I believe it to be simply a memorandum of agreement providing for an absolute sale to the said Alexander Johnston and Charles John Johnston, or one of them, for four hundred pounds, of the plaintiff's interest in the lands demised by the said first-mentioned lease; but that it contained no stipulation whatever respecting the right of removal of her house and stockyard improvements, nor respecting her right of occupation for six months over the whole lands.

7. The said Robert Port induced the plaintiff, as I am informed and verily believe, to sign the said agreement by threatening that unless she so agreed she would be imprisoned by the said Alexander Johnston and Charles John Johnston, for the costs of this action, and that she would not get one penny, and her said leasehold interest, and all other property of hers, would be seized and sold in case she refused; and that I, having retired from practice, she would be helpless, and have nobody to assist her; and he also represented that he, Robert Port, was acting in her sole interest and in her behalf, and not on behalf of the said Alexander Johnston and Charles John Johnston; and the plaintiff informed me, and I believe it to be true, that the said Robert Port advised the plaintiff, who is nearly seventy years of age, not to withhold her signature until she should have an opportunity of seeing me, but to sign the agreement then and there, otherwise she would be sold up and made bankrupt as aforesaid: And I, Mary Leach, say that the statements made in this paragraph numbered 7 are true.

8. The said Robert Port has recently stated to me, George Elliott Barton, that the defendant, Alexander Johnston, and the said Charles John Johnston, were led by him to believe that he was acting for them; but he also declared to me that in reality he was acting solely on behalf of and in the interests of the plaintiff; which said last-mentioned statement I believe to be false, and that he was acting as the agent and in the interests of the defendant and the said Charles John Johnston; and I feel strengthened in this belief by the following facts:—

9. On the second day after the verdict had been given I met the said Robert Port, who told me he was authorized to give Mrs. Leach, the plaintiff, two hundred pounds in full settlement of all her claims and interests, and that he was going to offer it to her; and he asked me if I would get her to accept it; and he also said that it was not right for Charles John Johnston to have sat on the said jury, as he was interested in the matter. Whereupon I told the said Robert Port that I intended to move to set aside the verdict, and that I meant to stand by the plaintiff and prevent her being cheated out of her rights. And I now find that it was after this conversation that the said Robert Port used the threats aforesaid, and induced the plaintiff to sign said agreement, without taking my advice or waiting to see me on the subject, by causing her to believe that I was about to desert her.

10. On the twenty-fourth day of July instant, and before the signing of the said agreement by Mary Leach, I wrote and sent to Messrs. Brandon and Son a letter, whereof the following is a copy:—

"Brandon Street, 24th July, 1878.

"Dear Sirs,— "*Leach* v. *Johnston.*

"I understand that Mr. Johnston, who was on the jury in this case, is a trustee for Mrs. Burnes, who is a co-owner with defendant. Is this the fact? Mrs. Leach is with me while I write this note, and she informs me that Mr. Port, on behalf of defendant (and who is another of the jury), went to her last night to induce Mrs. Leach to give up possession and take compensation, two hundred pounds, which John Johnston would pay. This was to be done behind my back, and, I presume, without payment to me of my costs. I now give you notice that any proposal of settlement must be through me—that I have possession of the leases, and that I claim my lien.

"I do this, not choosing to be treated as your client endeavours to treat me, even were I to hand over the whole amount to Mrs. Leach or the benevolent asylum five minutes afterwards.

"Messrs. Brandon and Son." "George E. Barton.

11. On the twenty-sixth day of July instant the plaintiff, Mrs. Leach, came to me to be advised, and she then informed me of the fact that she had signed the agreement at the solicitation of the said Robert Port, and informed me of what she believed to be the purport thereof, but stated that she was apprehensive she would not be fairly dealt with, and requested me to take measures for her protection; whereupon I at once prepared a demise of all her leasehold interests at Pollhill's Gully, less one day of the term thereof, to myself, and caused the same to be forthwith registered; and I then wrote to the defendant and Charles John Johnston the following letter, which was delivered to the defendant and Charles John Johnston:—

"Sirs,— "Brandon Street, 26th July, 1878.

"I hereby give you notice that Mrs Leach has demised to me her leaseholds at Polhill's Gully, now in her possession, and I further give you notice that I have forwarded same lease to the office for registration of deeds. I also give you notice that I have possession of the two leases, dated respectively the 26th July, 1862, and 12th July, 1872, produced by me at the trial of Leach *v.* Johnston, and now in Court, exhibits in the cause. I also give you notice that I claim a lien on the leases and documents for the costs due to me by Mrs. Leach.

"Mrs. Leach has informed me of the agreement which Mr. Port made, and which he informs me he made on her behalf, a statement which I disbelieve: It was that she should receive from you four hundred pounds, and on receiving it sign a surrender of her leases, excepting her hay paddock, you giving her the right to remove her house, and stockyards, and buildings, &c., and to retain possession of the whole leasehold property for six months from the completion of the arrangements.

"From what Mr. Port tells me, the written agreement signed by Dr. Johnston is silent upon several matters.

"When Mr. Charles John Johnston was sworn in as a juryman to decide a cause in which he had a direct interest, and when Dr. Johnston sat at the table witnessing so disgraceful a transaction, you must both have been aware that Mr. Charles John Johnston's presence on that jury was contrary to the plainest principles of honor and justice. Of course such a verdict (given by a man himself a defendant virtually) cannot stand, and I am instructed to move to set it aside, with costs. I have advised Mrs. Leach that in my opinion the conduct of the parties concerned amounts to a conspiracy, and I have taken the demise from her above-mentioned and registered it, to put it out of the power of the conspirators to defraud either her or myself. Your conduct in negotiating the sale behind my back, notwithstanding the notice I sent to your solicitor, and through the threats and intimidation used to her by Mr. Port, I will not characterize as I ought perhaps to do.

"I require from you a copy of the agreement, or alleged agreement, signed by you and Dr. Johnston, and I also require you to admit or deny in writing the statement of the true agreement made by Mrs. Leach with Mr. Port on your behalf. I do not say whether I shall advise Mrs. Leach to adopt the arrangement, or to resist it. That will depend on my belief (yet to be formed) whether the bargain is a fair one, and for her interests.

"I cannot but express my surprise that men of great wealth and high position should be guilty of such acts towards an aged and poor widow now seventy years old.

"George Elliott Barton.

"Charles John Johnston, Esq., and Alexander Johnston, Esq., M.D."

12. I have received no answer to the said letter.

13. The plaintiff signed and executed the said demise to me in the presence of Henry Samuel Fitzherbert, Henry Hope, and Elliott L'Estrange Barton; and I read over the same to her in their

presence previous to her signing it, and she perfectly understood that she was so signing the same, in order that I might compel the said sum of four hundred pounds to be paid to me, and the said agreement to be carried out through me in case I should find that the memorandum of said agreement fairly embodied the arrangement made.

14. And I, Mary Leach, make oath and say that the statement above made concerning my acts and those of the said Robert Port and George Elliott Barton with me are true, and that I believe the remaining statements to be true.

GEORGE ELLIOTT BARTON.
MARY (her x mark) LEACH.

Sworn at Wellington, this thirtieth day of July, one thousand eight hundred and seventy-eight, by the said George Elliott Barton, and by the said Mary Leach, in my presence, the said affidavit having been first read over to the said Mary Leach in my presence, and she appearing perfectly to understand the same, after which she signed it with her cross in my presence:—

H. S. FITZHERBERT,
A Solicitor of the Supreme Court of New Zealand.

In the Supreme Court of New Zealand, Wellington District, between Mary Leach, plaintiff, and Alexander Johnston, defendant.

WE, Charles John Johnston, of the City of Wellington, Merchant, Alexander Johnston, of the same place, Doctor of Medicine; and Robert Port, of the same place, Merchant; severally make oath and say:

And I, the said Charles John Johnston, for myself, say:

1. That one Adam Burnes, formerly of the City of Wellington aforesaid, died in Sydney, in New South Wales, in or about the month of June, one thousand eight hundred and seventy-six.

2. That Mary Jane Burnes, his widow and sole devisee legatee was, at the time of the death of her husband, in Sydney aforesaid.

3. That the said Adam Burnes was possessed of certain policies of insurance on his life, and of a lease of certain land in Wellington, which contained a provision for the purchase of the freehold within a certain time.

4. That the said Mary Jane Burnes, not being desirous of returning to New Zealand, requested me to take such steps as might be necessary to obtain payment of the assurance moneys, and complete the purchase of the freehold of the land in the lease before mentioned.

5. That I was advised that it was necessary that probate of the Will of the said Adam Burnes should be granted; and a power of attorney was accordingly executed by the said Mary Jane Burnes, authorizing me to prove the said Will of the said Adam Burnes in the colony as her attorney; and on application to this honorable Court probate was granted to me accordingly.

6. That I obtained payment of the money before mentioned, and completed the purchase of the said land, and, having done so, and the said Mary Jane Burnes returning to New Zealand in the month of November, one thousand eight hundred and seventy-six, I concluded that all my duties as attorney for the said Mary Jane Burnes ceased.

7. That, on leaving the jury-room, Mr. Port, with whom I chanced to pass out, said, "What a pity that the case wasn't settled by arbitration, as I settled mine." I simply agreed with him, and hurried away. Next morning Mr. Port came to my office and said, "I have been thinking over this matter of Mrs. Leach, and I shall be glad if I can help to settle it." I said, "It will be a good thing, but, as I have nothing at all to do with the matter, you had better go to Dr. Johnston;" and he went. Some little while after, both Dr. Johnston and Mr. Port came to me, Dr. Johnston saying, "Port says you advised a settlement of this case." I replied, "No, I did not; but, as Mr. Port informs me that he has some influence with Mrs. Leach in consequence of her friendship with his late wife, and is willing to use it for the purpose of saving further costly litigation, I sent him to you." Some discussion then took place, to which I paid no very great attention; but I remember Dr. Johnston refusing to sign an agreement, already, I believe, signed (by her mark) by Mrs. Leach, because the land included was not the whole fifty (50) acres. After further talk, Dr. Johnston said, "I will give three hundred pounds for Mrs. Leach's interest in the leases;" which Mr. Port said he did not believe she would accept. Then the two left. Subsequently I met the defendant and the said Robert Port in the street, and the defendant said, "I have just told Port that, rather than have any further trouble in the matter, I have offered four hundred pounds." I said, "It is an absurd price," to which the defendant replied that he "would rather the old woman got a hundred or so out of him than the lawyers."

And I, Alexander Johnston, the above-named defendant, for myself say as follows:—

8. That the trial took place on the twenty-second day of July last.

9. That Robert Port came on the following day and told me that in the Judge's direction to the jury he had said that the action was on a wrong basis, and that it was possible that another might be brought. In order to prevent further litigation, he had spoken to one or two of the jurors, among whom was the said Charles John Johnston, as to whether some arrangement could not be made to prevent this. He said he did this without hope of fee or reward, and only on account of his feeling for Mrs. Leach, in the hope of sparing further expenses. I said we would go to the said Charles John Johnston, and, if he concurred in the idea that, after what the Judge had said, another action might be brought, I should be prepared to come to some arrangement.

10. That the said Robert Port subsequently came to me, and we went to the counting-house of the said Charles John Johnston, and after some conversation with him on the matter I told him the said Robert Port that I would give her three hundred pounds. He then left me, and came the next day with an agreement to sell twenty-five (25) acres only for three hundred pounds. I then told him that I would not entertain it; I thought the arrangement was for the fifty (50) acres, and would treat only on the basis of buying the fifty (50) acres, and not the twenty-five (25) acres only; when the said

Robert Port said he was sure she would not take that, and that he would wash his hands of the matter. They left together, and on the street, being anxious to make an arrangement, I told the said Robert Port that, if he could make terms, I would even give four hundred pounds, saying, at the same time, that I would sooner the old woman had the hundred pounds than the lawyers. The said Robert Port then left me. The next time I saw him he gave me the memorandum executed by Mrs. Leach, and said he had promised, on my part, that she should have the use of the house and garden for six months rent free; and, after that, if she remained, she was to pay such rent as might be agreed upon—that is, for house and garden.

11. And I furthermore state that I have always considered and do consider Mrs. Burnes as the sole person interested under her late husband's will, and I alone have dealt with the Polhill's Gully leases for her and my own benefit.

And I, the said Robert Port, for myself say:

12. That I am not personally interested on either side in the above action, and that what I have done in such matter has been only in a friendly feeling towards Mrs. Leach, having known her and her family for years.

13. That I was one of the special jurors on the last trial, and I said to the deponent, Charles John Johnston, who was also a juror on the said trial (on coming out of Court), that the case should have been settled by arbitration, the same as I had myself settled a dispute between Mr. Baker and myself.

14. That, on the following day, I waited on Mrs. Leach and asked her, if I could get her one hundred pounds or one hundred and fifty pounds to settle the matter, "would she be agreeable." To this she assented. I then waited on the said Charles John Johnston, and he said he thought it would be a good thing could it be settled in that manner; but that he had nothing to do in the matter, but advised me to see the defendant, Dr. Johnston; which I did, and he (the defendant) accompanied me to the counting-house of the said Charles John Johnston, where, after some discussion, I got the defendant to agree to pay three hundred pounds.

15. I made out a memorandum of agreement purporting to be between the said Mary Leach and the defendant, whereby he was to give her three hundred pounds for her interest in the lease; but, on showing him the agreement, he said it was the fifty (50) acres, and not the twenty-five (25).

16. The said Alexander Johnston and I then came out into the street together, and I said to him I should have nothing more to do with it, and would trouble myself no further in the matter; upon which defendant said he would rather that the old lady should have a hundred pounds than give it to the lawyers, and that he would give four hundred pounds for the fifty (50) acres.

17. That I then got a memorandum of agreement made out, and soon afterwards called on the said Mary Leach and asked her about the lease, and she said, "I have two leases—one for fifty acres, and the other for my hay-paddock." I told her I was acting solely out of kindness and regard for her interest, and that I might rent the hay-paddock myself for the remainder of the term, and I should get the defendant to give her six months to move her house from the ground to be given up.

18. That the said Mary Leach affixed her mark to the agreement, and I brought it to the defendant, and accompanied him to the office of his solicitors, Messrs. Brandon and Son, and saw him duly execute the same, promising at the same time to let me have a copy of the agreement, which I have since received.

19. And I further swear that I have read the affidavit of George Elliot Barton in this matter, filed in the Supreme Court on the thirtieth day of July last, and I most positively deny all the allegations in the seventh paragraph, except that I represented to her the said Mary Leach that I was acting for her sole benefit and on her behalf, and not on behalf of the said Alexander Johnston and Charles John Johnston.

20. That I also positively deny the statement made in the eighth paragraph, "That I had recently stated to the said George Elliott Barton that the defendant, Alexander Johnston, and the said Charles John Johnston were led by me to believe that I was acting for them.

21. That the following is a copy of the agreement referred to, and to which Mary Leach, after the same was read over and explained to her, affixed her mark in my presence:—

MEMORANDUM of Agreement made the twenty-fourth (24th) day of July, 1878, between Mrs. Leach, of Wellington, in the Colony of New Zealand, Dairykeeper; and Alexander Johnston, M.D., of Wellington aforesaid:

I, Mary L. Leach, agree to take the sum of four hundred (£400) pounds sterling for all my interest in remainder of lease of fifty acres (50A.) of land situate in Polhill's Gully aforesaid, City of Wellington, and agree to waive all further claims on the said Alexander Johnston, M.D., up to date in respect to said land in consideration of the sum before mentioned.

Witness—Signed in the presence of R. Port—

MARY L. LEACH (her x mark).

I, Alexander Johnston, M.D., agree to pay to Leach the sum of four hundred (400) pounds. sterling for all her interest in remainder of lease of fifty (50) acres land situate in Polhill's Gully aforesaid, City of Wellington; she, on her part, agreeing to waive all further claims on me in respect to the within-mentioned land.

ALEXANDER [1s. stamp] JOHNSTON, M.D.
C. J. JOHNSTON.
ALEXANDER JOHNSTON, M.D.
R. PORT.

Severally sworn at the City of Wellington, this sixth day of August, one thousand eight hundred and seventy-eight, before me—

W. H. QUICK,
A Solicitor of the Supreme Court of New Zealand.

No. 7.

Mr. G. E. Barton to the Hon. the Colonial Secretary.

Sir,— Brandon Street, Wellington, 16th December, 1878.

I can hardly express my surprise at receiving from the Government, in answer to my demand for inquiry into the conduct of the Judges, a document consisting of twenty-six closely printed blue-book pages, professing to deal with the whole of my charges and to refute them exhaustively, and informing me that, although the Government has decided to refuse me an inquiry, they have themselves made a "searching inquiry" without having "thought it necessary to communicate with any of the Judges, or to submit a copy of [my] letter of 5th November for their consideration."

Thus I am asked to believe that the Government have evolved this elaborate defence of the Judges out of their own "inner consciousness," without reference either to the accuser or the accused.

Before making any observations on the contents of this printed document, I complain that the Government should have printed a whole edition of it without prefixing the letters containing my charges. I complain also that this document was withheld from me till a sackful (out of which the messenger handed me my copy) was ready for distribution over the colony. I further complain that, on the same day it was delivered to me, it was, with indecent haste, delivered also to the Wellington Press, for publication, all this being done in the interest of the Judges, and, doubtless, to make an impression in their favour before I should have time to expose your mis-statements. Such conduct is the conduct of partisans rather than of persons sincerely desirous of doing right between the contending parties.

On reading this document I find that not only it is not an exhaustive refutation as it professes to be, for it entirely suppresses all those charges that have most stirred the public mind, and the mind of Parliament, but it grossly garbles and mis-states the twelve subsidiary charges which alone it undertakes to answer. It refutes not the charges made by me, but charges invented by the writer for refutation. I confess it is inexplicable to me, if the Cabinet did actually spend, as you assert they have spent, the six weeks between the date of my letter and the date of your reply in making "a searching inquiry," that Ministers should have passed by in utter silence my month's imprisonment "without special instructions as to diet or otherwise," and the obviously malicious intention with which that imprisonment was inflicted—viz., that of ruining my business and of crushing, in my person, freedom of advocacy except in cases where it suits the Judge's purpose to permit it. It also passes my comprehension how Ministers could have left out of their consideration (and refutation) the following, viz.:—

1. The infliction of £50 fine upon me, because I strove to compel the Court to declare whether it was deciding in Spencer *v.* Pearson with or without jurisdiction, their refusal to do which afterwards caused such indignant remonstrances by my principals, Messrs. Sievwright and Stout, and such embarrassment to them and to the Supreme Court at Dunedin, as I proved before Parliament by reading Mr. Stout's own telegrams and letters to me on the subject. 2. Judge Richmond's misconduct in corruptly sheltering Gillon's opponents and refusing protection to Gillon, while those opponents were "spiriting sway" the whole property of the subject-matter of the litigation, thus converting that litigation into a "hollow mockery," and the decree, when he afterwards made it, into a "Dead Sea apple." 3. Judge Richmond's misconduct in corruptly making Gillon a bankrupt, while he kept back in the hollow of his hand the decree by which he on the same day pronounced Gillon's creditors in the bankruptcy proceedings his debtors, for at least forty times the amount of their bankruptcy debt. 4. The corrupt refusal of both Judges to accede to my request that they should send for their notes to correct their own misstatements, and their equally corrupt pretence that in my persistent attempts to compel them to do so I was guilty of "disobeying the repeated orders of the Court to cease from interrupting its proceedings, and to sit down." The monstrousness of thus silencing counsel, who is present in Court for the express purpose of thus "interrupting its proceedings," so struck Sir George Grey, that in his speech he thus refers to it (*Hansard, page* 458.): "It was monstrous that a barrister pleading for his client, arguing nothing for himself, and only doing his duty to the person who employed him, should be subjected to imprisonment in the common gaol for one month. . . . It is the first time in six hundred years that the right has been exercised by the Judges of imprisoning an advocate for the manner in which he pleaded the cause of a client in their Court." Mr. Macandrew was also so struck with it that he said (*Hansard, page* 456): "I know nothing to compare to it since the days of the Star Chamber."

Not one of these important matters is even alluded to in your "exhaustive" reply, and yet you assert that the "long delay in replying to [my] letter was occasioned mainly by the Government making searching inquiry into [my] charges, and by the time that was necessarily spent in obtaining the documents and papers relating to them."

Your statement that the Cabinet has been making "searching inquiry" during the six weeks' interval between the date of my letter and the date of your reply, carries its own refutation, when compared with the notorious fact that the majority of the members of the Cabinet have been, some continuously, others almost continuously, away from Wellington, and from each other: Sir George Grey went to Kawau more than a month ago; Mr. Sheehan has been away in Dunedin and Taranaki; Mr. Macandrew in Dunedin and Auckland; Mr. Fisher in the South ill. During that six weeks Mr. Ballance and Mr. Stout have alone been constantly in Wellington, and yet your letter pledges itself that the Cabinet has made "searching inquiry." And you add, with unnecessary offensiveness, "I have now dealt with the various charges I have made, and, after a careful and calm review, regret that you should have made those charges;" and you sneeringly tell me that you "feel assured that I will yet acknowledge that they were made either under some temporary irritation, or without due consideration." Sir, they are made after Mr. Justice Richmond had twice ruined me, and driven me from practice in the Courts.

Your twenty-six pages of letter and Appendix may be briefly summed up as follows:—

1. The decisions you have impugned, Mr. Barton, were all strictly legal, and could not have been appealed from. Your remedy was by appeal: why did you not appeal? We have set out all the judgments in the Appendix that you may see how legal they are, and how impossible it would be to appeal against them.

2. You have mentioned Mr. Travers's name as a person mixed up with Judge Richmond in a certain proceeding. We have "paraded" Mr. Travers, and he entirely exonerates both himself and the Judge.

3. Your clients are all bankrupt, 'tis true, but we set forth the proceedings in the Appendix; you can see with your own eyes that all the cards are fair; there is nothing anywhere that could give rise to an appeal.

4. Lastly, you have made the great mistake of treating the Executive as an Appellate Court. "It is not the function of the Executive of the Colony to act as an appellate tribunal. If the Judges decide contrary to law, ample machinery has been provided to have their decisions reviewed. Were the Executive to interfere with the Judges whenever a disappointed litigant invoked their aid, the due administration of justice would be impeded."

What a mockery of answer is this! My objections to the Judge's decisions were made not on the ground of their *illegality*, but of their *corruption*. Who ever heard of an Appellate Court dealing with the corruption of a Judge? It deals with his mistakes, but always presupposes them to be simply mistakes. Fancy the absurdity of appealing from these two Judges to a Court composed of themselves and three others, on the grounds that, although their decisions may be *perfectly legal*, they were perfectly corrupt. That these two had systematically slaughtered the interests of clients in my hands, had combined to drive me from the profession, had imprisoned me to ruin me, had shut my mouth whenever they could not answer my arguments, and, finally, that one of them had slandered me in a letter he laid before Parliament, which letter was a tissue of prevarication and falsehood from beginning to end. No Court of Appeal could deal with such conduct, and, even if it could, bold as I am for right, I dare not face the life-long incarceration for "contempt of Court" which these Judges would inflict upon me, for daring to argue to their own faces that they were unfit to sit and listen to me.

The only tribunal for an appeal from corruption is the Government. I have appealed to that tribunal, and your letter is the answer. The Judges are acquitted without a trial. I am asked to produce no evidence, and yet the Government calls this a "searching inquiry." The whole thing is a miserable farce!

The only conclusion I can come to is, that the Government had neither hand, act, nor part in the preparation of their letter, and had not even read it before it went to the printer. It is not possible that the Cabinet could have passed over in silence the whole of the charges, with which the most prominent Ministers dealt in their speeches, and with which the country has been ringing from end to end. On the other hand, the circumstantial evidence all points to the real author; the whole letter is self-defence, and every sneer it contains, every mean evasion, every turn of thought and expression betrays the writer. I have had sixteen years' experience of his sneers, evasions, habits of thought and forms of expression, and I feel no doubt about them whenever I meet them, whether in newspaper articles, Court judgments, or anywhere else. Although it is impossible that the Cabinet could have ignored all my most prominent charges, it is quite natural that the accused should ignore them, and confine his defence to those with the particulars of which the public are not familiar. By pretending that I had attacked the legality only of his judgments, he could hope to throw dust in people's eyes respecting unfamiliar cases; but he could not hope to throw such dust respecting the facts of my imprisonment, of Gillon's case, of Sievwright and Stout's case, and, above all, of his own letter to Parliament, all too widely known to permit misrepresentation to pass current.

Ever since the tumultuous demand for inquiry which followed my speech, and rendered it imperative that something must be done to allay public distrust, Mr. Justice Richmond has been absent from his Court duties through "illness," and on the very day I was officially informed that the draft of your letter was completed and would be sent to me as soon as fair-copied, Mr. Richmond steamed out of Wellington harbour on his holiday trip to the Hot Springs. I can now fathom the purpose of the astonishing statement that "the Government have not thought it necessary to communicate with *any* of the Judges"—that purpose being to draw a red-herring across the scent.

I would have hesitated to impute to the Government such a mode of evading their heavy responsibility if I had not already conclusive evidence that on a previous occasion they pursued the same course. Incredible as it may appear, Mr. Commissioner Shearman swore in my presence—and it now stands recorded in his published evidence—that he was ordered by his superior officer, Colonel Reader, to hold no communication with me respecting my charges against the police, and he produced the letter which he had written to me, and which was suppressed by the head of his department. The only energy displayed in the police affair was in efforts to discover my informant, and the only attempt they made to ascertain the truth was to "parade" the men, who promptly declared themselves "not guilty." Throughout these twenty-six pages of judicial "parade," the same course has been followed, and the Judges have declared themselves "not guilty."

Sir, your letter reveals to me, as a lightning-flash in the darkness, the precipice on whose brink I have been standing. I now see the destruction that would have befallen me had I succeeded in forcing an inquiry, and I am humbly thankful to Providence for so shaping events that I am at least spared that crowning disaster—an inquiry predestined to fail, whose failure would be the more crushing by reason of its having been held under the auspices of the "people's" Government.

I have, &c.,

The Hon. G. S. Whitmore, Colonial Secretary. GEORGE ELLIOTT BARTON.

No. 8.

The Hon. COLONIAL SECRETARY to Mr. G. BARTON.

SIR,— Colonial Secretary's Office, Wellington, 20th December, 1878.

I have the honour to acknowledge the receipt of your letter of yesterday's date, being a rejoinder to mine of the 12th instant.

As the Government has, at your request, exhaustively examined into all the specific charges contained in yours of the 5th November, amongst which, I may remark, there was none relating to your imprisonment for contempt, and as you have been duly informed of the decision at which it has arrived upon each of the twelve charges enumerated, the correspondence upon the subject has reached its natural conclusion, and no useful purpose can be served by re-opening it.

Otherwise, it would have been my duty to return your letter last received, as the language it contains is at variance with the well-understood courtesies of official correspondence; and the insinuation that Judge Richmond was consulted in reference to your charges, or was even cognizant of the decision of the Government, is as untrue, as it is gratuitously insulting to the Cabinet and the law officers of the Crown.

I have, &c.,

G. E. Barton, Esq., M.H.R., Wellington. G. S. Whitmore.

By Authority: George Didsbury, Government Printer, Wellington.—1879.

Price 1s. 6d.]