

Now, prior to the Act of Settlement the Judges held office at the pleasure of the monarch. This will be seen in many books and reports: I might just mention Foss's "History of the Judges." In Croke's "Reports of the Time of Charles I.," page 52, there is a memorandum as follows: "Upon Friday, being 10th day of November, Sir Randolph Crewe, Chief Justice of the King's Bench, was discharged of that place by writ under the Great Seal, for some cause of displeasure conceived against him, but for what was not generally known." Then there is a note by the editor: "Hume says he was discharged as unfit for, and not sufficiently obsequious to, the purposes of the Court." In the same volume there are other examples given, which it is unnecessary for me to refer to, of Judges being discharged on writs simply because they held their office as at pleasure.

The Chief Justice: The Chief Justice was appointed by writ, and the other Judges by Letters Patent.

Sir R. Stout: There are examples of other Judges being discharged besides the Chief Justice. However, it is not necessary for me to deal with that. Under the Act of Settlement special provision was made in reference to the Supreme Court Judges. Their tenure was to be *quamdiu se bene gesserint*. Hence, save for misbehaviour in their office or by an address of both Houses of Parliament only was it possible to remove them. There may be a question as to whether this Act is in force in New Zealand. I submit it is, so far as can be applicable to the circumstances of the colony.

Mr. Justice Richmond: It must: it affects the succession of the Crown.

Sir R. Stout: It must be in force, of course, because it deals with the right of the succession of the Crown, and has force in all parts of the Empire. It is set out in the "Imperial Acts in Force in New Zealand," compiled by Mr. Justice Johnston and the Solicitor-General. It will be found in section 396 of that volume. There is a great number of text-books bearing on the subject, showing what was the provision made by the law by this section; but it appears to me, after reading a great number of them, that the best statement of the law about the office of the Judges and the Judges' tenure is that which is given in Hearn's "Government of England," at page 81 of the first edition, and page 83 of the second edition. He says—which is true, as far as I can find out—that there has been no judicial determination of the Act of Settlement referring to the Judges. He says, page 82,—

"The provisions of the Act of Settlement, and of the Act of George III., which determine the tenure by which the Judges hold their office, have never been the subject of judicial interpretation. Few of our historians or juridical writers have noticed the peculiarity of this tenure. They content themselves with remarking that the Judges have been rendered independent, and cite the terms of the Act without observing that any question has been raised concerning the precise meaning of these terms. . . . The question, therefore, is not undeserving of careful consideration."

This goes on for several pages, down to page 89, all showing what the real tenure of the Judges is. But it is unnecessary for my purpose at present to deal with that, except to show that, according to Hearn, it was absolutely necessary that if the Judges were to be independent their salaries should be ascertained and established, and be removed beyond the control even of Parliament. He says:—"The legal effect of such grant [as that provided for in the Act of Parliament] is the creation of an estate for life in the office, conditional upon the good behaviour therein of the grantee. Such an estate, like any other conditional estate, may be forfeited by a breach of the condition annexed to it—that is to say, in this case by misbehaviour." He argues this out at great length, and says, that "in the case of misconduct outside the duties of the office the misbehaviour must be established by a previous conviction by a jury according to law." He points out that there is a power of removal for misbehaviour, and also a power of removal or redress for both Houses, but the Crown is not bound to act upon the redress.

He argues that out at great length but it is not necessary to deal with it here. Then, as to the effect this Act, coupled with the Act of George III., has had in dealing with the Supreme Court, that is referred to in "Story's Commentaries," p. 192, Vol. ii.; and "Kent's Commentaries," Vol. iii., pp. 391 and 392; and there is also mention of it in "Hallam," Vol. iii., p. 192. I will not take up your Honour's time in quoting what these writers say; but this may be said: that all constitutional writers recognise that the Act of Settlement, without the Act of George III., which made permanent appropriations for the salaries, would not have secured for the Judges the independence which was secured by the Act of George III., though, of course, Mr. Hallam assures us that we owe the independence to the Act of Settlement and not to the Act of George. No doubt the principle was laid down in the Act of Settlement; but it was not until the Act of George that this principle was properly given effect to and carried out. In England no doubt the Judges are made independent, I submit, by having a life tenure, or a tenure during good behaviour, subject to the condition of removal on misbehaviour or on a motion of both Houses; but they were also made independent by having their salaries secured to them, and I submit that both were necessary to make the Bench thoroughly independent. The Act of George was, so to speak, necessary to complete the principle that was laid down in the Act of Settlement. Of course, William III. declined to put any part of their salary on the Civil List. He thought, probably, that the Civil List was already heavily enough weighted. As to the meaning of "fixed and determined," I submit that it means fixed and determined by some person who has the power to pay. I will show that later on. "Bowyer, on Constitutional Law," p. 177, refers to the Act of George, and says,—

"And now, by the noble improvements of that law in the statute of 1, Geo. III., c. 23, enacted at the earnest recommendation of the King himself from the throne, the Judges are continued in their offices during their good behaviour, notwithstanding any demise of the Crown, which was formerly held immediately to vacate their seats, and their full salaries are absolutely secured to them during the continuance of their commissions, His Majesty having been pleased to declare that 'he looked upon the independence and uprightness of the Judges as essential to the