

otherwise authorised. Observations of the Lord Chief Justice in the case of *Churchward v. The Queen* were much relied on by the plaintiff in support of the proposition that a binding contract on which a petition of right would lie might be made by the Admiralty or head of a department agreeing in express words to employ any particular person, whether Parliament found the funds or not. These observations were not necessary to sustain the judgment, and are admittedly extrajudicial." The judgment then proceeds:—

"They conclude with an express remark that the Court was not called on to decide that proposition in the case then before them, and that he, the Lord Chief Justice, individually, should be sorry to think that the Court should be driven to come to an opposite conclusion; obviously implying that, did such a case arise, he might be so driven. These remarks received no response from other members of the Bench, and the observations, as well as the judgment itself, appear to us to have been somewhat misapprehended. The Court decided in that case that there was no express covenant on the part of the respondent, as alleged in the petition, and they declined to infer any other covenant on the part of the Admiralty binding on the Crown, except a covenant to employ if Parliament provided the funds."

Then he goes on to hold the same in this case. The same conclusion was arrived at in a case in our own Court of Appeal, *Holmes v. Richardson* (2 Appeal Cases, p. 1). This was a case against the Superintendent of Canterbury by a contractor on the contract for the Lyttelton tunnel. The Court of Appeal held that the words of the 2nd section of the Act did not empower the Superintendent to give public money for the construction of the line, or engage the public credit by contracts for the execution of works without appropriation by the Provincial Council. Then there was a decision in the Supreme Court by Mr. Justice Ward, *Murray v. McAndrew* (Macassey's Reports, 360). The same was held in that case. And there were other cases. There was also a case against the Superintendent of Southland, in which Mr. Justice Richmond held similarly. I need not refer at greater length to this point, but I submit that all these cases show that there can be no contract to pay a salary until Parliament by its Act ascertains and determines that salary. There has been no fixing, and ascertaining, and determining by Parliament of any salary in this case. There is no contract to pay any salary until Parliament authorised the making of such a contract by Act. I understand that in this case this gentleman, although he only got his Commission on the 6th March—that was the day on which his Commission was sent to him—claimed his salary as dating back, whether as Commissioner or Supreme Court Judge I know not, to the 27th February, the date on which the Order in Council appointing him a Commissioner was issued.

*Mr. Harper*: I do not know that there is any evidence of that.

*Sir R. Stout*: I think evidence can be obtained of this, and I think there is a good deal to be said on this point. However, what happened was this: The Executive, having no vote available for the payment of any salary, either as Commissioner or Judge, proposed to pay it out of "Unauthorised expenditure." This gentleman, apparently, says that he made out his vouchers as Judge; but, at any rate, he claimed his salary from the 27th February, the date on which the Order in Council was issued making him a Commissioner under the Native Lands Act. I submit that he ought not to have claimed salary until the 14th March, because he was not ripe for judicial duties until he had taken the oath under the Promissory Oaths Act of 1873. The Promissory Oaths Act of 1873 provides that the oath of allegiance and the judicial oath shall be taken as soon as may be after acceptance of office. I submit that the acceptance of office could not have preceded the 5th March, and that, at any rate, he could not deem himself completely a Judge until he had taken the judicial oath and performed some judicial act. At any rate, this salary was paid out of "Unauthorised expenditure." Having been so paid, the Parliament was then, by message from the Governor, informed of the supplementary estimates providing for the Commissioner's salary. It was not on the ordinary estimates, the reason no doubt being that Parliament was to be invited to pass an Act providing a salary for a sixth Judge of the Supreme Court. There has been an affidavit filed showing that the House went into Committee of Supply to consider this question of an Act, and it seems to have reported progress after an hour or two's discussion, and never went into Committee of Supply on the Bill again. Of course, I may say about this that from one point of view a Court can only look at the acts done by Parliament by means of the Acts agreed to by the Governor, the Legislative Council, and the House of Representatives. Parliament never speaks in a negative way, but always in a positive way. That is alone how Parliament can speak. It makes some positive declaration of law, or it does nothing. To say that Parliament does nothing is of no avail. If Parliament does nothing, nothing can come of it. It is not a body which speaks negatively; it must do positive acts. That is laid down clearly enough by Chief Justice Cockburn, in the case of *Churchward v. The Queen*, who referred to the fact that Churchward had apparently petitioned Parliament, and Parliament had done nothing for him. So we have the right to say that Parliament declined to do anything, seeing that nothing was done when this Act was sent down. Your Honours will see on page 30 of the affidavits which have been filed the Act that purported to validate the appointments that had been made. Of course that does not prove anything. It only shows that there seems to have been doubt in the minds of the Executive. I do not say that the Court need interpret this draft Bill at all; but if it is to interpret it I say that it will bear the interpretation of the need of making provision for an additional Judge. Well, this Act never came before the House further than that it was referred to a Committee of Supply. What did go before the House was the supplementary estimates, and when the supplementary estimates were before the House the Governor sent down a message striking out the words "and Judge," and even when those were struck out the defendant says there was obstruction. There does not seem to have been any obstruction until the words "and Judge" were struck out, and then there was obstruction to voting any salary at all. After a vote of a smaller sum had been agreed to in the House, the Minister of Justice, the defendant says, got up and said that the Ministry would not interfere with the discharge by the defendant of his