

TUESDAY, 19TH MAY, 1891.

The Court resumed at half-past 10 o'clock this morning.

*Mr. G. Harper* : May it please your Honours, I think that I am entitled in this case to say that possibly it is a unique one. My learned friends have not been able to bring before your Honours at all in the course of their elaborate arguments any case like this one which has ever been before any Court, either in England or elsewhere, and I feel sure that your Honours will, under these circumstances, allow me and my learned friends to take up possibly a little longer time than the other side did in considering this very important case. I feel quite justified in going into the matter in detail because of the very important issue attached to it; and that issue is whether Mr. Justice Edwards, who now holds the Governor's Commission issued under the seal of the Colony—whether that Commission can be cancelled and set aside by this Court simply upon the ground that Parliament—or the Government, rather, for the time being, and Parliament subsequently—did not act in a strictly constitutional way. These proceedings have been started in this Court for the purpose of testing this question, which of course is peculiar, and there is very little authority, as far as one can gather from the books and reports, for the institution of such proceedings; but it appears that they are rightly commenced by way of *quo warranto* in the first instance, in order to enable the person who is charged with usurping the office to come forward and show by what warrant he holds his office. Your Honours will see by the statement of defence that the warrant under which we say he held the office is the Commission issued by His Excellency the Governor; so that practically the Court has before it two proceedings—in the first instance one calling upon Mr. Justice Edwards to show by what warrant he has usurped this office, and then the Court has to go still further—and that, I submit, will be the main point in this case—and say whether its arm is long enough and strong enough to cancel the warrant or Commission which he sets up in defence of these proceedings. I repeat again that there is no case in the books that my learned friends on this side have been able to come across under similar circumstances. I shall presently quote a case which has not been referred to by the other side—a case somewhat analogous to this, which came before the Supreme Court in Victoria; but the analogy in it is only in this respect: that in that case the Commission of a County Court Judge was tested. But the whole question went off on the ground that that Commission was held during pleasure; it was not brought for the purpose of cancelling the Commission, but merely to test the Governor's right to revoke the Commission on the ground that the County Court Judge held it during pleasure.

*The Chief Justice* : We have instances in England of County Court Judges.

*Mr. Harper* : There are plenty of instances where they have held during pleasure, but not during good behaviour. There is not one single case I have come across in looking into this matter where a Patent or Commission, such as this we have in this case, issued during good behaviour, has been upset except for certain specific grounds. Now, those grounds upon which any proceedings in the nature of *scire facias* have been allowed, or were supposed to have been allowed, to enable action to be taken in connection with the repeal of a Commission held by a Judge are stated in Todd's "Parliamentary Government" to be such grounds only as would entitle him to be removed for misconduct or bad behaviour. So, for the moment, I merely in passing state to your Honours that we shall not, except in a very indirect manner, be able to bring before your Honours any authority which is at all on all-fours with the present position. I will now proceed to deal with the first point my learned friend raised, because I wish to get rid of that as shortly as I possibly can. It comes rather out of order, but my learned friend took it first in order, and I will reply to it in that order. And it was with reference to the letters which passed between Mr. Edwards and the Premier of the day—the letter of the 1st March and also the letter of the 6th March following, comprising the offer and the acceptance of this Judgeship. My learned friend, your Honours will recollect, referred to these letters in support of one of his points, that Mr. Edwards was to receive the status of a Supreme Court Judge only, and that that was the basis of the understanding upon which he accepted the office of Commissioner. I am not going to take up the time of the Court in replying to this at any great length.

*Mr. Justice Denniston* : Was it not that, accepting it first to be a contract, and assuming that you rested upon that as a contract?

*Mr. Harper* : No, your Honours, I do not take it in that way; I take it generally, and I may say I was somewhat surprised at the other side having put their case in that way. I expected the other side would simply come into Court on the main issue whether under the Act of 1882 it was competent for the Governor to appoint Mr. Edwards a Judge. Instead of that, my learned friend, at the starting of the case, drew attention to the actual contents of this offer, for the purpose of showing that, as a matter of fact, Mr. Edwards simply required the status of a Supreme Court Judge in addition to that of Commissioner. My learned friend did not—and possibly for his case it was not necessary for him to do so, but for our part of the case it is most decidedly necessary—he did not refer to the sequence of events set out in the statement of defence leading up to it. I am not going to refer to this at the present moment for the purpose of bringing it to bear upon the so-called contract, but I am entitled to refer to these facts, now that my learned friend has given me the cue, for the purpose of showing the circumstances under which Mr. Edwards was negotiated with for the purpose of accepting these two offices; and for that purpose it was set out in the defence—and I think the Court is entitled to take these facts into consideration in coming to any conclusion it may arrive at with reference to the salary being ascertained and established, apart from any question of contract, which is also raised as an alternative defence on the pleadings. That, again, was another reason for setting out the defence in the manner which has been done for the purpose of applying the facts to any aspect of the law which may crop up during the case, and for the purpose of showing what the real negotiations were under which this office was accepted, and also for the purpose, if we cannot—I do not say we cannot, but if we cannot—establish an absolute contract—for the purpose of showing that, as far as Mr. Edwards was