been increased from time to time, and there has not been any attempt whatever to limit it by any Act that might have to be passed before any appointment was made. If the Legislature at Home and the Legislature of Victoria have not been satisfied with relying on constitutional principle, then I submit that this Court will not do so; because the remedy would have been as simple as possible if it was intended by the Legislature, having in view their past legislation and their Civil List Acts, that this principle should apply to the Act of 1882; and nothing would have been easier than for them to have expressed it. In this connection, your Honours, my honourable friend referred to the difference between the law of the Constitution and the conventions of the Constitution; and he said that the Court was bound in interpreting a statute of this sort to bring to bear on it the law of the Constitution. I shall submit this to your Honours with confidence: that this enactment in the Act of Settlement certainly was not a law of the Constitution till then—this enactment is not a law of the Constitution except in so far as it refers to the Act of Settlement itself, and to what has been done afterwards in the various Acts appointing the Judges—carrying out, in fact, the principles laid down in the Act of Settlement. I submit to the Court confidently that it cannot take this—this outside unwritten law, so to speak—and apply it in the interpretation of this statute. It has never been attempted to be applied in any sort of way at Home. The principle has been laid down distinctly in words in the various Acts, whereas here we have not got it in our statute.

My learned friend read from Dicey, showing the difference between the law and the conventions of the Constitution. The principle is in Dicey, on page 24, the test of what is constitutional law as distinguished from convention of the Constitution.

The Chief Justice: Do you say that outside of this section there is not an indication of the intention to introduce what you have referred to as the constitutional principle?

Mr. Harper: No; I am not driven to that, but I am prepared to rest my case in this way: that this constitutional principle is not to be invoked as a condition precedent to the exercise of the unlimited power given to the Governor. The Act may be unfortunately worded, but our client's appointment is under the Act, and he says that he holds his appointment under those words which give the Governor power from time to time to appoint Judges. We then say this constitutional principle ought to be recognised, and recognised by the Legislature, but not as a condition precedent to the appointment of a Judge. To go back to the Act of Settlement, it does not say that a Judge's salary shall be ascertained and established prior to appointment. It says they shall hold their tenure during good behaviour, and that their salaries shall be ascertained and established. The growth of history connected with this shows that there have been augmentation and appointment of salaries since.

Mr. Justice Richmond: You regard it as a vow by Parliament—a vow which it did not fulfil till fully sixty years after?

Mr. Harper: I can put it as high as this: Parliament allows the King to exercise his prerogative and appoint Judges; it is true that the number was generally fixed, but James the First did not keep to that number. He created nine at one time, and Parliament at that time gave the King the full exercise of his prerogative. It did not limit the exercise of his prerogative, although the King, as a rule, did not act up to it.

Mr. Justice Richmond: Hearn says that the Crown may not increase the number of Judges.

Sir R. Stout: I referred to it, your Honours: it is on page 74.

Mr. Justice Richmond: But it does not appear to be supported by the authority he cites (4 Inst., 75).

Mr. Harper: I have authority to show he may create Judges, but not create jurisdiction. I submit that my learned friend must go as far as this to interpret this constitutional principle—the prior ascertainment and establishment of salaries. Now, I would make bold to say that there is not a single writer on constitutional history, nor is there any authority that has been cited by the other side, or that can be cited, to show that it was intended by the Act of Settlement that the ascertainment and establishment of salaries should be prior to the appointments. Therefore, if the Act of Settlement did not contemplate the ascertainment and establishment being made prior to the appointments, then, when the Crown has given to it by statute, not by prerogative, the power of appointing Judges from time to time, why should not the Crown appoint a Judge, trusting to the Ministry of the day not to advise the Crown to do what is unconstitutional—and go to Parliament afterwards to ascertain and establish the salary? Why should the Judge be turned out in the cold because Parliament does not do what is laid down in the Act of Settlement as one of the principles of the Constitution?

Mr. Justice Williams: Now you are invoking the Act of Settlement.

Mr. Harper: I always have.

Mr. Justice Richmond: Is not prohibition of such appointments the only security against the present position—a position which was never contemplated—a Judge without a salary.

Mr. Harper: The Court has to go to such lengths as have never been attempted in any other case. My friend is asking your Honours to cancel an appointment under the seal of the colony, being a life office. In the first instance, it is not contrary to law if you read the Act of 1882 alone. It is not contrary to law, because that Act *primâ facie* gives the Governor power to appoint Judges; but my learned friend says you must invoke into the Act a constitutional principle—a practice which obtains in New Zealand prior to the Act of 1882. I have endeavoured to show that this constitutional practice was technically not observed. I go further, and say you cannot bring into the Act of 1882 a mere constitutional principle if the Act in itself gives, as it does give, the power to the Governor, in plain and distinct words, to appoint Judges from time to time. There is no mention of salaries; that is the fault of the Legislature in drawing up the Act. There is no mention of salaries, nor of the fund upon which they are to be charged. There is no fixing of any number of Judges. But the whole thing is left in a general way to the Governor to appoint as he pleases. I was referring to this because it is very essential to apply the test given here