

*Sir R. Stout*: You say the statute gives him the power?

*Mr. Cooper*: I say he has power by virtue of his Commission and the statute.

*Sir R. Stout*: Why do you invoke the Legislature at all?

*Mr. Cooper*: Because it has been held in one case quoted by my friend that the Governor's power to contract is derivable in part from his Commission and in part from statute. In the first instance, he is the delegate or agent of the Queen—he is not Viceroy of the Queen: that doctrine has been exploded—and as the agent or delegate of the Queen certain power is derived in the first instance from his Commission, and secondly from the Legislature of the colony. I only quote this Commission for the purpose of showing that the Queen herself in her Commission to the Governor has delegated any power which existed in her to appoint Judges and other necessary officers of State, and that the Governor also obtains these powers under the statute of 1882. He has ample power to contract if he has power to appoint, and I submit he derives power to appoint from the joint assistance of the Commission and the statute, and he acts as Her Majesty's agent, not because of the statute, but by virtue of the Commission.

*Mr. Justice Conolly*: Apart from the statute, how could he lawfully appoint a Judge?

*Mr. Cooper*: No doubt if a statute said he should not appoint a Judge, I do not say that the Commission would enable him to do so, but I say the two are to be read together. Passing from that to the Crown Suits Act of 1881, we have the Legislature recognising that there may be a contract entered into by virtue of the implied powers vested in the Governor. By section 37 it is provided,—

“No claim or demand shall be made upon or against Her Majesty under this Part of this Act unless the same shall be founded upon and arise out of some one of the causes of action hereinafter mentioned, and for which cause of action a remedy would lie if the person against whom the same could be enforced were a subject of Her Majesty.”

Then, subsection (1) provides—

“(1.) Breach of any contract entered into by or under the lawful authority of the Governor on behalf of Her Majesty, or of Her Majesty's Executive Government in the colony, whether such authority be express or implied.”

I submit that if the Governor has power to appoint he has power to do all things necessary for the appointment. I do not say that he can bind the Legislature by virtue of the terms of the appointment to vote a certain sum of money—I do not submit that for one moment, but I do submit that he can enter into a contract which, so far as the Crown Suits Act is concerned, is binding upon the Crown, leaving it to the Legislature subsequently, if it chooses to do so for the honour of the Queen, to vote the sum necessary to carry out the terms of the contract.

*The Chief Justice*: You mean, it would be dishonourable on the part of the Legislature if it did not carry out the contract.

*Mr. Cooper*: That is really what is laid down in a number of English cases. There is no compelling-power, but there is no doubt it would be dishonourable. It would be dishonourable assuming the contract was made by the Governor in pursuance of his power, and assuming that it was a proper and reasonable appointment—an appointment made upon proper consideration; and I say that it has been dishonourable in this case for the Legislature not to carry out their part of the contract which the Governor entered into.

*The Chief Justice*: I understand you to contend that if there is a contract there is an end to the matter, except that the Legislature has to vote the money. I do not go into the question as to whether the appointment was proper or not.

*Mr. Cooper*: The question of honour or dishonour might arise if there was a question whether the Governor had given the appointment to a proper or an improper person. We will not go so far as to suggest that if the Governor had appointed an improper person to the Supreme Court it would be a dishonourable thing on the part of the Legislature to refuse to vote sums to pay that person; but I submit that if the person appointed is a person fitted to hold the office, and the Governor appointed him in the exercise of the powers of the Executive Government according to law—of course my argument is based entirely upon the previous ground I have advanced, that it is made according to law—then it would be a dishonourable thing on the part of the Legislature to refuse to pay the salary to the person appointed. I think that may be put forward as part of our case.

*Mr. Justice Richmond*: If you were suing under the Crown Remedies Act, would you be entitled to judgment upon this correspondence?

*Mr. Cooper*: We should be entitled to judgment; but that would not give us the money. The next step would be to go to the Legislature; but even then it is difficult to say what the remedy would be. I intend to deal shortly with this branch of the subject, and to show that your Honours are practically placed in the same position as Judge Edwards. If an unconstitutional Governor or a weak and corrupt Ministry were to invoke feelings of dislike to the Supreme Court, and were to refuse to pay the salaries, your Honours would be in the same position—exactly the same position—as Judge Edwards, although the money is voted to Her Majesty for the purpose of paying you. We cannot for a moment suppose that such a concurrence of circumstance would ever arise, but I submit that such is the state of the law in the event of the Government refusing to recommend the Governor to sign his warrant. If the Governor declined to sign his warrant, there is no machinery that I am aware of in this Court for compelling the payment of the salaries of your Honours or of other officers whose salaries are secured upon the Civil List.

*The Chief Justice*: Do you contend that these provisions in the Crown Suits Act give power to the Governor to contract?

*Mr. Cooper*: No. I contend that the provision in the Crown Suits Act recognises that the power to contract may arise by implication. I do not say for one moment that the Crown Suits Act is other than a procedure Act. It gives the right to a certain remedy—which may or may