

not be a substantial remedy—where no remedy previously existed. In reference to Churchward and the Queen—the case which Sir Robert Stout relies on—I submit that is really an authority in favour of the defendant on this branch of the subject. Dealing with the abstract principles of law which are suggested in the judgment of the Court, we must consider the facts of the case. In Churchward and the Queen the decision of the Court turned not upon whether or not a contract was valid, but upon the fact that no contract was made to support the declaration. The action was upon a covenant, either expressed or implied, to pay a certain sum of money to the plaintiff. A careful perusal of the contract, and the judgment, shows that there was no express contract and no implied covenant, and consequently no cause of action; and the case was determined upon exactly the same principles as determine a suit between subject and subject when a plaintiff has brought an action and has no contract to support it. It was, however, in the course of this judgment that the Lord Chief Justice made the remarks quoted, and which I submit show that there may be cases—and the Court recognised that there may be cases—where, even if no funds be voted by Parliament for the purpose, yet the executive officer of the Government may make a contract to bind the Crown, leaving it to Parliament subsequently to provide the funds to carry out that contract. The Lord Chief Justice says so in express words. It is evident, whatever construction the Chief Justice of Victoria placed upon his observations, that this was the meaning in the Lord Chief Justice's mind—that such a contract might be made; and he says that to say that it might not be made would be too extreme a proposition, and that he would be sorry to hold that that was the law. Then, there is the case of *Regina v. Thomas*, in which it was held, following the “Bankers” case (it is reported in Law Reports, 10 Queen's Bench, page 31), that where a contract is made on behalf of the Queen, there a petition of right will lie, even though unliquidated damages are claimed; and Justice Blackstone, in delivering the judgment of the Court, ten years after the case of Churchward *v.* The Queen, says, “Contracts can be made on behalf of Her Majesty with subjects, and the Attorney-General, suing on her behalf, can enforce these contracts against the subject; and if the subject has no means of enforcing the contract on his part there is certainly a want of reciprocity in such cases.” This judgment is based upon the well-known “Bankers” case, where one of the Stuarts borrowed money from certain London bankers, and by letters patent contracted to repay it, and charge the money on excise; then the King, as often happened in those days, refused to repay either interest or principal. The bankers waited till the Stuarts had lost the sovereignty and then brought an action against the Crown. It was held not that the Crown was bound to pay, but that a petition of right would lie. Mr. Justice Blackstone follows this case, and says that where there is a contract on behalf of the Queen, even though the claim is unascertained, a petition of right will lie. I may illustrate the point by one or two cases. Suppose it was necessary to build a ship here—suppose that a set of circumstances arose in connection with the defences of the colonies so that it became necessary to build or to purchase a gunboat; and suppose the Government purchased one, and there were no funds appropriated for the purpose of the contract; I submit, there would be a good contract, and the shipbuilder could, by a petition of right, not enforce his contract to execution, but obtain a declaration from the Court that there was a sufficient contract between him and Her Majesty, leaving it to the Legislature subsequently to appropriate the amount. So that he would have to wait till the Legislature had appropriated the funds before he could receive remuneration for his services rendered: showing, I submit, that want of the appropriation of the money necessary to carry out a certain duty is not essential to a contract which the State enters into with a person to perform that duty. Want of money is no doubt a bar to that person getting payment by execution. All he can get is a barren judgment, leaving it to the honour of Parliament for the honour of Her Majesty to vote a sufficient sum of money to pay the Queen's debts. In the case of *Alcock v. Fergie* this principle is recognised by counsel for the Crown, and also by the Chief Justice.

*Sir R. Stout*: That was not a case between the Crown at all.

*Mr. Cooper*: Well, the defence raised was that the Crown had not the power to make a contract, and Mr. Ireland, in arguing in support of the proposition that this contract was *ultra vires*, said, “It must, however, be admitted that the Governor, by virtue of his Commission, which authorises him to do all things under the laws in force in the colony, is a duly-authorised agent to enter into contracts for the Crown.” On page 310 of the judgment, the Chief Justice says, “Parliament may, by legislative enactment, either in express terms or by necessary implication, authorise the Government to enter into contracts.” Now, I submit, without going over the ground that has been traversed by my learned friends yesterday, that, assuming the power of the Crown to make a contract, we have all the necessary essentials. We have the contracting parties, we have a proper definition of the office, the salary mentioned, and we have a Commission following upon the terms which have been settled between the parties, appointing Judge Edwards in the fullest possible way to the office of Supreme Court Judge.

*The Chief Justice*: Is the authority given expressly in this case, or is it by implication?

*Mr. Cooper*: I contend that it is given expressly. The authority to appoint is given expressly. The authority for the contract and the terms of the agreement is derived by implication.

*Mr. Justice Richmond*: Your argument would be equally valid if the Governor had fixed the salary at £5,000.

*Mr. Cooper*: It might have been unreasonable in such a case. We are only dealing with the actual contract in this case. I do not for a moment wish to shirk any inference that may be drawn from the argument that I have addressed to your Honours. Suppose the Queen or the Governor contracted for the construction of a man-of-war, and agreed to pay the contractor three times as much as the man-of-war was worth, and, instead of paying £10,000, contracted to pay £50,000, the contract would not be bad unless fraud had been practised on the Crown. The contract would not be bad simply because the Crown agreed to pay too much. I should say, in the case put by Mr. Justice Richmond, if the Governor's contract was to pay the additional Judge £5,000, the Commission would be bad because of fraud in its inception. The contract would be a fraudulent contract.