1892.

NEW ZEALAND.

THE CASE OF W. B. EDWARDS

(CORRESPONDENCE RELATING TO).

Return to an Order of the House of Representatives, dated 10th September, 1891, on Motion of Mr. Fisher.

No. 1.

The CROWN SOLICITOR to the UNDER-SECRETARY, Justice Department.

Wellington, 12th June, 1891.

SIR,— *The Attorney-General* v. *W. B. Edwards.*

I have the honour to report that the whole proceedings in this matter, including the judgments of the Court of Appeal, are printed and ready for transmission to the Privy Council. I have also drafted full instructions to Messrs. Mackrell, Maton, and Godlee, so as to enable them to duly instruct counsel.

I am informed by the Hon. the Attorney-General that he desires that Sir Horace Davey and Mr. Findlay should be retained to argue the case before the Privy Council, and I propose, unless otherwise advised, to request Messrs. Mackrell, Maton, and Godlee to retain those gentlemen. In the meantime I await your further instructions.

I have, &c.,

HUGH GULLY,

The Under-Secretary, Department of Justice, Wellington. Crown Solicitor.

No. 2.

The UNDER-SECRETARY, Justice Department, to the CROWN SOLICITOR.

SIR,— Department of Justice, Wellington, New Zealand, 19th June, 1891.

I have the honour to acknowledge the receipt of your letter of 2nd June instant, with reference to the case Attorney-General *v.* Edwards, and, in reply, am directed by the Minister of Justice to request you to kindly forward a copy of your letter instructing Messrs. Mackrell and Co., in order that the same may be filed in this office.

I have, &c.,

C. J. A. HASELDEN,

H. Gully, Esq., Crown Solicitor, Wellington. Under-Secretary.

No. 3.

The CROWN SOLICITOR to the UNDER-SECRETARY, Justice Department.

Wellington, 29th June, 1891.

SIR,— *Attorney-General* v. *Edwards.*

I forward you herewith copy of my draft instructions to Messrs. Mackrell and Co., as requested by you. I also forward copy letter written by me to the defendant's solicitor. I should have sent you copy of my letter to my London agents before, but I understood that there was to have been a Cabinet meeting to decide finally on certain matters in connection with proceeding with the appeal, and I awaited some definite instructions before actually lodging security, &c., and forwarding papers. As I understand from my interview with you on Saturday that no further instructions are considered necessary, I have the honour to request that you will cause to be forwarded to me the sum of £500 as security for the appeal, which will be at once lodged with the Registrar, who has intimated that he will be satisfied with that amount.

As before intimated to you, the papers are ready, and I propose to lodge the security immediately on receipt from you, and to forward the above-mentioned instructions by the first outgoing mail.

I have, &c.,

HUGH GULLY,

The Under-Secretary, Department of Justice, Wellington. Crown Solicitor.

Enclosure 1 in No. 3.

The CROWN SOLICITOR to Messrs. MACKRELL, MATON, and GODLEE, Solicitors, London.

Wellington, , 1891.

DEAR SIRS,— *The Attorney-General* v. *Edwards.*

This case arises out of the appointment of Worley Bassett Edwards as a Puisne Judge of the Supreme Court of New Zealand, under commission from the Governor of the colony bearing date the 2nd day of March, 1890. The appointment purported to be made under section 5 of "The Supreme Court Act, 1882." Immediately and for a considerable time prior to this appointment the Supreme Court had consisted of one Chief Justice and five Puisne Judges, and their salaries had been appropriated by statute. No statute had been passed either authorising the appointment of a sixth Judge, or providing for the payment of an additional salary. A doubt was at once suggested by the Chief Justice of the colony, whose function it was to swear in the new Puisne Judge, as to whether the appointment was constitutionally valid. After some slight delay, however, Mr. Edwards was sworn in, and proceeded to perform the ordinary functions of a Supreme Court Judge.

In the month of the colonial Legislature was in session, but the sittings ended without any validatory Act being passed, or any statutory appropriation of salary for the new Judge. A general election followed, and at the next ensuing session of Parliament the Government in power when the application was made found themselves in a minority, and the present Government took their place. In the meantime the doubt as to the validity of Mr. Edwards's appointment had been made public and freely circulated, and it became essential that some definite step should be taken to solve the doubt. The present proceedings were ultimately begun by the Attorney-General for the colony.

I now forward for your information—(1.) The case as argued before the colonial Court of Appeal. (2.) A report of the arguments of counsel before that Court. (3.) The judgments of the Court.

With regard to the procedure adopted in this case, I need only state that the statement of claim was filed under the New Zealand Supreme Court Code. Under that code there is no objection to causes of action being joined; and in this case you will see that by the prayer of the claim the plaintiff virtually seeks *quo warranto*, and in the alternative *sci. fa.* to repeal the grant. No question arises on the form of the claim, nor upon the parties, as the defendant has been a consenting party waiving all technical objections.

Yours faithfully,
HUGH GULLY,
Crown Solicitor.

Messrs. Mackrell, Maton, and Godlee, Solicitors, London.

Enclosure 2 in No. 3.

The CROWN SOLICITOR to L. TRIPP, Esq., Solicitor.

Wellington, 29th June, 1891.

DEAR SIR,— *Attorney-General* v. *Edwards.*

I am preparing to send forward the case for appeal to the Privy Council herein at once, and should be prepared to meet your convenience in any way you can suggest with regard to printed copies of the case, or of counsel's arguments, which you may require.

I am instructing Messrs. Mackrell and Co., my agents, to retain Sir H. Davey and Mr. Findlay, Q.C., to argue the case before the Privy Council.

I propose to lodge the cases and formal notice at once. I understand that the Registrar will be satisfied with the deposit of £500 as security.

I have, &c.,
HUGH GULLY.
Crown Solicitor.

L. Tripp, Esq., Solicitor, Wellington.

No. 4.

The SECRETARY, Canterbury Law Society, to the MINISTER of JUSTICE.

SIR,— Christchurch, 7th July, 1891.

I have the honour, by direction of the Council of the Canterbury District Law Society, to forward the following resolution passed unanimously at a meeting held yesterday:—

"That the appointment of Mr. Justice Edwards having been made nearly eighteen months ago, and being valid according to the judgment of the Court of Appeal, and his Honour having in the interval discharged his duties as a Judge to the satisfaction of the profession and the public, and there being no objection on the score of character or capacity, this Council ventures respectfully to urge upon the Government the advisability of discontinuing further proceedings, and of passing an Act providing for his salary, as in the opinion of this Council the present deadlock is injurious to the prestige and authority of the Supreme Court."

I have, &c.,
HENRY SLATER,
Honorary Secretary, Canterbury Law Society.

The Hon. W. P. Reeves, Minister of Justice, Wellington.

No. 5.

The Secretary, Taranaki District Law Society, to the Minister of Justice.

Sir,— New Plymouth, 13th July, 1891.

I am directed by the Council of the Taranaki District Law Society to forward you a copy of the following resolution passed at a meeting held to-day :—

"That the appointment of Mr. Justice Edwards having been made nearly eighteen months ago, and being valid according to the judgment of the Court of Appeal, and his Honour having in the interval discharged his duties as a Judge to the satisfaction of the profession and the public, and there being no objection on the score of character or capacity, this Council ventures respectfully to urge upon the Government the advisability of discontinuing further proceedings, and of passing an Act providing for his salary, as in the opinion of this Council the present deadlock is injurious to the prestige and authority of the Supreme Court."

I have, &c.,
Clement W. Govett,
Honorary Secretary, Taranaki District Law Society.

The Hon. the Minister of Justice, Wellington.

No. 6.

The Secretary, Wellington District Law Society, to the Minister of Justice.

Supreme Court Library, Wellington, 15th July, 1891.

Dear Sir,— Re *Mr. Justice Edwards.*

I have the honour to inform you that, at a meeting of the Council of the Wellington District Law Society held last evening, the following resolution was passed respecting the above matter —namely :—

1. "That this Council, having read the resolution of the Canterbury Law Society with reference to Mr. Justice Edwards, entirely agree with its terms and join in the respectful request to the Government that no further proceedings in the appeal to the Privy Council should be taken."
2. That a copy of this resolution be forwarded to the Minister of Justice.

I have, &c.,
F. Harrison,
Secretary, Wellington District Law Society.

The Hon. W. P. Reeves, Minister of Justice.

No. 7.

The Secretary, Hawke's Bay Law Society, to the Minister of Justice.

Sir,— Napier, 16th July, 1891.

I am directed by the Council of the Law Society for the District of Hawke's Bay to enclose a copy of a resolution passed at a meeting of the Council held here this day, in reference to Mr. Justice Edwards, as follows :—

"That the appointment of Mr. Justice Edwards having been made nearly eighteen months ago, and being valid according to the judgment of the Court of Appeal, and his Honour having in the interval discharged his duties as a Judge to the satisfaction of the profession and the public, and there being no objection on the score of character or capacity, this Council ventures respectfully to urge upon the Government the advisability of discontinuing further proceedings, and of passing an Act providing for his salary, as in the opinion of this Council the present deadlock is injurious to the prestige and authority of the Supreme Court."

I remain, &c.,
A. Stubbs,
Secretary, Hawke's Bay Law Society.

The Hon. the Minister of Justice, Wellington.

No. 8.

The Secretary, Westland Law Society, to the Minister of Justice.

Sir,— Hokitika, 28th July, 1891.

I am instructed by the Council of the Westland Law Society to inform you that a resolution in the words hereunder written was passed at a special meeting of the Council held on Monday last.

I am, &c.,
James A. Murdoch, Secretary.

The Hon. the Minister of Justice, Wellington.

"That the appointment of Mr. Justice Edwards having been made nearly eighteen months ago, and being valid according to the judgment of the Court of Appeal, and his Honour having in the interval discharged his duties as a Judge to the satisfaction of the profession and the public, and there being no objection on the score of character or capacity, this Council ventures respectfully to urge upon the Government the advisability of discontinuing further proceedings, and of passing an Act providing for his salary, as in the opinion of this Council the present deadlock is injurious to the prestige and authority of the Supreme Court."

No. 9.

The UNDER-SECRETARY, Justice Department, to the SECRETARY, Westland Law Society.

SIR,— Department of Justice, Wellington, 3rd August, 1891.

I have the honour to acknowledge the receipt of your letter of the 28th July, covering a copy of a resolution passed by the Law Society in reference to the case, Attorney-General *v.* Edwards.

In reply, I am directed by the Minister of Justice to inform you that the Government has decided upon the course it will pursue in this case, and that no reason is seen for departing from that decision, which was not arrived at without the fullest and most careful consideration.

I have, &c.,

J. A. Murdoch, Esq., Secretary, Westland District Law Society, Hokitika. C. J. A. HASELDEN, Under-Secretary.

[Similar letters sent to the other Law Societies forwarding similar resolutions—namely, Christchurch, Wellington, Hawke's Bay, and New Plymouth.]

No. 10.

The CROWN SOLICITOR to the ATTORNEY-GENERAL.

Wellington, 11th August, 1891.

SIR,— *Attorney-General* v. *Edwards.*

I have the honour to transmit herewith copy letter from Messrs. Chapman, FitzGerald, and Tripp, in reference to the costs in the above action.

I have, &c.,

The Hon. the Attorney-General, Wellington. HUGH GULLY, Crown Solicitor.

Enclosure in No. 10.

CHAPMAN, FITZGERALD, and TRIPP to the CROWN SOLICITOR.

Wellington, 10th August, 1891.

DEAR SIR,— *Attorney-General* v. *Mr. Justice Edwards.*

We are in receipt of your letter of the 7th August, and regret that there is a difference of opinion between the Hon. the Attorney-General and our Mr. Chapman as to the understanding come to in respect of the ascertainment of the costs.

In reply to the latter part of your letter, we suggest that the counsel's fees be fixed by the parties, and the other costs be taxed by the Registrar as between solicitor and client.

With reference to the counsel's fees, we suggest that Mr. Harper's fee be 200 guineas, Mr. Chapman's 175 guineas, and Mr. Cooper's 150 guineas.

Yours faithfully,

The Crown Solicitor, Wellington. CHAPMAN, FITZGERALD, and TRIPP.

No. 11.

The Hon. the PREMIER to the AGENT-GENERAL.

New Zealand: Premier's Office, Wellington, 12th August, 1891.

SIR,— *Attorney-General* v. *Edwards.*

I have the honour to request that you will be good enough to provide Messrs. Mackrell and Co. with such funds as may be necessary to enable them to carry on the appeal to the Privy Council herein.

I have, &c.,

The Agent-General for New Zealand, London. J. BALLANCE.

No. 12.

The CHIEF JUSTICE to the Hon. the PREMIER.

SIR,— Judge's Chambers, Wanganui, 6th October, 1891.

I have the honour to enclose a copy of a letter I have received from Mr. Justice Edwards, and, with reference to the concluding part of the letter, I venture to suggest for your consideration, whether the Ministry would see fit to give to Mr. Justice Edwards an assurance that, with them, the fact of his not acting in his office pending the appeal to the Privy Council will not, and in their opinion ought not, to prejudice any claims he may have.

I have, &c.,

The Hon. the Premier, Rutland Hotel, Wanganui. JAMES PRENDERGAST.

Enclosure in No. 12.

Mr. Justice EDWARDS to the CHIEF JUSTICE.

DEAR SIR,— Hill Street, Wellington, 16th September, 1891.

In view of the possibility of an appeal to the Privy Council in the proceedings undertaken by the Attorney-General against myself, I deemed it advisable that I should cease to take any part in the judicial work until the Law Officers of the Crown had intimated what course it was intended to take with respect to the matter,

The judgment of the Court of Appeal was delivered, as you will remember, on the 27th May last, and it was not until 29th June that the Crown Solicitor could intimate to my solicitors what course was to be taken, although he was repeatedly pressed for information in the meantime.

On 29th June the Crown Solicitor intimated to my solicitors that he was instructed to proceed with the appeal. On the same day my solicitors wrote to the Crown Solicitor, mainly with reference to payment of my salary and to provision for the costs of the proceedings, but pointing out also that if it was desired that I should not, pending the appeal, exercise my judicial functions, it would be necessary, in addition to providing for payment of my salary, that formal leave of absence should be granted to me; and stating that in order to anticipate any objection which might be raised to payment of my salary, and to granting me leave of absence on the ground that that course would involve a recognition of the validity of my appointment, they were instructed to undertake that no such result should follow, and that I would sign any formal undertaking to that effect which might be deemed desirable.

No reply was received to this letter until 16th July, upon which day the Crown Solicitor wrote to my solicitors enclosing copy of a letter, dated 15th July, from the Under-Secretary for the Department of Justice to himself, curtly stating that he was directed by the Minister of Justice to inform the Crown Solicitor that he regretted that the Government was unable to accede to the request made by my solicitors.

On 28th July, the late Premier, Sir Harry Atkinson, had an interview with the present Premier, the Hon. John Ballance, with reference to the mode in which I am being treated by the present Ministry, with the result, as I am informed, that the Premier did not express himself in any degree personally adverse to treating me with every consideration, but said that he must consult the Cabinet before expressing any definite opinion.

I made many attempts to ascertain whether the matter had been reconsidered by the Cabinet, but without success; nor do I know even now whether the Premier has ever returned any reply to Sir Harry Atkinson.

On 11th August I wrote to the late Native Minister, the Hon. E. Mitchelson, and requested him to see the present Native Minister, the Hon. Mr. Cadman, upon the subject. Mr. Mitchelson did so, and Mr. Cadman promised to bring the matter before the Cabinet for reconsideration. This was not done until the 28th of August, although repeated efforts were made to obtain a definite reply. On the 28th of August Mr. Cadman informed Mr. Mitchelson that at a meeting of the Cabinet, held on that day, it had been decided to let matters take their course.

On the 4th of September I presented a petition to Parliament, in which, amongst other things, I pointed out that, unless leave of absence were granted to me, it would be necessary for the preservation of my rights that I should resume the exercise of my judicial functions, and that I should have no alternative but to do so.

On the 9th of September I learned from the public Press that the Premier had declined to allow a Select Committee to be set up to consider my petition, alleging as his reasons the lateness of the date at which it was presented, and the fact that the case is *sub judice*. I have, therefore, now exhausted every means in my power to obtain leave of absence while the appeal is pending, and, although it would be more consonant with my own inclinations, and necessarily, I imagine, in the circumstances, with the wishes of the other members of the Bench, that I should not act until the appeal to the Privy Council has been disposed of, I see no alternative but now to resume my seat upon the bench.

I am, &c.,

His Honour the Chief Justice, Wellington. W. B. Edwards.

No. 13.

The Hon. the Premier to the Chief Justice.

Sir,— Premier's Office, 12th October, 1891.

I have the honour to acknowledge the receipt of your letter of the 6th instant, covering copy of a letter from Mr. W. B. Edwards in reference to his position, and, in reply to your suggestion, beg to state that, in the opinion of the Government, the fact of his not acting in his office pending the appeal to the Privy Council will not prejudice any claims he may have.

I have, &c.,

His Honour the Chief Justice, Wellington. J. Ballance.

No. 14.

The Crown Solicitor to the Attorney-General.

Sir,— Wellington, 19th March, 1892.

I have the honour to report that yesterday evening I received a cable from my London agents informing me that the case, Attorney-General *v.* Edwards, had been fixed by the Privy Council for Wednesday next. I presume, therefore, that the argument will begin on that day.

I have, &c.,

Hugh Gully,

The Hon. the Attorney-General, Wellington. Crown Solicitor.

No. 15.

The CROWN SOLICITOR to the ATTORNEY-GENERAL.

SIR,— Wellington, 31st March, 1892.

I have the honour to inform you that I have this afternoon received a cable from my London agents that in the case of The Attorney-General *v.* Edwards the argument has been concluded, and judgment reserved.

I have, &c.,
HUGH GULLY,
Crown Solicitor.

The Hon. the Attorney-General, Wellington.

No. 16.

The AGENT-GENERAL to the Hon. the PREMIER.

Agent-General's Office, London, 31st March, 1892.

SIR,— *Attorney-General* v. *W. B. Edwards.*

I have the honour to inform you that, in accordance with the instructions contained in your letter (I. '91/728), No. 1,682, of the 12th August last, I have paid Messrs. Mackrell and Co. the sum of £500, by cheque on the Foreign Imprest Account. Voucher for the payment goes to the Treasury by this mail.

I enclose extracts from the *Times*, referring to the proceedings before the Judicial Committee of the Privy Council. Yesterday the argument in the case was concluded, and the Court reserved its judgment.

I have, &c.
W. B. PERCEVAL.

The Hon. the Premier, Wellington.

Enclosures in No. 16.

(The *Times*, Thursday, 24th March, 1892.)

LAW REPORT, 23RD MARCH.—JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Present—The Lord Chancellor, Lord Watson, Lord Hobhouse, Lord Herschell, Lord Macnaghten, Lord Hannen, and Sir Richard Couch.

Buckley (*Attorney-General of New Zealand*) v. *Edwards.*

THIS was an appeal from a judgment of the Court of Appeal of New Zealand of May 27th, 1891, refusing a motion, made on behalf of the Attorney-General of New Zealand, that the respondent, Mr. Worley Bassett Edwards, should show by what warrant and authority he claimed to exercise the office of Judge of the Supreme Court of New Zealand, or that his commission of office of Judge of the Supreme Court should be cancelled.

Sir Horace Davey, Q.C., Mr. Rigby, Q.C., and Mr. J. G. Butcher were counsel for the appellant; Sir Walter Phillimore, Q.C., and Mr. Danckwerts for the respondent.

The question to be determined in the appeal was whether the respondent, Mr. Edwards, who claimed to have been duly appointed a Puisne Judge of the Supreme Court of New Zealand by virtue of a commission, dated March 2nd, 1890, had, in fact, been validly appointed. It appears that by "The Civil List Act 1863 Amendment Act, 1873," a sum of £7,700 per annum was set apart for the payment of the salaries of the Chief Justice and four Puisne Judges of the Supreme Court of the colony. By "The Supreme Court Act, 1882," the Court was constituted to consist of the Chief Justice and such other Judges of the Court as the Governor, in the name of the Queen, should from time to time appoint. In 1889, the Native Land Courts Amendment Act was passed, and Mr. Edwards, the respondent, who was a practising barrister in the colony, was offered the appointment of Chief Commissioner of the Native Land Court, which he declined. Later on the Government offered him the office of Chief Commissioner with a Judgeship of the Supreme Court at a salary of £1,500 per annum—the same as the existing Puisne Judges—which he accepted, and Lord Onslow, the then Governor of New Zealand, issued a commission purporting to appoint him a Puisne Judge of the Supreme Court. He was also appointed, under an Order in Council, a Commissioner of the Native Land Court. No salary as Puisne Judge was provided for Mr. Edwards by the General Assembly of New Zealand, but he appeared to have been paid from a source called "The Unauthorised Expenditure Account," which is sanctioned by "The Public Revenue Act, 1878." The respondent's appointment as Commissioner under the Native Land Act came to an end in March, 1891, and the Attorney-General subsequently filed a statement of claim against Mr. Edwards calling upon him to show by what authority he claimed to hold the office of a Puisne Judge, and praying that the commission might be cancelled. The appellant contended that the Governor of New Zealand had no power to appoint Mr. Edwards to be a Judge or to issue the commission, and that Mr. Edwards never had any legal warrant for exercising the office. The respondent claimed to have been validly appointed. The matter was argued before the Court of Appeal in May, 1891, when the Chief Justice and Mr. Justice Connolly were of opinion that as there was no vacancy in March, 1890, by death, removal, or resignation of any of the four then existing Puisne Judges, and as the General Assembly had not provided out of the revenue for the salary and allowances of a fifth Judge, there was no power on the part of the Crown to appoint the respondent. The majority of the Court, however, consisting of Justices Richmond, Williams, and Denniston, were of a contrary opinion, and held that under "The Supreme Court Act, 1882," and the other legislation, the Crown had power to appoint an additional Puisne Judge, and that the respondent had been validly appointed. From this judgment the present appeal was instituted.

The arguments were unfinished when their Lordships rose for the day, and will be resumed on Wednesday next.

(The *Times*, Friday, 1st April, 1892.)

LAW REPORT, MARCH 31.—JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Present: The Lord Chancellor, Lord Watson, Lord Hobhouse, Lord Herschell, Lord Macnaghten, Lord Hannen, and Sir Richard Couch.

Buckley (*Attorney-General of New Zealand*) v. *Edwards*.

Their Lordships resumed the hearing of the arguments in this New Zealand appeal. The Court of Appeal in New Zealand had refused a motion made on behalf of the Attorney-General for New Zealand that the respondent, Mr. Worley Bassett Edwards, should show by what warrant and authority he claimed to exercise the office of Judge of the Supreme Court of New Zealand, or that his commission of office as Judge of that Court should be cancelled.

Sir Horace Davey, Q.C., Mr. Rigby, Q.C., and Mr. J. G. Butcher were counsel for the appellant; and Sir Walter Phillimore, Q.C., and Mr. Danckwerts for the respondent.

The question for decision was whether the respondent, Mr. Edwards, who claimed to have been duly appointed a Puisne Judge of the Supreme Court of New Zealand, by virtue of a commission dated March 2, 1890, had, in fact, been validly appointed. Mr. Edwards, who was a practising barrister in the colony, was appointed Chief Commissioner of the Native Land Court, with the salary and status of a Puisne Judge of the colony, under a commission signed by Lord Onslow, the then Governor. No salary was provided for him by the General Assembly of New Zealand; but he appeared to have been paid from another source, sanctioned by the Public Revenue Act. Mr. Edwards's appointment as Native Land Commissioner came to an end in March, 1891, and the Government of New Zealand then sought to invalidate and cancel his commission as a Puisne Judge on the ground that the Governor had no power at the time to appoint an additional Judge. The matter was argued before the Court of Appeal, when the learned Judges were divided in opinion. The Chief Justice and Mr. Justice Conolly thought that, as there was no vacancy in March, 1890, by death, removal, or resignation of any of the four existing Puisne Judges, and as the General Assembly had not provided any salary for a fifth Judge, there was no power to appoint Mr. Edwards. The majority of the Court—consisting of Justices Richmond, Williams, and Denniston, whose opinion prevailed—held that under "The Supreme Court Act, 1882," and the other legislation, the Crown had power to appoint an additional Puisne Judge, and that the respondent had consequently been validly appointed. From that judgment the present appeal was instituted.

At the conclusion of the arguments yesterday their Lordships intimated that they would take time to consider their judgment.

No. 17.

The Hon. the PREMIER to the AGENT-GENERAL.

SIR,— Premier's Office, Wellington, 21st May, 1892.

I have the honour to acknowledge the receipt of your letter, No. 450, of the 31st March last, reporting that you have paid Messieurs Mackrell and Co. the sum of £500 on account of the case Attorney-General *v.* Edwards, and enclosing newspaper reports of the proceedings before the Judicial Committee of the Privy Council.

I have, &c.,

The Agent-General for New Zealand, London. J. BALLANCE.

No. 18.

The AGENT-GENERAL to the Hon. the PREMIER.

Westminster Chambers, 13, Victoria Street,
London, S.W., 24th May, 1892.

SIR,— *Attorney-General* v. *W. B. Edwards*.

I have the honour to transmit herewith the *Times* report of the judgment in this case, together with copy of the cablegram which I sent to you on the 21st instant, the day on which the judgment was delivered.

I also attach copy of a letter received from Messrs. Mackrell on the subject.

I have, &c.,

The Hon. the Premier, Wellington. W. B. PERCEVAL.

Enclosure 1 in No. 18.

(Extract from the *Times*, Monday, 23rd May, 1892.)

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Present: Lord Herschell, Lord Macnaghten, Lord Hannen, and Sir Richard Couch.

Buckley (*Attorney-General of New Zealand*) v. *Edwards*.

THIS was an appeal from a judgment of the Court of Appeal of New Zealand of May 27, 1891, refusing a motion made on behalf of the Attorney-General of New Zealand that the respondent, Mr. Worley Bassett Edwards, should show by what warrant and authority he claimed to exercise the office of Judge of the Supreme Court of New Zealand, or that his commission of office of Judge of the Supreme Court should be cancelled.

Sir Horace Davey, Q.C., Mr. Rigby, Q.C., and Mr. J. G. Butcher were counsel for the appellant; Sir Walter Phillimore, Q.C. and Mr. Danckwerts for the respondent.

This important case was argued on March 22 and 30 before a Board consisting of the Lord Chancellor, Lord Watson, Lord Hobhouse, Lord Herschell, Lord Macnaghten, Lord Hannen, and Sir Richard Couch, when judgment was reserved.

Lord Herschell to-day gave their Lordships' judgment. He said: On March 2, 1890, His Excellency the Governor of New Zealand issued a commission to the respondent appointing him a Puisne Judge of the Supreme Court of New Zealand, to hold the office during good behaviour. On the previous day the then Premier of New Zealand wrote a letter to the respondent informing him that the Governor had approved of his appointment to the office of a Commissioner under "The Native Land Courts Acts Amendment Act, 1889," and that it had appeared to the Government that for an office of such importance the Commissioner should have the status of a Judge of the Supreme Court, and, therefore, he would be appointed to that office also. The letter added that the demands on the time of the Judges caused unavoidable delay in the despatch of business, and that it was hoped that this arrangement, by which the respondent would afford occasional assistance in the Supreme Court work, would temporarily meet the requirements. On March 6, 1890, the commission appointing him a Judge was transmitted to the respondent, together with an Order in Council appointing him and Mr. John Ormsby to be Commissioners under the Native Land Act above mentioned. The appointment of the respondent as Commissioner came to an end on March 31, 1891. No salary had at the time of his appointment or has since been provided for the respondent as Puisne Judge by the General Assembly of New Zealand, nor was there any parliamentary sanction for the appointment of an additional Puisne Judge unless it is to be found in prior legislation. It may be added that shortly after the appointment of the respondent a change of Government took place in the colony, and that the House of Representatives of New Zealand have refused to vote any salary for the respondent as a Judge of the Supreme Court, and that, although a Bill to amend the Supreme Court Act, 1882, and to provide for the payment of an additional Judge was transmitted by the Governor to the House of Representatives, leave to introduce such Bill was not given. Under these circumstances the appellant, as Attorney-General of New Zealand, filed his statement of claim in the Supreme Court. On 6th May notice of motion was filed on behalf of the appellant, calling on the respondent to show cause why he should not show by what warrant and authority he claimed to exercise the office of Judge of the Supreme Court of New Zealand, or why his commission of Judge of the Supreme Court of New Zealand should not be cancelled. This motion was heard by the Court of Appeal, and judgment was pronounced in favour of the respondent by three learned Judges, the Chief Justice and one other Judge dissenting. The question raised is one of grave importance, the contention on the part of the respondent being that, as the law stands in New Zealand, the Governor has the power of adding without limit to the number of Judges of the Supreme Court of that colony without express parliamentary sanction and in the absence of any parliamentary provision for the salaries of the Judges so appointed. Both sides have placed reliance on the law which has prevailed in England governing the appointment of Judges. Their Lordships do not propose to deal with this subject in detail, as it can have only an indirect bearing upon the question to be determined, which must depend upon the construction of certain New Zealand statutes. It appears certain that since the reign of James I., with two possible exceptions, the latest of which dates back as far as 1714, no addition has been made to the number of Judges without express Parliamentary sanction. In the Act of Settlement it was provided that the Judges' commissions should be made *quamdiu se bene gesserint*, "and that their salaries should be ascertained and established." The latter provision was not completely carried into effect until a subsequent period. The remuneration of the Judges was in former times derived partly from fees and partly from the Civil List of the Sovereign. By several Acts passed prior to the reign of George III. the salaries of the Judges were in part provided by certain sums charged upon the duties granted by those Acts. The Act of the first year of Geo. III., c. 23, recited the provision of the Act of Settlement to which attention has been called. It recited further that his Majesty had been pleased to declare from the Throne to both Houses of Parliament that he looked upon the independence and uprightness of the Judges as essential to the administration of justice and as one of the best securities of the rights and liberties of his subjects, and that in consequence thereof his Majesty had recommended to Parliament to make further provision for the continuing Judges in office, notwithstanding the demise of his Majesty, and that his Majesty had also desired his faithful Commons that he might be enabled to secure the salaries of Judges during the continuance of their commissions. After these recitals it was enacted that such salaries as were settled on Judges by Act of Parliament, and also such salaries as had been or should be granted by His Majesty, his heirs and successors, to any Judge or Judges, should in all times coming be paid and payable to every such Judge and Judges for the time being, so long as their patents or commissions should remain in force, and should, after the demise of the Crown, be charged upon and payable out of such of the duties and revenues granted for the use of the civil government of His Majesty, his heirs and successors, as should be subsisting after such demise, until further provision was made by Parliament. By an Act of the 6 Geo. IV., the salaries of the Puisne Judges were fixed at £5,000 a year, and charged upon the Consolidated Fund. Their Lordships think that the Act, 1 Geo. III., c. 23, would render it difficult to contend that the Crown could after that date appoint additional Judges for the payment of salary to whom Parliament had given no sanction. For the salaries of the Judges were then, by the authority of Parliament, secured to them during the continuance of their commissions, and after the demise of the Sovereign were charged upon the revenues granted by Parliament for civil government of the realm. The recital which precedes this legislation shows that with a view to their independence it must have been intended that all the Judges should be in this position, and it certainly cannot have been the intention of Parliament to enable the Sovereign to increase without its sanction the charges which, after the demise of the Sovereign, were to be imposed upon the revenues of the realm. Down to 1852 New Zealand was a Crown colony. It was only then that it received com-

plete representative institutions. Whilst it was thus a Crown colony an ordinance was passed in 1841 by the Governor, with the advice and consent of the Legislative Council, establishing a Supreme Court for New Zealand, and defining its jurisdiction, constitution, and practice. The eighth section is as follows: "The Court shall be holden before one Judge, who shall be called the Chief Justice of New Zealand, and such other Judges as her Majesty or the Governor shall from time to time be pleased to appoint." This provision was (with some others contained in the ordinance) modified by another ordinance passed in 1844, the tenth clause of which is in these terms: "The Court shall consist of one Judge, who shall be called the Chief Justice of New Zealand, and of such other Judges as Her Majesty shall from time to time be pleased to appoint. Provided that it shall be lawful for His Excellency the Governor to appoint such Judges provisionally until Her Majesty's pleasure shall be known. The Judges of the Court shall hold their office during Her Majesty's pleasure." It is clear that as regards the Crown these were not enabling provisions. The power of the Crown to appoint in a Crown colony such Judges as might be deemed advisable could not be doubted, but whilst the earlier ordinance had conferred upon the Governor power to appoint absolutely, the later one gave him this provisionally only, until Her Majesty's pleasure was known, and further provided, in terms which the previous ordinance had not done, that the Judges should hold their office during Her Majesty's pleasure. By the Imperial Act, 15 and 16 Vict., c. 72, a representative Constitution was granted to the Colony of New Zealand. The 64th section of this Act is, so far as material, as follows: "There shall be payable to Her Majesty every year . . . the several sums mentioned in the schedule of this Act, such several sums to be paid for defraying the expenses of the services and purposes mentioned in such schedule." By section 65 the General Assembly of New Zealand was empowered by any Act or Acts to alter all or any of the sums mentioned in the schedule, and the appropriation of such sums to the services and purposes therein mentioned; but until and subject to such alteration by Act or Acts as aforesaid the salaries of the Governor and Judges were to be those respectively set against their several offices in the schedule. In the schedule to the Act occur these words: "Chief Justice, £1,000; Puisne Judge, £800." The section concludes with the following proviso: "Provided always that it shall not be lawful for the said General Assembly by any such Act as aforesaid to make any diminution in the salary of any Judge to take effect during the continuance in office of any person being such Judge at the time of the passing of such Act." It is manifest that this limitation of the legislative power of the General Assembly was designed to secure the independence of the Judges. It was not to be in the power of the colonial Parliament to affect the salary of any Judge to his prejudice during his continuance in office. But, if the Executive could appoint a Judge without any salary, and he needed to come to Parliament each year for remuneration for his services, the proviso would be rendered practically ineffectual, and the end sought to be gained would be defeated. It may well be doubted whether this proviso does not by implication declare that no Judge shall thereafter be appointed save with a salary provided by law to which he shall be entitled during his continuance in office, and his right to which could only be affected by that action of the New Zealand Legislature which is excluded by the Imperial Act. It appears from the affidavit of Mr. Francis Harrison that Mr. Justice Gresson was temporarily appointed a Puisne Judge on December 8, 1857. The affidavit does not state under what circumstances this took place, nor does it expressly state that the office of Puisne Judge was full at the time, but it may be presumed that the predecessor of Mr. Justice Johnston, who was appointed on November 3, 1858, then held that office. The appointment of Mr. Justice Gresson probably purported to be made by the Governor under the powers of the ordinance of 1844 which had not been repealed. Under these circumstances it was only natural that the whole subject of the status of the Judges, and the salaries to which they were to be entitled, should be brought under the consideration of the Legislature. Accordingly, two Acts were passed by the Legislature in the following year —the one entitled "An Act to regulate the Appointment and Tenure of Office of the Judges of the Supreme Court;" the other "An Act to alter the Sums granted to Her Majesty by the Constitution Act for Civil and Judicial Services." By the Supreme Court Judges Act, the tenth section of the ordinance of 1844 was repealed. The second and third sections were as follows: "II. The Supreme Court of New Zealand shall consist of one Judge, to be appointed in the name and on behalf of Her Majesty, who shall be called the Chief Justice, and of such other Judges as His Excellency, in the name and on behalf of Her Majesty, shall from time to time appoint. III. The commission of the present Chief Justice, and of every Chief Justice, and other Judges of the said Court to be hereinafter appointed (except as hereinafter provided), shall be and continue in full force during their good behaviour notwithstanding the demise of Her Majesty, any law, usage, or practice to the contrary notwithstanding." The fourth clause empowered the Governor at his discretion, in the name and on behalf of Her Majesty, upon the address of both Houses of the General Assembly, to remove any such Judge from his office. It is needless to comment upon the important change which the third clause made in the status of the Judges thereafter appointed. It is contended that the second clause in terms enabled the Governor to appoint as many additional Judges as he pleased; that, though Parliament might not have sanctioned any increase of the judiciary or provided any salary for the Judges so appointed, the Governor might appoint any number of Judges without salary, or, as in the present case, with a salary temporarily provided by Parliament for other services, whose commission should not be temporary, but should continue in force during their good behaviour. It certainly would be startling to find that when the tenure of the judicial office was so materially altered, this power had been vested in the Governor by the advice of his Executive, for it is to be observed that whilst under the ordinance of 1844 the Governor could only appoint provisionally until Her Majesty's pleasure was known, this Act enables him to appoint absolutely in the name and on behalf of Her Majesty. Their Lordships need not dwell upon the importance of maintaining the independence of the judges; it cannot be doubted that whatever disadvantages may attach to such a system the public gain is,

on the whole, great. It tends to secure an impartial and fearless administration of justice, and acts as a salutary safeguard against any arbitrary action of the Executive. The mischief likely to result, if the construction contended for by the respondent be adopted, is forcibly pointed out by one of the learned Judges who held the appointment now in question to be valid. He said: "In the present case, until such time as the matter may be finally dealt with by Parliament, the position will undoubtedly remain most unsatisfactory. The Judge is absolutely dependent upon the Ministry of the day for the payment of any salary, and has to come before Parliament as a suppliant to ask that a salary be given him. It is difficult to conceive a position of greater dependence. No Judge so placed could, indeed, properly exercise the duties of his office. One of these duties, for instance, is the trial of petitions against the return of members of Parliament. How could a Judge in this position be asked to take part in such a trial? Against the occurrence of such a state of things obviously neither the power of the purse which Parliament has, nor the power of removal by address, can be a sufficient protection." Nevertheless, weighty as these considerations are, if the natural meaning of the general words used be to confer the power contended for, and if there be no other provisions in the Act showing that this was not the intention of the Legislature, effect must be given to the enactment, without regard to the consequences. But it cannot be disputed that it is legitimate to read every part of an Act in order to see what construction ought to be put upon any particular provision contained in it. Now, the sixth section of the Supreme Court Judges Act provides that "A salary equal at least in amount to that at which at the time of the appointment of any Judge shall be then payable by law shall be paid to such Judge so long as his patent or commission shall continue and remain in force." The language of this section is imperative and general. How can its requirements possibly be complied with in any reasonable sense in the case of a Judge to whom at the time of his appointment there was no salary payable by law? Is this not a clear indication of the intention of the Legislature that there should be no appointment of a Judge unless at the time of his appointment there was a fixed salary payable to him by law in respect of his office? It is inconceivable that it should have intended to enable the creation of two classes of Judges, the one entitled by law from the time of their appointment to a salary unalterable during the continuance of their commission, the other without any legal right to salary at all. There was some controversy as to what the salary "then payable at law" referred to. Their Lordships think this is made clear by a reference to the Civil List Act of the same year, which must be read with the sixth section of the Supreme Court Judges Act. It was said in the Court below that this and the other Civil List Acts, to which reference will have to be made, were mere money Bills; but though the parliamentary incidents of such Bills are no doubt special, when they pass into law, they do not, in their Lordships' opinion, differ from any other Acts of the Legislature. "The Civil List Act, 1858," provides that "there shall be payable to Her Majesty the several sums mentioned in the schedule to this Act instead and in lieu of the sums mentioned in the schedule to the Constitution Act of the 15th and 16th Victoria." The schedule to the Civil List Act contains these words: "Chief Justice, £1,400; First Puisne Judge, £1,000; Second Puisne Judge, £1,000." Reading the two statutes together, the effect of "The Civil List Act, 1858," clearly is to provide that the salaries of the Chief Justice and of the two Puisne Judges "shall be those respectively set against their several offices in the schedule." This Act, though reserved for the signification of Her Majesty's pleasure on the 21st August, 1858, did not receive the Royal assent until the 25th July, 1859, but it is significant that its second clause provided that it "should be deemed to take effect on and after the 1st July, 1858," immediately prior to the Supreme Court Judges Act which came into force on the 3rd of July following. What was meant, therefore, in the sixth clause of the Supreme Court Judges Act by the salary payable by law to a Judge on his appointment does not admit of doubt. There was a fixed salary payable to the Chief Justice and one Puisne Judge under the Constitution Act, and "The Civil List Act, 1858," made provision for the payment of a fixed salary to the Chief Justice and to two Puisne Judges respectively, which could only be altered by fresh legislation. But the sixth section of the Supreme Court Judges Act is not the only one which throws light on the construction to be put upon the second section of that Act. The seventh section empowers the Governor in Council, at any time during the illness or absence of any Judge appointed as aforesaid, or for any other temporary purpose, to appoint a Judge or Judges of the Supreme Court to hold office during his Excellency's pleasure; and it provides that every such Judge shall be paid such salary, "not exceeding the amount payable by law to a Puisne Judge of the said Court" as the Governor in Council shall think fit to direct. This section clearly implies that there will be a fixed salary payable to any person filling the office of Puisne Judge of the Supreme Court. If a Puisne Judge can be appointed to whom there is no amount payable as salary, what will be the operation of this section? The superannuation clauses point in the same direction, though perhaps not so forcibly. They imply, however, that every Judge of the Supreme Court will be entitled to an annual salary at the time of his resignation. Returning now to the second clause, which is more immediately under consideration, it is to be observed that even if it be confined, by reference to other parts of the Act, to the appointment of Judges to whom a fixed salary is payable by law at the time of their appointment, every word of the section—the main object of which was manifestly to define the constitution of the Supreme Court and to prescribe the mode of the appointment of the Judges—would still be necessary and would have full effect. In view of the considerations to which attention has been called their Lordships are of opinion that the section can, consistently with other parts of the Act, only be construed as vesting in the Governor the appointment of Judges to whom an ascertained salary is payable by law at the time of their appointment. None of the Judges in the Court below appear to have doubted the expediency of such a construction if it be legitimate, and their Lordships think that it is the only one which will give full and consistent effect to all the provisions of the Act. Their Lordships have dealt thus fully with the construction of "The Supreme Court Judges Act, 1858," although it is not the statute which now regulates the

appointment of Judges, because, if it could have been shown that it bore the construction contended for, it would not have been possible to resist the conclusion, having regard to the terms of the Act of 1882, that the power which it conferred upon the Governor was still vested in him. If, on the other hand, the Act of 1858 conferred no such power, this is a legitimate consideration when inquiring into the effect of the later Act. Before proceeding to this inquiry, it will be desirable to refer to the intermediate legislation, as some stress has been laid upon it. "The Civil List Act, 1862,' substituted for the sums mentioned in the schedule to "The Civil List Act, 1858," the following: "Judges, £6,200." "The Civil List Act, 1863," substituted £7,700 for £6,200 as the sum payable to the Judges. Whilst each of these Acts increased the sum payable, neither of them specified how the respective sums were to be distributed amongst the Judges. It appears to have been afterwards thought, not unnaturally, that this was objectionable, and accordingly an Act was passed in 1873 to amend "The Civil List Act, 1863," which, after reciting that it was expedient that the sum of £7,700 granted to Her Majesty by that Act for defraying the salaries and expenses of the Judges of the Supreme Court should be more definitely appropriated to such service, enacted that this sum should "be applied in paying to the Judges of the said Court respectively the annual salaries specified in the first schedule—viz., annual salary to the Chief Justice of the Supreme Court, £1,700; annual salaries of four Puisne Judges of the Supreme Court (£1,500 each), £6,000." This enactment implies that, unless the Legislature should intervene, "the Judges of the Supreme Court"—other than the Chief Justice—would be four in number only. This statute was in force, unaltered, at the time "The Supreme Court Act, 1882," was passed. The object of that Act was, it is to be gathered, to make certain alterations in the practice and procedure of the Court, but it was evidently thought convenient that the Judicature provisions should also be found in the same Act so as to render it a complete code. Part I. of the Act consists, therefore, in substance of a re-enactment of the Supreme Court Judges Act with the addition of a provision defining the qualifications requisite for the appointment to the office of Judge. The 7th section of the earlier Act is repeated with an immaterial verbal alteration. For the 6th, however, the following is substituted: "11. The salary of a Judge shall not be diminished during the continuance of his commission." What was the cause for this change does not appear, but it affords no ground for the conclusion that it was intended to affect the limitation of the power of appointing Judges which, in their Lordships' opinion, was then in force. The 11th section of the Act of 1882, as distinctly as the 6th section of the earlier Act, involves the necessity of a salary being fixed at the commencement of a Judge's commission. Some stress was laid in the argument for the respondent upon the interpretation which it was alleged had been put upon the Supreme Court Judges Act, as evidenced by certain appointments made by the Governor. It appears that Mr. Justice Gillies and Mr. Justice Williams were appointed in 1875, about a month before the resignation of the learned Judges whom they were to succeed was gazetted. Mr. Justice Richmond and Mr. Justice Chapman received their appointments in 1862 and 1864, before the Civil List Acts of 1862 and 1863, each of which provided the salary for an additional Judge, came respectively into force, though after they had passed the Legislature and had been reserved for Her Majesty's pleasure to be signified. The former Act provided that it was to take effect from 1st July, 1862, a date prior to the appointment of Mr. Justice Richmond, but there was no such provision in "The Civil List Act, 1863." It is manifest that all these were intended to be appointments of Judges to whose office a salary was regarded as already secured by the Legislature. And Mr. Justice Gresson, whose appointment was the first made under the Act of 1858, did not receive his commission until the day after the Act providing a salary for him had come into force. Their Lordships cannot attribute any weight to the facts relied on as affecting the interpretation of the enactments which have to be construed. There may have to be irregularity in some of these appointments, and it would be contrary to sound principle to allow the interpretation indicated by any such practice, even if it had been uniform and unequivocal, to guide the Court in the construction of a modern statute. Their Lordships will humbly advise Her Majesty that the judgment of the Court of Appeal of New Zealand should be reversed and judgment on the motion entered for the Attorney-General. Under the peculiar circumstances of this case, their Lordships do not think that the respondent should be ordered to pay the costs in the Court below or of this appeal.

Enclosure 2 in No. 18.

(Telegram.) 21st May, 1892.

EDWARDS appeal allowed, Court holding Judges can only be appointed for whom salary fixed by law. No costs either side.

To Premier, Wellington.

No. 19.

21, Cannon Street, London, E.C., 24th May, 1892.

DEAR SIR,— *Buckley* v. *Edwards.*

Confirming our conversation with you on Saturday, the Privy Council delivered their formal decision on Saturday last, allowing the appeal of the Government, but without costs under all the circumstances of the case. We shall be able to obtain prints of the judgment as soon as Her Majesty has held a Council, so that the Order may be made, and you will, no doubt, like to have a copy.

We are reporting the matter to the Crown Solicitor by this week's mail.

We have, &c.,

The Agent-General for New Zealand. MACKRELL, MATON, AND GODLEE.

Approximate Cost of Paper—Preparation, nil; printing (1,350 copies), £17 8s.

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