Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Buckley (the Attorney-General of New Zealand) v. Edwards from the Court of Appeal of New Zealand; delivered 21st May 1892.

Present:

THE LORD CHANCELLOR.
LORD WATSON.
LORD HOBHOUSE.
LORD HERSCHELL.
LORD MACNAGHTEN.
LORD HANNEN.
SIR RICHARD COUCH.

[*Delivered by Lord Herschell.*]

On the 2nd of March 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 Court 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

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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 the 6th of March 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 the 31st of March 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 has 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 the 6th of 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 the 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 upon 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 *quam diu 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 George 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 George IV., the salaries of the Puisne Judges were fixed at 5,000*l.* a year, and charged upon the Consolidated Fund.

Their Lordships think that the Act of the 1st George 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 the 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 the year 1852, New Zealand was a Crown Colony; it was only then that it received complete representative institutions. Whilst it was thus a Crown Colony an Ordinance was passed in the year 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 the year 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 power 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 of the 15th & 16th Victoria, 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 men- "tioned in the schedule to 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*l.*, Puisne Judge, 800*l.*" 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 con- "tinuance 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 the 8th of December 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 that time, but it may be presumed that the predecessor of Mr. Justice Johnston who was appointed on the 3rd of November 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 Zea-
"land 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 Judge of the said Court to
"be hereafter appointed (except as hereinafter
"provided) shall be and continue in 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 commissions 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 ab- "solutely 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 to 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 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 by "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 of 1858 clearly is to provide that the salaries of the Chief Justice and two Puisne Judges "shall be those respec- "tively set against their several offices in the "schedule." This Act, though reserved for the signification of Her Majesty's pleasure on the 21st of August 1858, did not receive the Royal Assent until the 25th of July 1859; but it is significant that its second clause provided that it should "be deemed to take effect on and after "the 1st day of 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 ex- "ceeding 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 appears 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 of 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 of 1858 the following: "Judges, 6,200*l.*" The Civil List Act of 1863 substituted 7,700*l.* for 6,200*l.* 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*l.* 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" thereto. The schedule was in these terms: "Annual salary of the "Chief Justice of the Supreme Court, 1,700*l.* "Annual salaries of four Puisne Judges of the "Supreme Court, each 1,500*l.*—6,000*l.*" 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 appointment to the office of Judge. The seventh section of the earlier Act is repeated with an immaterial verbal alteration. For the sixth section, however, the following is substituted: "**11.** The salary of a Judge shall not be "diminished during the continuance of his com-"mission." 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 eleventh section of the Act of 1882, as distinctly as the sixth section of the earlier Act, involves the necessity of a salary being fixed at the commencement of the 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 the 1st of 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 been 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.