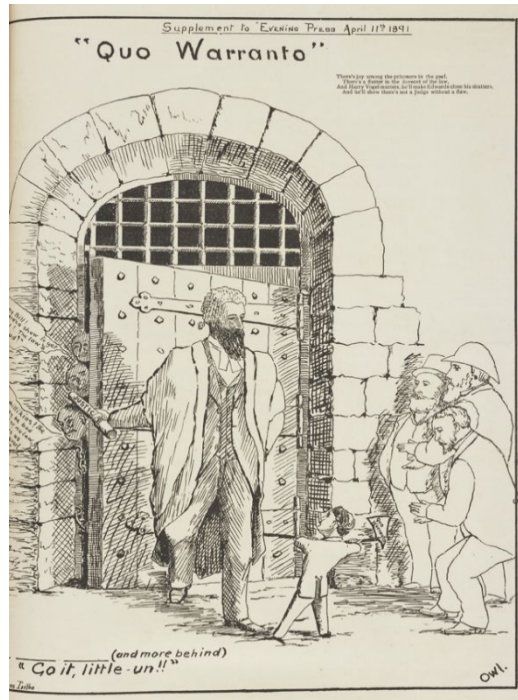


THE REMOVAL OF JUSTICE EDWARDS AND THE STRUGGLE BETWEEN THE "LEGAL" AND THE "CONSTITUTIONAL" IN LATE NINETEENTH-CENTURY NEW ZEALAND

*Geoff McLay**

This article examines an extraordinary episode in New Zealand's constitutional history: the 1892 removal of Justice Worley Bassett Edwards as a Supreme Court judge after having been invalidly appointed by the previous government. Edwards' case is important as the only time a New Zealand government has formally sought to remove a sitting judge of the Supreme or (as it is now) High Court. But the article argues that the Edwards controversy is also an example of how New Zealand politicians and lawyers thought about judges within the developing New Zealand state, and even more profoundly about what was constitutional, as opposed to just legal, within that state.

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I INTRODUCTION

An April 1891 cartoon depicts an extraordinary circumstance. On the right are New Zealand Premier John Ballance, Attorney-General Patrick Buckley, and their friend and adviser, the future Chief Justice Sir Robert Stout. They encourage solicitor Harry Vogel to "chop down" a sitting Supreme Court judge, Justice Worley Bassett Edwards, to free his client, a convicted forger. The axe is a quo warranto proceeding challenging the validity of the Judge's appointment.¹ Prisoners peer through the crack in the gaol house door gleefully, anticipating their convictions might also be overturned.

Edwards had been appointed a puisne judge of the New Zealand Supreme Court in 1890, making him the fifth puisne judge and, counting the Chief Justice, an unprecedented sixth Supreme Court judge. In April 1892, the Privy Council ruled that Edwards had indeed been invalidly appointed as a Supreme Court judge, upholding the new Liberal New Zealand Government's contention that his

¹ The ancient writ was described by Blackstone "in the nature of a writ of right for the king, against him who claims or usurps any office". For the English history and practice of the quo warranto writ see John Shortt *Informations (criminal and quo warranto), mandamus, and prohibition* (W Clowes and Sons, London, 1887). Shortt details the change of the quo warranto procedure from a writ to an information.

appointment had not been constitutional.² This article is about how this strange state of affairs occurred and how New Zealand lawyers and politicians argued about the constitution, the relationship between what was "constitutional" (that judges could not be appointed without a guaranteed salary) and what was "legal" (an absolute discretion for the Governor to appoint a judge).

The Edwards case is the only time a New Zealand government has formally sought to remove a sitting judge of the Supreme or (as it is now) High Court.³ On one level, this article is about a New Zealand legal history curiosity. Some writers have recounted this story in less detail, and it has been included in histories of the profession⁴ or biographical accounts; Grant Morris has narrated the story from the perspective of the then Chief Justice in his biography of James Prendergast.⁵ But this article is also about more than just a peculiar story. Judicial appointments in New Zealand have long been apolitical and uncontroversial, but this has not always been the case.

The Edwards controversy is one example of how New Zealand politicians and lawyers thought about judges within the developing New Zealand state, and even more profoundly about what was constitutional, as opposed to just legal, within that state. The New Zealand Law Reports and the Gazette Law Reports reveal it is the first reported time that lawyers cited Dicey's *Law of the Constitution* and its distinction between a "convention" and a "legal" requirement to a New Zealand court.⁶ For scholars and others interested in developing independent judiciaries around the Empire,

2 *Buckley v Edwards* [1892] AC 387 (PC).

3 There are two other cases in which High Court judges left after periods of public controversy. Peter Mahon resigned under considerable pressure from the Prime Minister after his Erebus Royal Commission: Peter Mahon *Report of the Royal Commission to Inquire into the Crash on Mount Erebus, Antarctica of a DC10 Aircraft Operated by Air New Zealand Limited* (Government Printer, Wellington, 1981); and Grant Morris "Mahon, Peter Thomas" in *Dictionary of New Zealand Biography* <<https://teara.govt.nz>>. In 2010, the Acting Attorney-General accepted the resignation of Wilson J from the Supreme Court. A panel had been formed to investigate his conduct under the Judicial Conduct Panel Act 2004 after a panel had been recommended by the Judicial Conduct Commissioner. In that case, there was no public political pressure and the Attorney-General stood aside because he had practiced with Wilson.

The change from calling the Supreme Court to the High Court occurred in 1980 as a result of the "Report of Royal Commission on the Courts" [1978] II AJHR H2.

4 One who remembered was Sir Ivor Richardson, who described the Court decision as part of a larger project: Ivor Richardson "The Privy Council as the Final Court for the British Empire" (2012) 43 VUWLR 103.

5 Grant Morris *Prendergast: Legal Villain?* (Victoria University Press, Wellington, 2014) at 126–130.

6 Alfred V Dicey *Lectures Introductory to the Study of the Law of the Constitution* (Macmillan, London, 1885), later *Introduction to the Study of the Law of the Constitution* (Macmillan, London, 1889).

the Edwards saga generated a Privy Council case cited in leading textbooks⁷ and provides a critical case study of debate about the nature of judicial independence.⁸

The participants in the debate around the Edwards appointment were a literal *who's who* of the New Zealand governing class: Edwards himself; Sir Robert Stout, who prosecuted the case against him; Premier Ballance, who made the removal a focus of his leadership; Prendergast, who, as Chief Justice, dithered about the appointment; and Attorney-General Patrick Buckley, who took over the case against Edwards in the Court of Appeal.⁹ It shows that legal principle was essential, but politics was also important: the Liberals' opposition to Edwards' appointment was at once motivated by constitutional theory and political opportunism, a combination that I suspect has been ever-present in the development of our constitution.

II THE EDWARDS APPOINTMENT

A Why Was Edwards Appointed a Sixth Supreme Court Judge?

Edwards' appointment as a judge became a political, legal and constitutional controversy as soon as the Government announced it in March 1890. Some newspapers, like *The Press*, the establishment Christchurch newspaper, welcomed the activation of the Native Land Commission, Edwards' appointment to it and the appropriateness of making him a Supreme Court judge.¹⁰ However, *The Press'* partisan liberal counterpart, *The Lyttelton Times*, slammed almost everything about the appointment, from the drip-feeding of news of the appointment to its constitutionality.¹¹ *The Press*, in contrast, recounted the political imperatives of the new job. Land purchasers before the reform

7 See for instance Arthur Berriedale Keith *Responsible Government in the Dominions* (Clarendon Press, Oxford, 1912) at 1072 in relation to colonial judiciaries in general; and William Harrison Moore *The Constitution of the Commonwealth of Australia* (2nd ed, CF Maxwell G Partridge & Co, Melbourne, 1901) at 204–205 discussing independence under the new Australian Constitution. The case was also cited for procedural points in the Supreme Court of Canada in a dispute over who was actually the Chief Justice of Alberta: *Re the Chief Justice of Alberta* (1922) 64 SCR 135.

8 See for instance the brief account of the case in Andrew P Stockley "Judicial Independence: The New Zealand Experience" (1997) 3 Aust J Leg Hist 145 at 155, n 41. Stockley, though, is more interested in Edwards' later hastened retirement: see 155–156. See also the citation of the case by Michael J Beloff for the proposition "that, unless Parliament had provided (or promised) a salary no judicial vacancy could be filled" in Michael J Beloff "Paying Judges: Why, Who, Whom, How Much – Neill Lecture 2006" (2006) 18 Denning LJ 1 at 11, n 75.

9 Michael Bellam "Buckley, Patrick Alphonsus" in *Dictionary of New Zealand Biography* <<https://teara.govt.nz>>.

10 *The Press* (New Zealand, 14 March 1890) at 4.

11 *Lyttelton Times* (New Zealand, 12 March 1890) at 4.

"[knew] that at any moment a legal pistol may be held to his head and he may be told to stand and deliver by some bewigged and begowned highwayman."¹²

The Ministry favoured direct settler purchase of Māori land instead of the Crown having the sole right to purchase Māori land. It introduced several reforms to Māori land law,¹³ including the Native Land Court Acts Amendment Act 1889. The Act created two Commissioners whose role was designed to facilitate the private purchase of Māori land. Edwards was chosen for that job by the Minister of Native Affairs, Edwin Mitchelson, who wanted Edwards' native land expertise. Under s 27 of the new Act, Commissioners had the power to effectively complete "equitable" transactions, notwithstanding that purchasers could not register the transfers because the memorials or titles did not include all the signatures of "native" owners. The statute gave the Commissioners various powers to instigate and conduct inquiries, including regulating inquiry procedures. The other Commissioner, John Ormsby, had to be Māori. The Commission was not particularly successful, though it became the forerunner of the Liberals' later Validation Court.¹⁴

When offered the job, Edwards counter offered ambitiously: appointment as Supreme Court judge, with its larger salary. The Ministry saw his judicial appointment as a way of getting him to become a Commissioner. Mitchelson bridled when Edwards ultimately put his work as a judge ahead of his career as a Commissioner, and the ensuing tension is evident in correspondence between Mitchelson and Edwards. In response to a terse letter from Mitchelson urging him to get on with his work as a Commissioner,¹⁵ Edwards argued he could fit the job around his judicial commitments. In September 1890, Mitchelson wrote to Edwards that he wanted him to commence work in the Waikato, but Edwards argued that work would have to wait until the long court vacation. Mitchelson shot back that his:¹⁶

... appointment as a Judge of the Supreme Court was for the purpose of giving you proper status as Commissioner, and that such appointment was to be subsidiary to that of Commissioner.

12 *The Press* (New Zealand, 14 March 1890) at 4.

13 An account of the various swings and roundabouts of native land policy is beyond the scope of this article; for a full treatment see Richard Boast *Buying the Land, Selling the Land: Governments and Maori Land in the North Island 1865–1921* (Victoria University Press, Wellington, 2008) in particular ch 3 "From McLean to the Liberals: Native Land Policy in its Political Context 1869–1891" at 121–176.

14 Richard Boast *The Native Land Court Volume 2 1888–1909: A Historical Study, Cases, and Commentary* (Thomson Reuters, Wellington, 2015) at 37–38.

15 See letter from the Hon E Mitchelson to Mr Commissioner Edwards (20 September 1890) in "Mr WB Edwards (papers relating to the appointment of)" [1891] II AJHR H13 at 10.

16 Letter from the Hon E Mitchelson to Mr Commissioner Edwards (22 September 1890) in "Mr WB Edwards (papers relating to the appointment of)" [1891] II AJHR H13 at 10.

B The Conspiracy Theories

Some Government opponents' more colourful explanations for Edwards' appointment perhaps illustrated the politics surrounding the appointment. One version was promoted towards the end of the affair by Jeremiah Twomey, the Liberal activist who edited *The Temuka Leader*, who argued that Edwards had been appointed to block the future appointment of Judge Dudley Ward to a permanent judgeship after a series of temporary appointments. Ward was a well-known legal figure whom Twomey thought more appropriate. Twomey argued that he had been passed over after angering the Atkinson Government: its Colonial Secretary, Hislop, had been forced to resign after clumsily attempting to interfere with a case before Ward.¹⁷ There is no question that Ward was a candidate for promotion; Atkinson even raised that possibility with Stout in October 1888.¹⁸ But this explanation seemingly ignores Atkinson's focus on appointing Edwards as a Native Lands Commissioner.

In July 1890, *The Otago Workman* had made the even more spectacular allegation that a gang of intriguing lawyers had sought to swap lucrative offices: the then Agent-General in London, Sir Francis Henry Dillon Bell, would take the lucrative Controller-Generalship; Atkinson himself would replace Bell in London for this trouble; Bell's son would get "the lucrative agencies" possessed by Edwards; and Edwards would get his judgeship. The editor, Lister, claimed to be free from "political or party animus" in these revelations, which seems unlikely given Lister's political commitments. Stout prosecuted him for criminal libel on behalf of the Bells,¹⁹ somewhat ironically given Stout's opposition to Edwards' appointment, but more in line perhaps with his bitter political relationship with Lister.²⁰ The Bells' intention in filing the action had been to find the writer, whom Lister refused to divulge. The Bells ultimately withdrew the prosecution after Lister apologised.²¹

C Who Was Edwards?

Many did not like Edwards, and some came to detest him, but he was undoubtedly tenacious and had enough respect in the community to be appointed twice to the Bench. Edwards, despite his ability, never entirely fitted in at the New Zealand Bar. For instance, LOH Tripp's recollection of Edwards was not altogether flattering. His firm had occupied the office next to Edwards'. In his memoir, which

17 For an account of the affair see Geoff Adams *Judge Ward: An 'infamous' New Zealand colonist and his two celebrity wives* (Geoff Adams, Dunedin, 2011).

18 See letter from Atkinson to Stout (28 October 1888) in "Inward Correspondence 1888" Turnbull Library MS-Papers-0040-19.

19 "A Criminal Libel Case" *Otago Daily Times* (New Zealand, 19 September 1890) at 4.

20 "Personalities" *The Observer* (New Zealand, 11 October 1890) at 7. Lister and the *Otago Workman* had supported strikers in 1889–1890, leading Stout to cancel his subscription in a rage and to prosecute Lister for printing a handbill without an address: Erik Olssen "Lister, Samuel" in *Dictionary of New Zealand Biography* <<https://teara.govt.nz/>>.

21 "Supreme Court – Criminal Sittings" *Evening Star* (New Zealand, 3 March 1891) at 3.

was written in the 1950s, undoubtedly also influenced by what happened with Edwards' appointments, LOH Tripp wrote that:²²

Edwards was a very able barrister, and his opinions were much sought after. He was an unpopular man because I think he must have suffered from some disability ... Edwards was a very peculiar man to deal with.

Edwards parlayed a not very lucrative and somewhat limited government position as a Native Commissioner into a judgeship. Edwards then held on against new Government opposition and a Premier who wanted to remove him. When the Privy Council invalidated his appointment, he managed to relaunch his legal career and was subsequently reappointed to the Bench. He continued to fight for compensation over his expenses till he got it in 1904. Later the Liberals reappointed Edwards to the Supreme Court, but he so antagonised the Auckland Profession that he moved back to Wellington. His relationship with the Wellington Profession was no better, and he ultimately resigned under threat of removal, famously leaving with a Justice Department typewriter.²³

Edwards' memoirs detail his rise from poverty in Otago as the son of a ne'er-do-well father from a relatively well-off English family and his misadventures in England, where his cousin's incompetence derailed his career ambitions. His legal career stuttered on his return to New Zealand. To take a partnership in Wellington, he took on a loan that he worried about for the rest of his life. There is a significant tinge of regret in Edwards' memoir, but never about his conduct. He had wanted to be a great writer rather than a lawyer but was proud of his career.²⁴

... I honestly believe it to be true, that there is no name of any lawyer, be he Judge or be he still a member of the Bar, which stands higher in this country than stands my name at this hour.

III ARGUING ABOUT THE LEGALITY AND CONSTITUTIONALITY OF THE APPOINTMENT

A The Legislative Background: Did the New Statutes Create Real English Judges?

The nub of the legal argument over the Edwards appointment was the tension between the Governor's power to appoint Supreme Court judges on Atkinson's advice – a power which appeared,

22 Ross Gore *Chapman Tripp & Co – The First 100 Years* (Chapman Tripp, Wellington, 1975) at 47 and 50.

23 For accounts of Edwards' career see Rosemary Joy Fauchelle "The Life and Times of Sir Worley Bassett Edwards (1850–1927)" (LLB (Hons) Dissertation, University of Auckland, 1991); and Bernard Brown "Edwards, Worley Bassett" in *Dictionary of New Zealand Biography* <<https://teara.govt.nz>>. For an account of Edwards' fall from grace with the Auckland profession see DF Dugdale *Lawful Occasions: notes on the history of the Auckland District Law Society, 1879–1979* (Auckland District Law Society, Auckland, 1979).

24 Worley Bassett Edwards "Memoirs of Worley Bassett Edwards" Hocken Library Misc-MS-1299 at 42.

at first glance, unfettered²⁵ – and the fact that the Civil List Act provided only for the salaries of the Chief Justice and only four puisne judges. The Civil List Act limited the number of judicial salaries by providing a lump sum that covered the salaries of the Chief Justice and four puisne judges. At the same time, the Constitution Act 1852 prohibited any reduction of judges' salaries during their time in office,²⁶ a prohibition repeated in s 11 of the 1882 Act. By implication, opponents of Edwards' appointment argued that the appointment exceeded the maximum number of judges since a new judge could not be paid without effectively reducing the salaries of the others. Importantly for a small court that had to cope with temporary incapacities or, later in the century, the occasional judicial leave home to England, s 12 provided that the Governor could appoint temporary judges.²⁷ For instance, at Edwards' appointment, Dudley Ward had served as a temporary judge for a considerable period. Perhaps strangely, in an argument about the sanctity of judicial independence, little importance was placed on the Government's ability to appoint temporary replacements.

The status of the judges had been a significant matter during the very first New Zealand Parliament. During the Crown Colony period, judges served at will until the passage of the Constitution Act 1852 in the United Kingdom. In Wood's analysis, there was little distinction between the Crown Colony judges and other members of the Executive. The effect was that there was "no comparison ... between a colonial and an English judge"; while the latter had independent tenure, the former could be dismissed at will.²⁸ As part of a compact between its two leading figures, Stafford

25 Section 5 of the Supreme Court Act 1882 (which had replicated s 2 of the 1858 Act) provided:

The said Court shall consist of one Judge, to be appointed by His Excellency the Governor in the name and on behalf of Her Majesty, who shall be called the Chief Justice of the said Court, and of such other Judges of the said Court as His Excellency the Governor, in the name and on behalf of Her Majesty, shall from time to time appoint.

26 New Zealand Constitution Act 1852 (UK) 15 & 16 Vict c 72, s 65:

... 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.

27 Supreme Court Act 1882, s 12:

It shall be lawful for the Governor in Council, in the name and on behalf of Her Majesty, at any time during the illness or absence of any Judge of the Court, or for any other temporary purpose, to appoint a Judge or Judges of the Court to hold office during His Excellency's pleasure, and every such Judge shall be paid such salary, not exceeding the amount payable by law to a Judge of the said Court, other than the Chief Justice, as the Governor in Council shall think fit to direct.

28 GA Wood "Construction and Reform: The Establishment of the New Zealand Supreme Court" (1968) 5 VUWLR 1 at 1. See also James Hight and HD Bamford *The Constitutional History and Law of New Zealand* (Whitcombe and Tombs, Christchurch, 1914) at 353–371. For an account of general issues relating to judicial independence in New Zealand see Jeremy Finn "Achieving Judicial Independence – New Zealand Style" in John Burrows and Jeremy Finn (eds) *Challenge and Change: Judging in Aotearoa New Zealand* (LexisNexis, Wellington, 2022) 91.

and Fox, the first representative Parliament in 1856 resolved that "the tenure of office of Judges of the Supreme Court ought to be assimilated as nearly as may be to that of Judges in England".²⁹ It also proposed a rather peculiar device to manage appointments: appointing an English judge to advise the Queen on who would be suitable judges. Stout referenced the 1856 compact in his argument in the Court of Appeal, though he accepted that the Court could not rely on it.³⁰

The 1858 Act was an attempt to create an independent judiciary. Stafford, who had been Premier in 1858, later argued the power to ensure independent appointments had been given to the Governor rather than the Governor-in-Council. Still, it became accepted that judges were to be appointed on the recommendation of Ministers. According to Wood, this created fears of political patronage.³¹ In 1862, Stafford unsuccessfully attempted to change the Act to require that judges be appointed based on English recommendations rather than recommendations by New Zealand Ministers. The House of Representatives rejected Stafford's proposed change to the 1858 Act.

B Somewhere Between (Un)lawful and (Un)constitutional: The Advice of the Judges and the Solicitor-General

Upon hearing of the appointment, Prendergast CJ immediately raised his concerns about its legality. The Chief Justice threatened not to swear Edwards in, writing to Atkinson on 10 March 1890 that he preferred the appointment to be delayed until Parliament could authorise it and he sought the view of his fellow judges.³² The judges were somewhat divided. Conolly J in Auckland was clear, as he would remain throughout the affair, that appointment was limited to those whose salaries could be paid. Denniston (Christchurch) and Williams (Dunedin) JJ both expressed doubts about the legality of the appointment for similar reasons. Williams J wrote in his urgent telegram that the:³³

Constitutional question cannot be entirely severed from legal question because in a question of construction, presumption would be that Legislature did not intend to override recognised constitutional principles.

29 (23 July 1856) B NZPD 297–298, 299–301 and 356–357.

30 Arguments in the Court of Appeal in the "Case in the Court of Appeal between the Honourable the Attorney-General and Mr W B Edwards" [1891] II AJHR H13 at 73–74.

31 Wood, above n 28, at 8. See also (21 August 1862) D NZPD 591–594; (13 August 1861) D NZPD 278 ff; [1862] I AJHR A7 and A7(a); and (28 August 1862) D NZPD 659.

32 Letter from his Honour the Chief Justice to the Hon the Premier (10 March 1890) in "Mr WB Edwards (papers relating to the appointment of)" [1891] II AJHR H13 at 3.

33 Letter from Mr Justice Williams to his Honour the Chief Justice (12 March 1890) in "Mr WB Edwards (papers relating to the appointment of)" [1891] II AJHR H13 at 5.

Richmond J (Blenheim) thought that the appointment was legal but cryptically added:³⁴

I consider the appointment without previous permanent provision for the salary is open to objection on constitutional grounds. If the Chief Justice continues to entertain doubt as to the legality of the appointment, he should certainly not be asked to swear in Mr Edwards.

As time wore on, the Chief Justice appears to have accepted the appointment as a necessary practical measure to deal with the temporary shortage created by Richmond J's impending departure for England, where he was to spend a year on leave.

Reid, the politically neutral Solicitor-General,³⁵ produced two opinions: one for Atkinson and his Attorney-General Whittaker in March 1890 after Prendergast CJ's objections, and then another for Ballance and Buckley a year later when they prepared to remove Edwards. The March 1890 opinion is shorter than the one prepared a year later, but both are to the same effect: the need for Parliament to approve the Judge's salary did not prevent the appointment.³⁶ For Reid, what counted were the legal rules set out in the Act. The Civil List Act was merely an appropriation statute.³⁷ Moreover, Richmond and Chapman JJ had been appointed before the legislature had appropriated their salaries. This was enough for Atkinson and Whittaker, who gave a similar opinion to Reid, ending on a feisty note:³⁸

If the Chief Justice has scruples about administering the oath, the only alternative I see is the substitution of someone else to do so.

But in early 1891, Reid's opinions were not enough for Ballance or Buckley (who had earlier been Reid's law partner). In his second opinion, written in February 1891 for the new Liberal administration, Reid expressly distinguished between what was legal and was constitutionally proper. The appointment might be legal, but Reid reserved his view as to whether it was constitutionally proper:³⁹

34 Telegram from Mr Justice Richmond to his Honour the Chief Justice (12 March 1890) in "Mr WB Edwards (papers relating to the appointment of)" [1891] II AJHR H13 at 5.

35 See John McGrath "Principles for Sharing Law Officer Power – The Role of the New Zealand Solicitor-General" (1998) 18 NZULR 197.

36 Letter from the Solicitor-General to the Hon the Premier (11 March 1890) in "Mr WB Edwards (papers relating to the appointment of)" [1891] II AJHR H13 at 4.

37 Letter from the Solicitor-General to the Hon the Premier (11 March 1890) in "Mr WB Edwards (papers relating to the appointment of)" [1891] II AJHR H13 at 4.

38 Letter from the Hon Sir F Whitaker to the Hon the Premier (11 March 1890) in "Mr WB Edwards (papers relating to the appointment of)" [1891] II AJHR H13 at 5.

39 Letter from the Solicitor-General to the Hon the Minister of Justice (17 February 1891) in "Mr WB Edwards (papers relating to the appointment of)" [1891] II AJHR H13 at 14.

I do not think it is within my province to express an opinion as to the propriety of the late Government having made this appointment before provision had been made for the salary of the office. That is a matter of constitutional usage and practice, which, I think, is quite distinct from the legal position, and I confine myself entirely to the latter.

Today, Ballance and Buckley's refusal to follow the Solicitor-General's advice seems extraordinary. Solicitor-General opinions now prevail over other government interpretations.⁴⁰ Buckley produced a contrary Attorney-General's opinion that focused on his view that the English statutes and the connection between guaranteed salary and judicial appointment applied, not directly, but rather because they reflected first principles.⁴¹ Similarly, in a memorandum written for Ballance in response to one of Edwards' letters defending his appointment, Buckley emphasised the appointment was unconstitutional.⁴²

C Sir Robert Stout: Unconstitutional is Illegal

Sir Robert Stout immediately condemned the appointment as "unconstitutional".⁴³ Stout made the same argument in the Court of Appeal. The trouble was not Edwards himself, whom Stout complimented for his qualifications, but the fact that the appointment was unconstitutional. The lack of a guaranteed salary put judicial independence at risk. Despite the apparently unlimited appointment power contained in the Supreme Court Act:⁴⁴

It was never intended there were to be two classes of Supreme Court Judges, one class made independent by their salaries being permanently appropriated, and another having to rely on the vote of Parliament.

Stout was one of the Colony's leading lawyers and had been Attorney-General in the Grey administration (1878). He had been Premier (1884–1887) in a Government that he shared with Sir

40 See McGrath, above n 35, at 206:

Part of the Solicitor-General's responsibility is to resolve conflicting views of the law within government. Ministers like contestable policy advice but definitive legal advice. In this area the Solicitor-General's role is that of a proxy for the Courts. Ministers may seek the Solicitor-General's view (or a Crown Law Office view) if a decision is likely to be tested in the Courts. If a Court later concludes that the Solicitor-General's opinion was wrong, it is the Solicitor-General rather than the government who will be most open to criticism. The advantages of the system for decision-makers wishing to act according to the law are obvious, although it is not unknown for the disgruntled to try to by-pass it.

41 Memorandum from the Hon PA Buckley to the Hon the Premier (21 February 1891) in "Mr WB Edwards (papers relating to the appointment of)" [1891] II AJHR H13 at 15.

42 PA Buckley "Memorandum for the Hon Premier, in reply to the Memorandum of WB Edwards, Esq, in which he defends the validity of his Appointment as a Judge of the Supreme Court" in "Mr WB Edwards (papers relating to the appointment of)" [1891] II AJHR H13 at 28.

43 "The Sixth Judge: Sir Robert Stout Interviewed" *Evening Post* (New Zealand, 17 March 1890) at 4.

44 At 4.

Julius Vogel until that Government was defeated, and he had lost in the Dunedin North electorate; ironically, Sir Harry Atkinson had offered to appoint Stout to the Supreme Court in 1889.⁴⁵ Stout had served afterwards as the President of the Otago District Law Society. Perhaps most importantly for this story, he was a very close friend of emerging Liberal leader John Ballance and was influential in shaping Ballance's views about Edwards' appointment, both while Ballance was in Opposition and then during his tenure as Premier. Stout did not take up the offer and Atkinson appointed Denniston, who would be the critical vote in the Court of Appeal when it upheld the legality of Edwards' appointment. Similarly, there had been rumours that Stout himself had been a possible replacement for the ill Atkinson as Premier.⁴⁶

Stout, despite his prominence, was only one lawyer. Others, of course, disagreed. Fellow Dunedinite, Downie Stewart, argued in July 1890 that Stout was wrong. Stewart, who was perhaps more conservative than Stout, served as a Member of the House of Representatives and was later appointed by Atkinson to the Legislative Council as part of Atkinson's attempt to stack the Council.⁴⁷ Rebutting Stewart's arguments, Stout accused him of not considering the constitutional issues. Their debate continued through the newspapers into 1891.⁴⁸

D Ballance's Opposition: Somewhere Between the Constitutional and the Political

Newspaper accounts and parliamentary debates placed the new leader of the Opposition, and Robert Stout's best political friend, Ballance, at the forefront of the campaign against Edwards' appointment. Trevor McIvor, Ballance's biographer, argues the Edwards affair gave Ballance dignitas, both as leader of the Opposition and then as Premier:⁴⁹

Throughout the affair, Ballance emphasised the constitutional principle at stake; that is, the obligation of a government to abide by the statutory limitation on the number of judges, rather than the question of whether another judge was needed. As in the debate over the Legislative Council, Ballance put forward a democratic, moral argument that gained him enormous respect in the country.

45 Letter from Atkinson to Stout (28 October 1888) in Turnbull Library Inward Correspondence MS-Papers-0040-19.

46 Timothy McIvor *The Rainmaker: A Biography of John Ballance – Journalist and Politician, 1839–1893* (Heinemann Reed, Auckland, 1989) at 157.

47 See Stephanie Dale "Stewart, William Downie" in *Dictionary of New Zealand Biography* <<https://teara.govt.nz>>.

48 See Robert Stout "To the Editor" *Otago Daily Times* (New Zealand, 21 March 1891) at 6.

49 McIvor, above n 46, at 211.

The ultimate Privy Council victory gave the Liberal Government a rare win in its first 18 months of office, which had otherwise been marred by the struggle to pass its programme through a reluctant Legislative Council.

There are perhaps three interlocking explanations for the opposition of Ballance and his allies. First, they genuinely felt the appointment was constitutionally wrong. Secondly, opposing was good politics. The proposed extra expenditure came at a time of retrenchment in the wake of the Long Depression of the 1880s, driving a convenient wedge between the Government and its more fiscally conservative parliamentary allies.⁵⁰ As the affair progressed, the Atkinson Government's inability to get Parliament to validate Edwards' appointment or at least pay for his salary as a judge symbolised its ineffectiveness. Thirdly, Edwards' appointment was part of the Native Lands regime that had supplanted Ballance's own.

Throughout 1890 the Atkinson Government defended the appointment in terms of legality, merit and need. Atkinson, for instance, addressed the issue in a July interview with *The Evening Star*. He disagreed with Stout: while acknowledging he was not himself a lawyer, and without going into legal particulars, Atkinson stated that the "appointment was perfectly legal" and that "if the legal business of the colony [was] to be satisfactorily done a sixth Judge [was] required". In his view, it was just politics that had prevented Parliament from dealing with the appointment in the usual way.⁵¹ In July, the Government attempted to get a validation Bill passed, but the Opposition had the numbers to block it.⁵² Interestingly, the reporter talked with Stout during the debate, who had concluded the matter needed to go to the Privy Council.⁵³

The failed Bill would have increased the amount paid to the current judges, with the increase to be "applied in paying the salary of an additional Puisne Judge of the said Court". But the Bill would have also barred future appointments exceeding "the number for whom salaries are provided by the ... General Assembly".⁵⁴ In the August and September wrap-up session, the Liberal Opposition used the appointment as a reason to stall the budget. They succeeded in forcing a reduction of the appropriation for judges' salaries from £1,620 to £1,495, the amount necessary to cover only the salary of the other judges. A little parliamentary humiliation was inflicted: the £125 difference between

50 See generally Judith Bassett *Sir Harry Atkinson, 1831–1982* (Auckland University Press, Auckland, 1975) at ch 11, in particular at 140–155.

51 "The Premier Interviewed" *Evening Star* (New Zealand, 16 July 1890) at 2.

52 "Determined Stand of the Opposition" *Thames Star* (New Zealand, 5 July 1890) at 4.

53 At 4.

54 "An Act to amend 'The Supreme Court Act, 1882,' and to provide for the Payment of an Additional Judge" in "Mr WB Edwards (papers relating to the appointment of)" [1891] II AJHR H13 at 6–7.

Edwards' salary as a Commissioner and a Supreme Court judge was recorded as "unauthorised expenditure".⁵⁵

The election campaign that followed led to the Opposition's victory in the 5 December election. Opposition MPs used Edwards' appointment as a trope for government incompetence,⁵⁶ but historians might perhaps place greater emphasis on broader developments.⁵⁷ Ballance did not come to power until late January, when it became apparent in a special parliamentary session that Atkinson no longer had the numbers to govern. By that time, however, Atkinson had had the Governor make several appointments to the Legislative Council, including himself.⁵⁸

E The Liberal Government Acts (Un)constitutionally but (Il)legally in Making Life Difficult for Edwards

The new Government responded with a mix of administrative, political and vindictive acts that often perhaps missed the point of the judicial independence that the Government claimed to be protecting. Asked about the issue in a nationally published interview with the *New Zealand Times* after the election, Ballance replied that he had not "considered the subject recently", though he maintained his earlier view "that the appointment was illegal, unconstitutional, and subversive of the independence of and respect due to the Supreme Court Bench", as well as causing unnecessary expense.⁵⁹

After Ballance's confirmation as Premier in early 1891, there was a concerted Government effort to stop Edwards from continuing to sit on the Court. Terse letters were exchanged between Ballance and Edwards, who was at pains to tell the Premier when the Premier had misspoken about Edwards' status by describing him as a "Native Commissioner".⁶⁰ As Solicitor-General, Reid now wrote his second opinion supporting the legality of Edwards' appointment, while Attorney-General Buckley wrote a much longer one rebutting it. Ballance and Chief Justice Prendergast agreed that Edwards would not sit, as had been planned, in Hawke's Bay at the end of February, though this agreement was

55 See for instance the account of the debate in the *Southland Times*: "House of Representatives" *Southland Times* (New Zealand, 17 September 1890) at 2.

56 One example was the speech given by the Dunedin South Member HS Fish in October which linked the Edwards appointment with other examples of Government misconduct: see "General Elections" *Star* (Christchurch, 4 October 1890) at 3. Unfortunately for Ballance, Fish's opposition to Government continued once Ballance became Premier: see McIvor, above n 46, at 194–195.

57 See David Hamer *The New Zealand Liberals: The Years of Power, 1891–1912* (Auckland University Press, Auckland, 1988) at 13–36.

58 See McIvor, above n 46, at 179.

59 "Mr Ballance interviewed" *New Zealand Times* (New Zealand, 11 December 1890) at 2.

60 Letter from Mr Justice Edwards to the Hon the Premier (12 March 1891) in "Mr WB Edwards (papers relating to the appointment of)" [1891] II AJHR H13 at 29.

somewhat frustrated by Edwards travelling to Napier.⁶¹ In a letter to Ballance, the Chief Justice notably referred to "Mr Edwards", not "Justice Edwards".⁶²

The Liberals fired Edwards and Ormsby as Commissioners in the middle of March, stopping Edwards' salary entirely, and then refused Edwards' request to be paid as a judge in April – an outcome that was not exactly consistent with judicial independence.⁶³ This somewhat indeterminate skirmishing ended when the *Aldridge* proceedings were filed, and Cabinet first decided not to back the validity of Edwards' appointment and joined the proceedings. Ballance summarily rejected Edward's request for support:⁶⁴

... this Government has never recognised your status as a Judge of the Supreme Court and is not prepared to instruct the Law Officers of the Crown to defend any action which may be brought against you.

Edwards goaded the Government to remove him from office and not simply:⁶⁵

... stand by as indifferent, publicly declaring, however, that my commission (which is regular in form, at all events), is invalid, while that commission is being attacked by a felon regularly imprisoned in the public prison.

Edwards ultimately agreed not to sit once Ballance had made it clear that the Government would seek to have him formally removed. Alas for Edwards, Stout was able to convince the Government to do what Edwards had asked.

IV THE COURT CHALLENGES

While politicians debated Edwards' judicial fate, it was an imprisoned forger from Marlborough, or at least his politically connected lawyer, who put the matter directly before the courts. Aldridge challenged his conviction in the form of a quo warranto action. Aldridge's claim was subsequently overtaken by a quo warranto-based proceeding brought by Attorney-General Buckley, with the

61 Letter from his Honour the Chief Justice to the Hon the Premier (28 February 1891) in "Mr WB Edwards (papers relating to the appointment of)" [1891] II AJHR H13 at 25.

62 Letter from the Hon the Premier to his Honour the Chief Justice (23 February 1891) in "Mr WB Edwards (papers relating to the appointment of)" [1891] II AJHR H13 at 18.

63 Letter from the Under-Secretary, Justice Department to Mr ET Sayers (21 April 1891) in "Mr WB Edwards (papers relating to the appointment of)" [1891] II AJHR H13 at 36.

64 Letter from the Hon the Premier to Mr Justice Edwards (17 April 1891) in "Mr WB Edwards (papers relating to the appointment of)" [1891] II AJHR H13 at 35.

65 Letter from Mr Justice Edwards to the Hon the Premier (17 April 1891) in "Mr WB Edwards (papers relating to the appointment of)" [1891] II AJHR H13 at 35.

assistance of Aldridge's counsel, Sir Robert Stout, and Harry Vogel, the son of Stout's sometimes political collaborator, Sir Julius Vogel.⁶⁶

A The Judges' Second Round of Extrajudicial Opinions

Before the legal action commenced, Ballance extraordinarily asked the Supreme Court judges for another set of opinions about the validity of Edwards' appointment to answer Edwards' J's own opinion, which he had fulsomely provided. As Reid's opinions had highlighted, there was now a worry about the somewhat sloppy nature of earlier judicial appointments in the Colony, including that of Williams J himself. These appointments might have suffered from the same problem as Edwards', as each judge had been appointed temporarily without a guaranteed salary. There had already been four puisne judges at the time of each appointment, as the one retiring had not yet formally done so. Indeed, if there was a strict limit of four puisne judges, then it was Williams J who had not been validly appointed: Williams J had temporarily served as a fifth judge at the time of his appointment.

Significantly, Williams and Denniston JJ had changed their minds about the appointment's validity. For them, the issue was now simply one of just what the statutes said. Conolly J and Prendergast CJ, who would later hold the appointment invalid, demurred about providing further opinions. Conolly J simply stood by his previous one; Prendergast CJ, "entertaining doubts", had not had the "time".⁶⁷

Williams J's second memorandum was the shortest and perhaps the most pointed. He simply gave his conclusion that the appointment was valid, saying that he could say more if asked, and sought to disassociate himself from some of the arguments made in previous opinions. He also differentiated his own appointment from that of Edwards. The Richmond memorandum was the longest, and although he expressly reserves the possibility that he might decide a case differently, it leaves little doubt that the constitutional argument cannot override the wording of the statute, which failed to limit the number of judges.⁶⁸ Parliament simply had not legally required what Edwards' opponents claimed

66 For a general account of the rather peculiar alliance of former political adversaries brought together somewhat by circumstances see Raewyn Dalziel *Julius Vogel: Business Politician* (Auckland University Press, Auckland, 1986).

67 Letter from his Honour the Chief Justice to the Hon the Premier (10 April 1891) in "Mr WB Edwards (papers relating to the appointment of)" [1891] II AJHR H13 at 30.

68 "Enclosure 1 in No 69. Copy of Opinion Mr Justice Richmond on Appointment of Mr Edwards" in "Mr WB Edwards (papers relating to the appointment of)" [1891] II AJHR H13 at 31–33.

was constitutionally required.⁶⁹ Denniston J produced a memorandum midway in length between that of Williams and Richmond JJ, and he also confined himself to the legal point:⁷⁰

A consideration of the colony's legislation will show that the Governor had the power to appoint, and did appoint, Judges for whose salaries no permanent provision had been made. I am therefore of opinion that there is no legal restriction ...

As Richmond J had concluded, arguing otherwise required reading the statutes in a way that Parliament had not written them.

B The Aldridge Case

Edwards J had convicted John Aldridge, a hotelkeeper from Tuamarina,⁷¹ in November 1890 for a £15 cheque forgery, sentencing him to five years after haranguing him for blaming another man.⁷² Aldridge's new Wellington solicitor, Vogel, filed a habeas corpus petition in Wellington, where Aldridge was in gaol, but changed this to a quo warranto proceeding to challenge Edwards J's appointment. The parties and the papers used the term "quo warranto", notwithstanding that rule 454 of the Code of Civil Procedure had effectively replaced the quo warranto writ with a general court power to remove officers invalidly appointed.⁷³ Vogel engaged Sir Robert Stout to be Aldridge's counsel.⁷⁴ The case was pending at the beginning of April, immediately after Edwards J's appointment as a Native Commissioner expired.

69 "Copy of Opinion of Mr Justice Richmond on Appointment of Mr Edwards" in "Mr WB Edwards (papers relating to the appointment of)" [1891] II AJHR H13 at 32.

70 "Enclosure 3 in No 69. Memorandum in Reference to the Appointment of Mr Justice Edwards" in "Mr WB Edwards (papers relating to the appointment of)" [1891] II AJHR H13 at 34.

71 Aldridge had not long been running the pub at Tuamarina, having announced his taking over the pub in 1889: "Tuamarina Hotel" *Marlborough Express* (New Zealand, 9 October 1889) at 2.

72 "Aldridge's Case" *Marlborough Express* (New Zealand, 29 November 1890) at 2.

73 See Robert Stout and William Sim *Practice of the Supreme Court and Court of Appeal* (2nd ed, Sim, Whitcombe and Tombs, Christchurch, 1902). The authors note at 190 that the intention of the rule was to enlarge the powers that the Court might have:

When the assistance of the Court is sought to remove any person from office, or to try the right of any person to hold any office, the Court may order that such person be removed from office, or declare who is entitled to hold the office in question.

74 "Wellington Items" *Lyttelton Times* (New Zealand, 21 April 1891) at 5.

C The Buckley Case

Stout and Vogel thought better of proceeding with Aldridge as the lead plaintiff, writing to Attorney-General Buckley on 27 April that "it would not be safe to continue the proceedings in Aldridge's name".⁷⁵ They wrote:⁷⁶

Seeing the great importance of the matter, and that the question should be decided on its merits, free from any technical point about the procedure, we trust that you will allow your name to be used as the plaintiff in the action.

According to their letter they had already sought the approval of Edwards' counsel, Chapman, for this change. Replacing a forger with the Attorney-General removed the political cost and mitigated the fear that the *Aldridge* case would mean prisoners might be released.

The importance of the case is shown by the involvement of high-profile figures, from Stout and the Attorney-General to the leading lawyers who represented Edwards himself. George Harper, who acted as lead counsel for Edwards, was a well-known Canterbury lawyer, and his two juniors, Chapman⁷⁷ and Cooper,⁷⁸ were subsequently appointed Supreme Court judges.

Stout's extensive submission before the Court of Appeal and Harper's slightly shorter reply did not just address the narrow statutory interpretation issue. Rather, they touched on broader issues, including the nature of the New Zealand judiciary and its similarity to that in England but also, interestingly, in America. Stout and Harper argued over what was at stake in the case. The *Buckley* case remained all about whether, after the enactment of the Supreme Court Act 1858, New Zealand judges enjoyed the same privileges as those at "Home" – that is, whether they were "real judges". Arguments in the case revolved around the impact of the Act of Settlement and its creation of life tenure during good behaviour and guarantee of salary. The question was, what did these developments mean for Edwards' appointment, which had been made without a guaranteed salary?

For Stout, what was involved was not a mere convention but something more fundamental.⁷⁹

75 Robert Stout and HB Vogel "Sir Robert Stout and Mr H B Vogel to the Hon the Attorney-General. *Memorandum for the Attorney-General*. In re *Mr Edwards, and his Status as Supreme Court Judge, and the Convict John Aldridge*" [1891] II AJHR H13 at 36.

76 Robert Stout and HB Vogel "Sir Robert Stout and Mr H B Vogel to the Hon the Attorney-General. *Memorandum for the Attorney-General*. In re *Mr Edwards, and his Status as Supreme Court Judge, and the Convict John Aldridge*" [1891] II AJHR H13 at 36.

77 Peter Spiller "Chapman, Frederick Revans" in *Dictionary of New Zealand Biography* <<https://teara.govt.nz>>.

78 RCJ Stone "Cooper, Theophilus" in *Dictionary of New Zealand Biography* <<https://teara.govt.nz>>.

79 Arguments in the Court of Appeal in the "Case in the Court of Appeal between the Honourable the Attorney-General and Mr W B Edwards" [1891] II AJHR H13 at 80.

This is more than a convention of the Constitution, such as Dicey mentions in his book. It is, so to speak, a law of the Constitution, which the Court must, I submit, look at, and must read into our New Zealand Acts. Now, as to the effect of what may be termed custom, or outside practice, or what may be termed even constitutional law, as bearing on the interpretation of the statutes, there are many examples in our books.

Harper replied with a different view of what it was to be an independent judge, arguing that the salary and good behaviour requirements had been put in place much later than the Act of Settlement.⁸⁰ Moreover, what mattered was the actual New Zealand law, not constitutional principle.⁸¹

I submit to the Court confidently that it cannot take this—this outside unwritten law, so to speak—and apply it in the interpretation of this statute. It has never been attempted to be applied in any sort of way at Home. The principle has been laid down distinctly in words in the various Acts, whereas here we have not got it in our statute. My learned friend read from Dicey, showing the difference between the law and the conventions of the Constitution. The principle is in Dicey ... the test of what is constitutional law as distinguished from convention of the Constitution.

D The Court of Appeal's Judgments

Despite their length and the positive press coverage that they received, it is not immediately apparent that the counsels' arguments persuaded anyone. Unsurprisingly, the judgments in the Court of Appeal closely resembled the second opinions the Judges had already given. Prendergast CJ remained convinced that the general words were "controlled" by the "subject matter with which the provision is dealing" and the Constitution Act and the Civil List Act.⁸² Conolly J found that the statute, interpreted as a whole, meant that a judge could not be appointed without a salary. In the majority, Richmond, Williams and Denniston JJ each presented slightly different variations on the theme that Parliament could have, but had not, expressly linked appointment to available salaries – and, therefore, Edwards could be appointed without a guaranteed salary. In other words, a 3-2 majority of the Court of Appeal rejected Stout's contention that what was "constitutional" had to shape what was "legal".

The majority focused instead on what the statutes had not expressly done: they had not expressly limited the number of appointments. Richmond and Williams JJ's account of the history was different

80 Arguments in the Court of Appeal in the "Case in the Court of Appeal between the Honourable the Attorney-General and Mr W B Edwards" [1891] II AJHR H13; and letter from Mr Justice Edwards to the Hon the Premier (17 April 1891) in "Mr WB Edwards (papers relating to the appointment of)" [1891] II AJHR H13 at 35.

81 Arguments in the Court of Appeal in the "Case in the Court of Appeal between the Honourable the Attorney-General and Mr W B Edwards" [1891] II AJHR H13 at 105; and letter from Mr Justice Edwards to the Hon the Premier (17 April 1891) in "Mr WB Edwards (papers relating to the appointment of)" [1891] II AJHR H13 at 105.

82 *Attorney-General v Mr Justice Edwards* (1891) 9 NZLR 321 (CA) at 341 per Prendergast CJ.

from that provided by Stout and by Prendergast CJ; according to their Honours, the legislature had not quite established English "Act of Settlement" judges.⁸³ Denniston J was prepared to accept that the salary remained in the remit of Parliament and that, indeed:⁸⁴

... the whole course of legislation, past and present, in the colony shows that the Legislature never contemplated the appointment of a Judge of the Supreme Court before his salary was either established or arranged for.

But Denniston J nevertheless held that the Court could not challenge Edwards' appointment.⁸⁵

It is suggested that by an elaborate collation of other statutes, past and present, and the aid of certain constitutional maxims, one may arrive at an intent of the Legislature other than that apparent by the words of the Act. I do not dispute that the consequences of a literal construction may compel violence to the words of a statute. But this canon of construction is, I think, one to be invoked as seldom as possible. It leads not seldom to a judicial assumption that the Legislature must be taken to have said what it does not say, because of the inconvenience of holding it to have said what it did say. I do not think that in this case the natural or necessary consequences of construing the statute in its plain terms require any such drastic judicial remedy.

In contrast, for Prendergast CJ and Conolly J, the fixed salary had to go with the appointment because, without it, the appointment was unconstitutional and, therefore, illegal and inappropriate.⁸⁶ Prendergast CJ wrote:⁸⁷

It hardly needs observation that the office of Judge of the Supreme Court, to which is attached in the interest of the public a tenure practically one for life, is a very different subject matter to that of the like office held during pleasure. ... It could not be intended that the Crown should have power to appoint to such an office without at the same time having power to allot a salary for the performance of the duties, unless a salary were by law attached to the office.

This contrasted with the at-will appointments which had been made before the introduction of representative government. Without a guaranteed salary at the time of appointment, Parliament would have to put things right by a further statute "for shame's sake, to do what it disapproves of".⁸⁸ What mattered was Prendergast CJ's and Conolly J's view of the whole of the statute, which assumed that there was a fixed salary and which, following Stout's argument, had to be interpreted with the

83 At 368 per Williams J and at 366 per Richmond J.

84 At 377 per Denniston J.

85 At 377–378 per Denniston J.

86 At 346–347 per Prendergast CJ.

87 At 346–347 per Prendergast CJ.

88 At 348 per Prendergast CJ.

constitutional objective of independence in mind.⁸⁹ While Conolly J's conclusion that the appointment was invalid was based solely on statutory interpretation, he also wrote of the importance of independence and the absurdity of having one judge without a guaranteed salary.⁹⁰

It appears that the legal profession generally accepted the Court of Appeal's decision, and some members actively opposed the Liberal Government's decision to pursue the case to the Privy Council. The Canterbury Law Society Council passed a motion urging the Government to discontinue further proceedings and to enact a validating statute, arguing the "present deadlock" was "injurious to the prestige and authority of the Supreme Court". The Council noted that 18 months had passed since the appointment, that Edwards had "discharged his duties as a Judge to the satisfaction of the profession and the public", and that "no objection" could be made as to his "character or capacity".⁹¹ The Hawke's Bay,⁹² Taranaki⁹³ and Wellington Law Societies joined Canterbury.⁹⁴ Stout's Otago Law Society was more cautious, agreeing that the deadlock was dangerous but "express[ing] no opinion" on removing it.⁹⁵ Nevertheless, the Government persisted in going to London.

E The Privy Council

The case was argued in London by a cast of very distinguished barristers. Reflecting the significance of the issues at hand, seven Law Lords heard the case. Leading the Government's case was Sir Horace Davey, a former Liberal MP and Solicitor-General under Gladstone. Davey's legal expertise was immense; he "was the acknowledged leader of the chancery bar for well over a decade" and ultimately became a Law Lord.⁹⁶ Sir Walter Phillimore, a successful ecclesiastical barrister and less successful Liberal politician, led Edwards' response. He was subsequently appointed to the Queen's Bench in 1897 and, in 1913, to the Court of Appeal.⁹⁷ Amongst Phillimore's juniors was Danckwerts, who had prosecuted the famous 1884 "cabin boy cannibalism" case of *Dudley v Stephens*. Chapman & Tripp, who had purchased Edwards' practice on his appointment, had organised

89 At 347–348 per Prendergast CJ.

90 At 382 per Conolly J.

91 *Star* (Christchurch, 8 July 1891) at 3.

92 "The Judge Edwards Appeal" *New Zealand Times* (New Zealand, 27 July 1891) at 2.

93 *Taranaki Herald* (New Zealand, 17 July 1891) at 2.

94 "Telegraphic" *Star* (Christchurch, 17 July 1891) at 3; and "The Edwards Case" *New Zealand Herald* (New Zealand, 27 July 1891) at 5.

95 "Judge Edwards' Case" *Bush Advocate* (New Zealand, 18 July 1891) at 3.

96 See Nathan Wells "Davey, Horace, Baron Davey (1833–1907)" (4 January 2007) Oxford Dictionary of National Biography <www.oxforddnb.com>.

97 See Sankey (revised by Hugh Mooney) "Phillimore, Walter George Frank, first Baron Phillimore (1845–1929)" (3 January 2008) Oxford Dictionary of National Biography <www.oxforddnb.com>.

his involvement as he was a friend of the firm's partner, Tripp.⁹⁸ Missing was Sir Robert Stout, probably to his regret. There had been much speculation about Stout's rumoured trip back to London; the *New Zealand Herald* had, for instance, protested against Stout's glorification. The cost of the proceedings had evidently attracted some public interest, and Parliament had published Stout and Vogel's fees as a matter of public record.⁹⁹

On the history of judicial independence, the Privy Council took a similar view to Stout. There had been a progression from the period when appointments were solely at the will of the Crown Government. The restriction on legislative power in the Constitution Act promoted independence:¹⁰⁰

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.

Front and centre of Lord Herschell's advice was the line that Stout had consistently maintained since Edwards was first appointed – the English history supported the importance of parliamentary sanction for an appointment, and New Zealand shared that constitutional understanding. The narrative was tricky, but the "ascertained salaries" rule had been in place since 1716–1717:¹⁰¹

Their Lordships think that the Act of the 1 Geo. 3, 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 shews 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.

As it had been for Stout, independence was a hallmark of the judiciary, and guaranteed salaries were integral to securing it.¹⁰² Having reviewed the constitutional importance of independence, Lord

98 See Gore, above n 22, at 48.

99 "WB Edwards (return of costs of legal proceedings in connection with removal of, from position of judge of supreme court)" [1893] AJHR H42.

100 *Buckley v Edwards*, above n 2, at 394–395.

101 At 393.

102 At 396–397.

Herschell focused on the particular statutory history, as he accepted that the legislature might have done something else:¹⁰³

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 shewing that this was not the intention of the legislature, effect must be given to the enactment without regard to the consequences.

But his Lordship's conclusion was that the New Zealand statutes were predicated on there being a fixed salary – that much being evident from the requirements that judges' salaries could not be lowered, substitute judges were not to be paid more than the judge who was being replaced, and superannuation was to be paid. Of course, for the salary to be fixed, there had to be a salary in the first place.

Arguments based on the somewhat fraught legalities of the administration of New Zealand judicial appointments did not tell against the conclusion that judgeship had to come with a salary. Even if that history showed that judgeship often (temporarily) had not come with a salary, this was not dispositive. Lord Herschell put to one side the arguments that Gillies and Williams JJ had been appointed when their predecessors were still in office or that Richmond and Chapman JJ had been appointed before the enactment of the Civil List Act.¹⁰⁴ Similarly, the fact that Gresson J had been appointed a day before the Act granting his salary had come into force did not sway their Lordships:¹⁰⁵

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.

Ballance, on hearing the news in Wellington, immediately telegraphed Stout in Dunedin news of great triumph.¹⁰⁶ *The Times* of London welcomed the decision. The editorial writer put things grandly, characterising the issue as a "grave constitutional question, destined it may be to affect the rights and liberties of thousands of British subjects for generations to come." The stakes had been high.¹⁰⁷

103 At 397.

104 At 401.

105 At 401.

106 Telegram from John Ballance to Robert Stout (23 May 1892) Turnbull Library MS0040-38 telegrams 1878–1892.

107 *The Times* (2 May 1892), reported in the *New Zealand Herald* (New Zealand, 6 July 1892).

It is hardly an exaggeration to say that had the Privy Council felt constrained to decide ... otherwise ... their judgment would have inflicted a disastrous blow on the independence of the Judiciary of New Zealand.

Of course, the New Zealand papers that favoured the Government lauded the decision, as did the Government itself.¹⁰⁸

V AFTERMATHS

The Privy Council's decision did not benefit Aldridge, who remained imprisoned in the Mount Cook gaol. Aldridge again petitioned Parliament in July 1892 that he had been wrongfully convicted because Edwards had been invalidly appointed. The Petitions Committee recommended that the "surrounding circumstances" be considered, and a portion of the sentence be commuted.¹⁰⁹ But nothing seems to have happened. Vogel again filed a habeas corpus petition which the Court of Appeal heard at the end of April 1893 and quickly dismissed on 12 May in a unanimous decision that the conviction was valid.¹¹⁰ Vogel appeared this time without Stout, who by then was involved in an unsuccessful tussle with Richard John Seddon for the Premiership after Ballance's death on 24 April. The Court, previously divided, was unanimous that Edwards J had acted as a de facto judge, if not a de jure one. As such, his actions were valid until the Privy Council had decided he was not appropriately appointed.¹¹¹

The Judges were not impressed by Aldridge's argument that Edwards had been appointed to a non-existent judicial position. Instead, they insisted Edwards had been invalidly appointed to an existing court because of the lack of salary. Williams J tried to explain this away by holding that a judge could potentially be appointed so long as the legislature voted the money and the "effect of the new appropriation would be not to create new offices, but to authorise additional appointments".¹¹²

¹⁰⁸ *New Zealand Herald* (New Zealand, 6 July 1892).

¹⁰⁹ *Pelorus Guardian and Miner's Advocate* (New Zealand, 26 July 1892) at 2.

¹¹⁰ *Re Aldridge* (1893) 15 NZLR 361 (CA).

¹¹¹ At 366.

¹¹² At 372–373.

Richmond,¹¹³ Williams,¹¹⁴ Denniston¹¹⁵ and Ward¹¹⁶ JJ, sitting in place of Williams J, were clear that Edwards could not be considered a usurper. Aldridge had been validly convicted.¹¹⁷

Edwards' career after the Privy Council decision was hardly smooth. He was able to re-enter private practice, having been excused from the restraint of trade clause in an agreement for the sale of his practice to Chapman Tripp, concluded at the time of his appointment. Tripp had asked that Edwards cover the interest on the loan that had been used to buy the practice, but Edwards, pointing to the circumstances, demurred.¹¹⁸

Eventually, Mrs Edwards came to see me, so I said to Chapman, "I cannot bear women coming to see me about their husbands' business. Let him practice without payment" which we did. And he never thanked us for it, which showed what a peculiar man he was. But as I say, we must make some allowance because I am sure he had some disability.

Despite being removed as judge, Edwards became President of the Wellington District Law Society from 1895 to 1896. He was appointed, this time validly, to the Supreme Court in July 1896, somewhat ironically on the death of his nemesis, Buckley, and from 1899 he served under Chief Justice Stout. He continued his petitions to Parliament for financial redress until finally successful in 1905.¹¹⁹

His second career on the Supreme Court seems to have started calmly enough as a resident judge in Auckland. Commentators were always complimentary of Edwards J's legal ability. But his limited capacity to win friends took over, leading to an appeal from Auckland lawyers to move him elsewhere. After a short spell back in Wellington, he resigned in 1921, a year before retirement, seemingly induced by an additional payment of £1,000.¹²⁰ Not content, he took his Justice Department-issued typewriter with him, with the Department writing it off "irrecoverable".¹²¹ As Robin Cooke noted,

113 At 369.

114 At 372.

115 At 379.

116 At 380.

117 See Owen Dixon "*De Facto Officers*" [1938] Res Jud 71, (1935–1938) 1 Res Judicatae 285.

118 Gore, above n 22, at 50. Note that there was a suggestion that Mrs Edwards was also difficult: see Fauchelle, above n 23, at 31.

119 In 1901 and 1902 Edwards sought compensation of £3,916 19s for his removal as Commissioner and Supreme Court judge, a petition that was endorsed by the Petitions Committee: see [1901] I AJHR II and [1902] I AJHR II.

120 See Dugdale, above n 23, at 26–36.

121 See RB Cooke *Portrait of a Profession: The Centennial Book of the New Zealand Law Society* (Reed, Wellington, 1969) at 56.

Edwards remained unreconciled to the wisdom of the Privy Council, adding remarks to the protest of the Bench and Bar that followed the Privy Council's somewhat dismissive reversal of the Court of Appeal in the *Wallis* case.¹²² He also wrote in 1917 of a Privy Council decision about relief from forfeitures:¹²³

With the utmost possible deference to their Lordships' authoritative but apparently hastily considered decision it appears to me to be demonstrably wrong. It is, however, useless to discuss it, as it is binding upon all the Courts of this country.

The Liberals' delight in removing Edwards did not lead them to clarify the law immediately, which was no longer a priority. Parliament did so only in 1900 when increasing the number of puisne judges from four to five in the Supreme Court Judge Appointment Act. Notably, the Act provided for a specific number of judges: it supplied "the Annual salaries of five puisne Judges, each one thousand five hundred pounds",¹²⁴ a formula that was repeated when judges' salaries increased in 1904.¹²⁵ The Judicature Act 1908 consolidated the law relating to the courts but still left it to the Civil List Act 1908 to prescribe the number of judges as five. In 1913, the Judicature Act was amended to adopt the current scheme of a hard limit on the number of judges with an external mechanism for determining their salaries. The Conciliation and Arbitration Court initially provided this mechanism; today, the Remuneration Authority determines judges' salaries.¹²⁶ The Senior Courts Act 2016 continues the pattern that judges' salaries do not require a further appropriation. Still, it sets an absolute upper limit on the number of permanent judges.

VI CONCLUSION

New Zealand's constitutional development is often seen by lawyers, at least, as incremental, continuous and evolutionary.¹²⁷ But there is much more to interest lawyers. The Edwards removal was not as dramatic as Governor Grey's rejection of New Zealand's first Constitution in 1846.¹²⁸ Nor

122 *Wallis v Solicitor-General* [1903] AC 173 (PC). The protest is reported in "Protest of Bench and Bar, April 25, 1903" (1840–1932) NZPCC App 730.

123 *Chrystall v Ehrhorn* [1917] NZLR 773 (SC) at 778.

124 Supreme Court Judge Appointment Act 1900, s 3.

125 Supreme Court Judges' Salaries Act 1904, s 3.

126 See the Senior Courts Act 2016, s 7 (number of judges limited to 55) and s 135 (salaries to be determined by the Remuneration Authority).

127 The author of New Zealand's leading constitutional textbook summarises changes between 1840 and 1970 in a paragraph: Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) "1.2 Constitution in Transition" at 3.

128 For an account see ch 1 "A Divided Colony" in André Brett *Acknowledge No Frontier: The Creation and Demise of New Zealand's Provinces, 1853–76* (Otago University Press, Dunedin, 2016) at 25–43.

was it as traumatic as the same Governor's invasion of the Waikato in 1863.¹²⁹ The Edwards controversy played out alongside a dispute over the Legislative Council's role and the new Government's ability to get appointments that would ensure the passage of their reform programme.¹³⁰ But Edwards' removal did test the contemporary understanding of how the constitution was supposed to function, how the law was to be interpreted and the significance of what was understood.

This article does not claim that the debate over Edwards was a formative one or that it is the source of modern understandings of the New Zealand constitution, but it does show part of New Zealand's constitutional journey. An understanding of the Edwards affair illustrates and gives some colour to a larger story of how New Zealand lawyers argued about the nature of law and judges and the idea that judicial independence is a central tenet of the rule of law. But the story also carries with it echoes of the very New Zealand refrain that all that is legal is not necessarily constitutional. It also shows another potential theme, that while New Zealanders have long argued about what is constitutional, there has often been a particular political context. Stout's campaign against Edwards' appointment was, at the same time, both high minded but also deeply political. Balance may have shared the high principle, but the campaign against Edwards in opposition served a very political purpose, and on McIvor's account, the removal bolstered a struggling government's prestige.

129 See Vincent O'Malley *The Great War for New Zealand: Waikato 1800–2000* (Bridget Williams Books, Wellington, 2016) at ch 10.

130 McIvor, above n 46, at 206–207.

