1878.

NEW ZEALAND.

"NEW ZEALAND JURIST" REPORT ON CASES OF SPENCE V. PEARSON, AND GILLON V. MACDONALD

(LETTER FROM MR. JUSTICE RICHMOND RELATIVE TO).

Laid on the Table by the Hon. Mr. Sheehan with the leave of the House.

Mr. Justice RICHMOND to the Hon. the COLONIAL SECRETARY.

SIR,— Judges' Chambers, Wellington, 3rd October, 1878.

In the recent debate on the Judicial Commission Bill, several members of the House of Representatives appear to have founded their opinions upon a report, contained in the *New Zealand Jurist* for February last, of the cases of Spence *v.* Pearson and others, and Gillon *v.* Macdonald and others (3 *N.Z. Jurist*, N.S., 25). This has for the first time called my attention to the report in question, and I feel it to be my duty to point out to the Government certain misstatements therein which materially affect the merits of Mr. G. E. Barton's case.

1. It is made to appear that in the case of Spence *v.* Pearson the Judges declined to inform Mr. Barton on what ground they were refusing leave to appeal to the Privy Council. This is contrary to fact. The Chief Justice and myself, sitting in the Court of Appeal, distinctly decided that we had no power under the Order in Council of 16th May, 1871, either to grant or refuse an appeal. Our reason was clearly stated—namely, that the case in question was one *removed* for argument from the Supreme Court into the Court of Appeal, under section 19 of "The Court of Appeal Act, 1862," and that the Order in Council applies only to cases in which the Supreme Court has given a decision, and there has been an appeal from that decision. There was no possibility of mistake upon this point. The whole argument turned upon the terms of the Order in Council, and the decision was expressly based upon the authority of a prior decision of the Court of Appeal, which was cited (Brogden *v.* Miller). Just before the application in Spence *v.* Pearson, Mr. Gordon Allan had applied for leave to appeal in a case similarly situated—namely, that of Calder *v.* Duff. The Court had given leave to appeal; but when Mr. Bell, who was opposed to Mr. Barton, raised the objection that the Court of Appeal had no jurisdiction, and cited the prior decision of the full Court of Appeal, the Judges revoked their determination in Calder *v.* Duff, and told Mr. Gordon Allan that his leave to appeal must depend upon the decision in Spence *v.* Pearson. It is therefore absolutely untrue that the Judges declined to say whether their refusal of Mr. Barton's application was on the ground of want of jurisdiction. It was fully allowed that both cases were proper cases to take to the Privy Council, and the only question was as to the power of the Court of Appeal.

2. The offensive language used by Mr. Barton during the morning sitting of the 30th January was in reference to a different matter. After the Court had intimated that it had no power to allow an appeal, Mr. Barton applied, in the same case of Spence *v.* Pearson, for leave to plead. Here again the same difficulty occurred, arising out of the peculiar provisions of the Court of Appeal Act in reference to cases removed from the Supreme Court under sections 18, 19, and 20 of the Act. It appeared that the Registrar of the Court of Appeal had already remitted the pleadings to the Supreme Court, along with a note of the decision of the Court of Appeal. The Chief Justice intimated a doubt whether the matter was not now out of the hands of the Court of Appeal, and whether the application ought not therefore to be made to the Supreme Court at Dunedin. I remarked that we must, if possible, avoid the inconvenience to the applicants of being bandied about between the two Courts; because it seemed possible that the Supreme Court at Dunedin might also doubt its power to give leave to plead after a decision of the Court of Appeal. Therefore the Judges informed Mr. Barton that he might take an order for leave to plead on the usual terms, for what it was worth; leaving him to make a similar application to the Supreme Court at Dunedin, but securing his clients, so far as we could, against the consequences of a refusal of jurisdiction by the Court at Dunedin. Our purpose was to secure the leave to plead *quâcunque viâ datâ*. It was upon this that Mr. Barton demanded from the Court an absolute decision whether they had, or had not, power to grant the leave to plead. Of this demand we took no further notice than to say that he might take or leave the order we had given him as he pleased. The particular case was fully provided for by the order we had made. On the general question it would have been inexpedient to give a decision, as the Chief Justice and myself were merely sitting to dispose of the residuary formal business of the Court of Appeal.

3. Next, as to the report of Gillon *v.* Macdonald. This report is a one-sided one. It states that Mr. Travers had admitted that Saunders had ceased to be a partner in the *Argus* Company. This, indeed, was Mr. Barton's contention, but was, and has always been, absolutely denied on the part of the defendants. On the part of the defendants it was stated that Mr. Travers had said "he made no point of the non-joinder of Saunders as a defendant, and would consent to his being made a party to the suit." This, of course, implies that Saunders really was a partner. The notes taken by the Chief Justice on the first trial were referred to, and confirmed that statement as to the nature of the consent given by Mr. Travers. The plaintiff never did add Saunders as a party to the suit, and it became, in the subsequent proceedings, a serious question whether the Court could issue orders purporting to affect the copartnership and its property without insisting that all the partners should be before the Court. Some of Mr. Barton's numerous interruptions of the Court whilst delivering judgment related to this question respecting Saunders. On these occasions he was not calling the attention of the Court to any matter which could possibly have been overlooked, but was contradicting and protesting against the conclusions of the Judges upon one of the main questions before them, and renewing passionate assertions which he had already made over and over again.

4. I need scarcely add that it is quite a misapprehension to suppose that the Chief Justice refused to refer to his notes of the first trial. I do not know that there is any ground for this mistake in the *Jurist* report, which, so far as it is based on the report of the *New Zealand Times*, is fair enough. His Honor's note-book and my own were both produced, and the entry in the former of the consent given by Mr. Travers was one of the chief subjects of discussion. The Chief Justice did at one point in the discussion observe that, where the question related to the state of the record, it must be determined by the record and not by his note-book. Some reporter must have misunderstood the observation. Such mistakes are continually occurring.

5. It does not appear to have occurred to any one who relied upon the report in the *Jurist* to inquire into the origin of that report. I declare it to be quite untrustworthy, so far as it is original. I have reason to believe that it was not furnished to the *Jurist* by either of the barristers who are announced as the reporters for this district.

The report in the *New Zealand Times* of 31st January is a fair report so far as it goes; but it fails, as almost any report must do, to convey an adequate idea of the scene in Court. It also fails, or rather it does not attempt, to show the nature of the questions before the Court. Without some apprehension of these questions it is not possible for any one to understand how thoroughly without ground of complaint Mr. Barton has been.

I respectfully submit that it is desirable to lay this letter on the table of the House of Representatives. It will be understood that I have confined myself to noting a few important misstatements in a report which some members have relied upon.

I have, &c.,

The Hon. the Colonial Secretary, Wellington.

C. W. Richmond.

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