

agree upon a statement of a case which might be submitted to that tribunal. The Government therefore must ask that some arrangement may be made by which Mr. Edwards shall cease to exercise judicial functions.

His Honour the Chief Justice.

I have, &c.,

J. BALLANCE, Premier.

No. 58.

His Honour the CHIEF JUSTICE to the Hon. the PREMIER.

SIR,—

Judge's Chambers, Wellington, 28th February, 1891.

I have the honour to acknowledge the receipt, last evening, of your letter of yesterday's date, and the enclosure therewith.

Immediately upon receipt of that letter I communicated it to Mr. Edwards, and stated that if he informed me that it was his intention not to sit at Napier I would arrange for the adjournment of the sittings, and for the holding such adjourned sittings. Mr. Edwards has not informed me to that effect, but I am told that he has proceeded this morning to Napier, and no doubt intended me to understand that he would sit there. In my letter to Mr. Edwards I stated that I had not intended to convey to him that the idea or suggestion of obtaining a decision of the Privy Council, or an opinion from the Law Officers in England, as to the validity of his appointment, had come from the Attorney-General, but that I believed I stated that the idea was mine, and that, as to the Privy Council, the Attorney-General had doubted whether there was any precedent under which such a matter could be referred to the Privy Council.

In my letter to Mr. Edwards I also stated that my conversation with the Attorney-General was quite unofficial, and that what I had communicated to Mr. Edwards of it had not been intended to form the basis of any official communication from Mr. Edwards, or to be referred to in any such communication.

I must express my regret that I had not made this clear to Mr. Edwards. However, as you no doubt must be aware, such misunderstandings are very likely to arise from verbal communications.

As Mr. Edwards has not informed me that he does not intend to sit at Napier, I can only repeat what I stated in my former letter to you, that I do not see what steps I can take in the matter of the sittings appointed to be held at Napier.

I have, &c.,

The Hon. the Premier, Wellington.

JAMES PRENDERGAST, Chief Justice.

No. 59.

MEMORANDUM for the Hon. the PREMIER, in reply to the Memorandum* of W. B. Edwards, Esq., in which he defends the Validity of his Appointment as a Judge of the Supreme Court.

1. It is, I think, to be regretted, for the sake of the Supreme Court Bench, that any appointment should have been made about which any doubts as to its validity could have been raised. Such a proceeding must tend to weaken the influence of the Bench. And that an appointment should have been made for which no salary has been appropriated by Parliament is much to be deplored.

2. I regret also that it should be incumbent on me to make any remarks on Mr. Edwards's memorandum on the validity of his appointment. It contains, however, many statements which should not be allowed to go without reply, as they show, in my opinion, an entire misapprehension of the position of those who question the validity of the appointment.

3. The second and third paragraphs of Mr. Edwards's memorandum are as follows: "(2.) I propose to deal with the matter from its constitutional aspect first, as apart from this question it has never been pretended that my appointment is not strictly warranted by the law. (3.) The word 'unconstitutional' is frequently very loosely used; but it must, I apprehend, be used by those who challenge my appointment upon this ground as meaning something which is so contrary to the spirit of the Constitution of this colony as to render it illegal."

4. In reply to this, it may at once be said that it is contended that his appointment is "not strictly warranted by the law." Surely he has not been left unaware that at least two of the Judges of the Supreme Court have urged this contention; and the letter of the Premier, speaking on behalf of the Government, gave utterance to the same view. I shall state further what the arguments are of those who, like myself, declare that his appointment was "not strictly warranted by the law."

5. Perhaps the most extraordinary thing in his memorandum, however, is the 3rd paragraph quoted above. It is an entire misapprehension of the meaning of the term "constitutional" to assume that it has reference to the New Zealand Constitution Act. It is not to be supposed that the words "constitutional" or "unconstitutional," as applied to the act of the members of an Executive Government, are not understood, not only by lawyers, but by laymen. What is understood by the term is pointed out in Mr. Dicey's book, "Lectures Introductory to the Study of the Law of the Constitution." There is such a thing as the "Law of the Constitution"—that is, "rules expressed or recognised by the Courts." And there is also the "conventions of the Constitution," which consists of certain practices, maxims, or precepts which are not expressed or recognised by the Courts, but which make "up a body, not of laws, but of constitutional or political ethics." And Mr. Dicey says, "A lawyer cannot master even the legal side of the English Constitution without paying some attention to the nature of these constitutional understandings which necessarily engross the attention of historians or of statesmen. He ought to ascertain, at any rate,

* See Enclosure 1 in No. 55, page 20