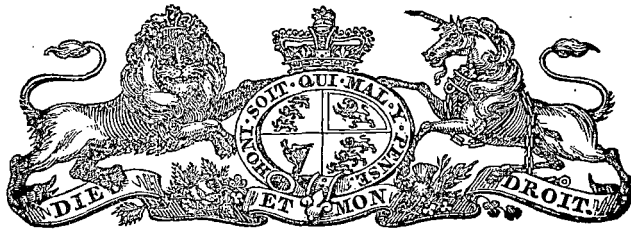


(No. 36.)



1878.

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T A S M A N I A.

H O U S E O F A S S E M B L Y.

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**THE HUNT CASE :**

**DESPATCHES AND CORRESPONDENCE.**

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Laid upon the Table by the Colonial Treasurer, and ordered by the House to be  
printed, July 16, 1878.



DESPATCH No. 11.

*Government House, Hobart Town, 11th February, 1877.*

MY LORD,

I HAVE the honor to state, for Your Lordship's information, that having on the advice of Ministers remitted the unexpired portion of a sentence passed on Louisa Hunt in accordance with the prayer of a respectably signed petition, the propriety of the advice tendered to me was questioned; and public interest having been excited, various reports were set on foot, some of a most improbable character. I therefore thought it advisable to put facts on record, offer suggestions for future guidance, and afford Ministers an opportunity for explanation in the following Memorandum:—

Louisa Hunt.\*  
Parliamentary  
Papers.

#### MEMORANDUM.

THE Governor desires to call the attention of Ministers to certain questions which formed the substance of a conversation he yesterday held with the Premier on his return from the North, relative to the exercise of the prerogative of mercy, and to certain instances of its exercise which have recently given rise to public comment.

Louisa Hunt.\*  
Parliamentary  
Papers.  
Further correspond-  
ence.  
Memo. by Governor  
and Attorney-  
General.

On the Governor's arrival in Tasmania, he found a practice of remission in operation which appeared to him more lenient (especially considering the "regulated remission" regulations laid down by Parliament) than the practice to which he had been accustomed either as a Governor or as a Prime Minister or other Executive Councillor; and though he has ever borne in mind the instructions to "allow great weight" and to "pay due regard" to the recommendations of Ministers, he has still found it his unpleasant duty on various occasions to object to remissions that have been proposed to him.

Memo. by Ministers  
and reply.†

The Governor also, with the full concurrence of the late Attorney-General, has adopted the plan of conferring personally with the Attorney-General upon important or doubtful cases before dealing with them in Executive Council. This practice, new in this Colony, has also been recognised by the present Attorney-General as conducive to the more careful conduct of this branch of the public business.

The Governor, in his late Government (a Colony of the "Crown," or rather mixed or transition type of Constitution), was in the habit of rarely interfering with sentences, beyond simple good conduct remissions, without previously considering the recommendation of the Judge, or the appearance of new facts or matters unknown at the trial; consequently he has here frequently asked Ministers for the recommendations of the Judges, and expressed an opinion that in every case of importance they should be obtained. In this opinion the late Attorney-General frequently expressed his concurrence, but regretted that the Judges were unwilling to give opinions or recommendations on the exercise of the prerogative of mercy; and the present Attorney-General has also informed the Governor and the Premier that he understands the Judges to hold, that to advise is not their duty or province.

The Governor has now, however, some grounds for believing that the position taken by the Judges may not have been quite fully or accurately apprehended by the Law Officers of the Crown, and that more assistance than has been obtained may be obtainable; and it is mainly to lead the way to a clearer understanding on that point that the Governor now writes this paper.

The Governor will note in regard to the recent instance of a pardon granted to the woman Hunt, that he assented to her release after some discussion, on the distinctly expressed ground that he considered that a Governor, having responsible advisers, ought not to refuse (excepting on grounds of Imperial policy or on very grave considerations) a very strongly urged and unanimous request for mercy to a Convict made formally in Executive Council by his Ministers, backed by the assurance of the Premier that he did not doubt the innocence of the prisoner, and by the point urged by the Attorney-General, that the witness Amelia Dear having been since convicted her evidence was worthless, and that consequently new light had been thrown on the case since the trial.

The liberation of Aherne on ticket-of-leave was agreed to in Executive Council by the Governor, on the recommendation of Ministers, on the 4th December; but as the Governor was about to proceed to Port Arthur, accompanied by three of his responsible advisers, the Attorney-General, from information received, thought it best to make some further enquiries at Port Arthur. Those enquiries were satisfactory, and, by the renewed advice of Ministers present, the Governor then

\* Paper No. 9, Sess. I., L. C., 1877. H. A., Sess. I., No. 3.

† Paper No. 34, Sess. II., L. C., 1877. H. A., Sess. II., No. 27 (differently arranged).

informed Aherne of the decision which had been already arrived at in Executive Council; but Aherne was also told that his ticket would be revoked if he came to Hobart Town or gave cause of fear to his wife there resident. On the Governor's return to Hobart Town, however, he was informed privately that there were grounds for apprehension on the part of the wife: similar information was conveyed to the Attorney-General, and the prisoner was, and is still, detained pending further enquiry.

In such cases as Aherne's it is a grave matter for consideration whether all hope of mercy is to be for ever cut off from criminals who after long years of servitude and punishment have conducted themselves well for a considerable period, and who have had hopes held out to them that good conduct, and the suppression of strong natural tendencies to violence and resistance to authority, will obtain for them remissions which have been frequently granted to men whose original offences were possibly worse, or more generally dangerous to society than theirs. Nor does this last remark apply only to Tasmania; in England very long probation servitude is becoming obsolete; and a very distinguished Australian Governor, in fulfilment of a personal promise, set free the bush-ranger Gardiner after Ten years servitude although the Judge declined to recommend mercy.

Having thus reviewed the actual position, the Governor desires to impress upon Ministers the advisability of taking steps to ascertain definitely what measure of assistance the Judges may consider it consistent with their duty to afford to the Executive when questions of remissions of sentences arise. The Governor now records his repeatedly expressed opinion that the Judges should be requested to make a minute, with such recommendations or observations as they may see fit, upon each case in which sentence has been passed by them, before the question of remission is brought before the Governor; and he recommends that Ministers, or that he himself, should at once officially ascertain how far the Judges feel themselves at liberty to assist the Executive in a matter in which they are so specially competent to advise,—a matter directly affecting the ends of justice, and more indirectly, but still very really, the status of the Supreme Court.

The Governor has no wish to discuss the soundness of the advice tendered to him by Ministers in Mrs. Hunt's case, but he has lately been informed that reports or memoranda exist bearing on that case which have not been brought to his knowledge by Ministers, and he learns that their existence is also unknown to the Premier; should those papers contain the expression of the opinion of a Judge, the Governor's decision might have been materially influenced by that opinion. It will readily be admitted that it is the duty of a Ministry to lay all possible information before the representative of the Crown. The Governor doubts not but that Ministers will ever endeavour to fulfil that duty, and it is equally clear that reference to the Judges may much facilitate that endeavour.

The Governor desires, in placing this Memorandum before Ministers, to record facts, to suggest an arrangement for future guidance, and also to afford Ministers an opportunity for making any explanations, suggestions, or remarks which they may think it advisable in the interest of the Public Service.

FRED. A. WELD, *Governor.*

*Government House, 5th January, 1877.*

2. Believing it to be desirable that the Country should know the position of the case, and that it should be removed if possible out of the sphere of party politics, I suggested to Ministers the advisability of taking the earliest opportunity of placing everything before Parliament. They preferred, however, to wait until the Papers were called for by Mr. Giblin, the leader of the Opposition in the House of Assembly; and on their production, Mr. Adye Douglas moved that "the advice tendered by his Ministers to His Excellency, and which led to the release of the prisoner Louisa Hunt, was improper, and such as to tend to subvert the administration of justice."

3. A similar motion was proposed by Mr. Grubb in the Legislative Council. In the Assembly, Ministers, who did not make it a Ministerial question, were defeated by the casting vote of the Speaker, who concisely expressed his views by saying, that he did not question the good faith, but disapproved the advice given by Ministers.<sup>a</sup> It is noteworthy, in view of the correspondence which follows, that neither in the resolution itself, nor in the Speaker's words, does there appear the slightest reference to any advice other than that given to extend the exercise of the prerogative of mercy to Louisa Hunt.

4. In the Legislative Council the party of the late Ministry have voted with those gentlemen who may be described as the Legislative Council party proper; that is, gentlemen who hold views independently of either of the parties in the Assembly: thus Ministers are in a hopeless minority in the Council, and on this question did not even divide.

<sup>a</sup> Mr. Speaker said:—

"I should have been glad if, in giving my Vote on the question now before the House, I could have availed myself of the Constitutional practice of voting so as to avoid, as far as possible, the final decision of the question at issue by the casting vote of the Speaker, by giving an opportunity for further deliberation and the formation of a greater preponderance of opinion on one side or the other.

"On this occasion, however, I must rely on my own judgment of the merits of the case before the House, and my own sense of right and wrong, to the exercise of which I have an undeniable right.

"While not doubting that the Ministers, in advising His Excellency the Governor to grant a pardon to the woman Hunt, were actuated by conscientious motives, I cannot avoid thinking that they committed an error of judgment in giving that advice, which was not calculated to promote the ends of justice or inspire respect for the law.

"On these grounds I am constrained to give my Vote with the Ayes."

5. Ministers nevertheless uphold their action, and believe that it has the support of a large proportion of impartial men. The press, however, is clearly adverse to their view. The Tasmanian press has contained numerous references to my Memorandum of January 5th, and, so far as I am aware, they have all been of a highly favourable character; and all allusions to me personally in the Parliamentary debates have, I believe, been not only respectful, but complimentary. The Melbourne *Argus* has, however, a leading article which takes a view different in some respects from mine, and that, I believe, of all, or almost all, the leading men of both parties in Tasmania. Viewing the position held by the *Argus* amongst Australian papers, I enclose a copy of the article in question, as it is of advantage to look upon a question from both sides. I must, however, remark that by "object" I do not mean refuse: Attorney-Generals have ever shown readiness to meet such objections in a reasonable spirit, and I should be careful not to object excepting on good grounds. In Mrs. Hunt's case, however, Ministers unitedly, in formal Executive Council, having previously come to their decision in Cabinet, made a strong recommendation to mercy, alleging certain grounds stated to have been not apparent at the trial. The existence of some sources of information it appears was at the time unknown to Ministers, and consequently to me. No Imperial question, nor, to my knowledge, any special consideration was involved. I know nothing at all about the case, or woman, excepting what was placed before me in Executive Council. I believed, and believe, that my Advisers were acting in good faith; and I did not think, after some discussion had taken place, that I should have been justified in refusing the deliberate and strong recommendation of Ministers. It is my duty to treat all Ministries alike; and to accept the resignation of a Ministry happening to have a strong support in Parliament under similar circumstances would, I think, lead to public inconveniences more serious than a mistake on the side of mercy.

Paragraph I.

*Argus* article.

6. It is now my duty to come to a new and, to me, an unexpected phase of the question, and to forward to Your Lordship a Correspondence that has taken place between their Honors the Judges of the Supreme Court and myself. His Honor the Chief Justice it appears, with the concurrence of the Puisne Judge, is convinced that an aggression has been made by Ministers on the Supreme Court, and that he is bound publicly to repel it: he is fully convinced that the Governor has been "advised" that the Governor in Council sits as a Criminal Court of Appeal in a judicial sense, and their Honors, in effect, now decline to accept either my assurance or that of my Ministers that they have not so advised me, enter into an elaborate argument to prove that they have; and, it appears to me, take a line of argument closely analogous to that which might be taken by Managers appointed to plead in proof of allegations brought against a Minister in a Parliamentary impeachment. The documents before Your Lordship will at a glance show whether I rightly or wrongly appreciate what appears to me to be the singular line of action adopted by their Honors; but as it is for them to decide what course of action they think best calculated to uphold the dignity of the Supreme Court, and remonstrance has been unavailing, I cannot but think that Your Lordship will agree with me that the public service cannot be benefited by my entering into controversy with their Honors; and though their Honors repudiate the possibility of any imputation of partizanship being attached to them, my experience of human nature, and especially of party human nature, would lead me to be more cautious. I have, therefore, abstained from indicating points that seemed to me strained in their inferences or conclusions, or a result of imperfect knowledge of facts, or mistakes in their Honors' arguments or rejoinders.

Judges to Governor,  
27th January.\*  
Governor to Judges  
of 30th January.\*  
Judges to Governor,  
2nd February.\*  
Governor to Judges,  
6th February.\*  
Judges to Governor,  
9th February.\*  
Governor to Judges,  
10th February.\*  
Judges to Governor,  
10th February.\*

7. I wish, however, to observe that the question is not whether or no Ministers wisely advised the remission of the unexpired portion of Louisa Hunt's sentence. Upon that point Parliament has pronounced, and I admit its competency and accept its decision; but the question now is, whether Ministers have advised the Governor that the Governor sits in Executive Council as a Judicial Court of Appeal in Criminal cases,—and I can only repeat that I am not aware that such advice has ever been tendered to me, and Ministers distinctly deny ever having tendered it; and it will undoubtedly be admitted by all who reason calmly, that even did speeches prove Ministers to hold personally certain opinions, that would not prove that Ministers made such opinions part of their policy, still less that they had advised the Crown to adopt such opinions as its own, or to accept them as its line of conduct. Moreover, I frankly expressed my views in my first reply to their Honors. I understand them to concur with those views: Ministers cannot sit in Executive Council without the Governor; why then continue the discussion?

8. I have the greatest possible regard for their Honors the Judges, and it is with regret that I record my difference of opinion with them. That I carry my

\* Paper No. 34, Sess. II., L. C. 1877. H. A. Sess. II., No. 27 (differently arranged).

desire to uphold the dignity and position of the Supreme Court to its utmost legitimate limit, my antecedents in Western Australia, as records in Your Lordship's office will prove, plainly and markedly show; and for that very reason I cannot but think it unfortunate that highly respected Judges, who have for years held a line of conduct which has won them the confidence of the country, should feel it their duty, as they do, no doubt most conscientiously, feel it their duty, to descend into the arena from the high eminence upon which their judicial character has seated them.

9. I must really apologise to Your Lordship for stopping to explain that in saying that the Governor was "the sole and only competent judge whether they (Ministers) have or have not tendered certain advice to him," I had no intention of ignoring the proper functions of Parliament. I meant, and the context, I submit, clearly implies, that what passes between the Governor and his Ministers can be known to them only until by them communicated; and that as Ministers have denied to the Governor that they have ever advised him in the sense affirmed by the Judges, the Governor is the sole and only competent judge of whether they speak the truth or no. I had in the preceding paragraph expressly recognised Parliament "as the proper and ultimate tribunal by which the actions" (and tendering advice is an action) "of Ministers are approved or condemned."

10. I will make but one other remark. Their Honors the Judges would seem to suppose that because I do not think it wise for a Governor, when dealing with clear and well-understood principles, to enter into argument upon accessories which have been the recent occasion of warm public discussion, I must therefore be indifferent to the gradual growth of systems from precedent to precedent. Not so; the reverse is the case, and because it is the case I desire to avoid reversing the growth of English constitutional practice, and so far as in me lies to eschew a course which, if commenced deepening from precedent to precedent, may, especially where in a small democratic country Judges are usually taken from the ranks of politicians (necessarily and properly in most cases so taken), lead to weakening institutions of the utmost value at present held in high respect, and which, though in this instance we differ unfortunately as to the mode of action, their Honors the Judges equally with myself desire to strengthen and uphold.

11. Before the mail closes I expect to receive a Memorandum from Ministers upon this question: if so, I shall do myself the honor of enclosing it or any further correspondence that may reach me.

I have, &c.

(Signed) FRED. A. WELD.

*The Right Honorable the Earl of CARNARVON.*

P.S.—On the 16th inst. I received three Memoranda from Ministers, and on the 17th one from the Attorney-General. With the concurrence of Ministers and at the request of the Chief Justice, I transmitted a copy to the Judges for their information. I forward the whole correspondence to Your Lordship at the request of Ministers; and should their Honors the Judges write any further reply, it will be sent by the next mail.

(Signed) F. A. W.  
19th February, 1877.

DESPATCH No. 14.

*Government House, Hobart Town, 17th March, 1877.*

MY LORD,

IN my Despatch No. 11, of 11th February, 1877, I, by last mail, at the request of Ministers, forwarded to Your Lordship certain correspondence between the Judges of the Supreme Court, Ministers, and myself. I now enclose to Your Lordship the conclusion of the correspondence, and also further papers respecting the cases of Louisa and Edwin Hunt. These last-mentioned papers are the papers to which I refer in my *Memoranda* of January 5th and of January 24th, and which were unknown to Ministers (then new to office), and consequently were not brought before me.

2. By these papers Your Lordship will observe that the foreman of the jury signed and "strongly" recommended the Petition in favour of the release of Edwin Hunt: that the Judge, in opposition however to his view of the jury's opinion, thought that Edwin Hunt "to a great extent controlled his mother:" that the late Ministry recommended the release of Edwin Hunt: that the presiding Judge's

\* Paper No. 34, Sess. II., L. C., 1877. H. A., Sess. II., No. 27, (differently arranged).

Ministers to Governor.\*  
Ministers to Governor, 9th February.\*  
Ministers to Governor, 13th February.\*  
Attorney-General to Governor, 17th February.\*

Judges to Governor, 19th February.\*  
Governor to Judges, 21st February.\*  
Ministers to Governor, 24th February.\*  
Judges to Governor, 28th February.\*  
Governor to Judges, 1st March.\*  
Governor to Ministers, 1st March.\*  
Premier to Governor, 1st March.\*

view of the amount of reliance to be placed in Detective Simpson did not seem to materially differ from that of Ministers, which is stigmatised with much emphasis in the paragraph commencing "There is a darker side" in their Honors' letter of 27th January.

Governor to Ministers,  
2nd March.\*  
Governor's Memo.,  
16th February.\*

Petition of William  
Hunt. †

3. It has been apparently seriously held that, because Ministers believed in the innocence of Mrs. Hunt, they could not advise her liberation without constituting the Governor in Council into a Court of Appeal. I am not aware that innocence or doubtful guilt has been ever considered a bar to mercy; and it would be superfluous to quote numerous cases where pardon has been extended to persons whose guilt has been doubtful, or whose innocence has become apparent, though, as the Judges very justly remark, the verdict of a jury is "*res judicata*," and cannot be overthrown or got rid of by individuals. Nevertheless, any offence may be pardoned or any sentence remitted by the exercise of the prerogative of the Crown, the constitutional exercise of which it has been found wise to leave unfettered: consequently this controversy seems to many to have rather affected expressions than realities.

4. In Colonies the Governor representing the Crown is responsible to Her Majesty through the Secretary of State, and Ministers are responsible to Parliament for the proper exercise of their respective functions; but, though Judges may (as I think) be properly consulted, they are practically irresponsible, and rightly so, because their proper function is exhausted in each case after sentence is passed; and it must be borne in mind that to them also the verdict of the jury is "*res judicata*."

5. The real feature of this controversy is, however, the constitutional question involved in the attitude assumed by the Judges of pleaders seeking to convict Ministers of having tendered certain "advice," "advice" which Ministers deny having tendered, asserting that it was not even in accordance with their opinion, advice which the Governor denies having received, and which he would have repudiated had it been tendered.

6. Ministers, I am informed, now propose to bring the question before Parliament; but Ministers are not strong in Parliamentary support. Constitutional considerations can hardly be here confidently expected to outweigh all others; and, should a Ministerial defeat result from the action of the Judges, Your Lordship will readily estimate the effect upon the public mind no less than on that of the party represented by Ministers. I deeply regret the unfortunate impressions that are already widely diffused, and that the warning I gave the Judges in my Memorandum of 6th February has even now been far more than justified by the results.

7. As the Judges in their penultimate Memorandum characterise Ministers' disavowal of the alleged "advice" as "startling and unexpected," and in their last consider that the prolongation of the correspondence on their part is attributable to the delay of Ministers in forwarding that disavowal, I am unwillingly, and with great respect and regard for their Honors, forced to point out that it is impossible for me to sympathise with, or even to comprehend, their Honors' surprise: for, before I accepted their Honors' first letter, I personally told the Chief Justice that I had not received that "advice,"—that I believed that Ministers did not even theoretically entertain that opinion. I offered to obtain a disavowal from Ministers, and I pointed out evils that I feared might arise, and which have arisen, from their Honors' proposed action,—evils uncompensated by any result.

I have, &c.

(Signed) FRED. A. WELD.

*The Right Hon. the Earl of CARNARVON.*

TASMANIA, No. 29.

*Downing-street, 29th October, 1877.*

SIR,

I HAVE had before me your Despatch No. 11 of the 11th February last, with the papers and correspondence which it enclosed, arising out of the exercise by you of the Royal Prerogative in the case of Louisa Hunt, upon whom a sentence of imprisonment had been passed in Tasmania in 1875.

\* Paper No. 34, Sess. II., L. C., 1877. H. A., Sess. II., No. 27, (differently arranged).

† Paper No. 7, Sess. III., H. A. 1877. Paper No. 9, L. C., Sess. III., 1877.

2. I understand from these documents that the question which was raised was not whether Louisa Hunt was properly pardoned,—a question which has been discussed in the Tasmanian Parliament,—but whether the views entertained by yourself and the Attorney-General in respect of the relations between the Judges and the Executive Council in considering cases of pardon are open to question.

3. The Attorney-General, in a Memorandum presented formally to you after consideration by the Cabinet, spoke of the Governor in Council as “acting in some measure as a Court of Appeal” in criminal cases.

4. The Judges took exception to this expression, and publicly protested against it, and I am of opinion that they were justified in this protest by the language of the Attorney-General, who no doubt in expressing his meaning did not have present to his mind the construction which has been put upon his words. His proposition was, however, open to observation in so far as he appeared to claim even in the smallest degree any right of appeal from the sentence of the Courts.

5. It is to be remembered that though the Governor, in exercise of the Crown’s prerogative, may remit a sentence, he does not technically *reverse* it, nor does he by his action in any way pronounce it wrong. This he could only do after hearing an appeal from the finding of the Court, if there were provision for such an appeal. The action of the Governor in effect amounts to this, that not questioning the verdict of the jury and sentence of the Judge to have been properly given, still Her Majesty, through her representative, thinks fit of her Royal Prerogative to show mercy to the convict. Strictly, therefore, the Judges were right in their protest.

6. They were also technically right in refusing to accept the assurance that the view put forward by the Attorney-General was not the view of the Ministers, for, as they point out, the document containing these views was considered by the Ministers and then formally presented to the Governor, facts the evidence of which cannot be ignored.

7. I feel, however, bound to add that there was, in my opinion, some needless heat shown by the Judges in the correspondence; and it appears to me that they might have accepted without difficulty your assurance that the Ministers did not claim to be a Court of Appeal.

8. I must also express my inability to concur in the view expressed in your Memorandum that the Judges ought to make a minute upon each case in which sentence has been passed by them,—for the use of the Governor in Council, as I presume. This would tend, I think, to confirm the pretension that the Governor and Council are a Court of Appeal from the sentence of the Court. The Governor, I think, must keep steadily in view that the act of pardon to a sentenced criminal is an act of pure clemency, and in no way judicial. Except in capital cases, as to which the Royal Instructions lay down a distinct course of procedure, the Governor, in order to inform his mind whether clemency ought to be extended in any case, will do well to consult informally those who can best assist him. Among these he will naturally in most cases have recourse in the first instance to the Judges, and particularly to the Judge who tried the case; and they, if they are consulted in this manner, will no doubt always be found ready to give their advice.

9. If, on the other hand, the Judges were bound formally to make a report on each case, an untenable position would be advanced, since either the Governor would have to assume to review their report and reverse their decision, if necessary, or on the other hand would feel himself bound to follow their report in every case.

10. I have also received your further Despatch No. 14 of the 17th of March, with its enclosures on the same subject.

11. I have already so fully expressed my views upon this case that it only remains for me to add that I observe with regret the acrimonious tone of the further communications which have passed between the Judges and your Ministers.

I have, &c.

(Signed) CARNARVON.

Governor WELD, C.M.G.

DESPATCH No. 52.

*Tasmania, Hobart Town,  
Government House, 29th October, 1877.*

MY LORD,

THE Legislative Council having by address requested me to lay before them any despatches addressed by me to Your Lordship in reference to the controversy between my late Advisers and the Judges of the Supreme Court, I, as is usual in cases where papers or public (numbered) Despatches are called for, asked the opinion of Ministers as to the desirability of producing them, and requested them to advise. After several communications had taken place between us, I this morning received the enclosed Memorandum from Ministers. As the mail is closing, and I have had a long Executive Council to attend, time does not permit me to make any observations upon the Memorandum, but I at once wrote a short reply, which I now do myself the honor to enclose. I have, however, touched the main points which are requisite to lay the question before Your Lordship.

Address from Legislative Council, 9th October, 1877.\*  
Memo. for Ministers, 11th October.\*  
Memo. for Ministers, 15th October.\*  
Memo. by the Premier, 24th October.\*  
Memo. for Ministers, 29th October.\*  
Memo. by the Premier, 29th October.\*

Ministers inform me that they "concur in the course indicated in His Excellency's Memorandum of this day's date."

I have, &amp;c.

(Signed) FRED. A. WELD.

*The Right Honorable the Earl of CARNARVON.*

DESPATCH No. 55.

*Tasmania, Hobart Town,  
Government House, 26th November, 1877.*

MY LORD,

IN my Despatch No. 52 of 29th October, 1877, by last mail, I forwarded to Your Lordship a Memorandum by Ministers and my reply, and as I did not wish in any way to add to their embarrassment, I agreed to refer the matter to Your Lordship.

I now have to forward you further correspondence with their Honors the Judges, which followed a resolution of the Legislative Council censuring the action of Ministers.

Their Honors base their letter on rumour—a vague and intangible ground—but I have thought it well to return a courteous reply, which is quite sufficient to remove false impressions from the mind of any person who does not desire to cherish them, should any such person be.

Personally, I should rather be desirous than otherwise of producing Despatches which would dissipate imputations which are being made against myself, if I thought such imputations found credence, or were worthy of notice; but in the face of my Ministers' Memorandum, and after agreeing to a reference to Your Lordship, I am debarred from doing so, though their Honors regret my adherence to constitutional and official practice.

I deeply deplore if the outcome of their Honors' attack upon my late Ministers and upon myself has resulted in rumours being prevalent reflecting on their Honors' integrity. Your Lordship having my Despatches will at once see that such rumours could not be based upon them by any fair construction, were their contents known. I have never doubted their Honors' integrity. On the contrary, it is with deep regret that I have observed that His Honor the Chief Justice has been subjected to imputations by speech and writing; and it was because I knew the opinion held by the then Premier—who may probably again hold office—and by some at least of his colleagues and party regarding the Chief Justice, whilst the opinions held by the Chief Justice, regarding the Premier more especially, were a matter of public talk, that I, when the question was raised, instead of simply referring their Honors to my late Ministers endeavoured to prevent an unseemly controversy. After a meeting with the Puisne Judge I had a conversation with the Chief Justice, which I do not further allude to, because it was agreed that it should be considered unofficial. The following day he again had an interview with me, and at the close of that interview I, as Governor, offered to address my Ministers, and to obtain from them for the Judges an official denial not only of having advised me to constitute the Governor in Council into a legal Court of Appeal, but even, as I rightly believed I could, that they theoretically held that the Governor in Council was such a court. In despite



of this offer, strictly official, though by word of mouth, (an offer that I should have been quite ready to put in writing had the Chief Justice wished to have it in that form), the Chief Justice decided on commencing the correspondence, in which their Honors declined to extend to Governor or Ministers the ordinary courtesy of taking their word upon a matter within their province or cognizance.

With regard to my Despatches on the subject, I repeat that nothing was further from my thought in writing them than making any imputation upon their Honors' integrity. The Chief Justice has long held a high reputation, first as a politician in the colony, then as a judge, and has acted as Administrator of the Government, and may do so again. Mr. Justice Dobson, a younger but not less distinguished Judge, justly enjoys a more universal respect and esteem than falls to the lot of any but a very few men; but I could not allow the fear of offending one, or even both their Honors, to lead me off the straight course of truth and even-handed justice. If their Honors' arguments and innuendoes were good, Your Lordship would probably have concluded not only that my late Ministers were incapable and corrupt, but that I was unfit for the high position I occupy. I have been obliged, therefore, to criticise the position taken by their Honors. I did not, however, mark the Despatches "confidential," in order that if their Honors desired to see them, and Ministers so advised, they might have the opportunity of reply. I cannot, however, admit a right, should such right be ever claimed, in any body, Legislative or otherwise, not only to ask for, but to demand Despatches addressed by a Governor to Your Lordship. Still less can I admit the plea that the Judges are only amenable to the Legislature. They are so primarily, but the ultimate decision rests with the Governor or Governor in Council. (*Vide* Act 20 Vict. No. 7.) Moreover their Honors the Judges are not only subjects of Her Majesty the Queen, but the Chief Justice may actually at any moment be acting as temporary Representative of the Crown. His attitude, therefore, in relation to public men and affairs, his appreciation of constitutional questions, and even the amount of co-operation which the Governor might expect from him, cannot but be matters upon which it is my duty to assist Your Lordship to form an opinion; and to deny that it is a Governor's duty to report fully and, if he thinks fit, confidentially, upon all matters affecting the interests of the colony over which he presides, is a doctrine which could find but few supporters, and which I have never heard advanced until lately—a doctrine which would deny to the Representative of the Crown, who is one branch of the Colonial Parliament, a liberty which is conceded even to the Ambassadors of Foreign States by all civilised peoples.

I have, &c.

(Signed) FRED. A. WELD.

*The Right Honorable the Earl of CARNARVON.*

P.S.—I am informed, but I have not yet received the Parliamentary Paper, that at their last sitting the Legislative Council, by a majority of eight to four, passed the following resolution:—"That this Council, under the circumstances disclosed in this correspondence, are of opinion that Ministers should not refrain from advising His Excellency to order the Despatches referred to to be laid on the table of this Council without delay." Ministers cannot do this without abandoning the position they have taken that it is not their duty to advise, and of compromising the difference of opinion between them and me by referring the matter to Your Lordship; but should they do so, I hold myself bound by what I believe to be an invariable official rule, that under no circumstances, excepting by your own instructions, can I take action in a matter which has been referred for Your Lordship's decision. Should the matter be pressed, I will communicate by telegram.

(Signed) F. A. W.

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*Downing-street, 26th January, 1878.*

SIR,

I HAVE had before me your Despatches, No. 52 of the 29th of October, and No. 55 of the 26th of November, with their several enclosures, in which you bring under my consideration certain questions arising out of the action taken by the Legislative Council in requesting you by address to lay before them any Despatches addressed by you to the Secretary of State in reference to the controversy between your late Advisers and the Judges of the Supreme Court in connection with the case of Louisa Hunt.

2. Two principal questions appear to be raised by these despatches, viz.—

(1.) Whether the Governor of a Colony is bound, upon a demand from either House of Parliament, to lay before it any numbered and not confidential Despatch addressed by him to the Secretary of State? and

(2.) Whether the Governor can act in such a matter independently of or in opposition to the advice of his Responsible Advisers?

3. I am of opinion that the view put forward in your Memorandum for Ministers of the 29th of October is substantially correct, and that, for the reasons you point out, as a general rule it would be improper for the Governor to lay before Parliament any Despatches on a subject of controversy not affecting Imperial interests unless so advised by his Ministers. With respect, however, to the obligation of the Governor to lay Despatches when so advised no general rule has been laid down, nor has any general practice been established, for the simple reason that everything must depend upon the circumstances of the particular case. It may, however, be understood that unless there is some strong reason to the contrary (and a pending reference to the Secretary of State would be such a reason) it is desirable that the Governor should, when advised to do so by his Responsible Ministers, lay any numbered Despatch before Parliament.

4. With reference to the present case, I have no doubt that it would be desirable that the correspondence on the subject should be laid before Parliament, more particularly because it deals with a constitutional question which is known to have been referred to Her Majesty's Government. I can, however, only express an opinion to this effect, as I do not desire to interfere with the responsibility vested in your Ministers of deciding whether or not they should recommend this course.

I have, &c.

(Signed) CARNARVON.

Governor WELD, C.M.G.

DESPATCH No. 57.

*Tasmania,  
Government House, Hobart Town, 19th December, 1877.*

MY LORD,

IN my Despatch No. 55 of 26th November, 1877, I informed Your Lordship that, should the question of the production of the Despatches regarding the controversy between the Judges and my late Ministers be pressed, I would communicate by telegram. Such a course was not necessary. Ministers abided by their action, and I expressed my opinion to them in a Memorandum dated 26th November, 1877, which I now do myself the honor to enclose. (*Vide* Parliamentary Paper continuation of No. 35.) In the House of Assembly Mr. Gellibrand moved, "That an Address be presented to the Governor praying that His Excellency's Despatches to the Right Honorable the Secretary of State for the Colonies, having reference to the correspondence between His Excellency and the Judges, may be laid upon the Table of this House," and was defeated by a majority of 9 to 4. On the occasion of the passing of the Appropriation Bill in the Legislative Council, it was moved by Mr. Chapman "That the further consideration of the Bill be deferred until Tuesday, the 29th of January, 1878; so that the reply of the Secretary of State should be put in possession of the House along with the Despatches," which motion was defeated by 8 to 5.

2. The Session was drawing to a close, and the question did not seem to be considered of sufficient consequence to command anything like a full attendance of Members: nevertheless, among those Members who remained were those who were anxious for the production of the Despatches; and I cannot refrain from expressing to Your Lordship my high sense of the respect and good feeling expressed towards me personally, and the moderation which characterised the debate.

3. The above quoted Parliamentary Paper also contains the first Memoranda which passed between myself and my Ministers on the subject of the production of the Despatches. As they were written on the Address of the Council itself, they were in the hands of Ministers when I sent my Despatch No. 52 of 29th October, 1877, and the mail was closing (as I then informed Your Lordship) before I was in a position to obtain them. I do not consider that they throw fresh light on the

question, but still call your Lordship's notice to them. The same Parliamentary Paper also contains further correspondence with their Honors the Judges. Regarding it I will only remark that Ministers might consider that the dignity of the Supreme Court was best consulted by avoiding anything that might afford to the Chief Justice the opportunity of renewing a correspondence which has already been unnecessarily prolonged. His Honor the Chief Justice has throughout seen fit to consider himself slighted and accused; but if rumours unfavourable to His Honor's integrity really do exist it is my well-founded opinion that they are mainly kept alive by, if they do not originate in, the action of the Chief Justice himself. Words have been spoken and written no doubt which can hardly be agreeable to His Honor, but as to those I allude to I have no concern whatsoever. I regret deeply if the Chief Justice be subjected to imputations, or that the status of the Supreme Court should suffer, if it does suffer.

As to my Despatches, my late Ministers did not advise with me as to their contents, nor did they in requesting me to forward the correspondence express any wish that I should comment upon it. The Honorable W. L. Crowther, accused of divulging the contents of the Despatches, has distinctly and emphatically denied any knowledge of their contents, and I can confirm his statement so far as I know.

My present Ministers have seen the Despatches in confidence, as circumstances rendered it necessary that they should, and as Your Lordship had replied, and they also absolutely deny having divulged their contents, I do not myself believe that those contents are known; if so, they must have transpired by some underhand proceedings, but rumours may be spread abroad to serve ulterior purposes.

I must further remark that in the opinion of Ministers and of myself, not only the "point of practice" but the whole subject matter of Ministers' Memorandum of the 24th October, 1877, on the question of the advisability of a production of the Despatches, was referred to Your Lordship if you should see fit to give any opinion.

I have, &c.

(Signed) FRED. A. WELD.

*The Right Honorable the Earl of CARNARVON.*

22nd December, 1877,  
one enclosure.  
22nd December, 1877,  
one enclosure.

P.S.—Since writing the foregoing I have received a letter from His Honor the Chief Justice, and one from their Honors the Judges jointly, both with enclosures, for remission to Your Lordship, which I now transmit.

The copy of correspondence now transmitted will be found in your Office. Your Lordship will observe that it was my care to see that their Honors had full fair play that led to the papers being re-arranged, as the rectification was only possible owing to my Memorandum of 16th February, 1877, written expressly to prevent misapprehension as to dates.

In reference to their Honors' joint Memorandum, parts of it are met in my foregoing observations, and I will only add that imputations upon their Honors were made before my Despatches were written, and my Despatches simply point out where they have erred regarding questions which they themselves brought before me off the Judicial Bench.

There is now no doubt but that His Honor the Chief Justice holds that the proposal I made to him when he officially, as Chief Justice, finally presented to me as Governor, his first letter impugning the conduct of Ministers, and inferentially my own, was confidential, because we had held a previous confidential conversation, which from its nature and by special agreement was confidential. A somewhat similar line of argument, Your Lordship will remember, was taken by Chief Justice Sir James Martin in his controversy with Sir Hercules Robinson, and was repudiated by His Excellency. I will only refer to my Despatch No. 55 of 26th November, 1877, in which I mention the interview in question. Sir Francis Smith came to perform a strictly official act, and I, as Governor, made him a definite formal offer to obtain a written statement from Ministers which would remove all ground for controversy. Sir Francis, violently excited, repudiated it with extreme indignation, saying, that "some people" did not seem to know that his office was "second to none in the Colony;" that he was determined to "exhaust" the subject. "I warn you, Sir," he cried, "that I will have it all publicly out." I more than once reminded him that my carriage was waiting, and Ministers also, and rose to leave. I should have acted unfairly to Ministers had I not informed the Premier of an

offer virtually made on their behalf, though subject to their consent, (for I had not previously asked them), and Mr. Reibey, the Premier, at once informed me that he would willingly have written the proposed letter, and thus ended the whole matter.

(Signed) FRED. A. WELD.

*Chief Justice's Chambers, 22nd December, 1877.*

SIR,

I HAVE the honor to request that Your Excellency will be so good as to forward the enclosed letter to the Right Honorable the Earl of Carnarvon, together with its enclosure.

I have, &c.

*His Excellency the Governor.*

(Signed) FRANCIS SMITH.

*Chief Justice's Chambers,  
Hobart Town, Tasmania, 22nd December, 1877.*

MY LORD,

I GATHER from the dates of Despatches of His Excellency Governor Weld, forwarding correspondence relating to the case of Louisa Hunt, as appearing in Despatches from the Colonial Office acknowledging their receipt, that that correspondence was forwarded to Your Lordship in the form in which it was first arranged and printed. That form is calculated to create false impressions. The only copy in which the correspondence is arranged in accordance with reality is that which was printed by order of the Legislative Council, which refused to permit it to appear upon its records in the misleading form in which it was presented.

I therefore ask permission to hand to Your Lordship the enclosed copy as printed by order of the Legislative Council.

Louisa Hunt. Papers  
and Correspondence  
relating to her libera-  
tion. Legislative  
Council Paper  
No. 34.

I shall not think of troubling Your Lordship with any further remark in reference to this correspondence unless Your Lordship should propose to express an opinion upon the part which the local Judges have taken in it, and call upon us, as I am confident you would previously do, for explanation. In that case we shall be prepared to give such explanations as, we feel assured, will demonstrate the propriety of the course which we felt compelled by a sense of duty to adopt.

I have, &c.

(Signed) FRANCIS SMITH, C. J.

*The Right Honorable the Earl of CARNARVON.*

*Judges' Chambers, 22nd December, 1877.*

SIR,

WE have the honor to request that Your Excellency will be so good as to forward the enclosed letter to the Right Honorable the Earl of Carnarvon, with its enclosure.

We have, &c.

(Signed) FRANCIS SMITH.

W. L. DOBSON.

*His Excellency the Governor.*

*Judges' Chambers, Hobart Town, Tasmania,  
22nd December, 1877.*

MY LORD,

WE request permission to offer some explanation of our reasons for entering upon correspondence which has recently passed between His Excellency Governor Weld and ourselves, of which we have the honor to enclose a copy.

Correspondence  
between the Judges  
and the Governor.  
House of Assembly  
Paper No. 51.

For some months assertions were continually made, both in public and private, that the Despatches therein mentioned contained serious reflections upon our conduct, and we were threatened with their disclosure. Of these we took no notice until discussion in the local Parliament and press assumed such a prominence that we should have exposed ourselves to misconstruction had we remained longer silent. Proof will be found in leading articles and in reports of election and parliamentary proceedings in the local press for several months past. In particular

Correspondence  
between the Governor,  
Ministers, and the  
Judges. House of  
Assembly in continua-  
tion of Paper No. 51.

we refer, for example, to a leading article in the Hobart Town *Mercury* of 15th November, and to the debate in the Legislative Council reported in the issue of the 16th November of the same paper, and ask whether longer silence would not have lent countenance to suggestions which were in circulation, and of which we could not pretend to be ignorant, that the Ministry were keeping back the Despatches to screen the Judges. It was at this juncture that we wrote the letter of 16th November.

Afterwards was published a Memorandum from the Governor to Ministers in which allusion was made to the Despatches in terms which left no doubt that they contained reflections upon our conduct as Judges. We submit that we could not suffer such an allusion to pass without notice, and therefore wrote our letter of 1st December.

We have not claimed the right to "call for Despatches;" but submit that when the Governor made public the allusion contained in that Memorandum we were justified in asking that the Despatches themselves should be disclosed.

It has been attributed to us that we have shown undue sensitiveness in regard of the supposed contents of these Despatches, considering that public confidence is undiminished by anything that has taken place. We answer that, while we are glad to feel assured that we possess the undiminished confidence of the people, we think it would savour of arrogance were we to assume that we are so secure in that confidence as to be able, or to make it decorous, to treat with indifference the supposed censure of the Governor, especially when conveyed in a manner so serious as that of a Despatch to Her Majesty's Secretary of State; and submit that, in desiring an opportunity of vindicating ourselves, we did not exhibit undue sensitiveness.

We have, &c.

(Signed) FRANCIS SMITH, C.J.  
W. L. DOBSON, J.

*The Right Honorable the Earl of CARNARVON.*

TASMANIA, No. 5.

*Downing-street, 4th March, 1878.*

SIR,

I HAVE the honor to acknowledge the receipt of your Despatch No. 57, of the 19th of December, forwarding a letter addressed to my predecessor by the Chief Justice of Tasmania, with a further joint letter from Sir Francis Smith and Mr. Justice Dobson, with reference to certain questions arising out of the case of Louisa Hunt, which have recently been under discussion.

2. You will have the goodness to inform Sir Francis Smith and Mr. Justice Dobson that I have had their letters before me, and that while I fully sympathise with their natural and proper anxiety that no imputation should rest upon the character of their Court, I am perfectly satisfied that the sentence in your Minute to which they refer cannot have been intended to convey any such imputation.

3. That Minute appears to me to have been written with the object of placing before your Ministers several cases in which the publication of certain Despatches might or might not be desirable, and to elicit their advice in respect to publication, the whole Minute being directed to the point that Despatches ought not to be published except under such advice, and not purporting in any way to call in question the Judges' conduct.

4. I request also that you will inform Sir Francis Smith that he is right in supposing that the correspondence to which he refers in the case of Louisa Hunt was first transmitted to this office in the form in which it was originally arranged in the Colony; but that copies of the correspondence as finally printed by order of the Legislative Council were also duly forwarded and were received in this Department last July.

I have, &c.

(Signed) ML. HICKS BEACH.

Governor WELD, C.M.G.

FURTHER CORRESPONDENCE BETWEEN HIS EXCELLENCY THE  
GOVERNOR AND HIS HONOR THE PUISNE JUDGE.

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*Judges' Chambers, 20th May, 1878.*

SIR,

I HAVE at length had the opportunity of reading Your Excellency's despatches in the Hunt Case. In that of the 26th November you state that you did not mark the despatches "Confidential," in order that the Judges might have the opportunity of reply. I think it due to Your Excellency as well as to myself to take advantage of that opportunity. I first addressed Your Excellency with the view of resisting what appeared to me to be an attempted invasion of the jurisdiction of the Court in Criminal Cases. This was disclaimed, and so that issue was satisfactorily concluded.

Your Excellency, however, in the correspondence with us raised certain other questions; and as to these the Secretary of State has now decided, 1st, that we were justified in our protest against the language of the Memorandum speaking of the Governor in Council acting in some measure as a Court of Appeal in Criminal Cases; and 2nd, that we were technically right in refusing to accept the assurance that the view contained in the Memorandum was not the view of Ministers formally presented to yourself.

His Lordship adds, that in his opinion some needless heat was shown by the Judges. Assuming this to be so, I regret it; at the same time I would remark that the present Chief Justice of England descended into the "arena," as Your Excellency terms it, and used language at least as strong as ours, in addressing the English Government, when he considered that an appointment was being improperly made to the Court of Appeal.

In the despatch of 11th February, 1877, you write, "Their Honors, in fact, now decline to accept either my assurance or that of my Ministers that they have not so advised me, enter into an elaborate argument to prove they have, and, it appears to me, take a line of argument closely analogous to that which might be taken by managers appointed to plead in proof of allegations brought against a Minister in a Parliamentary impeachment." His Lordship decides that we were technically right in refusing this assurance. Your Excellency, later in the despatch, adds with reference to the same subject, "The Governor is the sole and only constitutional judge of whether Ministers speak the truth or no." I do not enquire whether you are here at issue with His Lordship's opinion, because I venture to assure Your Excellency that I never viewed the question in dispute, as to whether advice was or was not tendered, as in any degree impugning the veracity of yourself or your Ministers. To put the question in such a form seems to me to raise a false issue, and one that unnecessarily renders the matter in controversy personal, instead of being purely a question of constitutional usage, arising out of admitted facts. The controversy was, as I understood it, whether a certain document, framed and delivered to Your Excellency under certain circumstances, was, in accordance with constitutional usage, to be deemed to contain the views of Ministers and advice to yourself. This I always considered a matter of argument, and, I repeat, not one of personal veracity; and I regret that Your Excellency should ever have viewed it as such.

I would add, parenthetically, that a most material fact came to our knowledge after the correspondence had concluded; namely, that the Attorney-General's Memo. reached the hands of Your Excellency attached to a Memorandum signed by all the other Ministers.

I now turn to the despatch of 17th March. You there state that Lord Carnarvon will observe \* \* \* that my view of the amount of reliance in Detective Simpson did not seem to materially differ from that of Ministers, which was stigmatised with much emphasis in the paragraph commencing "There is a darker side" in our letter of 27th January. Here Your Excellency, I believe unintentionally, does me wrong. I venture to assure you that the view which I have uniformly held of Simpson's testimony in the Hunt case is precisely the reverse of that which you here attribute to me. I am aware that you have not had the advantage of reading the evidence taken at the trial: had it been otherwise, I have no doubt that you would have come to the same conclusion as that arrived at by the Jury, and in which I concur. Had you desired to know my opinion upon any matter in the case I should have had pleasure in giving it to you.

In order to ascertain to what you refer, I have looked into the papers to which you call His Lordship's attention; and I presume that you draw your inference from my having advised that the Petition of Edwin Hunt for release, with a statement of Louisa Hunt annexed, should be referred to some independent person, and not to the Police, for enquiry. I did so: 1st, because the statement impugned the conduct of the Police; 2nd, because I was aware that it was asserted that

a reward had been offered to secure a conviction; 3rd, because, if the conviction was wrongful, not only must evidence have been suppressed by the Police, but evidence must have been concocted by them in concert with other witnesses; and lastly, because whenever a conviction is challenged (more especially when it is on such grounds as were suggested in this case), I do not deem it consistent with reason or justice to cause enquiry into the soundness of that conviction to be made by the Police through whose instrumentality it was obtained. In taking such a course I do not in the slightest degree impugn the character or intelligence of the Police who have been engaged in the case. Your Excellency appears to me to call upon His Lordship to observe that, whilst in our letter to you I spoke of Simpson as "a meritorious officer of long service \* \* \* and of reputable character," my real opinion of him did not materially differ from that of your Ministers, who imputed to him perjury and the concoction of evidence. I trust that I have said enough to satisfy Your Excellency that so grave an imputation has no foundation.

Your Excellency further writes, "The real feature of the controversy is, however, the constitutional question involved in the attitude assumed by the Judges of pleaders seeking to convict Ministers of having tendered certain advice, advice which Ministers deny," &c. On the constitutional question the Secretary of State has decided that we were technically right; and I abstain from any comment upon the language which Your Excellency applies to us in this, and in your former despatch, with reference to the arguments which we used in discussing a constitutional question, and also upon the manner in which Your Excellency, being a party to the controversy, urges your own views upon his Lordship when we had no opportunity of replying to them.

In the despatch of 26th November last Your Excellency speaks of their Honors' "attack" upon yourself, and subsequently say, that we "refused to extend to Governor and Ministers the ordinary courtesy of taking their word on a matter within their province or cognizance;" and again, that if our "arguments and innuendos" were good, His Lordship would probably conclude that you were unfit for your high office. Such statements appear for the first time after a lapse of nine months, and after Your Excellency had twice addressed the Secretary of State at length, when the matters were recent. Our letter of the 10th February, in which we assure Your Excellency that our misfortune to differ from you was perfectly consistent with the sincere respect which we entertained for you in your personal, no less than in your official capacity, and our reiteration of that assurance on the 19th February, and your reply of the 21st February accepting that assurance, must surely have escaped Your Excellency's recollection when penning your despatch of the 26th November.

I am unaware of having made any "attack" upon Your Excellency, or of having, as stated, refused to take your word or that of Ministers. I differed in matter of opinion on a constitutional question, and the Secretary of State says that in doing so I was technically right. I am at a loss to comprehend what "arguments and innuendos" of ours would, "if good," unfit you for your office. I am not only unaware of any such, but I can confidently assure Your Excellency that such were never intended.

With reference to "imputations upon their Honors" arising out of the course which we have taken in this case, to which Your Excellency gives prominence, their importance depends upon their source and the circumstances under which they originate. The despatch of 19th December last affords this information. In order to show that your despatches could not have given rise to the alleged imputations, you say that imputations upon their Honors were made before your despatches were written. Now, Your Excellency's first Despatch is dated 11th February. The letters between Your Excellency and the Judges were forwarded by Your Excellency to Ministers on 30th January, and on 8th and 10th February, and they were not published in the Press till some time after the date of your despatch, when Your Excellency permitted the publication of part of the correspondence. The source of such imputations is, therefore, reduced within very narrow compass indeed, and to an origin, where our letters must (and so far I regret it) have been the cause of irritation and annoyance.

The imputations, if they ever substantially existed, have, so far as I am aware, subsided; but I regret to add that, in my opinion, no means would be so likely (although, no doubt, on Your Excellency's part, unintentionally so) to give prominence to the imputation, to circulate them widely, and to give permanence to them, as Your Excellency's despatches.

In conclusion I would add that, although I do not here take exception to any other matters, Your Excellency must not therefore conclude that I acquiesce in all that I have not objected to.

I have the honor to be,  
Sir,

Your Excellency's most obedient Servant,  
W. L. DOBSON.

*His Excellency F. A. WELD, Esq., C.M.G.*

*Government House, 23rd May, 1878.*

THE Governor acknowledges Your Honor's letter of the 20th May.

He is obliged to differ from Your Honor in Your Honor's estimate of the bearing of certain despatches from Her Majesty's Secretary of State alluded to by Your Honor, despatches entirely in accordance with the Governor's expressed views excepting on the one point of the advisability of officially consulting the Judges in cases of remission. The Executive had been blamed for not sufficiently consulting the Judges; the Secretary of State, on the contrary, is of opinion that the Governor's proposal to adopt the New South Wales practice of always officially consulting them would be inadvisable.

Your Honor refers to the action of the Chief Justice of England in the case of Sir R. Collier's appointment. That action, as you are doubtless aware, was impugned, and also was disregarded by Crown and Ministers. Waiving that consideration it was in no sense a case in point. The Chief Justice of England protested not against an ambiguous phrase in a Memorandum, but against what he held to be a violation or evasion of the law regarding a purely legal appointment. But admitting the right of the Chief Justice of England in that case (as of Your Honors in this) to protest, it must be observed that he did not refuse to accept a disclaimer, (which the nature of that case did not even admit)—he did not quote speeches uttered under the cover of parliamentary privilege—nor did he by innuendo seem to accuse Ministers of malversation.

Your Honor is misinformed regarding the late Attorney-General's Memorandum. It was by mere accident that it ever came to the Governor's hands: the Prime Minister had supposed it withdrawn. No doubt Ministers were technically answerable for it, as, after it had been alluded to, it was sent forward to the Governor.

The Governor must differ from Your Honor in your opinion that Lord Carnarvon has decided that Your Honors were constitutionally right. His only allusion to the constitutional case proper being his opinion that Your Honors "might have accepted without difficulty 'the Governor's' assurance that the Ministers did not claim to be a Court of Appeal."

The Governor also thinks that Your Honor will hardly on consideration seriously hold that a Governor's despatches should be submitted for the perusal of those with whom he may differ before they are forwarded to Her Majesty's Secretary of State. To await every possible rejoinder would indefinitely delay the transmission of despatches; and, moreover, the Governor must abide by established official custom.

The Governor is not aware that he has given unnecessary prominence to imputations on your Honors; and it must be remembered his despatches were produced at your Honors' desire. Your Honors have called attention to imputations: the Governor has shown they could not have originated in his despatches, and he must confess that he fails to see the relevancy of Your Honor's remark apparently in reply.

He accepts your explanations in regard to Your Honor's view of Detective Simpson. Your Honor might naturally attribute a graver import to the Governor's expression than was at all intended; if so, he regrets it, and will make any representation Your Honor may desire to the Secretary of State.

Finally, the Governor, while regretting that he cannot always concur with Your Honor's arguments or conclusions, even when on some points he has not thought it necessary to controvert them, can, and does, unreservedly accept Your Honor's personal explanations and the disclaimer of any intention to make an "attack" upon him; but Your Honor will forgive him if he cannot refrain from regretting that the Judges of the Supreme Court did not, in like manner, accept the disclaimer conveyed in his letter of 30th January, 1877, a course which would have obviated much unnecessary controversy.

FRED. A. WELD.

*His Honor Mr. JUSTICE DOBSON, Puisne Judge.*

*Judges' Chambers, 28th May, 1878.*

SIR,

I HAVE the honor to acknowledge the receipt of Your Excellency's Memorandum of the 23rd instant. I regret that Your Excellency and I should differ as to the meaning of the Secretary of State's despatch, and I should especially regret to construe it unfairly to yourself.



His Lordship says that we were "right" in our protest against the Memo., and that we were technically "right" in refusing the assurance; I should have thought that His Lordship would not have expressly said that we were *right* in these matters, unless, in his opinion, some one had contended that we were wrong. If Your Excellency agrees with His Lordship on these points, then I am happy to find accord between Your Excellency and ourselves, where I had always believed that difference of opinion existed.

I cited Sir R. Collier's case to show that Judges, standing as they do between the Crown and the people, deem it their duty to defend the administration of justice when they think it assailed. Not only did Lord C. J. Cockburn protest, but Lord C. J. Boville, of the Common Pleas, did so also; and I could refer Your Excellency to a stronger case where a Lord Chief Justice rebuked not only a Prime Minister, but the King himself, when he ventured to assume judicial functions.

I am aware that the Chief Justice's protest in Sir R. Collier's case was "impugned" (amongst others) by Mr. Gladstone, who complained of it as "denouncing the conduct of the Government;" but the opposite view was entertained (amongst others) by Mr. Cross and Mr. Hardy. Your Excellency tries to distinguish the case cited, by saying that the Chief Justice "did not quote speeches under cover of Parliamentary privilege." To ascertain the meaning of an ambiguous phrase (as Your Excellency terms it) in the Memorandum of a Minister, we referred in support of our view as to its true construction to a contemporaneous speech of that Minister upon the subject in Parliament. I affirm with every deference to Your Excellency, that a reference under such circumstances and for such a purpose to a Parliamentary debate violated no known Parliamentary usage. For authority I need not go outside Sir R. Collier's case; for Boville, C. J., in his protest against the appointment, refers to the debates in Parliament as clearly indicating that his construction of the Act was the right one: I may add that the *Times* did so too.

Your Excellency also says that the Chief Justice "did not by innuendo seem to accuse Ministers of malversation." I do not care to enquire whether this novel view of Your Excellency is fairly justified by any existing facts, because my answer is, that the Chief Justice did more,—he directly accused Ministers of "mere subterfuge" and "evasion" of the law in order to secure for their colleague a high and lucrative office.

Your Excellency writes that I am misinformed regarding the late Attorney-General's Memorandum. My information is taken from Your Excellency's Memorandum of 24th January, 1877, in which you speak of the Attorney-General's "*Minute attached to Ministers' Memorandum of this day.*" If this does not refer to the Attorney-General's Memorandum, it seems to me that there must be an unpublished Minute.

Your Excellency says that the only allusion to the constitutional case proper is His Lordship's opinion that we "might" have accepted without difficulty your assurance, &c. I thought the questions whether we were justified in protesting, and whether the Memorandum did constitute the opinion of Ministers formally delivered to Your Excellency, and whether we were bound to accept the assurance to the contrary, were all questions involving more or less constitutional principles; but I certainly never imagined that the question whether we "might" have accepted the assurance or not, was anything more than a question of personal discretion involving no constitutional considerations.

My objections to the despatches from Your Excellency, had I entered upon them, would have involved considerations quite distinct from what Your Excellency seems to suppose.

I thank Your Excellency for your offer to make any representations I may desire to the Secretary of State as to Simpson's matter. I accept what Your Excellency has already written as amply sufficient, as I presume that this correspondence will in ordinary course be forwarded to the Secretary of State.

I have the honor to be,  
Sir,

Your Excellency's most obedient Servant,  
W. L. DOBSON.

His Excellency F. A. WELD, Esq. C.M.G.

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Government House, Hobart Town, 29th May, 1878.

THE Governor acknowledges Your Honor's letter of 28th May, which would lead to the inference that Your Honor has hitherto been unaware that he repeatedly told the Chief Justice that did he (the Governor) hold Your Honor's view he would, were he in your place, protest or ask explanation.

A volume of controversy might be written on the Collier case. Suffice that the protest was disregarded by Crown, Ministers, and Parliament. Were it analogous to this case, which cannot be admitted, it would be therefore no conclusive precedent. To refer to debates to prove the construction of an act, might be objected to chiefly as a bad canon of interpretation. But that was not what Your Honor did. Your Honor refers to the *Times*, yet is doubtless aware that what properly would be high breach of privilege in the Crown or Judges, is by usage permissible to the press, and essential, as a rule, to the fulfilment of its proper functions.

It seems of very minor consequence whether the late Attorney-General's Memorandum was "attached" to another or not; but as Your Honor seems to think otherwise, the Governor would remind Your Honor that his Memorandum of the 24th January, 1877, could not have referred to a Memorandum which he only received (and for the first time read) on the 25th January, as printed dates show. On reference he this morning finds, that he referred to the following words of the then Attorney-General:—"I was aware of a report of the Puisne Judge in the case of Edwin Hunt, but not of any on Mrs. Hunt's case," signed "C. Hamilton Bromby;" this was attached to Ministers' Memorandum of January 24th, in the copy sent to the Governor; but on looking over the papers he observes that the Minute is not printed with the Memorandum as it should have been, when it would have given point to the argument he was enforcing, and might have prevented Your Honor's misconception.

The differences of opinion between Your Honor and the Governor seem now to be reduced to a very small compass; and the Governor trusts that you will not think it discourteous if he asks Your Honor, in accepting his very sincere expression of personal regard, to forgive him if he declines to continue a discussion which, in his opinion, can serve no good purpose not already attained.

FRED. A. WELD.

*His Honor Mr. JUSTICE DOBSON, Puisne Judge.*

*Judges' Chambers, 31st May, 1878.*

SIR,

I HAVE the honor to acknowledge the receipt of Your Excellency's Memorandum of the 29th instant.

I am happy to be able to concur with Your Excellency in the opinion that to continue the discussion any further can serve no good purpose not already attained.

There is, however, what appears to me a slight misapprehension which I should like to remove. Your Excellency seems to me to say that we did not refer to the debates to prove the construction of the Memo. I can only point out that the reference was made by us expressly in answer to Your Excellency's statement that "it (the Memo.) does not appear necessarily or even naturally to have the full signification which Your Honors attach to it." But for that statement no reference would have been made by me to the debate.

I am glad to find that the misconception on my part as to the "attached Minute" is accounted for by the fact, pointed out by Your Excellency, that the Minute referred to is omitted from the Parliamentary copy of Correspondence to which alone I had access.

I thank Your Excellency for your expression of personal regard; and I conclude with the expression of a hope that whatever has fallen from my pen has not been without due respect both to Your Excellency personally, and to your high office as Her Majesty's Representative.

I have the honor to be,  
Sir,

Your Excellency's most obedient Servant,  
W. L. DOBSON.

*His Excellency F. A. WELD, Esq., C.M.G.*

## FURTHER CORRESPONDENCE BETWEEN HIS EXCELLENCY THE GOVERNOR AND HIS HONOR THE CHIEF JUSTICE.

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*Chief Justice's Chambers, 21st May, 1878.*

SIR,

YOUR Excellency's Despatches, transmitting to Her Majesty's Secretary of State the papers and correspondence relating to the pardon of Louisa Hunt, have at length been made public. I wish I could be spared the necessity of making any observations upon them. I would avoid if I could renewing a correspondence which has been inordinately prolonged, and of which everybody—and no one more than myself—is weary. The question so long in controversy has at last been authoritatively settled. The Secretary of State has decided that the Judges were right in their opinion and justified in their protest. There I would gladly let the matter rest. Nothing is to be gained by discussing it further. On the contrary it will involve labour, trouble, annoyance, and the expenditure of time that might be more profitably, and certainly more agreeably, spent. But the injurious reflections upon my character as a man and as a Judge which I find in these Despatches forbid me to be silent. Silence would inevitably be deemed tantamount to admission. I cannot submit to that. I am forced, however reluctantly, in self-defence, to answer imputations which Your Excellency has thought it consistent with fair dealing to make without my knowledge, and without affording me an opportunity of explanation.

I should have earlier addressed Your Excellency, were it not that the Despatches did not reach me until the 10th instant, and ever since they appeared I have been engrossed by judicial business and other pressing engagements that could not be deferred.

The manner in which Your Excellency's imputations are made renders it difficult to grasp them. They are conveyed, for the most part, in the form of vague suggestion, and not in the form of direct, open, charge. The Despatches abound in disparaging innuendos. Hints occur throughout attributing to the Judges, more or less obscurely, such faults as these:—imprudence, mistake, sophistry, partizanship, disregard of judicial dignity, conduct calculated to weaken public esteem for the Supreme Court. There is a pretty plain intimation that they will only be saved from deserved parliamentary condemnation by the weakness in parliamentary support of Your Excellency's late Advisers, and the disregard of Constitutional considerations which you attribute to Parliament. But there are some imputations more plainly stated, of so disparaging a character as imperatively to demand an answer. To give a complete answer will, I fear, make this a very long letter. It cannot be helped. It is one of the penalties of standing accused. An imputation may be made in a line which it may require a page to answer.

The most serious reflection of the whole is one that I am bound to believe Your Excellency did not intend. It arises out of the construction of these words, in paragraph 7 of Despatch No. 14:—“As the Judges in their penultimate Memorandum characterise Ministers' disavowal of the alleged ‘advice’ as ‘startling and unexpected’ . . . I am unwillingly, and with great respect and regard for their Honors, forced to point out that it is impossible for me to sympathise with, or even to comprehend their Honors' surprise: for before I accepted their Honors' first letter I personally told the Chief Justice that I had not received that ‘advice’—that I believed that Ministers did not even theoretically entertain that opinion. I offered to obtain a disavowal from Ministers, and I pointed out evils that I feared might arise, and which have arisen from their Honors' proposed action. . . .”

The natural meaning of these words appears to me—and to many intelligent persons whom I have consulted—to be this,—that upon receiving your Ministers' disavowal I feigned surprise which I did not feel, and which could not be genuine, because Your Excellency had previously informed me that you could obtain this disavowal;—in plain English, that I was guilty of dissimulation. I am bound, however, I repeat, to believe that Your Excellency did not intend this imputation, because you assured the Judges, in your Memorandum of the 19th November, that “by no natural construction could the Despatches in this instance be construed into reflecting upon” our integrity. But there, nevertheless, stands the imputation. It may come to the knowledge of some who may not hear of Your Excellency's disclaimer. It is therefore incumbent upon me to disprove it. There is an ambiguity about the situation which is fraught with danger to my reputation. I dare not leave it as it stands. I must make it clear beyond doubt that there is no room for the imputation—whether intended or not. This I now proceed to do.

The interview at which you personally told me you had not received the alleged advice took place on the afternoon of Monday, the 29th January, 1877. Your Excellency, in the course of a correspondence which passed between us in December last, alleged that it was at our interview next morning you made the communication. I believe you were mistaken in that allegation. I am certain that, if you mentioned the matter then, it was but a repetition of what had passed the day before ; and that you did mention it on Monday afternoon. This conversation was private and unofficial ; as, according to my understanding, were all the conversations between Your Excellency and myself in relation to the Hunt case. I should have thought that everything that transpired in this and the other conversations was protected by implied confidence. Your Excellency, however, appears to have thought otherwise. I cannot help feeling surprise and regret that such should be the case. I have already, in my letter of 12th December, given to Your Excellency in detail my recollections of those conversations, and amongst them of that of Monday, 29th January. I will here only recall so much as is necessary to elucidate my answer to the present imputation.

I waited upon Your Excellency in consequence of a message brought by my colleague, whom you had seen that morning after your official receipt of our first letter of 27th January, 1877. I found that your object in wishing to see me was to induce me to withdraw that letter,—for two reasons ; one, that you considered it contained expressions not respectful towards yourself ; the other, that, in your opinion, it proceeded upon a mistaken assumption that certain advice had been given by your Ministers. As to the former, I at once earnestly disclaimed all intention of using language of the supposed character ; and begged Your Excellency to point out the objectionable expressions, in order that I might change them. You did so ; and on leaving I took away the letter for the purpose ; and having made the desired alterations returned it to Your Excellency next morning.

With regard to the other question we entered upon a long discussion. It was free and unreserved ; sometimes it was animated. I had no reason to think then, although I now suspect, that Your Excellency misconstrued whatever animation I displayed. You strenuously contended that the Attorney-General's Memo. of the 10th January, 1877, in reply to yours of the 5th January, did not express the views of Ministers and would not bear the construction put upon it in our letter. I argued the contrary. We could not agree. Amongst other things advanced by Your Excellency in support of your contention was your belief that you could obtain from your Ministers a disavowal of the alleged advice. My answer was to the effect that I thought it impossible they could so contradict themselves ; and declined to be a party to seeking a disclaimer which I did not believe could be truthfully given. But I pointed out that, quite apart from this consideration, we could not accept anything of the kind as a condition of the withdrawal of our letter, for the reason that our object in writing it was to obtain your opinion, not theirs ; and that we could accept no private assurance, even from Your Excellency, inasmuch as we were resolved that our protest and your reply should be placed officially on record, and ultimately made public.

Your Excellency was thus made fully aware of my resolution not to withdraw the letter ; and upon the termination of the discussion you repeated an observation that you had already made more than once during our conversation, to the effect that if you held the same opinions you would follow the same course ; to which I replied to the effect that that was conclusive of the propriety of our course.

I pause here to ask whether any one reading Your Excellency's despatches would conceive it possible that you could ever have expressed yourself to this effect ? Looking at your unqualified condemnation in these despatches of the course we pursued in sending forward this letter, would any one think that you could have conditionally given it the testimony of your approval, by declaring that, with our views, you would follow the same course ?

Next morning, Tuesday, 30th January, I rode out to Government House and returned the letter, informing you that the objectionable passages had been altered.

Now if the disclaimer of Your Excellency's Advisers, which you informed me you believed you could obtain, had been regarded as of such importance as is now represented, would it not have been furnished and forwarded without delay ? Instead of this a Memo. was written by Your Excellency, with the knowledge and consent of your Ministers, argumentatively disputing our construction of the Attorney-General's Memo., and our inference that Ministers had given the alleged advice, but saying not one word of any disavowal of that advice. Who could suppose that your Ministers would act so preposterously as to stand by and allow Your Excellency to engage in an argument upon a disputed question of construction which their disclaimer would render superfluous, and not give that disclaimer if they could ? No more suitable opportunity was likely to occur ; and the fact that they did not give it then was a corroboration, which seemed conclusive, of my conviction that they could not.

We wrote a second letter, of 2nd February, in which we strongly asserted that no other construction could be put upon the words and acts of your Ministers than that which we challenged ; and we proved our assertion by reasoning which Your Excellency, and afterwards your Ministers, vainly tried to refute ; and which has now received the support of the authority of the Secretary of State. In this letter occurs a passage which of itself, if there were nothing else, shows that there

could be no dissimulation,—proving as it does that, long before the disavowal reached me, my conviction was that Your Excellency had been mistaken in supposing your Ministers were prepared to give anything of the kind. Here is the passage :—“ It would certainly surprise us if Your Excellency’s Advisers were, themselves, to assert that the Memo. of the Attorney-General, seen and considered by themselves and handed to Your Excellency with their privity, did not contain their views, and was not to be regarded as their deliberate advice.” Had I known then what I know now, I should have mentioned that the Attorney-General’s Memo., which both Your Excellency and your late Advisers have so strongly—and, I beg leave to add, strangely—contended not to have received the concurrence of his colleagues, but to be only his individual opinion, was actually transmitted to Your Excellency, not by the Attorney-General but by the Premier, and attached to a Memo. signed by *all the Ministers*; and that Your Excellency’s reply to that Memo. is addressed, not to the Attorney-General, but to the Ministry, being headed “Memo. for *Ministers*.”

Now if the disavowal was ever to be forthcoming this passage of our letter must have elicited it. It was incumbent on your Ministers, if not upon Your Excellency, to take notice of this passage, and to contradict the assertion which it contains that the Attorney-General’s Memo. was to be regarded as their advice. But no disavowal came. There came instead Your Excellency’s Memo. in reply of 6th February, which we answered by our letter of 9th February, to which you replied on 10th February; and the correspondence was closed by our letter of the same date, not only without the production of the disavowal, but without a hint that anything of the kind would be forthcoming; notwithstanding that your Ministers were all the time cognizant of the progress and purport of the correspondence between Your Excellency and ourselves.

Nearly a week afterwards, and when I thought the matter at an end, came a printed paper from Your Excellency, which, on examination, I found to contain the same correspondence, with several Memoranda purporting to be addressed to Your Excellency from your Ministers interpolated so as to present the appearance of their having been engaged in the correspondence with us. I perused these Memoranda in blank amazement that Your Excellency could have consented to receive documents of such a character—in such a shape—and in such a manner—as representing genuine communications to yourself from your Ministers. Among other surprising allegations I read for the first time the disavowal in question. I suppose Your Excellency will not now find it so difficult to sympathise with, and even to comprehend, the surprise with which I read it. It came so unexpectedly after the termination of the correspondence between Your Excellency and ourselves; it seemed so out of date, and to involve such incredible self-contradiction.

I will not pursue the subject further. The imputation of dissimulation has been long since disproved; but I have not hesitated to adduce an overwhelming accumulation of proof in refutation, even if a large portion be superfluous. For everyone who knows me, the whole is superfluous. But for others, I must not forget that the high authority by which the imputation seems to be accredited may make requisite the whole of the proof which I have adduced to repel it. I must not permit the suspicion of a stain to rest upon my honour.

Another imputation which I think it incumbent on me to answer is contained in paragraph 6 of Despatch No. 14, in these words :—“ I deeply regret the unfortunate impressions that are already widely diffused, and that the warning I gave the Judges, in my Memo. of the 6th February, has even now been far more than justified by the results.”

This language seems rather the language of innuendo than of open and distinct charge. I take it, however—read in connexion with Your Excellency’s Memo. of 6th February—to impute that, by conduct in the controversy unbecoming our judicial character, we had impaired public confidence in our impartiality.

This is a grave charge. I deny that there is any ground for it, and respectfully call upon Your Excellency for proof. It is true that from the time we, at the call of duty, took steps to resist an usurpation which could not but lower the Supreme Court in public esteem and consequently impair its authority, industrious efforts were made to “diffuse” the “unfortunate impressions,” and to bring about the “results” which Your Excellency deplors. But I affirm that these efforts failed to create distrust in our judicial impartiality. The favourite means employed was the reiteration of the assertion that we were actuated by political partizanship, and not by a sense of duty. In the Memoranda of your late Advisers this assertion is made without disguise. I regret to find that it receives countenance in Your Excellency’s despatches, although only by a hint—a faint echo, so to call it. But a hint from Your Excellency I regard as more dangerous, and more likely to injure our judicial reputation, than the broad assertion of your late Advisers. That is why I am careful to answer the imputation which the hint tends to strengthen. Perhaps, too, that imputation derives colour from the figurative nature of the language in which some of your expressions are clothed. For example, you think it unfortunate that the Judges should “descend into the arena from the high eminence upon which their judicial character has seated them.” What arena? The prosaic fact thus figuratively described is this—that the Judges engaged in a serious official correspondence with the Governor upon an important question of constitutional law and usage. I fail to see how this can, with any accuracy, be called descending into an arena of any kind.

I bring the imputation of partizanship shortly to the test of fact. It is more than seventeen years since, upon exchanging the local office of Prime Minister for the office of a Judge, that, having regard to the smallness of our community, I prescribed to myself a strict abstinence from participation in public affairs which I have practised so rigidly as to have been thought to carry it to the verge of prudery. Time and change have long since effaced political sympathies. Of Your Excellency's late Advisers one only was in public life with me, and my relations with that gentleman have never been other than friendly. The Members in the House of Assembly who had been my supporters were about equally divided as supporters and opponents of your late Ministers. One of the most strenuous, as he was the ablest, of their parliamentary allies gave me a stanch and unwavering support throughout my administration. Is it not obvious that I should have been puzzled how to bestow political sympathies if I had wished to indulge them?

No, Sir; it was not partizanship, nor any motive but a sense of duty, that caused us to address Your Excellency. It was to save the administration of justice from being brought into contempt in the estimation of the people, to which risk it must have been exposed if the notion had gone abroad unchallenged that its solemn judgments were liable to be summarily set aside by the casual Minister of the day at discretion, and upon his mere surmise that they were wrong. It was to resist the assumption of a jurisdiction to reverse the regular judgments of the Court which could not but impair its authority. We knew that one encroachment leads easily to another; and that it was therefore our duty to resist this one in its earliest stage. "*Principius obsta*" is the only safe maxim in dealing with attempted usurpation; and it is the maxim which we followed. It is all very well now to say that the claim to reverse the judgments of the Court was never seriously advanced. I affirm that it was. The pardon was granted and vindicated, not as an act of mercy, but on the expressly declared ground that it reversed an erroneous judgment, and redressed a wrong. This was our motive; and not, as is untruly alleged, any political or personal antagonism to your late Advisers. Why did Your Excellency not believe the plain and positive assurance to that effect which we gave you in our letter of the 9th February, 1877, in these words:—"It can hardly be thought that we should have taken any different course to that which we have adopted, if other persons had been Your Excellency's Advisers. We should have been—we shall ever be—equally prompt to resist any invasion of the jurisdiction of the Supreme Court come from what person or from what quarter it may?"

What, I would seriously ask Your Excellency, have we done to impair confidence in our judicial impartiality? Is vigilance in resisting encroachment on the authority of the Court a rational ground for attributing partiality? Would even indiscreet zeal in the protection of the judgment seat infer corruption? Does Your Excellency really think there is a man in the island who seriously believes he will not have his rights adjudicated to the best of our ability according to law with absolute impartiality? And if not, what justification can there be for transmitting to the Secretary of State an imputation which implies that it is the case?

The imputation that we conducted the controversy in the manner of Managers of a parliamentary impeachment and assumed the attitude of pleaders which Your Excellency has thought it just and seemly to make against us is, having regard to our judicial character, peculiarly offensive. It is as if you were to impute heresy to a clergyman, or quackery to a physician. The charge is as unfounded as it is offensive. It is in fact and in effect—I do not say in intention—pure detraction. I feel bound to say that if the transmission to the foot of the Throne by Governors of Colonies of unfounded imputations of a disparaging nature is in accordance with a practice that is sanctioned by the Secretary of State, then it is plain that Her Majesty's subjects in the Colonies are exposed to serious danger and may suffer grievous wrong without remedy.

I am at a loss to understand in what respect Your Excellency intends to allege that we assumed the attitude of pleaders otherwise than as every disputant may be said so to do. We were of opinion that your Ministers had assumed a jurisdiction subversive of the due administration of justice, and had given advice in support of that assumption. We have now the Secretary of State's authority that we were right in that opinion. Your Excellency however disputed that opinion. We were convinced that it was well founded, and were put to the proof. And because we proceeded to adduce our proofs, we are subjected to what is in fact—I guard myself against being supposed to imply that it is so in intention—personal detraction. We are stigmatized by epithets of disparagement because we argued in proof of a proposition that was true.

It was objected by Your Excellency in the course of the controversy—and I observe that you repeat the objection in these despatches—that the argument was best kept apart from what you called "accessories." We differed—and I still differ—from your view; and consider that every relevant argument is open to the controversialist; and that no illustration can be so natural as, none stronger, more relevant, and trustworthy, than is furnished by the very case out of which the disputed question arises. In the present instance, would it not have been a piece of flimsy affectation, unworthy of men in earnest, to abstain from availing ourselves of arguments furnished by the case itself from a timid apprehension that we might expose ourselves to the charge of mixing in political controversy? If even political considerations should happen to fall within the range of legitimate discussion, I maintain that Judges are as free to deal with them as other men. But this was no

political question. It was a question relating to the administration of justice, upon which we had a right to be heard. If we had gone out of our way to refer to the case, or if it had not been relevant, then indeed I can understand that we should have been open to the suspicion of introducing it for a sinister purpose. But if the case furnished apt and relevant illustration, who was to prohibit its use? It would doubtless be extremely convenient for one disputant to be able to put a veto upon the other's use of his most efficacious arguments; but the choice of a man's arguments is hardly for his antagonist. I maintain that so long as arguments are relevant their adoption is a question exclusively for the disputant, and that Judges are entitled to the same freedom of choice as other men. I protest against Judges being handicapped in controversy; and decline to admit compulsory feebleness in argument to be a necessary judicial qualification. The offence taken at our reference to the case was, I believe, precisely in consequence of the force which it added to our reasoning.

If we had really assumed the attitude of pleaders and prosecutors we might have found no difficulty in stating a stronger and more damaging case. Had we been actuated solely by the spirit of the Advocate, might we not have treated Your Excellency in a different manner? You had—quite needlessly as we thought—chosen to enter the lists with us as a disputant. Yet we avoided—with scrupulous delicacy which has not been appreciated—all allusion to Your Excellency's personal share in a transaction which has been determined to have been subversive of the administration of justice. If we had really, as you charge in Despatch No. 55, made an "attack" upon Your Excellency, you would have found yourself involved in a very different controversy. Was the term "attack" just, or warranted? Was Your Excellency justified in telling the Secretary of State that the Judges had made an "attack" upon you? How is what you told the Secretary of State in November consistent with Your Excellency's assurance in relation to the very same thing in the preceding February? In Your Excellency's Memo. of 21st February, 1877, you say "the Governor is fully sensible that the most decided opinions are, to use your Honors' own words, 'very compatible with the highest respect for a person who holds opposite opinions.' He willingly adopts those words,—and he needs no assurance from your Honors that you are ever ready to uphold the respect due to his office as the Representative of the Crown. With this assurance the Governor closes his part of this correspondence." It is plain that this assurance is not consistent with any idea on the part of Your Excellency that we had made an attack upon you. Yet nine months afterwards you tell the Secretary of State something very different; a discrepancy to be accounted for probably by lapse of memory. Equally inconsistent with your opinion in February, and equally mistaken, seems to me Your Excellency's statement in November that the "correspondence may be held to contain imputations upon" yourself. We certainly intended no imputation upon Your Excellency; and I can find none. I regret much that you should have thought so, and that I suffer in Your Excellency's esteem from such a misconstruction. What we did was to deal with Your Excellency's arguments, of which we demonstrated what we thought to be the fallacies. The refutation of fallacious reasoning is no imputation, surely, upon the person who employs it; and that Your Excellency's reasoning was fallacious you will now of course yourself be prepared to admit.

I have thus answered—and claim with all deference to have refuted—the principal imputations contained in Your Excellency's original despatches. There are many other points open to observation but I will not prolong this letter by referring to them. One, however, I ought perhaps to notice. There seems something like a suggestion that the course we followed had a tendency to fetter the exercise of the prerogative of pardon. If so it would afford countenance to one of the misrepresentations which have been propagated. It has been imputed—I do not now refer to Your Excellency—that we assumed to interfere with the exercise of that prerogative. I wish to declare that I have never found fault with the pardon of Louisa Hunt regarded as an act of mercy. I would not presume to pass a judgment upon a matter so exclusively within Your Excellency's jurisdiction: I thought we had already sufficiently guarded ourselves by a disclaimer, in our first letter, of any wish to interfere with the unfettered exercise of the prerogative of pardon; quoting the saying of Lord Chief Justice Holt that it is "as much for the good of the people that the King should pardon as that he should punish." The very reason why we protested was, as I have said, that your Ministers rested the pardon on the ground, not of mercy, but of error in the judgment of the Court; for the "grounds stated to have been not apparent at the trial" referred to by Your Excellency in Paragraph 5 of Despatch No. 11, turned out to be, every one of them, groundless; an important fact which Your Excellency seems to have forgotten when you made your report to the Secretary of State. This reminds me to observe that these despatches, if they are to be considered as a report of the case of Louisa Hunt, omit many other material circumstances. For example, the Secretary of State is not informed that Your Excellency laboured under grave misapprehension with respect to the alleged offer of a reward to procure a conviction. Had not the amount of the reward stated to Your Excellency a very important influence upon your decision? Were you not seriously misled? Your Ministers subsequently explained the statement which they had made to Your Excellency as to the reward, by referring to the gratuity of £10. Was this explanation satisfactory to Your Excellency? Was not the gratuity so trivial in comparison of the sum named as that of the reward as to render it preposterous to suppose that one could represent the other? I ask these questions of Your Excellency very respectfully, but very gravely. Do they not suggest considerations of sufficient importance to have been submitted to the Secretary of State in any report of the case? Yet the despatches are silent as to these considerations; and as to many others, such as the character of

the comments of your Advisers; while our letters are made the subject of severe condemnation. Indeed the impression that the despatches convey is that they are an impeachment of the Judges rather than a report of the case of Louisa Hunt.

I here conclude my defence against the imputations contained in these despatches. There are some matters in the later despatches which I cannot leave unnoticed; but it would make this letter too unreasonably long were I to notice them here. I reserve my observations upon the last-mentioned Despatches for a separate letter.

In the meantime I have to request that Your Excellency will be pleased, with as little delay as may be convenient, to cause this letter to be made public in like manner as the despatches have been made public, in order that I may lie under the imputations of which I complain as short a time as possible.

While engaged in this my vindication I have been ever conscious of the need of watchfulness against being betrayed, through natural indignation which could not but be aroused by finding myself the subject of imputations of such a nature made behind my back, into any expression inconsistent with that respect for Your Excellency's office which that office will always command from me. In using the freedom of speech indispensable for my effectual defence I hope I have not uttered a word inconsistent with that respect.

I have the honor to be,  
Sir,

Your Excellency's most obedient humble Servant,  
FRANCIS SMITH, C.J.

*His Excellency the Governor,  
Government House, Tasmania.*

*Government House, 25th May, 1878.*

SIR,

I AM directed by the Governor, in acknowledging the receipt of Your Honor's letter of 21st instant, to inform Your Honor that His Excellency has awaited the further communication promised by Your Honor, and that he proposes to defer any further reply that he may see fit to make until he receives it.

I have the honor to be,  
Sir,

Your Honor's most obedient Servant,  
W. H. ST. HILL, Lt.-Col., Private Secretary.

*His Honor Sir FRANCIS SMITH, Chief Justice.*

*Chief Justice's Chambers, 29th May, 1878.*

SIR,

I GATHER from your Private Secretary's letter of the 25th instant that my request for the early publication of my answer to the reflections contained in Your Excellency's original despatches will not be complied with. It appeared to me that the original were so far separable from the later despatches that there would be no difficulty in permitting the publication of my comments on the former before that of my comments on the latter; for which I was anxious in order that the time during which Your Excellency's reflections were before the public without some answer might be as short as possible. But perhaps I ought not to feel disappointed when I recollect how the Judges failed in obtaining a short delay in the publication of the despatches which they requested on account of pressing engagements that prevented their giving attention to them.

I now proceed to make such observations as appear to be called for by Your Excellency's later despatches.

In Despatch No. 55 of 26th November, 1877, after saying that you "deeply deplore if the outcome of" what Your Excellency thinks fit to call our "attack upon" your late Ministers and upon yourself "has resulted in rumours being prevalent reflecting on our integrity," you introduce an allusion, with the preface of "deep regret," to certain "imputations by speech and writing" to which you observe that I have been subjected; and also an allusion to the late Premier's opinion of me, and mine of him. I do not know to what imputations by speech and writing you refer, nor what was the opinion that the late Premier communicated to Your Excellency. But whatever may have been the imputations and the opinion, the necessity for the allusions is not obvious. The reference to my supposed opinion of the late Premier is based on "public talk." What distinction there may be between "rumour"—which Your Excellency, only a few lines above, decries as "a vague and intangible ground"—and "public talk" I do not profess to comprehend. I do comprehend this, however—that "rumour," although "a vague and intangible ground," may furnish a very sufficient reason for requesting, as we did, the production of despatches for the purpose of



either confirming or dissipating the rumour; while "public talk" seems rather a novel ground whereon to base a representation to the Secretary of State.

But why should Your Excellency inform the Secretary of State that I had been subjected to imputations in speech and in writing, and—in effect—that the late Premier had a bad opinion of me? How was this relevant? It was the reflections said to be based upon your despatches that were then in question. The imputations, and the late Premier's opinion, to which you allude, had nothing whatever to do with these reflections. Why then were they brought in?

Again, the late Premier's communication of his opinion was either official or private. If official, it ought to have been brought to my notice. If private it ought not to have been mentioned to anyone, unless to myself, to afford me the opportunity of exculpation, if necessary. If Your Excellency thought it becoming, and consistent with the intimate social relations which subsisted at that time between Your Excellency and myself, to listen to private disparagement, was it quite justifiable, as between man and man, to make it the subject of allusion in a despatch to the Secretary of State? It was calculated to excite compromising suspicions in the mind of the Secretary of State. The allusion is dark and vague and may mean anything. You did not state the nature of the imputation, nor whether you thought it worthy of credit; nor did you even inform the Secretary of State that the late Premier's hostility towards me was incurred quite involuntarily on my part; in the discharge of my duty as a Judge. Either too little or too much was said.

I am quite ready—as I need hardly say—to meet any accusation that the late Premier, or anyone else, may choose to bring against me. But let it be made openly and distinctly; not by a side-wind, nor by hints and allusions in despatches to the Secretary of State.

The allusion which Your Excellency has thought fit to make to my opinion of the late Premier renders it proper for me to remark that when you listened to him you were aware that, whatever my opinion, I had not stated it to you. You know that I never spoke of him to Your Excellency but once, and that was in our conversation on the 29th January, 1877, and in strict relation to the points we were discussing in connexion with the pardon of Louisa Hunt. You know too that the assertions frequently made that I addressed advice and remonstrance to Your Excellency, and attempted to influence you with regard to your relations with the late Premier—assertions repeated in a public newspaper as late as last Wednesday—are destitute of foundation. Moreover, you are now aware that I actually abstained from availing myself of a friendly and flattering invitation once given me by Your Excellency to go out to Government House whenever I liked and talk over affairs with you, from a motive of delicacy towards the late Premier and his colleagues—viz., that I might not be led in the course of conversation to express any opinion with regard to him or them.

This mention of the late Premier and his colleagues reminds me to make a remark which I intended to make in my last letter and omitted by inadvertence; viz., that any reference to those gentlemen in that letter, or in this, is not made with the object of reflecting on them. I would not mention them if I could avoid it; and intend to do so no further or otherwise than is essential to my vindication. My complaint is not against them, but against Your Excellency. It is also proper, in view of Your Excellency's pointed but not obviously relevant allusion to the probability of the late Premier again holding office, and the possibility of my being again Administrator of the Government, to declare that I have never had any quarrel with the late Premier, nor any animosity against him; and that, should circumstances ever bring us into official relations, there would be no difficulty on my side in the courteous maintenance of those relations, and in the harmonious transaction of public business.

In Your Excellency's Despatch, No. 57 of 19th December, 1877, I find this passage:—"If rumours unfavourable to His Honor's integrity really do exist, it is my well-founded opinion that they are mainly kept alive by, if they do not originate in, the action of the Chief Justice himself. Words have been spoken and written no doubt which can hardly be agreeable to His Honor, but as to those I allude to I have no concern whatever. I regret deeply if the Chief Justice be subjected to imputations. . . ." These remarks are of a like character to those upon which I have been commenting, and show how persistently allusions having a tendency to disparage were brought under the Secretary of State's notice without apparent necessity. The "rumours" which you mention, if they existed, were not based upon the despatches, and consequently were not in question. The "words spoken and written" to which you allude—I do not know what they were—had nothing to do with the despatches. You say yourself that you "have no concern whatever with them." They therefore, like the rumours, were not in question. Why then refer to them? Clearly they were irrelevant. But the allusion tended to defame.

I now come to the postscript to the same despatch, and regard it as a very painful duty to be compelled to notice statements there made; because I feel how difficult it will be to say what I am bound to say without giving offence which I would avoid.

I find this scene introduced in a striking and dramatic manner. "Sir Francis Smith came to perform a strictly official act, and I, as Governor, made him a definite formal offer to obtain a

written statement from Ministers which would remove all ground for controversy. Sir Francis, violently excited, repudiated it with extreme indignation, saying, that 'some people' did not seem to know that his office was 'second to none in the Colony;' that he was determined to 'exhaust' the subject. 'I warn you, Sir,' he cried, 'that I will have it all publicly out.' I more than once reminded him that my carriage was waiting, and Ministers also, and rose to leave."

When I read this description I did not recognize the scene as one in which I had taken part; and, after mature reflection and an anxious endeavour to recall what transpired, I am constrained to deny that it ever took place as described; and desire to make this denial in the most emphatic and positive terms consistent with courtesy. I do not impute to Your Excellency—as I need hardly say—that you intentionally state what is not the fact. I do not doubt that something must have been said either at that interview, or the one which took place the previous day, that forms the foundation for your mistaken impressions; but equally am I without doubt that your memory has recalled it in an imperfect and inaccurate manner, and presented it in a distorted shape—so distorted as to be unrecognizable. That Your Excellency's memory is not infallible has been proved in the course of these transactions, having deceived you in one instance at least.

The contradiction between us is unhappily so irreconcilable that I deem it incumbent on me to point out the inferences as to probability arising from the circumstances.

The interview to which Your Excellency refers was that which took place on Tuesday morning, the 30th January, 1877. I had ridden out to Government House to return the letter which you had handed to me the day before for alteration in a few particulars. You say I "came to perform a strictly official act." I did not so understand it. The official act had been performed when we officially forwarded our letter to Your Excellency on the 27th January. I had received it back unofficially for a special purpose; and that was precisely the reason for my personal attendance to return it in the like manner—unofficially. I never understood personal delivery to be an official mode of transmitting official letters. I found Your Excellency's carriage at the door waiting, as I understood, to take you to the Council. I gave my horse to the Orderly, met Your Excellency in the passage, went with you into an adjoining room where we remained standing throughout the interview, and handed you the letter saying I had made the promised alterations. This was all I had to say, and I should have left at once but that Your Excellency began to express regret that we persisted in sending on the letter, and to urge some of the topics which had been fully discussed on the previous evening. I answered to the effect that our resolution was unalterable. I have already informed Your Excellency, in my letter of the 12th December, that I do not profess to recall the exact words of this conversation; but I have a clear recollection of its purport. I know that nothing was said that had not been said in the previous conversation and discussed at much greater length. Not much was said as I had no desire to prolong a discussion which I deemed finally concluded the day before.

What could occur in a conversation of this kind to cause me to be "violently excited," or to make the absurd and false assertion that "my office was second to none," or to cry "I warn you, Sir?" To say that my office was second to none would have been not only false, but not relevant. You represent me as violently excited, but frenzy itself would not account for such incoherent and bombastic nonsense.

Your Excellency's notion that I was violently excited is referable, I should imagine, to a confusion in your mind between what occurred during the conversation of the day before and this one;—both being upon the same subject, and introducing the same topics. I certainly was not violently excited in the former any more than in the latter. But the warmth developed in the course of the debate may have given Your Excellency that impression. It was a warmth natural when discussing points of interest; and there may have been some impatience, which ought not to have been shown if it was, at the reiteration of fallacious arguments after their fallacy had been demonstrated. Although I was compelled to deal unceremoniously with Your Excellency's arguments, I certainly intended no discourtesy to yourself; nor did you give me the slightest reason to suspect that you thought I had not observed due courtesy.

There are some incidental circumstances mentioned in Your Excellency's description which, although trifling in themselves, are very pregnant proof of misconception. You say that you "more than once reminded me that your carriage was waiting, and rose to leave." Now you would not have reminded me that your carriage was waiting unless I was detaining you. But it is indisputable that I had nothing to say to Your Excellency, nothing to do, but to return you the letter and go. There was nothing to induce me to prolong my stay, and I knew your carriage was waiting. It was you who renewed the persuasion of the day before, to which I was inaccessible. Consequently it was you who detained me, not I you. Then again you did not "rise to leave." We both remained standing during the interview. It is a little fact; but it indicates how thoroughly mistaken is Your Excellency's conception of the interview.

But again, if I had spoken and acted as Your Excellency represents, would you not have said something to remind me that my behaviour was unbecoming—something to indicate disapprobation

of such bombastic rudeness? Would you so long have concealed from me your impression that I had treated you presumptuously? Would you have continued on unaltered terms of social intimacy? Would there have been the like interchange of hospitalities as before? Or if you had been so placable as to receive me as your guest, is it credible that you could have submitted, without some apology or explanation, to be mine after such an affront? I am treated to my face as an esteemed guest and host. I am represented to the Secretary of State as a vulgar braggart.

Once more; if I had been guilty of such conduct as is described, would Your Excellency, three weeks afterwards, have written that you needed no assurance that I was "ever ready to uphold the respect due to your office?" It would be to attribute to Your Excellency odious dissimulation to suppose that at the time you wrote these words you believed that I had so lately spoken and acted as you imagined nearly a year later. You could not have brought yourself to tell me that you were assured that I was "ever ready to uphold the respect due to your office" if I had, three weeks before, rudely, boastfully, and falsely sought to lower it by asserting the equality of my own.

Everyone who knows me will recognize that I am represented in this despatch as acting and speaking in a manner which contradicts the whole tenor of my life. I can point to an official life of nearly thirty years, and ask, without apprehension as to the answer, who ever knew me to display pride or presumption? Who ever heard me speak boastfully of my office? Who ever knew me to give myself airs, or to presume upon my official rank, or treat any man—whatever his station—with arrogance? Is it likely that I should begin at the close of my official life to do these things—and, of all people in the island, that I should begin with the Queen's Representative, with whom I was upon pleasant terms of social intercourse, which, for every reason, I should obviously be unwilling to interrupt?

When, therefore, I affirm, as I do most solemnly, that—however your misconception is to be accounted for—I neither acted nor spoke as I am represented to have done by Your Excellency, it will be apparent that—apart from any question of veracity—every circumstance, every consideration, every probability corroborates my affirmation.

I now turn to a different aspect of Your Excellency's course of action as evidenced by these despatches. If even the scene you paint had occurred, what need was there to carry it to the Secretary of State,—and nearly a year, too, after it is alleged to have happened? The question recurs which I have been obliged to ask so frequently—where was its relevancy? Why should the Secretary of State be told, in that postscript, that the local Chief Justice had behaved rudely some ten months before, if it had been the fact? The purpose of the postscript was to notify the transmission of two letters from the Judges. There was nothing whatever in those letters to which the incident could have the remotest relation. The incident is introduced incoherently. But it had a tendency to disparage.

Again—if the conversation at that interview had been relevant ought not the whole to have been substantially communicated? Is it considered quite fair to select a phrase, separate it from the context, and quote it as an isolated sentence?

Moreover in professing to disclose anything that was said in this conversation Your Excellency was perfectly well aware that, according to my understanding, you were violating implied confidence. I know you contend that although the conversation of the previous evening was confidential, this one was not—a contention which in my judgment is palpably fallacious. But let that pass. Let it be conceded that you might reasonably have supposed the second conversation to be official. Yet is it not a common understanding that a conversation which either party regards as confidential ought to be respected by the other? You, however, seem to have hastened to disclose the conversation as soon as ever you received my assurance that I considered it confidential. On the 12th December I so informed Your Excellency. On the 22nd you violated my confidence.

Nothing, I apprehend, could be held to warrant a disclosure which either party regards as confidential, unless, it may be, important counterbalancing considerations, or a palpably untenable pretension. Was it an important counterbalancing consideration that the Secretary of State should be told that I had been violently excited in a conversation which took place nearly a year before? Was my pretension that this conversation was private and unofficial palpably untenable? An extract, which I propose to give in substance from my letter of the 12th December, will throw light on this question.

After giving Your Excellency the substance of every conversation which passed between us relating to the Hunt case, I proceeded to say—"Such were in substance these four conversations; and I now ask were they or not, one and all, equally private and unofficial? Is there to be no such thing as *implied* confidence? Sir, I have been nearly thirty years in the public service, during which time I have been in the closest relations, both official and social, with your predecessors Sir William Denison, Sir Henry Young, Sir Thomas Gore Browne, and Sir Charles Du Cane. Those relations were undisturbed by any misunderstanding; and all continued after the cessation of the official connexion in the shape of personal friendship. With this extended experience I say, emphatically, that if the

conversations between Your Excellency and myself were not private and unofficial, then I am incapable of forming an idea of what can constitute a conversation between a Governor and a public officer private and unofficial without the precaution of an express stipulation. But I have not been accustomed to such stipulations—to the necessity of labelling, as it were, a conversation in order to provide against breach of confidence. I should have considered it an insult to any of those gentlemen to have proposed such a stipulation where the nature of the conversation was such as to render it superfluous. In like manner I should, I do assure Your Excellency, have thought myself offering you an unpardonable affront if I had shown the distrust implied by proposing to you such a stipulation in respect of any of these conversations. All were on the same subject, between the same persons, in the same manner. . . . What was to make one private and the other public? Why should I talk to you one day as a private gentleman and the next day talk to you on the same subject, in the same manner, and under the same conditions, officially as the Chief Justice? I illustrated the absurdity of the position that one conversation was to be considered private and the rest official by allusion to the scene in Molière's Comedy which introduces Harpagon giving his orders to Maître Jacques, who is in his service in the twofold capacity of cook and coachman. He first appears habited as a coachman, and insists on being told whether it is to the coachman or the cook that his master is giving orders; and being informed that it is as cook, retires to change his coachman's coat, and re-appears attired as a cook to take his master's orders in that capacity. I told Your Excellency, and now repeat, that I should have felt I was doing something quite as absurd, if not so comic, as Maître Jacques, had I insisted (upon each successive occasion) upon an express stipulation as to the character in which I was to be deemed to take part in the several conversations with Your Excellency.

Your Excellency's doctrine that it is necessary to renew a stipulation against disclosure each time that a conversation, commenced in confidence, is renewed, makes such a demand upon vigilance, opens so wide a door to sharp practice, and is altogether so pregnant with distrust, that I feel assured most candid minds will instinctively revolt against it as being destructive of the confidence which ought to subsist between man and man.

Can it be said, in view of the considerations thus urged in my letter of December 12th, that my pretension was palpably untenable that the conversation, of which Your Excellency forthwith disclosed an alleged portion, was private and unofficial?

I regret that my observations should have extended to so great a length. But I do not see what could have been omitted if my vindication was to be complete. And it would have been better to leave it unattempted rather than to put forth a vindication that was incomplete.

I have the honor to be,  
Sir,

Your Excellency's most obedient humble Servant,  
FRANCIS SMITH, C. J.

*His Excellency the Governor,  
Government House, Tasmania.*

*Government House, 31st May, 1878.*

THE Governor in courtesy will further reply to a letter he has received from Your Honor dated May 21st, and also to the one dated 30th May, but in doing so he must decline to follow you in detail into a mass of matter, more or less relevant or irrelevant, which simply serves to distract attention from main issues; yet it is but fair to submit for Your Honor's serious consideration that if you succeed in carrying conviction that the Governor has accused you of a long and dark array of "faults," your reputation may unnecessarily, and even falsely, suffer by your own action.

Having made this remark, the Governor will proceed to notice those parts of Your Honor's letter which seem to require it.

The surprise which the Governor expressed in paragraph 7 of his Despatch No. 14, of 11th February, 1877, he still feels. He simply recorded a fact, and it is rather for Your Honor than for himself to explain your action, or to excuse your words; but, as you press it, he candidly states that he does not impute "dissimulation" to Your Honor: he is aware that extreme excitement disturbs judgment and impairs memory, yet he confesses that it is difficult to account for the circumstance that Your Honor not only apparently forgot words but also written and published statements. The Governor in his first Memorandum told Your Honor that "Ministers have not advised the Governor that the Executive Council is a judicial Court of Appeal from the Supreme Court,"—and again, "the Governor does not consider that he sits in Executive Council as a judicial Court of Appeal,"—and yet after this Your Honor characterises the same disclaimer when, (after having been delayed by your emphatic anticipatory refusal to accept it,) it later came from Ministers as "startling and unexpected"! Were the words of that Memorandum also a "private assurance?"

In the presence of written evidence the question of conversations is superfluous; yet it must be noted that Your Honor's recollection of the first, and, by agreement, confidential conversation

differs in some, perhaps not very important, particulars from that of the Governor. The Governor only said that he was "willing to talk the matter over" with you. The conversation turned principally on certain passages of Your Honor's letter that seemed to the Governor to reflect personally upon him. Your Honor pressed him to point them out. At your earnest request he indicated several, but repeatedly begged you not to erase them unless you yourself saw fit. Your Honor did erase them before you formally put in your letter. Though urged to do so the Governor declined to discuss the paragraphs of your letter relating to Ministers, saying, that to consult with you upon them would be disloyal to Ministers, but that he would go so far as to say that Ministers had not advised him that the Executive Council sat as a judicial Court of Appeal; that an ambiguous phrase in a Memorandum did not constitute "advice;" that Ministers were of course "strictly speaking" answerable for their colleague, but that Your Honor might rely upon it that the construction you placed upon the expression was not their deliberate meaning, and still less their "advice." The Governor further distinctly admitted the right of the Judges (taking the view they did) to protest. He thought it quite reasonable, and even possibly desirable, that Your Honor should ask the real views of the Executive, but he thought the form and tone of your letter objectionable and unwise, and distinctly said so. When Your Honor left him he was under the impression that you would very probably reconsider the matter and take his advice. Your Honor was then moderate and courteous and even friendly in your demeanour and language. But when Your Honor next sought an interview to deliver your letter officially all this was changed; it is not for the Governor to suggest the reason why. On that occasion the Governor determined to bring the matter to an issue by, as Governor, making Your Honor, as Chief Justice, a formal offer of a disclaimer and explanation from Ministers as well as from himself, and did so. Even had he done so before unofficially, Your Honor must surely be aware that that would not constitute a continuation of a confidential conversation. Formal proposals are constantly preceded by unofficial or even confidential overtures. How could the Governor suppose that Your Honor, one not unversed in affairs, could possibly imagine such a proposal at such an interview to be confidential? Had you hinted it you would have been called to note the offer as official at the time, and afterwards, had a doubt arisen in his mind. The Governor will not insult Your Honor by supposing but that an inborn love of fair play would have rendered you anxious that no material fact, even adverse to your contentions, should be suppressed.

But to resume. It must be observed that Lord Carnarvon commented upon your non-acceptance of the disclaimer upon perusal of the written documents only, and before he had received the despatch relating to the conversation.

The Governor has never said, nor hinted to any one, that Your Honor attempted to influence him in regard to his personal relations with the late Premier. No one, he imagines, would presume to attempt so to dictate to him. The Governor was ever willing to talk over general matters with you, but never local politics; and he distinctly informed Your Honor that he appreciated your delicacy in refraining from doing so. The Governor is glad to receive the assurance that Your Honor has no animosity against the late Premier; he presumes not only in a political but in a personal sense; and he trusts that your assurance may also be accepted by the late Premier, and that friendly relations may be restored between you.

As in the early correspondence Your Honor, disregarding the words of the resolutions in Parliament and those of the Speaker, claimed that Parliament (instead of condemning, as it did, advice given as to a particular exercise of the prerogative of mercy) had condemned an invasion of the rights of the Supreme Court, "the same opinion which we now hold,"—so now Your Honor roundly asserts, and, it must be supposed, that you seriously believe, that you are supported by the Secretary of State; that your arguments have not been refuted; that you have not sought to convict late Ministers (as in a Parliamentary impeachment) of opinions and actions which they denied; and, finally, that the Governor will, "of course, be prepared to admit" that his reasoning has been "fallacious." The Governor would willingly say no word to dispel such happy illusions; yet he must, on public grounds, briefly review at least one subject, namely,—the position taken by Her Majesty's Secretary of State in relation to his own views and those of Judges and Ministers.

Lord Carnarvon is of opinion "that the Judges were justified in their protest;" that "strictly speaking the Judges were right in their protest;"—that is, as the context proves, he admits their right to protest in this case "strictly speaking." This view was also held by the late Premier, and by the Governor himself. The Governor accordingly received and courteously answered the protest, taking no notice of its somewhat acrimonious tone, and gave the desired explanation. Your Honor, however, is good enough absolutely to set this question at rest. In your letter of 21st May, now under reply, you lay stress on the fact that the Governor "more than once" repeated that if he "held the same opinions," he would "follow the same course;" that is, if believing as you believed, he would have protested; not, of course, as you yourself show, thereby approving of the tone or form of the protest. This is conclusive of the identity of opinion on this point between Lord Carnarvon and the Governor;—though the former is the more reserved in his assent to the protest, using the words "strictly speaking."

Lord Carnarvon secondly holds that the Judges were "technically right in refusing to accept the assurance that the view put forth by the Attorney-General was not the view of the Ministers." The

Governor had already, in his Memorandum of 25th February, laid down the same rule in the following words:—"Every member of a Cabinet is bound by, and is answerable for, the action of his colleagues till he resigns;" and Ministers acquiesced in that trite axiom, and consequently it was not urged, as it might otherwise have been, that the Attorney-General's Memorandum had, as the Governor was told, never been discussed and agreed to in Cabinet; that the Premier, who had seen the draft, understood it to have been withdrawn; that the draft lay *perdu* in some pigeon-hole of the Government Offices till a statement in it having been publicly alluded to, the Governor asked for an explanation on the 25th January, and it was then formally sent to him, and answered the same evening. It was not "attached" to any other Memorandum; it is not the minute referred to by the Governor as so "attached." Does not Your Honor observe that the Governor, writing on the 24th, could not possibly refer to a Memorandum which only reached him, and was read by him for the first time, on the 25th, as the printed dates prove? The reference was to these words, signed by Mr. Bromby and in his handwriting: "I was aware of a report of the Puisne Judge in the case of Edwin Hunt, but not of any on Mrs. Hunt's case."—Signed "C. Hamilton Bromby." These words, which give point to the Governor's allusion, he, for the first time, observes are omitted in the printed papers; and of this he might have complained had he noticed it at the time, as he did of the misarrangement of the papers affecting your Honors, thus proving that he was more careful of your Honors' interests than of his own. Had not Your Honor emphasized your misconceptions by underlining, and seemingly attaching such weight to it, the Governor would not have stopped to sweep it aside. Thus the clear evidence of printed dates and recorded opinions are alike disregarded. In the former case the omission above referred to may afford an excuse; but it would seem that the latter at least has arisen from Your Honor's over-eagerness to attribute to the Governor opinions which calm consideration would show you to be exactly opposite to those he has placed on record. Of course Ministers were "technically" answerable. Had that not been admitted, the Governor would not have addressed (as you rightly remark that he did) his reply to Ministers generally, and Your Honor would have been referred to the Attorney-General for a personal explanation.

Lord Carnarvon's words "technically right" are full of meaning. To say "technically right" differs but little, if at all, from saying otherwise than technically wrong. As to the value and real significance of the doubtful expression in the late Attorney-General's Memorandum upon which Your Honor's case hangs, (for note, that Lord Carnarvon, like the Governor, declines to follow Your Honor into the privileged precincts of Parliament to seek to convict a member,) what are the words used by the Governor in his Memorandum of 30th January, 1877?—"The words in 'some measure' are probably the key to the real meaning of the writer, seem much to reduce the gravity of the sentence, and certainly to divest it of the accuracy and precision which alone would give importance." These are the Governor's words. Lord Carnarvon goes yet further: he says, "No doubt in expressing his meaning" (the Attorney-General) "did not have present to his mind the construction which has been put upon his words,"—that is, that doubtless the Attorney-General did not mean what Your Honor holds that he did mean. Nevertheless he laid himself, to use Lord Carnarvon's justly lenient expression, "open to observation." But if, according to the opinion of Lord Carnarvon, the ambiguous phrase was doubtless not an accurate expression of the intention and mind of the Attorney-General, still less could it have been (except in a mere technical sense) the weighed and accurate expression of the mind of his colleagues, and still less again, their deliberate and formal advice to the Crown.

The Governor, with very long personal experience, is of opinion that no generous political enemy of a Ministry in any Colony that he has known would persist in refusing a disclaimer under such circumstances. Why then should Your Honor? who, in the Governor's Despatch No. 11, of 11th February, 1877, will find the following paragraph:—"I am not aware that such advice has been tendered, and Ministers deny having tendered it; and it will be undoubtedly admitted by all who reason calmly that even did speeches prove Ministers to hold personally certain opinions, that would not prove that Ministers made them part of their policy, still less that they had advised the Crown to adopt such opinions as its own, or to accept them as its line of conduct. Moreover, I frankly expressed my views in my first reply to their Honors. I understand them to concur with those views. Ministers cannot sit in Executive Council without the Governor; why then continue the discussion?"

The Secretary of State, not being part of the Parliament of Tasmania, would naturally say little on the constitutional question; yet incidentally he disposes of it by inference, and, in a paragraph pregnant with significance, goes to the very root of the controversy. "I feel, however," says Lord Carnarvon, "bound to add that there was, in my opinion, some needless heat shown by the Judges in the correspondence, and it appears to me that they might have accepted without difficulty your assurances that the Ministers did not claim to be a Court of Appeal." Your Honor, in claiming to have received the support of Lord Carnarvon, doubtless was alluding to those points before referred to, in which he concurred with the Governor in so far justifying you, and must have overlooked this sentence bearing on the main points of difference, in which the words are now underlined.

It will be unnecessary to dwell upon the eighth paragraph of Lord Carnarvon's despatch. The Executive had been blamed for not sufficiently consulting the Judges. The Governor proposed to

adopt the practice of New South Wales and some other colonies, and lay down as a rule to consult your Honors upon all cases of remissions. Lord Carnarvon does not concur in this view, agreeing with that held (the Governor believes) most decidedly by the Honbles. W. L. Crowther and C. Meredith, members of the late Ministry. The Governor, with Lord Carnarvon, "regrets the acrimonious tone of the further communications which have passed between the Judges and "late Ministers."

The Governor need not point out that Lord Carnarvon's despatch of 26th January, conveying His Lordship's decision on the case referred to him regarding the production of despatches, expresses views absolutely identical with those put on record by the Governor, who has ever acted, and is always prepared to act, on them. Sir Michael Hicks-Beach, having succeeded Lord Carnarvon, is "perfectly satisfied" that the Governor's sentence referred to by Your Honor "cannot have been intended to convey" the meaning you attach to it, and generously argues the Governor's cause.

Your Honor asks for proofs that results have more than justified the warning conveyed by the Governor in these words, dated 6th February, 1877:—"It has now become his duty distinctly to express his conviction that it would be inconsistent with the proper position alike of the Governor and of the Judges, and he fears likely to impair public confidence in their impartiality," \* \* \* were they to pursue a certain course which Your Honor has seen fit to enter upon and continue. Your Honor's own letters afford the amplest proof of the truth of this anticipation. Your Honor has yourself referred to public rumours; and, in your very last letter, to one out of many newspaper articles that have appeared. The truth of rumours is beside the question; it is a public injury that the characters of high officials should be assailed, whether they be Governors, or Ministers, or Judges who are appointed on the recommendation of Ministers.

Yet if Your Honor now means to pledge your word that the correspondence referred to in the despatch of 26th November "was meant to convey no imputation" upon the Governor, he is bound to accept your assurance, only regretting that your terms should have been so unfortunate as necessarily to convey the impression that the Governor was either dishonest or incompetent. Your Honor talks of "host and guest" and "unaltered terms of social intimacy." Once since the controversy commenced the Governor dined with Your Honor,—in August, 1877,—but in November last Your Honor, disregarding the well-understood etiquette towards the Representative of the Crown, refused to dine with the Governor. Your Honor also re-opened the public controversy: you actually stooped to refer the Secretary of State to an article in the only journal that upholds Your Honor, carefully prepared to damage the Governor, which you must have well known to be inaccurate had you read it, and which you could be safe in supposing that the Governor would not notice. And on the 8th December, 1877, you commenced a series of seven letters addressed to the Governor, arising, to use your own words, "out of matters only personal to" the Governor and yourself, unpublished, but containing passages which, taken in connection with Your Honor's other recent action, rendered it impossible for the Governor to remain satisfied with assurances of your respect for his person and office as he had been in February, 1877, and obliged him, when he found himself accused of violating confidence, and the conversation publicly referred to, unwillingly in self-defence to describe more accurately, but still very faintly, the interview of the 30th January, 1877.

The Governor has already shown that that second interview was in no sense confidential; and, as a matter of fact, Your Honor did in express words label the former as such. There is such a thing as implied confidence, but also such another as implied official action; and who would shield himself under the plea that a proposal on a public matter, made by the Governor in a public capacity, was made in implied confidence? Your Honor solemnly affirms that the Governor's description of Your Honor's words and action at the interview is inaccurate. As the Governor never before witnessed a similar scene it is deeply impressed on his mind. The Governor and the Chief Justice are then at direct issue. The difference can only be accounted for by supposing that the one or the other allowed feeling to overpower reason and memory. There the matter must rest; but Your Honor obliges the Governor to record that Your Honor did detain him,—that the Governor did sit down in hopes that Your Honor would follow his example, and would become calmer,—and also that when he rose Your Honor might cease and leave. The Governor rose at least twice with the observation, or a similar one, that his time was passing for Executive Council; and at last he moved to the door, when Your Honor, quite absorbed in your feelings, brushed past him in a manner very foreign to your usual courtesy. Your Honor asks why did not the Governor take notice of all this, especially of the outbreak "second to none?" When Your Honor uttered these words the Governor was on the point of taking unmistakeable notice of them, when he suddenly remembered that the meaning might be construed as a reference to Ministers, and to Officers under the Crown, in which sense it might be correct; and besides, he thought it ungenerous unnecessarily to take notice of wild talk and behaviour the emanation of over-wrought feeling. The Governor considered too that he ought to subordinate personal feelings (had any but sorrow existed) to the duty, on public grounds, of preventing a rupture between the Governor and the Chief Justice. He did not therefore act as he might have done had he been in a private capacity; and later he accepted an assurance of respect to his person and office.



No reasonable limits could deal with Your Honor's minor points. Going back to the old Hunt case, you ask, "respectfully but very gravely," "had not the amount of the reward stated to Your Excellency a very important influence on your decision?" What amount? When stated? No such statement had any influence whatsoever. And so with regard to other points. Still there is one that cannot be lightly passed over.

Must the Governor refer to the repeated attempts made by Your Honor to suggest that he was guilty of complicity in misarranging the order of the printed papers, and to your statement (utterly unfounded and without the shadow of proof or probability) that he "consented to receive,"—that is, acquiesced in such misarrangement,—when Your Honor, as an old official and Prime Minister of Tasmania, must well have known that no Governor under Responsible Government takes a personal part in arranging the printing of his Ministers' correspondence; and, when records before you prove that it was simply the Governor's careful regard for Your Honor's interests that enabled the error to be detected,—an error which, the very first moment it was pointed out, was rectified by the Governor's express written direction. What must be his rejoinder to such an attack but that he in charity forbears from characterising it?

Seriously and thoughtfully the Governor viewing the interests of the public service, and, as from the first, considering the dignity of the Supreme Court as at stake, to which Your Honor cannot be indifferent, submits, (almost without hope), that even now Your Honor might take into consideration that pressing the public continuation of the controversy which you have forced on by not accepting, as you might have done "without difficulty," to use Lord Carnarvon's words, "the assurance" of the Governor, is prejudicial to the public interests in only a less degree than it is to that personal respect which all are anxious to be able to render to you. The Secretary of State's despatches might fitly have closed the controversy,—despatches eminently satisfactory to the Governor, and doubtless also accepted by both the late and present Ministry as lucid, temperate, statesmanlike, and most reasonable. Your Honor even professes to be satisfied with them. Why not then have let the matter rest? But if Your Honor still thinks it necessary "thrice to kill" those whom you seriously proclaim to be already "slain," the Governor, at least, secure in the loyal feeling of the people of Tasmania, resting in full confidence on their steady support in his efforts to uphold constitutional principles, fortified by the unanimous and dispassionate opinions in this matter which have reached him from men distinguished by constitutional knowledge and experience not only here but in England and in the Colonies, may be permitted to decline further disputation, and will submit with equanimity to assertions, querulous complaints, and queries that may be contained in any future communications from Your Honor on this question.

FRED. A. WELD.

*His Honor Sir FRANCIS SMITH, Chief Justice.*

*Chief Justice's Chambers, 1st June, 1878.*

SIR,

I HAVE the honor to acknowledge the receipt, this day, of Your Excellency's letter of yesterday's date. I do not propose to notice every assertion and argument that you put forward; which would add too formidably to the growing literature of this controversy. Moreover it is needless. To any intelligent and unprejudiced person—and to such only I appeal—it will be plain that Your Excellency fails to grapple with the substance of my letters; and consequently the answer to Your Excellency's present letter will be found to be substantially contained in those to which it professes to be a reply.

But I will make some observations which I think will tend to illustrate the inconclusiveness of your general mode of reasoning, and will try to clear up some misconceptions.

I do not fear that my reputation will suffer—as is insinuated—in consequence of the conviction gaining ground that I stand accused by Your Excellency of a "long and dark array of faults." My reputation—at least where I am known—could only suffer from my own admission, expressed or implied, that Your Excellency's accusations were true.

Your Excellency suggests that in characterising the disclaimer of Ministers as "startling and unexpected" I forgot statements contained in your first Memo. to the effect that "Ministers had not advised you that the Executive Council was a judicial Court of Appeal." This is a fair specimen of the kind of argument which Your Excellency employs. It is scarcely worth pointing out that the Memo. referred to, with the whole correspondence, was before me when I wrote, and could not be forgotten: and that the question, what advice had been given, was not a question of fact, but a question of construction. There was no dispute as to what, in fact, Ministers had stated, both to Your Excellency and in Parliament. The only question was what they meant. We put one construction upon their declarations, Your Excellency another. We thought Your Excellency wrong, and declined to accept your assurance that Ministers did not claim appellate power over the judgments of the Court, only because we believed that it was grounded on your erroneous construction



of their advice. We never understood that there was any question of fact between Your Excellency and ourselves. And the moment we were made aware that Ministers themselves in fact disclaimed the supposed usurpation we declared our object accomplished, notwithstanding that we could not help retaining our opinion that their words and acts did imply and involve such usurpation.

I will not follow Your Excellency through your laborious struggle to prove that Lord Carnarvon's despatch supports your views and those of your late Ministers, and dissents from ours. I may be permitted to doubt whether His Lordship would recognise his own meaning in Your Excellency's paraphrase. I am disposed to think that, when Lord Carnarvon says the Judges were justified, and strictly right, in their protest, he means what he says; and intends to declare his concurrence with the opinion upon which that protest was based. His Lordship thinks we were "strictly right" in our construction of the view put forward by one Minister; and "technically right" in attributing the same view to his colleagues, as the document containing it had been considered by them before being formally presented to Your Excellency. According to Your Excellency, Lord Carnarvon intends to say only that we were "otherwise than technically wrong"—whatever that may mean. I cannot think that His Lordship would be likely thus

" — spargere voces  
ambiguas. — "

Lord Carnarvon states distinctly wherein he differs from us. He thinks that some needless heat was shown, and that we might have accepted, without difficulty, your assurance that the Ministers did not claim to be a Court of Appeal. How far the impression that some heat was shown by us may have been unconsciously contracted from the arrangement by which our letters are made to alternate with comments in which considerable heat was, beyond doubt, exhibited, may be a question. And it might be open to doubt whether His Lordship would have been of opinion that we might have accepted Your Excellency's assurance if he had known that the question presented itself to us as a question of construction and not of fact. But, however this may be, the points in which Lord Carnarvon differs from us are subordinate and comparatively immaterial. They concern only the manner of our protest and a matter of personal discretion. On the main question in controversy we think His Lordship considers that we were right. We at least are satisfied with His Lordship's opinion. Your Excellency is also satisfied; and you suppose your late and present Ministers will be so too. Everybody is pleased. I imagine it would surprise His Lordship to find he had given such universal satisfaction, and that his utterances had been found as capable of opposite meanings as the famous response of the Pythia recorded by old Ennius.

Your Excellency recounts with gravity—which I suspect it will not obtain from most people—a new incident in the wonderful history of the late Attorney-General's famous Memo. of the 10th January—I mean the "*perdu*...pigeon-hole" incident—upon which it is hardly worth while to remark; any more than upon the "attached Memo.," which is now discovered to have been omitted from a paper that professed to print every Memo. I will only answer Your Excellency's question, "Does not Your Honor observe that the Governor, writing on the 24th, could not possibly refer to a Memo. which only reached him on the 25th, as the printed dates prove?" My reply is that I found the printed dates conflicting, and therefore untrustworthy; as Your Excellency will agree, when I point out that in your own Memo. of 30th January you state this very date as being, not the 25th, but the 26th. I am informed too that the "attached Memo." bears date the 25th, which, if correct, would prove that Your Excellency could not have seen it on the 24th. But I believe the date cannot be correct. Stephen Blackpool's frequent exclamation involuntarily occurs to one's mind.

The manner in which Your Excellency professes to answer my request for proof of your imputations that the Judges had impaired public confidence in their impartiality, is another notable specimen of your manner of reasoning. My own letters, you say, afford the amplest proof. How? By their reference to public rumours, and a newspaper article! This implies that those rumours were set in circulation by the conduct of the Judges. But that was not the case. They were rumours based upon the alleged tenor of your despatches. Did my conduct in connection with the Hunt Correspondence suggest the newspaper article; and did that article impeach my impartiality? Nothing of the kind. The article attributed—groundlessly as Your Excellency admits—that I had advised and remonstrated with Your Excellency against your acceptance of Mr. Reibey as Premier. What have rumours based on your despatches—what has this article, published on the 22nd May last, to do with your insinuation in your despatch to the Secretary of State of the 17th March, 1877—more than a year before—that the Judges, by their own conduct, had then impaired public confidence in their impartiality? It is difficult to believe that such arguments can be serious.

To Your Excellency's enquiries—"What amount? when stated?"—with reference to the reward which you were told was offered for a conviction, and was alleged to have led to the concoction of the case of arson by Mr. Detective Constable Simpson, I answer that if Your Excellency means the inference to be drawn that you were not told, before the pardon was granted, that a reward of very much larger amount than that of the gratuity which was afterwards made to stand for it, then some grave misapprehensions on that point have been long prevalent.

I must draw attention to a peculiar feature of this controversy which is pregnant with misconception; I mean the marked manner in which Your Excellency seeks to sever my colleague from

myself and singles me out for censure on account of our joint acts—a proceeding calculated to raise compromising suspicions, in the minds of those who may not know his loyalty and firmness as well as I do, either of his sincerity or of his independence. The natural inference, having regard especially to the intimacy known to subsist between Your Excellency and him, would be, either that Your Excellency gathers from him that he secretly dissents from our joint public action, or else that he is so weak as to be subservient to my will. I cite instances. In Your Excellency's despatch of 19th December transmitting further correspondence from both Judges, you speak of rumours affecting the Chief Justice alone, while our letter refers only to rumours affecting both Judges. In Your Excellency's letter under reply you impute to me over-eagerness to attribute to Your Excellency opinions the opposite of those placed on record, on grounds which apply equally to my colleague, inasmuch as he took the same point in his letter to Your Excellency; but I am not aware that these grounds are made the occasion of the like imputation against him. Your Excellency suggests that I have used words necessarily conveying the imputation that you were "either dishonest or incompetent." I declare, in passing, that such an imputation never entered my mind. My colleague joined in the words used. I have not heard that Your Excellency has laid the same charge against him. You say that I "stooped to refer the Secretary of State to an article in the only journal that upholds" me, "carefully prepared to damage the Governor, and which I must have well known to be inaccurate." My colleague joined in the act which you thus unjustly characterise. I do not believe that he is involved in the same culpability.

I am not sure that I quite understand Your Excellency's allusion when you say that I "stooped to refer the Secretary of State to" the article in question. My only motive in referring to it—as well as to the debate—was to prove that things had come to such a crisis that it was high time the Judges spoke out for themselves if they did not wish to be supposed to be sneaking from the consequences of the production of despatches said to be highly condemnatory of their conduct. I had no intention of conveying any intimation of my own opinion with relation to the tenor of the article. If Your Excellency means to impute—as it is possible your words may imply—that the reference to the article in our letter was a subterfuge for getting that article before the Secretary of State, I repudiate the imputation with indignation, and regard it as an affront. It is not in my nature to resort to petty acts of delation in order to vent small spite.

Your Excellency refers to alleged repeated attempts made by me to suggest that you were guilty of complicity in misarranging the order of the papers. I have not intentionally made any such suggestion. It is true that I complain of Your Excellency having sanctioned the irregular—and in my opinion improper—publication of the correspondence in the *Tribune* of the 21st February, 1877. But when in my letter of 21st May last I state, as quoted by Your Excellency, that you "consented to receive" documents in such a shape, what I meant to indicate was the fact that the whole of these documents reached you for the first time in a printed form, and all at one time, and therefore did not represent a genuine correspondence with Your Excellency. My surprise was that you should consent to be treated with such want of respect—to be made use of (if I may avail myself of a phrase so appropriate without offence) as a kind of lay figure whereon to dress a correspondence. In my letter of 12th December I mentioned the subject in the following manner. After referring to our conversation of the 21st February, 1877, and to the appearance of the correspondence in that morning's *Tribune*, I say:—

"As to this publication I said I felt sure that Your Excellency had not given your sanction to such an unprecedented proceeding, when to my unutterable astonishment... you said that it had been done with your sanction. I asked how you could possibly have been induced to consent to such a thing? You answered that your Advisers had represented to you that a perverted version of the correspondence had been put into circulation by the Judges, and they had therefore asked you as a matter of justice to enable them to counteract the injurious effect upon them which the false impressions caused by this distorted version would have. 'But' I interposed 'there was no foundation for such a representation.' I told you we had not disseminated any version... of the correspondence, and remarked that I should have expected that you would have made enquiry of us before concluding that we had been guilty of such improper conduct.

"I here pause to remark that this irregular, unprecedented, and, with all due deference to Your Excellency, I must add indefensible publication, in a sensational manner, has been the real cause of any misconceptions that have been produced with regard to the conduct and motives of the Judges. The documents as published were arranged and dressed so as to present a fictitious appearance and to create a false impression. They represented no real correspondence with Your Excellency. The Memoranda of your Advisers, which seemed to have been sent to you from time to time, had never been sent at all, but had in point of fact been sent, instead, to the Government Printer; and, so far as correspondence with yourself took place, it would have amounted practically to the same thing if they had sent you a copy of the *Tribune*.... It is this publication, made in this manner and form, which more than anything else, has assisted the industrious efforts since unceasingly made to create misconstruction as to the motives and conduct of the Judges. And that the thing was done with Your Excellency's consent and sanction will, I imagine, come upon people with something like a shock. I cannot conceive that there can be two opinions upon the question whether your treatment of us in not enquiring whether we had been guilty of the unworthy conduct imputed, but on the

contrary presuming everything against us, unheard, was such as the Judges of the land might reasonably expect at the hands of the Queen's Representative."

I wish to repeat—emphatically—my assurance, that while I do complain of Your Excellency allowing the publication at the time and in the manner in which it was published, it never entered my mind to impute that you were in any way party to the misarrangement, or even that it attracted your attention until we addressed Your Excellency on the subject. I am sure Your Excellency is incapable of any act of the kind.

On the question whether the conversation on the 30th Jan., 1877, was confidential or not, I can only say in all sincerity I believed it to be so; and maintain that it must have been private if the previous conversation was private. No one could anticipate that the character of successive conversations on the same subject could so shift and change. Such a practice, if general, would really operate as a trap for the unwary. But Your Excellency does not take notice of my allegation that, whatever you may have thought, the conversation ought to have been regarded as private from the moment you were made aware that I so considered it. And I venture to say that the great majority of men will concur with me in that view. I emphatically, but with all respect, deny that the offer Your Excellency mentions was officially made at that interview.

The conflict of assertion between Your Excellency and myself as to what transpired between us in those conversations is very painful. With regard to the first, it is hardly worth while noting the differences between our respective versions. Mine I believe to be substantially correct. I will only say that you are mistaken in asserting that I did, in express words, label it as private. There was no need to do anything of the kind; and, as I have already said, I have not been accustomed to such stipulations. With regard to the second I re-assert, emphatically, the denial contained in my last letter. I am unable to conceive anything that can furnish any foundation for Your Excellency's impressions but possibly some warmth exhibited in the previous day's discussion.

I gave Your Excellency no ground, in the previous conversation, for the impression you say you were under that I would very probably reconsider the matter and take your advice. My colleague will confirm my statement that I made no such suggestion to him when I pointed out the alterations suggested by Your Excellency; and that we both agreed in our resolution not to withdraw the letter. I repeat that the only purpose of my visit was to return the letter. You assert that I detained you. For what purpose? You do not say. I say that you detained me. I state the purpose. It was to renew your persuasion to withdraw the letter.

Your Excellency appears not to be aware that you suggest absolutely nothing to account for such a scene as you describe. Is it credible that any man not drunk or mad would be beside himself without some cause? Your Excellency states none. Yet you describe me as behaving and talking wildly—in a manner that no one ever knew me to behave and talk.

During a long public life I have been exposed to many provocations under which very few men could have retained their self-command. Yet I think I may venture to say that I never lost mine under the most trying of these provocations. And is it now to be believed that I should, with no adequate conceivable cause—with none, at all events, suggested—be seized with frenzy and utter rabid and incoherent nonsense to the Governor—with whom I was on friendly terms, and so continued long afterwards?

Does the revelation come in such a shape as to entitle it to carry conviction? It is made to the Secretary of State under evident irritation of feeling. Its inopportuneness, its incongruity with the purpose of the despatch, the selection of an imputed phrase, its isolation from the rest of the conversation, are all significant. The fashion in which the story was carried to His Lordship is recognized—more widely than Your Excellency suspects or than it would be pleasant for you to learn. Forbearance induces me to abstain from criticizing the excuse which Your Excellency tries to make for a proceeding of such a character as this.

I reject the shelter for my veracity offered by the supposition that feeling has overpowered reason and memory. For me it would be a flimsy, absurd, and false pretext. My reason was sound and my memory is clear. And I do not fear that any one who is acquainted with me will believe—at all events after my denial—that I acted and spoke as described by Your Excellency.

Looking back upon the whole course of this protracted and unhappy controversy, and its consequences, I cannot help being struck by the treatment I have encountered in the discharge, according to my lights, of a plain duty to maintain the lawful authority of the Supreme Court. The circumstances were such as, one would have thought, to forbid misconstruction of my motives. My attention was attracted in the first instance by hearing of the assumption, by means of declarations in Parliament by one Minister on behalf and in presence of his Colleagues, of an appellate power to reverse the judgments of the Court on the ground of error.

Your Excellency (I may remark parenthetically) questions the propriety of referring to statements made in parliamentary debate, which you characterize as entering the "privileged precincts

of Parliament." It appears to me that you confound the calling of a Member to account for his utterances in Parliament, and the quotation of these utterances for any other purpose. I do not understand on what principle a statement made in Parliament is to be forbidden to be cited as evidence of the Member's opinion. The fallacy of Your Excellency's view may be tested by putting a striking case. Suppose a Member in the course of debate should say of a Judge that he had accepted a bribe. Conceding that he could not be called to account or made responsible for such a calumny, is the Judge's mouth to be closed? Is he to be forbidden to notice it, and take steps, if he thinks proper, to disprove the imputation?

To resume—the declarations made in Parliament by and on behalf of Ministers were such as to leave no doubt whatever that appellate power was claimed, and it was indubitable that it had been in fact exercised in the case under debate. But I did not take any step in consequence of these parliamentary proceedings. I did not interfere until I found, some time after, that the claim asserted in Parliament had received countenance in an official document signed by one Minister and formally handed to Your Excellency, after having been considered by his Colleagues. I found at the same time that Your Excellency had recorded a misconception as to the Judges' view of their duty in advising on remissions, which necessitated an official communication from the Judges to correct that misconception. In making this it was found impossible not to take notice of the claim which had been made to appellate jurisdiction, unless we had been content to admit it. This was precisely the state of facts which made it the duty of the Judges to protest.

Now what possible motive could I have had but the discharge of duty? I was not personally concerned. I was not the Judge who tried the case. It was not my charge that was contemptuously criticized in Parliament; nor my judgment that was declared to be wrong, and summarily reversed. But the Supreme Court had been assailed in the person of one of its Judges, and I should have been ashamed of myself had I hesitated to step forward to resist the aggression.

What has prolonged the controversy? Your Excellency's entrance into the lists as a disputant against the Judges. The correspondence would never have proceeded beyond our first letter and Your Excellency's answer, if it had been confined to a reply to the question which the Judges considered it their duty to address to you. But you entered upon debateable ground, and made assertions which we were forced either to admit or deny. We could not admit them, and the denial which we felt compelled to make led to replication and so the controversy grew.

What I have suffered shows how formidable the discharge of duty may be made. My experience cannot be said not to have a tendency to intimidate. It is not well that Judges should be exposed to intimidation in the discharge of what they believe to be their duty. All men are not equally endowed with courage, constancy, and resolution. It is not a light matter to encounter the hostility of a Government, and the displeasure of a Governor. I have been made to feel the penalty in many ways. There is no fear of any want of firmness while the bench is filled by its present occupants: but it would be an evil day if it should ever come to be occupied by men of flabby moral fibre, who were deficient in constancy and resolution. The people would then understand, if they do not now understand, how true it is that their highest interests are involved in having for their Judges men whom it is not possible to coax or intimidate; men who, to repeat our own words uttered during the controversy, are vigilant in defending from aggression that authority of which they are, in a peculiar manner, the guardians on behalf of, and in trust for, the Crown and the people.

It is a cause of real regret to me that the performance of duty has involved the interruption of friendly relations between Your Excellency and myself; but I cannot allow any consideration, not even Your Excellency's displeasure and its consequences, to turn me from what I conscientiously believe to be the path of duty.

I have great confidence in British love of fair play; but should that confidence be disappointed, and my motives misunderstood by the people in whose interests I have followed the course which has involved these penalties, I shall only share the fate of many a better man; but shall have the abiding consolation that I have done my duty.

I hope that I shall never be faithless, in a humbler sphere than theirs, and in less trying circumstances, to the noble traditions of resistance against encroachment by the Executive Government handed down by an illustrious line of British Judges; and that, come what may, I shall always be found among the ranks of those men who are ready

“— libera  
Verba animi proferre, et vitam impendere vero.”

I have the honor to be,  
Sir,

Your Excellency's most obedient humble Servant,  
FRANCIS SMITH, C.J.

*His Excellency the Governor,  
Government House, Tasmania.*

*Government House, 3rd June, 1878.*

SIR,

I AM directed by the Governor to acknowledge Your Honor's letter of 1st instant.

To comply with Your Honor's desire for publication, His Excellency has placed Your Honor's three communications in the hands of Ministers for that purpose.

I have the honor to be,

Your Honor's most obedient Servant,

W. H. ST. HILL, *Lt.-Col., Private Secretary.*

*His Honor Sir FRANCIS SMITH, Chief Justice.*

## MEMORANDUM BY HIS EXCELLENCY THE GOVERNOR.

*Government House, 3rd June, 1878.*

### MEMORANDUM FOR MINISTERS.

THE Governor transmits to Ministers three further letters from His Honor the Chief Justice, and one from himself. It appears from His Honor's first letter that he desires the publication of this further correspondence.

It is more than eighteen months ago since this correspondence, lately renewed by the Chief Justice, commenced. At that time a Ministry held office under a gentleman between whom and the Chief Justice it is notorious that very bitter personal feelings existed. Under the advice of that Ministry a certain Mrs. Hunt was pardoned. Parliament censured the advice given. The Ministry was weak in parliamentary support. Some Memoranda that passed might have led to the opinion that the relations between the Governor and his Ministers were not quite cordial. At that moment the Attorney-General, Mr. Bromby, having written a Memorandum in which he alluded to the Governor in Executive Council as "in some measure" acting as a Court of Appeal, the Chief Justice intervened, construing these words as proof of formal advice having been given to the Governor, and an attack made on the Supreme Court; and, with the Puisne Judge, addressed the Governor on the subject. The Governor, admitting their right to ask explanation, gave one, with which their Honors expressed their "satisfaction;" but he would not bear witness against his Ministers that they had given advice which he knew that they had not given, and which they disclaimed. Neither his disclaimer however, nor theirs, has even yet been accepted by the Chief Justice, though Her Majesty's Secretary of State says that it might have been accepted "without difficulty." His Honor's action has led in great measure to the downfall of one Ministry; has since seriously embarrassed a succeeding one: and he has further seen fit to make the most injurious personal imputations upon the Representative of the Crown. And this action of His Honor is professedly based upon a certain ambiguous phrase of Mr. Bromby's Memorandum, which, even had it been the weighed and measured expression of the opinion of the Cabinet (which it was not), would, as it now appears, have only exactly expressed the opinions (given even in a more unqualified form) by such high authorities, political and legal, as Lord Cranworth, Sir G. Bramwell, Lord Wensleydale, Mr. Walpole, Lord Hobart, and Sir G. Grey, who, in their evidence before the Royal Commission of 1865, clearly refer to the exercise of the prerogative of mercy as the action of "a Court of Appeal," and sometimes use that very phrase itself.

FRED. A. WELD.

## FURTHER CORRESPONDENCE BETWEEN HIS HONOR THE CHIEF JUSTICE AND HIS EXCELLENCY THE GOVERNOR.

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*Chief Justice's Chambers, 13th June, 1878.*

SIR,

I HAD begun to indulge the hope that the correspondence between Your Excellency and myself was, at last, really ended. Your Private Secretary's simple acknowledgment of my last letter seemed a final termination. Your Excellency did retire from the open field of controversy. But you have taken advantage of retreat to shoot a Parthian arrow. For your Memo. of the 3rd inst., which reached my hands in a printed form yesterday evening, although it is addressed to Ministers, is aimed at me. If I pass by in silence the misrepresentations which your Memo. contains I shall be taken to admit them. In justice to myself I cannot do that. And thus we have another example of the way in which this correspondence has come to be prolonged.

The first assertion in Your Excellency's Memo. to which I take exception is this. You state that at the time the correspondence commenced "a Ministry held office under a gentleman between whom and the Chief Justice it is notorious that very bitter personal feelings existed." I understand this sentence to mean that bitter personal feelings in fact existed between Mr. Reibey and myself, and that the fact was notorious. The assertion, so far as it relates to me, is unfounded. It is not from me that you derive the impression. You profess to base it on notoriety, that is to say, on rumour. You yourself call this "a vague and intangible ground," and it has been described with, perhaps, equal fitness as

"—— a pipe  
"Blown by surmises, jealousies, conjectures."

Such a ground as this is surely not sufficient to warrant Your Excellency in making an assertion of this nature.

But there is another and a conclusive reason why Your Excellency should not have ventured to make the assertion. I declared to you in my letter of the 29th May that I had never had any quarrel with Mr. Reibey, nor any animosity (meaning personal enmity) against him. You accepted my assurance when addressing myself, but—and it is not the first time the like has happened—you state something very different when addressing others.

Supposing, however, that the assertion were true, why is it made? Is it considerate—is it humane—to make an enduring record of personal enmity? Is it not calculated to perpetuate feelings of hostility, if they existed? Your Excellency cannot intend to act the part of mischief-maker, yet you hardly follow the course of peace-maker. Your Excellency has frequently, in this correspondence, lectured me for imputed indifference to the dignity of the Supreme Court. May I venture in return to ask Your Excellency, with much deference, whether you think the Queen's Representative is occupied in a manner befitting the dignity of his office when he is making unwarranted and unnecessary allusions calculated to keep alive and perpetuate, if they existed, bitter feelings of personal enmity between two public men?

But with what object is the allusion to these supposed bitter personal feelings introduced? The only object, as it appears to me, is to suggest a motive for my intervention in consequence of the pardon granted, as you significantly state, by the advice of a Ministry of which this gentleman was the head—a gentleman, that is, between whom and myself you say that "very bitter personal feelings existed." It is best that I should not attempt to characterise the spirit from which emanates the imputation of so base a motive.

I now proceed to observe upon assertions so astounding that I involuntarily ask myself whether

"—— memory holds a seat  
In this distracted globe —";

or whether one or both of us can have

"—— eaten of the insane root  
That takes the reason prisoner"?

Here, at all events, it is beyond doubt that, to quote Your Excellency's phrase, something "has disturbed judgment and impaired memory." The assertions to which I allude are these:—"His Honor's action has led in a great measure to the downfall of one Ministry; has since seriously embarrassed a succeeding one; and he has further seen fit to make the most injurious personal imputations upon the Representative of the Crown."

My action—so says Your Excellency—"has led in a great measure to the downfall of one Ministry." I was under the impression that the sole cause of the "downfall" of that Ministry was

the rejection of their financial policy; a subject upon which I never expressed any opinion whatever. I have always believed—and I fancy other people share the delusion if it is one—that after the Treasurer had made his financial statement Mr. Fysh entered upon an elaborate criticism of that statement and thereupon moved and carried a vote of no confidence as an amendment to the motion to go into Committee of Supply. There was, I believe, no reference in the debate to the Judges or to the case of Louisa Hunt; but it was confined exclusively to the financial policy of Ministers. I thought that upon tendering the resignation of Ministers Mr. Reibey sent Your Excellency a Memo., dated 2nd August, 1877, stating distinctly the causes, all relating exclusively to finance, which led to that step. Mr. Reibey's statements in that Memo. are to this effect:—That Ministers were prevented in May from going into their financial scheme by an amendment moved by Mr. Giblin. That thereupon Your Excellency granted them a dissolution. That in the new Parliament the financial propositions of the Government were again prevented from being detailed in Committee by an amendment moved by Mr. Fysh. There is no hint of their "downfall" being, in the remotest degree, attributable to the Chief Justice.

But I have since—Your Excellency alleges—"seriously embarrassed a succeeding Ministry." You do not specify how I have done this. I have not heard of any embarrassment encountered by the present Ministry excepting that which was understood to have arisen from the arbitrary dilemma said to have been presented to them. The common belief is that they were required to advise whether the despatches should be produced, with an intimation that, if they so advised, they would be expected to support the views contained in the despatches. The expedient of a reference to the Secretary of State—by whomsoever suggested—would doubtless be welcomed as an escape from a strain upon conscience unendurable by honourable men. The adoption of this expedient placed them in a false position with relation to the local Parliament, and was, I believe, the real cause of any embarrassment.

My efforts to get the despatches produced can hardly have caused embarrassment. Originally I had no desire for their publication. The wish was not spontaneous. Even when Mr. Reibey, at the opening of the session, acting up to a threat thrown out during an election, moved for the despatches I was not eager to have them produced, and took no step whatever for the purpose. It was only when, late in the session, I found how seriously the Judges were likely to be compromised by keeping back the despatches that I began to make earnest efforts to procure their production. Before I took any step I gave Mr. Fysh fair notice; and he assured me that he thought it natural and justifiable, from my point of view, that I should try to get them made public. Mr. Fysh wished to retrace his steps, and advise Your Excellency to comply with the demand of Parliament, and thus end all embarrassment. What frustrated his wish? The tenacity with which Your Excellency clung to the reference which had been made to the Secretary of State. And thus the legitimate demand of Parliament was defeated by an expedient devised merely as an escape from a difficulty, and which, so far as it submitted to His Lordship the question whether it was advisable to produce your despatches, was a shifting to His Lordship of a responsibility which did not properly belong to him. I am of opinion that there was a departure from sound constitutional usage upon that occasion. The Ministers properly responsible for local questions are the local Ministers; and to frustrate a demand of the local Legislature by referring a local question to the Secretary of State is, in my judgment, virtually to suspend *pro tanto* parliamentary Government.

Your Excellency's present Ministers were in a novel and peculiarly delicate situation. Called upon to advise whether views contained in these despatches should be disclosed for which they were not responsible and of which, presumably, they could not but disapprove, good feeling and loyalty would naturally disincline them to place Your Excellency, by their advice, in the position of being exposed to adverse criticism against which they could not conscientiously defend you. On the other hand they could not be expected to take upon themselves the responsibility of defeating the legitimate wishes of the Legislature, if Your Excellency was willing to comply with them. The logical outcome of the position therefore was that they should give no advice either one way or the other. It was a question personal to Your Excellency upon which it was fitting that you should have a preponderating voice. And I have always thought, with much deference to those who entertain the contrary opinion, that Ministers were perfectly right in the course which they followed in the first instance of leaving the question entirely to Your Excellency's personal decision. Whether you were right—supposing the prevalent belief to be well founded that you did so—in requiring Ministers, if they advised you to produce the despatches, to support your views whether they conscientiously approved of them or not, may be a question for casuists. Plain men will have no difficulty in solving it.

At a later period it may be conceded that it did become the duty of Ministers to advise the production of the despatches. But by that time they had got into a false position—into which they were driven, as is commonly believed—in trying to escape from a strain put upon their consciences.

There were other things done at that time which Your Excellency's assertions in the Memo. under reply revive in my memory, and of which the propriety, in a constitutional point of view, may be open to question. The use of Your Excellency's name, and the private communication by



zealous friends of your alleged wishes, are well known to have exerted a considerable influence over some Members of the Legislature. If these communications were confidential, they did not reach me in confidence; and I break none by referring to them. In a small community like this it is next to impossible for the like to remain secret. Without conscious breach of confidence by any body they are sure, sooner or later, to become "*les secrets de Polichinelle*."

There was perhaps, after all, scarcely any real necessity to disprove assertions so wild as these which I have been answering; but I have thought it more respectful to Your Excellency to treat them as serious and to demonstrate that they are without foundation.

Your Excellency persists in asserting that I have made "the most injurious personal imputations upon the Representative of the Crown." Now I have denied—positively and emphatically—those imputations which you have specified; for example, that I ever meant to impute that you were "either dishonest or incompetent"; or that you were privy to "misarranging the order of the printed papers." You appear to think that in declining to accept Your Excellency's assurance that your late Ministers had not given certain advice, I doubted your veracity. Were it courteous I would say that the idea is utterly absurd. But I will say it is wholly mistaken. I have pointed out that the question did not present itself to me as one of fact, but of construction—viz. what was the true meaning of the advice actually given. I should be glad if Your Excellency would specify the imputations which you think I have made upon you, if there are any others than those which I have specifically denied. I believe it would be found that you are entirely mistaken in your impression that I have made "injurious personal imputations upon the Representative of the Crown."

Your Excellency's use of the opinions of the distinguished judges and statesmen who gave evidence before the Capital Punishment Commission of 1865 appears to me to be fallacious. You think such opinions support the views of Your Excellency and your late Advisers because these judges and statesmen speak of the Home Office in a familiar manner as a Court of Appeal. But this idea depends upon the erroneous assumption that our protest was based exclusively on the phrase in Mr. Bromby's Memo., and that the proceedings relating to the pardon of Louisa Hunt have any counterpart in the practice of the Home Office in England. The fallacy springs from the severing of Mr. Bromby's phrase from the course pursued by Ministers and their declarations in Parliament.

Your Excellency insists inexorably upon denying me liberty to refer to parliamentary debates. You call such a reference entering "the privileged precincts of Parliament"—but you appear to have no scruple in entering these "privileged precincts" yourself—that is, if I am right in supposing that you so designated every reference to debates in Parliament. You do not hesitate to refer to these debates to inform the Secretary of State that "all allusions to you in the parliamentary debates have, you believe, been not only respectful but complimentary."

The gravamen of our protest was that the whole proceedings of the Governor and his Advisers in relation to the pardon involved an assumption of power to deal with the judgments of the Supreme Court in a manner which could not but lower it in the estimation of the people. Mr. Bromby's phrase was the formal official justification of these proceedings, and was therefore selected as the occasion of our protest. But the protest was not confined, as Your Excellency assumes, to that phrase—a fact which will appear on reference to the early correspondence. It embraced the manner in which the Governor and his Advisers actually dealt with the case, and also the declarations of Ministers in Parliament.

Now the Home Secretary, in directing the exercise of the prerogative of mercy, is scrupulously careful to follow a practice that shall not impair the authority of Courts of Justice. He does not profess to review or reverse the judgments of these Courts. He does not claim to sit as a Court of Appeal. If doubts arise or new facts transpire in any case he invariably consults the judge who tried it, and causes the most careful enquiries to be made. If he advises mercy to be extended he does not declare that he reverses the judgment on a wrong inflicted—that he overthrows the verdict of the jury, and upsets the opinion of the judge. It is nothing to the purpose that statesmen and lawyers, speaking not officially but familiarly—not as a Minister of the Sovereign but as witnesses—using the term not strictly but popularly—describe the Home Secretary's function as practically amounting to that of a Court of Appeal. Their meaning is that it practically amounts to the same thing whether a sentence is reversed by a Court of Appeal or extinguished by a pardon. There is all the difference between the popular and the official use of a phrase. The highest constitutional authorities have familiarly characterised the English Monarchy as a Republic whose President is hereditary. But it would lower the dignity of the Crown, and be quite inadmissible, thus to designate officially, or strictly the Monarchy of England.

To render the phrase parallel and authoritative it must have been used under analogous circumstances. If such a thing can be conceived possible as that a Home Secretary should, in Parliament, justify a pardon on the ground that it was a reversal of the judgment as erroneous, in



the exercise of appellate jurisdiction, that, I admit, would furnish a precedent, and warrant for Your Excellency and your late Advisers. But can it be doubted that such a declaration by a Home Secretary would be met by instant challenge and protest on the part of the judges of England, in like manner as similar declarations, supported by official assertion, called forth our protest?

Consider for a moment what the transaction really was that called forth our protest, and it will be apparent that its necessary tendency was to lower the Supreme Court in public estimation, and consequently to impair its authority and usefulness. A pardon was granted by Your Excellency with the advice of your late Ministers which shocked the public conscience. Men felt that justice had been turned aside. Perhaps no stronger proof can be adduced of the unanimity of sentiment evoked by the scandal than the view taken by the organ of the then Ministry—the *Tribune* newspaper. From an article in that newspaper I make two extracts.

“We regret to be obliged to coincide with the generally expressed opinion of the public, that the latest publicly announced exercise of the Royal prerogative of mercy in favour of Mrs. Hunt cannot be justified on any plea of justice, of sound administration, or of public policy.” And lower down—“Can it be true that this woman, convicted on the clearest evidence of having caused the house she occupied to be fired by the hands of her own youthful son, was released after only serving seventeen months of a sentence of seven years, without any reference to the judge who tried her? If this should be the case, we are compelled to express our strongest reprobation of an act not only insulting to the highest tribunal of the laws in the Colony, but directly compromising the exercise of the executive action of His Excellency.”

This journal it is true has since taken an opposite view. But these appear to have been its unbiassed and candid opinions at the first.

When the pardon came to be arraigned in Parliament Ministers defended it as having been the remedy, by the exercise of appellate jurisdiction, of a wrong inflicted by the Court upon an innocent woman through error so transparent as to imply incapacity in the judge which, if it had existed, would have been pregnant with danger to the administration of justice. Surely this was to lower the Court in public esteem; and it transpired that the Governor had not afforded the support to the authority of the Court which was reasonably to be expected from the Representative of the Sovereign. For official records were published which showed that the Governor had virtually resigned the high prerogative of mercy into the hands of the Minister of the day. It appeared that the verdict and judgment of the Court had been so lightly esteemed by the Governor that the Minister's mere assurance that he did not doubt the prisoner's innocence was accepted as sufficient to counterbalance that verdict and judgment! And this had been done without consulting the judge, or so much as looking at the evidence. Whether the Governor followed those instructions of the Secretary of State which he is bound by his office to obey may be a proper subject for His Excellency to take into consideration. Here is the Secretary of State's instruction:—“The Governor, as invested with a portion of the Queen's prerogative, is bound to *examine personally* each case in which he is called upon to exercise the power entrusted to him, although, in a colony under responsible Government, he will of course pay due regard to the advice of his Ministers. . . .” In another despatch the Secretary of State says “the Minister in a Colony cannot be looked upon as occupying the same position in respect of the Queen's prerogative of pardon as the Home Secretary in this country. The Governor, like the Home Secretary, is personally selected by the Sovereign as the depositary of this prerogative, which is not alienated from the Crown by any general delegation, but only confided as a matter of high trust to those individuals whom the Crown commissions for the purpose.” Such a mode as was followed in this case of exercising so high a prerogative is thus demonstrated to have been not only subversive of the due course of justice but, when attempted to be vindicated as the exercise of a power to revoke the judgments of the Supreme Court at the discretion of the Minister of the day, to be derogatory to the lawful authority of the Court; and to have imposed upon the Judges an imperative duty to protest against it.

How Your Excellency could have felt warranted in telling the Secretary of State that no “special consideration was involved in this case,” is difficult to understand; the hypothesis upon which it was presented to you having been that the prisoner was the victim of a vile plot which had imposed upon the simplicity of the Judge and jury, but of which the signs of fraud were so palpable that the Minister, although he was not present at the trial, saw through the whole thing from the beginning.

I omitted, in my last letter, to refer to one or two points which, inasmuch as I have been forced to renew the correspondence, I will embrace the opportunity to notice.

In Your Excellency's Memo. of the 31st May you say—“in November last Your Honor, disregarding the well-understood etiquette towards the Representative of the Crown, refused to dine with the Governor.” I wish to explain that it was with sincere regret that I was unable to avail myself of Your Excellency's polite invitation. But I felt that to partake of your hospitality, to engage in seeming friendly talk, and to affect unrestrained confidence, while I believed in my heart

that you had reflected upon me in your despatches, would have been to wear a mask, and to act with dissimulation which would have been unfair to you and unworthy of me. You would have been a dupe, I a hypocrite. I could not so dissemble, and should feel sorry for the man who could.

In charging me with stooping to refer the Secretary of State to an article in the *Mercury* newspaper, you say that that journal is the only one that upholds me. I take occasion to record my appreciation of the independent approbation and support of that influential journal. At the same time I think it right to say that, were the press unanimous in condemning me, I should steadily follow the same course until convinced that it was wrong;

“— because right is right, to follow right  
Were wisdom in the scorn of consequence.”

But I demur to Your Excellency's assertion that the *Mercury* is the only journal that upholds me. Another influential journal, published on the northern side of the island, the *Launceston Examiner*, has also expressed approval of the course followed by the Judges, and disapprobation of that pursued by your late Advisers. For example, I find in an article upon the original correspondence this passage—“They (the Judges) then proceeded to point out in the most unanswerable manner, and in language of befitting temper and dignity, the dangers which must attend on the appellate jurisdiction of the Executive Council.” And in another article—“The several letters that passed between the Judges and the Governor are couched in moderate and dignified terms, but we regret we cannot say so much for the memoranda of Ministers. . . .” The same journal condemns the course pursued by Your Excellency's late Advisers in terms of such severity that I will not risk the provoking of irritation by quoting them. The course thus condemned is the same which Your Excellency is singular in approving. It is thus evident that you are mistaken in asserting that the *Mercury* is the only journal which upholds me.

Your Excellency's exulting depreciation of the support afforded me by the public press induces me further to record—and I do so with satisfaction—that the comments of the leading organs of public opinion in the neighbouring Colonies of Victoria and New South Wales have been favourable to the Judges. The *Argus* observes “It is, of course, needless to say that the controversy was conducted on the part of His Excellency and their Honors in the language of gentlemen occupying official positions, and we wish we could add that the Ministerial contributions to the correspondence were distinguished by equal courtesy. . . .” The *Australasian* remarks of the correspondence that “its tone was unexceptionable. Nothing in it was incompatible with the highest respect for the dignified position of the Governor on the one side and the Judges on the other, or calculated to in the slightest degree impair their amicable personal relations. It is impossible to express a similar opinion of the style and spirit of the contributions made to the discussion by the various memorandums of the Ministers upon the letters handed to them by the Governor. . . .”

Such are the terms of approval in which these organs of public opinion refer to a correspondence which Your Excellency, on the contrary, characterizes as an “attack” upon you—as the production of “pleaders” and “managers of an impeachment”—as “descending into an arena”—as conveying “imputations upon” Your Excellency—as sophistical, undignified, and I know not what besides. I fear that these quotations will—to adopt Your Excellency's own phrase—“dispel” some “happy illusions” as to the preponderance of support afforded by the Australian and Tasmanian press.

The *Sydney Morning Herald* also, in reference to Your Excellency's despatches, says—“They show clearly that the relations subsisting between the Governor and the Judges—especially the Chief Justice—have for a considerable time past been very unsatisfactory; and although Mr. Weld's vindication of his own part in the quarrel is most elaborate and voluminous, the impression of outsiders who peruse the correspondence will probably be that it was he rather than the Judges who had—whether consciously or unconsciously—an interest in its non-appearance before the public. It seems to have been suggested out of doors that the Ministry had kept back the papers in order to screen the Judges. Their Honors, however, who assign this rumour as a reason for their request for publicity, will probably suffer less than any body else in public esteem, now that their request has been tardily complied with.”

Before concluding I wish to say, if necessary, once for all, that while I have been obliged to characterize the assertions contained in the Memo. under reply as misrepresentations, and have proved them to be so, I do not impute that they are intentional.

I beg respectfully to request that publicity may be given to this letter without needless delay, considering that it is a defence against an unexpected attack, and an answer to charges some of which are quite new and have not before been even hinted at during this protracted correspondence.

I have the honor to be,

Sir,

Your Excellency's most obedient humble Servant,

His Excellency the Governor,  
Government House, Tasmania.

FRANCIS SMITH, C.J.

*Government House, 15th June, 1878.*

SIR,

I AM directed by the Governor to acknowledge the receipt, this day, of Your Honor's letter of the 13th instant, which His Excellency will at once forward to Ministers for publication in accordance with Your Honor's request.

I have the honor to be,

Your Honor's most obedient Servant,

W. H. ST. HILL, *Lt.-Col., Private Secretary.*

*His Honor Sir FRANCIS SMITH, Chief Justice.*

*Chief Justice's Chambers, 18th June, 1878.*

SIR,

YOUR Private Secretary's letter of the 15th instant informs me that Your Excellency will at once forward my letter of the 13th to Ministers for publication. I find on enquiry at the Colonial Secretary's Office this morning that this has not yet been done, although anticipated in the course of the day.

Every innocent man is expected to be prompt in repelling accusations; and delay exposes him to misconception. If the letter should even be forwarded to Ministers in the course of the day there will be further delay in the Government Printer's Office.

Under these circumstances I think it right to guard against misconception possibly arising from the length of time that I seem to be silent with reference to Your Excellency's fresh charges, by sending to the public newspapers the press copy of my letter for immediate publication, and deem it courteous to Your Excellency so to inform you.

I have the honor to be,

Sir,

Your Excellency's obedient Servant,  
FRANCIS SMITH, *C.J.*

*His Excellency the Governor, Government House, Tasmania.*

*Government House, 19th June, 1878.*

SIR,

I AM directed by the Governor to enclose for Your Honor's information copies of two Memoranda which have passed between His Excellency and his Advisers.

I have the honor to be,

Your Honor's most obedient Servant,

W. H. ST. HILL, *Private Secretary.*

*His Honor Sir FRANCIS SMITH, Chief Justice.*

#### MEMORANDUM FOR MINISTERS.

IN reference to His Honor the Chief Justice's letter of 18th June, transmitted to Ministers the same evening, the Governor observes that His Honor has carried out his intention expressed therein of publishing his letter of the 13th June in the newspapers.

That letter was received on the afternoon of Saturday, the 15th June, submitted to Executive Council on Monday, the 17th June, and was under consideration of the Cabinet on Tuesday, the 18th June, when on that day His Honor took the unusual course of sending it for publication to the newspapers without affording time for consideration or reply.

Under these circumstances Ministers will be so good as to advise the Governor whether it should now be published in an official form at the Government Office.

*Government House, 19th June, 1878.*

FRED. A. WELD.

#### MEMORANDUM FOR THE GOVERNOR.

MINISTERS have the honor to acknowledge the receipt of His Excellency the Governor's Memorandum of this day's date. They regret the precipitancy shown by His Honor the Chief Justice in

publishing his last letter on the day upon which it officially reached Ministers, and before they could possibly have had the opportunity either of considering its contents or of arranging for its publication. Under the circumstances, Ministers advise that the letter in question be not now published in an official form.

W. R. GIBLIN.

*Public Buildings, 19th June, 1878.*

*Chief Justice's Chambers, 20th June, 1878.*

SIR,

I HAVE the honor to acknowledge the receipt, this day, of your Private Secretary's letter of the 19th instant, enclosing copies of two Memorandums of the same date, one from Your Excellency to Ministers, and the other from Ministers to Your Excellency.

I beg to draw Your Excellency's attention to the fact that I did not, as Your Excellency supposes, send my letter of the 13th instant "for publication to the newspapers without affording time for consideration or reply." I did receive a reply to that letter through your Private Secretary dated the 15th instant informing me that Your Excellency would "at once forward it to Ministers or publication." I should not have caused the letter to be published, if I had not received a reply.

I observe that Ministers have, at Your Excellency's suggestion, advised that my letter "be not now published in an official form." The only interpretation I can put upon this decision is that it is intended as a punishment for the "precipitation" shown in publishing my last letter. The punishment may be deemed severe; but I submit with equanimity.

The only reason for printing any of the correspondence at the Government Printer's at this time was, not to make the correspondence official, but for the convenience of multiplying copies in order to facilitate the present object, which is publication in the newspapers.

The warrant for printing at the Government Printing Office is the anticipation that Parliament will sanction it by ordering the documents to be printed as parliamentary papers. I have attained the present object more directly and more expeditiously than by the roundabout method of first printing at the Government Printing Office; and shall attain the ultimate object of making my letter part of the official correspondence all in good time. That will be ordered by Parliament, if Parliament should think fit to order any of the correspondence to be officially printed.

I demur to the imputation of "precipitation." What just man will say that my letter should not be published without delay when the accusations to which it was an answer were already before the public? Who will say moreover that these accusations ought not in common fairness to have been submitted to me before they were published?

I had already had experience of the sort of diligence to be expected in getting my letter published from the mode previously adopted by the Government in "arranging for publication." On the 3rd instant I was told by your Private Secretary that Your Excellency "had placed my three communications in the hands of Ministers" for publication. Yet that publication did not take place until the 13th. I did not care to trust to such tardy "arrangements"; and as the single object at present, both on the part of the Government and myself, is publication in the newspapers, I am at a loss to perceive why that object should not be attained in the quickest and most direct manner.

I propose to cause the present correspondence to be published unless Your Excellency has any further observations to make,

I have the honor to be,

Sir,

Your Excellency's obedient Servant,

FRANCIS SMITH, C.J.

*His Excellency the Governor,  
Government House, Tasmania.*