

(No. 19.)



1859.

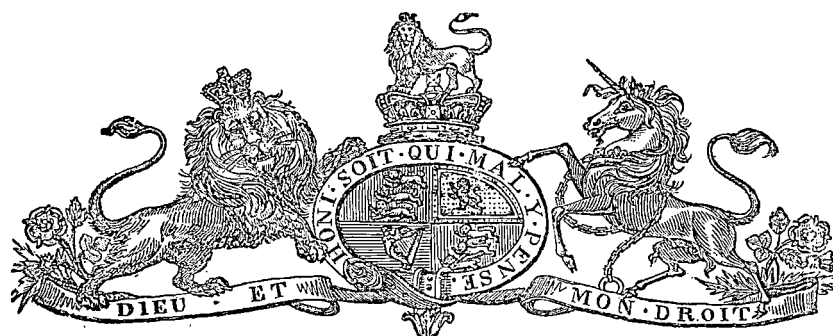
T A S M A N I A.

M R. A B B O T T.

**CORRESPONDENCE BETWEEN THE GOVERNMENT AND
THEIR HONORS THE JUDGES.**

(Return to Address. Mr. Miller, 9 August.)

Presented by Mr. Attorney-General, and ordered by the House to be printed,
17 August, 1859.



Judges' Chambers, 20th May, 1859.

SIR,

WE have the honor to inform you that Mr. Edward Abbott has applied to us to appoint a day for hearing his application for a Grant of 9A. 3R. 0P. of land, part of the property known as the Launceston Swamp.

Adverting to the position in which we stand with reference to this case, it is our deliberate opinion that we ought not to hear it.

As regards the Chief Justice, upon the fullest investigation of the case in all its bearings, he declared his opinion that Mr. Abbott had utterly failed to show any tenable ground whatsoever in support of his claim; and accordingly advised, in the teeth of a Despatch from the Secretary of State directing that Mr. Abbott should have the advantage of litigating his case before the Supreme Court, that a *Scire facias* should *not* issue to enable him to do so. The Chief Justice was also, in 1847, Counsel for the Crown before the then Caveat Board on an application by Mr. Abbott for a portion of the same land, which he resisted in the strongest manner, in the perfect conviction that the claim was utterly unfounded; and afterwards, on the occasion of a majority of the Commissioners being in favour of the application, he advised the Crown that they were not in any manner bound to accede to it.

Mr. Justice Horne stands in the same position, he having since the year 1841 steadily advised the Government against the claim of Mr. Abbott.

We take it to be a well-established principle, inherent in the constitution of judicial tribunals, that Judges should bring to the hearing of the case a mind not only perfectly unbiassed, but even free from the influence of previously expressed opinions upon its merits. So fully is this principle recognised in England, that it is the invariable custom for a Judge not only not to try a case in which he has been engaged as Counsel at the Bar, but even to abstain from delivering any opinion in the event of its coming in any shape before him when sitting with other Judges in Banco. And we conceive that this principle will apply far more strongly to us, both in our former position as Law Officers of the Crown solemnly advising it upon its interests, which we regard as widely different from that of a mere retained Advocate of a party, and in our present position where we execute the functions of both Judge and Jury, which is in our view essentially distinct from acting in the former capacity only.

Governed by these considerations, and assuming the state of facts upon which we have previously acted to be substantially the same, it is our deliberate conviction that no decision which we could give would be regarded as satisfactory, either by the party against whom it is pronounced or by the public generally; an opinion which is not in our judgment in the slightest degree affected by the circumstance of Mr. Abbott, who has no other alternative, waiving objection on his part by seeking to bring his case before us. We ought not consequently to be placed in such an invidious position as Judges of the highest Court of Judicature in the Colony.

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In conclusion, we therefore point out that the course taken in the analogous case of the late Captain Cheyne, viz., that of arbitration, ought in our judgment to be pursued in the present instance.

We have, &c.

V. FLEMING, C. J.
THOMAS HORNE.

The Honorable the Colonial Secretary.

*Colonial Secretary's Office,
28th May, 1859.*

GENTLEMEN,

I HAVE the honor to acknowledge the receipt of your Honors' letter of the 20th instant, having reference to the application by Mr. Edward Abbott for the appointment of a day for hearing his claim to certain land in the Swamp at Launceston, and suggesting that the case might be referred to arbitration.

In reply, I have the honor to inform you that your communication was duly submitted to His Excellency the Governor in Council, and I am directed to forward to your Honors a copy of the Council Minute thereupon as follows:—

“The Governor in Council (upon consideration of their Honors' letter and the circumstances of the case) does not feel justified in referring Mr. Abbott's claim to arbitration.”

I have, &c.,

WILLIAM HENTY.

*Their Honors
The Judges of the Supreme Court.*