

it so—of the Governor upon the person whom he has appointed, if there is nothing against that person being appointed. I think it is useful to refer here to what was done at the time Sir Robert Collier was appointed to the Privy Council. The action taken by the House of Commons then was, I submit, the proper and constitutional course which should have been taken in this case. This occurred in 1872. Sir Robert Collier was appointed temporarily for three days to the Court of Common Pleas, with the view of qualifying him, by having held that office, to be a judicial member of the Privy Council. I think I am entitled to refer to what took place in the House of Commons. The result was that the Government were very nearly turned out—they only got a majority of 27. That was a vote of censure passed upon the Government for having made such an appointment.

*Sir R. Stout* : And the Government were defeated at the poll.

*Mr. Harper* : Yes! I am glad my learned friend has told me so. I am glad to learn that the Government were beaten upon the poll. As pointed out in Todd, Parliament has got its powers, and we cannot control them in any shape or form. I allude to this to show that if the Ministry or the Government for the time being attempt in any way to increase the number of Judges, Parliament has got its remedy. Therefore, there was a reason, and, I submit, a good reason, why the Legislature should be satisfied to trust to the Governor exercising this unlimited power of appointment in the first instance. I say that, in answer to what my learned friend has repeatedly said, over and over again, that your Honours are bound by this constitutional principle that the salaries must be ascertained and established before any appointments.

*Sir R. Stout* : But what was unconstitutional in the appointment of Sir Robert Collier?

*Mr. Harper* : I am only showing what was done in that case.

*Mr. Justice Conolly* : There was a vacancy in the Court of Common Pleas at the time.

*Mr. Harper* : Yes, but it was looked upon as not a proper act on the part of the Government. There is another passage in Todd which I shall read—it may be regarded as a little more against me than the other one, but I do not dispute the power of Parliament to interfere in any shape or form—

*Mr. Justice Richmond* : You are rather suggesting that the power was left unlimited—that as many Judges as the Governor is advised to appoint the Legislature ought to provide for?

*Mr. Harper* : Yes.

*Mr. Justice Richmond* : Is not that rather loading your argument, and might it not sink it?

*Mr. Harper* : Yes, if the power were not properly exercised by the Governor. But I am assuming, and we must give credit—

*Mr. Justice Richmond* : If you are trying to convince us that the House ought to provide for every additional Judge that the Governor chose to appoint without consulting it, we might find it difficult to believe in the existence of such a power in the Governor.

*Mr. Harper* : I submit that, taking the Act by itself, and reading it *in pari materia* with English and other colonial statutes—there being no limitation in number, there being a fixity of salary, and there being no source from which that salary is to be derived—then I submit that certainly with regard to the number the Legislature have chosen to give the Governor power to appoint Judges—and he has done that in past times, as has been seen from the original number of two being increased to five. It is true, it is said there is provision for five Judges, but they are not limited to the number of five by the Act of 1882. If it can be said that the limit is five, then that ought to have been put in the principal Act itself, which, however, gives the power to appoint from time to time.

*Mr. Justice Richmond* : Here—and this seems to be the difficulty of your argument—the Governor has power to appoint, but the Legislature must provide; and if the two do not concur we come to this difficulty—and I venture to call it a scandal—of having a Judge of the Supreme Court without having a salary provided.

*Mr. Harper* : That is, of course, a difficulty I am coming to; but, I submit again to the Court, if the difficulty and scandal exists, it has been created by the Legislature in this particular instance; and a reference to *Hansard* will show that. What we submit is that, notwithstanding the constitutional principle laid down in the Act of Settlement, under the terms of the Act of 1882 it cannot be said that such a power of appointing from time to time has been limited by that principle as if it has to be read into the Act, and that no more than five Judges were to be appointed. We submit that the Governor had the power in the first instance, and it comes right down from the ordinances. It has been given to him advisedly, and the words “from time to time” occur right through. A Judge is a Judge all the same, salary or no salary. The fact of a salary not having been appropriated to him cannot, I submit, invalidate his appointment and enable your Honours to repeal this Commission. The only way in which that can be done is—and your Honours are invited to do so by my learned friends—that those words “from time to time,” in the Act of 1882 and the preceding Acts, should be limited by reference to other Acts giving salaries to the Judges under those Acts. I may put it in this way : Supposing, in the Act of 1882, the words had occurred “from time to time,” as they do, and there were salaries also fixed to be paid to Judges generally, but not the exact number, it could not be contended for one moment that the Governor would not have the right to appoint. He would have to take the initiative in doing so. It is given to him to do so in the first instance. So in this case we submit that, however unfortunate the circumstances may have turned out, for which we are not responsible, the appointment is none the less good. That brings me to where I started this morning, when I said advisedly that all the circumstances surrounding the appointment of Mr. Edwards in this case were according to the Act in the first instance; and the Commission was issued in the first instance by the Governor, and I have not been able to find any authority—and I submit there is none—to show that the Commission can be revoked. We shall be prepared to show that there may be an office without compensation, which cannot be reached by *scire facias*; and so in this case we shall rest our case in that respect, not mainly, but as a