

And, though in this section it had been provided that the sums so appropriated could be altered by Colonial Act, it concludes by providing that it should not be lawful for the Colonial Parliament to make any diminution in "the salary of any Judge to take effect during the continuance in office of any person being such Judge at the time of the passing of such Act." The Constitution Act, then, subject to any Act of the Colonial Parliament being afterwards passed altering the salaries attached to the respective offices of Chief Justice and one Puisne Judge, fixed the salaries of these offices. The 64th section is an appropriation provision; the 65th is not, or, at any rate, is not that solely. There were then, when "The Supreme Court Judges Act, 1858," was passed, salaries fixed and moneys appropriated, and in every sense "provided by law," for two offices of Judge of the Supreme Court, and no more—a Chief Justice and one Puisne Judge. The Colonial Parliament having before it, then, these provisions of the Constitution Act, proceeds to provide what, in my opinion, is in effect that, *whatever Judges* of the Supreme Court are appointed by the Crown, they shall hold office during good behaviour, shall have "a salary provided by law," that a lawfully-provided salary shall be enjoyed by each Judge from the time he receives his commission, and throughout the time he holds it; and in express terms enacts that throughout the Judge's tenure of office *there shall be paid*—meaning, of course, out of the colonial revenues—to each Judge a salary equal at least in amount to that which at the time of his appointment was payable by law. This provision is mandatory. It is intended to secure to the person the continued payment of that salary which at the time of his appointment was payable by law; but in the public interest it is intended to maintain the independence of the office. If this provision could not be satisfied, the appointment could not, as I think, be made. It could not be satisfied unless at the time of appointment there were a salary payable by law. It certainly would be a strange thing to find that, while provision is made for fixing by law the salary of a temporary Judge, and for securing the actual payment of the lawful salary of such a Judge, yet the Legislature had so provided that a Judge for life might be appointed without lawful salary; and so this provision for the maintenance of the independence of the Judge appointed for life have no effect in his case.

This provision in the Act of 1858, section 6, has not been re-enacted in the Act of 1882. The draftsman was probably under the impression that the provision in the Constitution Act was to the same effect, and therefore introduced into the Act of 1882, section 11, the provision that "the salary of a Judge shall not be diminished during the continuance of his commission." This 11th section, no doubt, was intended to secure that a salary equal at least to that payable by law at the time of the appointment shall be paid throughout the tenure of the commission. The Legislature cannot be supposed to have intended by this provision to be attempting to put a restraint upon itself. The object of the provision in the Constitution Act was to put a restraint on the Colonial Parliament, though it was also to directly enact that the salary should not be diminished.

The provision in the 6th section of the Act of 1858 was intended to be a provision by Parliament for the actual payment of the lawful salaries throughout the tenure of office. The draftsman of the Act of 1882 possibly somewhat misapprehended the full effect of that section, otherwise he would not have omitted it. It may be, and probably was, the case that he had before him the provisions of "The Civil List Act, 1873," and conceived that the provisions there were enough, together with the legislative declaration in the 11th section. "The Civil List Act 1863 Amendment Act, 1873," as already stated, provides that the sum of £7,700, granted to Her Majesty by "The Civil List Act, 1863," for defraying the expenses of the salaries of the Judges of the Supreme Court, *shall* be applied in paying to *the Judges* of the said Court respectively the annual salaries specified in the schedule—that is, "Annual salary of *the* Chief Justice of the Supreme Court, £1,700; annual salaries of four Puisne Judges of the Supreme Court, £1,500 each."

That Act, with the Act of 1863, then, not only grants the funds, but provides how those funds *shall* be applied, and, in doing so, speaks of these five offices as being "the Judges of the Supreme Court." The Civil List Act of 1863 had granted the sum *in globo*; the Amendment Act of 1873 provides how the sums "shall" be applied, not how they "may" be applied; and is, I think, intended to be as distinct a provision as that in the Constitution Act, which is, that "the salaries of the Judges shall be those respectively set against their names in the schedule." The terms of a mere Appropriation Act are, there shall and "may" be applied any sum or sums, &c., not exceeding so-and-so.

I am satisfied that no inference in favour of the validity of the appointment now in question is capable of being drawn from the substitution of section 11 in the Act of 1882 for section 6 in that of 1858.