

Then came the Supreme Court Act of 1882, under which the appointment now in question was made. It is admitted that at the time the appointment was made no provision had been made for the payment of a salary to a fifth Puisne Judge. There was then no salary payable by law to the person so appointed. Effect could not be given to the 11th section, for he had no salary which could be diminished. This provision, as already pointed out, was intended to secure during the whole tenure of office payment of a salary at least equal to a lawful salary payable at the time of appointment.

The manifest intention of the superannuation provision could not have effect given to it, for undoubtedly the Legislature was not providing a superannuation allowance for an officer who had no salary. Then, the provision as to the appointment of a temporary Judge could not be properly satisfied; for that provision contemplates not only that each Judge other than the Chief Justice shall have a salary, but shall have a salary payable by law; and here would be a Puisne Judge without any salary.

There are, then, in the Act of 1882 ample indications that in the public interest a secured salary shall be payable to each Judge throughout the tenure of his office, and that on his resignation he shall have a definite superannuation allowance proportioned to the amount of his lawful salary.

These provisions alone would in my opinion be sufficient to show that the general words in the 5th section relied upon as authorising the appointment now in question must be deemed to be controlled, and that the power can only be exercised if and when these indispensable provisions can be complied with. But when these general words are also found to be used in relation to the making appointments practically for life, it is still more apparent that that limitation upon the authority ought to be implied which the provisions relating to salary and superannuation suggest.

If the appointment is valid, what is the remedy? It is answered; Parliament to provide a salary if it thinks fit; and, as the Ministry of the day when the appointment was made had thought fit, the Legislature also ought to think fit, whether it does approve or not, and so for the credit of the country feel itself forced to do what it disapproves of. This, no doubt, is a position Parliament may often find itself in when the Ministry of the day has done an authorised act—when, in the exercise of that general but undefined and inexpressed authority subject to Parliamentary sanction afterwards to be obtained, the Ministry in a case of emergency does some act. This, however, is not the meaning of the contention. The contention is that Parliament has expressed itself, has given the authority, but retained the power of repudiation. I cannot think that Acts of Parliament are to be interpreted from such a point of view.

It is not contended in support of the validity of the appointment that Parliament has probably given a power it did not intend to give. That, no doubt, was felt to be dangerous ground to take; for if this were admitted it was no doubt felt that the argument as to the interpretation would be much weakened.

It was also contended that the legislative provisions in the Act of 1882, expressed and to be implied, relating to a fixed and secured salary, were satisfied in the case of this particular appointment, inasmuch as the Governor had contracted to pay the appointee an annual salary and that the Governor had power so to enter into a binding contract, and so it was urged that there was a "*salary provided by law.*" To lay a foundation for this contention, a mass of matter is brought before the Court for the purpose of showing that a contract in fact was made, and, as I understand, it was contended that the authority to enter into the contract was to be found in the power to appoint. The idea that the 37th section or any section in "*The Crown Suits Act, 1881,*" gave any authority to enter into any contract was expressly repudiated at the argument, and with good reason.

Does this power to appoint, assuming it to exist, give the power to contract for a salary? In my opinion, irrespective of any other considerations, the whole course of legislation as to the appointments of Judges, and the express provisions therein as to their salaries, show, that nothing was left to Executive action in this respect, except in one case—the appointment of a temporary Judge; and in that case, as already pointed out, express provision is made on the subject, defining a limit, and providing a salary within the limit, and providing the means for the payment of it. I think it beyond question that no power was given to contract. It is unnecessary, therefore, to go at length into the facts relied upon as showing a contract attempted to be made. It seems to me clear from the facts that the Ministry of the day did not profess to enter into such a contract, or profess to be able to do so. It appears that the Ministry were desirous of setting up the Commission authorised to be set up by the 20th section of