

DESPATCHES AND CORRESPONDENCE

RELATIVE TO THE

LEGALITY

OF THE

NEW PROVINCES ACT, 1858.

PRESENTED BY COMMAND TO BOTH HOUSES OF THE GENERAL ASSEMBLY.

OPINION OF THE LAW ADVISERS OF THE CROWN
RELATIVE TO THE
LEGALITY OF THE NEW PROVINCES ACT, 1858.

No. 1.

COPY OF A DESPATCH FROM HIS GRACE THE DUKE OF NEWCASTLE TO GOVERNOR SIR GEORGE GREY, K.C.B.

Downing Street,
10th August, 1861.

SIR,—

Governor Gore Browne in his Despatch of the 29th November last, No. 124, forwarded, in compliance with a Resolution of the House of Representatives, a Case which they were desirous should be submitted for the opinion of the Law Officers of the Crown, having reference to the legality of the "New Zealand New Provinces Act" of 1858.

I accordingly caused the Case to be referred to the Law Officers, and I now transmit to you for your own information, and for that of your Responsible Advisers, a copy of a letter received in reply, from which it will be seen that the Law Officers were of opinion that the General Assembly had not the power to constitute new Provinces.

As the Act in question was one of much value and importance, and as great confusion would be caused in the Colony by impeaching the proceedings which had taken place under its authority, I came to the conclusion that an Act of Parliament ought at once to be passed, to establish the validity both of the local Act and all that had been done under it, and at the same time, to give power to the local Legislature to constitute new Provinces in future.

The Act received Her Majesty's assent on the 11th ultimo, and a copy of it is herewith forwarded to you.

I have, &c.,

Governor Sir George Grey, K.C.B.,
&c., &c., &c.

NEWCASTLE.

Enclosure 1 in No. 1.

THE LAW OFFICERS TO THE DUKE OF NEWCASTLE.

Lincoln's Inn,
March 11th, 1861.

MY LORD DUKE,—

We are honored with your Grace's commands, signified in Sir Frederick Rogers' letter of the 4th March instant, in which he stated that he was directed by your Grace to transmit to us the accompanying "case," which had been prepared by a Select Committee of the House of Representatives of New Zealand, together with other documents having reference to the legality of the "New Provinces Act of 1858," and requesting that we would favor your Grace with our opinion on the questions set forth in those Papers.

In obedience to your Grace's commands, we have attentively considered the Papers transmitted to us, and beg leave to REPORT—

That by the Constitution Act, 15th and 16th Victoria, c. 72, s. 69, the General Assembly had express power to constitute New Provinces in New Zealand, and to alter the boundaries of existing Provinces. But the fact of the repeal of this 69th section by the 20th and 21st Victoria, c. 53, and also the exemption by the same Act of sects. 3 and 18 of 15th and 16th Victoria, c. 72, from the power of the General Assembly, prove conclusively that the General Assembly no longer has the power to constitute New Provinces, and for that purpose to alter existing Provinces. It follows, therefore, that the Act of Assembly of 21st August, 1858, so far as it attempts to create New Provinces by carving them out of existing Provinces, is *ultra vires*, and at variance with the existing Imperial Statutes.

It is impossible to sustain this Act of the Assembly by the doctrine of "inherent power."

No inherent power can enable the Assembly to do anything which is inconsistent with, and therefore forbidden by an Imperial Statute. The Act of Assembly of August, 1858, is, in effect, a repeal of the 3rd and 18th sections of the Constitution Act.

Nor can the power of the Assembly "to repeal, alter, and suspend" the provisions of the Constitution Act be appealed to; for, by the Act of 20th and 21st Victoria, c. 53, sect. 3 and 18 of the 15th and 16th Victoria, are exempted from the operation of this power.

The powers of the General Assembly are powers delegated to them by the Constitution Acts, and cannot be exercised, save in conformity with the two Imperial Statutes.

These observations are, in effect, an answer to the whole of the questions which are drawn out in detail in the "Case" transmitted from New Zealand; but, for fear of misapprehension, we proceed to answer these questions *seriatim*.

The first question must be answered in the negative; the second in the affirmative; the third, fourth, and fifth questions must be answered in the negative.

To the sixth question the answer is, that the "New Provinces Act," was in excess of the powers given to the General Assembly.

To the seventh question the answer is, that there is no longer a power of constituting New Provinces, if the doing so involves the alteration of existing Provinces.

To the eighth question we answer that, by the 3rd section of the Act of 15th and 16th Victoria, the Provincial Council is to consist of nine members, and the Superintendent is distinct from the Council; but, if by the New Provinces Act, the Superintendent is made an additional member of the Council, the Council will consist of ten and not of nine members; and, if the Superintendent is not added, but chosen from among the Council, then the Council will be reduced to eight members, and will not consist of nine. In any way, the New Provinces Act interferes with, and alters, the composition of the Council, or the relative position of the Superintendent and the Council, but which the Legislature of New Zealand had no power to do.

To the ninth question the answer is, that, in our opinion, the Provinces of Hawke's Bay and Marlborough are not lawfully constituted.

We are, &c.,

RICHARD BETHELL,
WILLIAM ATHERTON.

His Grace the Duke of Newcastle, K. G.,
&c., &c., &c.

Enclosure 2 in No. 1.

An Act to declare the validity of an Act passed by the General Assembly of New Zealand, intituled an Act to provide for the Establishment of new Provinces in New Zealand.
[11th July, 1861.]

WHEREAS by an Act of the Session holden in the fifteenth and sixteenth years of Her Majesty, intituled "An Act to grant a Representative Constitution to the Colony of New Zealand," it was provided that certain Provinces therein mentioned should be established in the said Colony, and that in every such Province there should be a Provincial Council, and that there should be in the said Colony a General Assembly competent to make laws for the Peace, Order, and good Government of the same; and by the sixty-ninth section of the said Act it was further provided that it should be lawful for the said General Assembly to constitute new Provinces in the said Colony, and to appoint the number of Members of which the Provincial Councils thereof should consist, and to alter the Boundaries of any Provinces for the time being existing, provided always that any Bill for any of the said purposes should be reserved for the signification of Her Majesty's pleasure thereon: AND WHEREAS by an Act of the Session holden in the twentieth and twenty-first years of Her Majesty, intituled "An Act to amend an Act for granting a Representative Constitution to the Colony of New Zealand," it was enacted that the sixty-ninth section of the said first-recited Act should be repealed, and that it should be lawful for the said General Assembly to alter, suspend, or repeal all or any of the provisions of the said Act, except the third section, and certain others therein specified: AND WHEREAS the said General Assembly by an Act passed in a Session holden in the twenty-first and twenty-second years of Her Majesty, intituled "An Act to provide for the Establishment of new Provinces in New Zealand," did authorise the Governor of the said Colony to establish such new Provinces in manner therein mentioned, and the said Governor did establish certain new Provinces accordingly: AND WHEREAS doubts are entertained whether it was competent to the said General Assembly to make such provision, and to the said Governor to establish such new Provinces as aforesaid, and it is expedient that such doubts should be set at rest: AND WHEREAS it is also expedient that the said General Assembly should be at liberty to alter part of the third section of the hereinbefore first recited Act of Parliament, as follows:—

1st. It shall be lawful for the said General Assembly, by any Act or Acts to be by them from time to time passed, or for the Officer Administering the Government of New Zealand, acting under authority of any such Act or Acts, to constitute new Provinces in New Zealand, and to direct and appoint the number of Members of which the Provincial Councils of such Provinces shall consist, and to alter the Boundaries of any Provinces for the time being existing in New Zealand.

2nd. It shall be lawful for the said General Assembly to alter, suspend, or repeal so much of the third section of the herein-before first-recited Act of Parliament as provides that the Provincial Council in each of the Provinces thereby established shall consist of such number of Members, not being less than nine, as the Governor shall by Proclamation appoint.

3rd. The herein-before recited Act passed by the said General Assembly, and all Acts, matters, or things done under and in pursuance of authority created or given or expressed to be created or given by the same Act, shall be, and shall be deemed to have been from the passing or doing thereof, as valid and effectual for all purposes whatever as such Acts, matters, or things might or would have been if at the time of the passing of the same Act by the said General Assembly this Act of Parliament had been in force.

4th. The provisions of the two herein-before recited Acts of Parliament as altered by this Act shall apply to all Provinces at any time existing in New Zealand, in like manner and under the same conditions as the same apply to the Provinces established by the hereinbefore first-recited Act of Parliament.

Case for Opinion referred to in the above.

The attention of the Law Officers of the Crown is requested to the following Sections of the New Zealand Constitution Act, 15 and 16 Vic., cap. 72, viz:—

The Sections 2 to 31 inclusive, especially to the 2nd, 3rd, and 18th, and also to Section 69.

In pursuance of the powers vested in the Governor by Section 2, Sir George Grey, the then Governor of the Colony, issued a Proclamation dated 28th February, 1853, fixing the boundaries of the six Provinces named in, and established by the 2nd Section of the Constitution Act

And under the powers of Section 5 by another Proclamation of the 5th March, 1853, he constituted Electoral Districts, &c., for those Provinces.

Copies of such Proclamations are herewith. An outline map of the Colony is also herewith, shewing, in a general way, the Provincial divisions with the respective Electoral Districts as fixed by Sir George Grey's Proclamations.

It will appear from such maps, that Sir George Grey's Provincial Division exhausted the two principal Islands, the Northern and Middle Islands, leaving Stewart's Island, the smallest, without any Provincial Constitution.

The attention of the Law Officers of the Crown is further requested to the New Zealand Constitution Amendment Act, 20 and 21 Vic., cap. 53.

By the first Section of that Act, Section 69 of the Constitution Act is repealed. By the second clause, power is given to the General Assembly by an Act or Acts from time to time to alter, repeal, or suspend any of the provisions of the Constitution Act, except certain specified provisions, including Sections 3 and 18 in particular.

On the 21st August, 1858, an Act was passed by the General Assembly of New Zealand, intituled "An Act to provide for the establishment of New Provinces in New Zealand:" it was duly transmitted to the Imperial Government for allowance, and has been left to its operation; a copy of the Act is herewith.

In pursuance of such last mentioned Act, two new Provinces, viz., Marlborough (within the original limits of Nelson,) and Hawke's Bay (within the original limits of the Province of Wellington,) have been established by the Governor upon the petition of the requisite number of Electors, &c., according to the conditions prescribed by the Act.

Copies of the Order in Council establishing such new Provinces, and also establishing the Electoral Districts for the same, are also herewith.

An outline map of the Colony is herewith, shewing the alterations so effected in the boundaries of Provinces and of Provincial Electoral Districts.

The original Provinces with their respective boundaries and Electoral Districts having been fixed by the 2nd Section of the Constitution Act, and Sir George Grey's Proclamation of the 28th February, and the 5th March 1853; and the 69th Section of Constitution Act having been repealed previous to the Constitution of any new Provinces, the power to constitute new Provinces and new Electoral Districts, and to alter the boundaries of the original Provinces, and of the original Electoral Districts, rests either in some inherent power in the Legislature, or on the power given by the Constitution Amendment Act, to repeal, alter, and suspend the provisions of the Constitution Act, and the questions are:—

1st. Has the General Assembly of New Zealand any inherent power to create New Provinces, Provincial Legislatures, and Electoral Districts, or is the power of the General Assembly so to create merely a power delegated to them by the Constitution Act, and only to be exercised in conformity with the terms of that Act of the Imperial Legislature?

2nd. Does the repeal of Section 69 of the Constitution Act by the Constitution Amendment Act, take away the power originally conferred by Section 69 on the General Assembly, of creating New Provinces, and if not, on what grounds?

3rd. If, notwithstanding the repeal of Section 69 of the Constitution Act, the General Assembly has still the power of creating New Provinces and New Provincial Legislatures, can they, by an Act of Assembly, vest that power, either unconditionally or subject to the fulfilment of certain conditions, in the Governor, or any other person?

4th. Does the power given by Section 2 of the Constitution Amendment Act, to repeal, alter, and suspend the provisions of the Constitution Act, (Section 69 of the Constitution Act having been repealed

by Clause 1 of the Constitution Amendment Act,) empower the General Assembly to create New Provinces?

5th. Can the powers given by the Constitution Amendment Act, of repeal, alteration, and suspension of the provisions of the Constitution Act be exercised inferentially by passing over-riding Acts, or must that power be exercised directly and expressly as an alteration, suspension, or repeal of certain specified provisions of the Constitution Act, and has the New Provinces Act in fact repealed, altered, and suspended the Constitution Act as regards the Original Provinces and their boundaries and Electoral Districts?

6th. Was the passing of the "New Provinces Act, 1858," generally consistent with the powers conferred on the General Assembly by the Constitution and Constitution Amendment Acts?

7th. Adverting to the 3rd and 18th Sections of the Constitution Act, (which are excepted from the operation of the Constitution Amendment Act,) the question arises whether the repeal of the 69th Section of the Act has or has not taken away from the Legislature itself the power of constituting New Provinces?

8th. Adverting to the 3rd and 18th Sections, by which it is made essential, without power of alteration, that there shall be a Superintendent, and a Provincial Council consisting of not less than nine members, and that the Superintendent shall make laws, &c., with the advice, &c., of his Provincial Council;

And also having reference to the 9th, 10th, 11th, and 12th Sections of the Constitution Act, and generally to the scope and intention of that Act;—

A further question arises—whether the 11th Section of the New Provinces Act, by which the Superintendent is made eligible as a member of the Council and the Speaker thereof, is consistent with the Constitution Act; and whether the functions of the two offices of Superintendent and Member of a Provincial Council are or are not incompatible?

9th. Generally, the opinion of the Law Officers of the Crown is requested as to whether the conditions of the "New Provinces Act, 1858," being assumed as complied with in the case of Hawke's Bay and Marlborough, these Provinces are lawfully constituted?

No. 2.

SECOND CASE FOR OPINION PROPOSED BY MR. SEWELL,

NEW ZEALAND.

Auckland, 22nd Nov., 1861.

New Provinces Validity
Act. (Imperial.)

The Act of the Imperial Parliament declaring the validity of the New Provinces Act, has removed the doubt as to the power of the General Assembly to constitute New Provinces, but it has not removed all the questions arising upon the Colonial Act.

We have now to read the Constitution Act as if it had originally contained the 1st and 2nd sections of the New Imperial Act.

The first section declares that "it shall be lawful for the General Assembly by an Act or Acts to be by them from time to time passed, or for the Officer Administering the Government of New Zealand, acting under the authority of any such Act or Acts to constitute New Provinces, to appoint the number of members of which the Provincial Council of such Province shall consist, and to alter the Boundaries of any Provinces for the time being existing in the Colony."

The second section authorizes the General Assembly to alter, suspend, or repeal so much of the third section of the Constitution Act as provides that the Provincial Government shall consist of not less than nine members,

This is the extent to which the Constitution Act is expressly altered by the new Act.

Then by the 3rd section of the New Provincial Act all things done under it, are declared to be as valid as if the new Act had been in force at the time of the passing of the New Provinces Act.

And then, further, by the 4th Section of the new Act, all the provisions of the Constitution Act and the Constitution Amendment Act, as altered by the new Act are declared to be applicable to all Provinces for the time being existing in the Colony, in the same manner as if they had been established by the Constitution Act.

It is clear that the power is now restored to the General Assembly of constituting New Provinces, &c. It is also clear that they may authorize the Officer Administering the Government to constitute such Provinces, &c.

It is also clear that the number of members of a Provincial Council need not be limited to nine.

But reading this (in connection with the Constitution Amendment Act) as the law when the New Provinces Act was passed, it is not equally clear that such last-mentioned Act would have been or is now to be considered a due execution of the Legislative power so vested in the General Assembly: if not, it may now be necessary to supplement the Imperial legislation by some Act of the General Assembly under its new powers in order to validate the constitution of the New Provinces.

Upon this point I suggest that the further opinion of the Law Officers of the Crown in England should be taken as a guide to Ministers, and with a view to their proposing to the General Assembly the requisite measures to meet the case. It will be obviously wrong to leave the question in uncertainty.

The intention of Parliament (by the new Act) would seem to be to vest in the Legislature of the Colony the power from time to time, to constitute such New Provinces specifically as shall appear to it expedient; the Legislature in each succeeding Session being made the Judge as to the particular emergency requiring the erection of a new Province. This power is to be used from time to time. Can the Legislature by any Act of its own deprive itself of such power or erect a permanent machinery for creating New Provinces without reference to itself?

Further, the Act provides that New Provinces may be constituted by the Officer Administering the Government acting under authority of any such Act or Acts, intending thereby, as I conceive, to enable the Legislature to devolve upon the Governor, for the time being, Ministerial functions as regards the constitution of any new Provinces, but not so as to pass away from themselves the Legislative direction of determining, when and under what condition, such new Provinces shall be established. Do not the words, "Acting under authority of any such Act or Acts," limit the Governor's functions to Ministerial Acts, in pursuance of Acts to be from time to time passed for constituting new Provinces?

But the New Provinces Act has established a permanent self-acting machinery by which new Provinces are to be practically constituted by the joint action of a certain proportion of the electors of districts, in conjunction with the Governor, without reference to the Legislature. Is this in accordance with the Act of the Imperial Parliament, which provides that new Provinces shall be constituted "by the General Assembly by any Act or Acts to be from time to time passed by them or by the Officer Administering the Government acting under the authority of any such Act or Acts."

Again, Parliament having vested in the General Assembly, or the Governor, acting under their authority, the power of constituting new Provinces, has that power been duly executed by placing it practically in three-fifths of the electors of a district, subject to certain fixed conditions, the Governor's power being merely Ministerial, the Act obliging him to give effect to such action of the electors?

The Provinces which have been created under the New Provinces Act, have in fact been created only in obedience to and in performance of the Ministerial functions so vested in the Governor, not in the exercise of any discretion on the part either of the Legislature or the Governor.

A variety of incidental questions occur.—

The New Provinces Act of the General Assembly makes the Superintendent eligible as a Member of Council. I understand the Law Officers in England to have given their opinion that this is not consistent with the 3, 9, 10, 11, 12, and 18 Sections of the Constitution Act, the two offices of Superintendent and Provincial Council being incompatible. If so, will not this invalidate the Constitution of new Provinces?

The Law Officers are, I understand, of opinion that the powers given by the Constitution Amendment Act to repeal, alter and suspend certain provisions of the Constitution Act cannot be exercised inferentially by passing over-riding Acts, but must be exercised directly and expressly.

The New Provinces Act does not exercise that power *passim* inferentially, and not directly and expressly. Does the new Act remedy that defect? This is an important question as affecting other Acts of the General Assembly.

The effect of the 4th Clause of the new Imperial Act is not clear. It enacts that the provisions of the Constitution and Constitution Amendment Acts as altered by this Act, shall apply to all Provinces at any time existing in New Zealand in like manner and under the same conditions as the same apply to the Provinces originally established by the first Constitution Act.

Is the effect of this, to make the provisions of the Constitution Act (altered originally by the 1st and 2nd Sections of the new Act) applicable to all Provinces in New Zealand, new as well as old? Or does it validate the various departures from the Constitution Act made by the New Provinces Act? *e.g.* The Constitution provides that the Superintendent of a Province shall be elected by the body of electors; the New Provinces Act provides that, as regards the new Provinces, the Superintendent shall be elected by the Provincial Council. How is this discrepancy to be reconciled?

The 13th Clause of the Constitution Act (unalterable) gives to the Superintendent and the Provincial Council the power to make and ordain Laws and Ordinances.

The 28th Clause (unalterable) provides that whenever any Bill shall have been assented to by the Superintendent as aforesaid, the Superintendent shall forthwith transmit to the Governor an authentic copy thereof.

The 29th Clause (unalterable) empowers the Governor within three months after any Bill has been received by him after its original transmission as enjoined by the 28th Clause (also unalterable) to disallow it.

The 13th Clause of the New Provinces Act enables a Bill to be twice presented to and received by the Governor, and declares the limit of three months to commence from the date of the second receipt.

That Clause also declares in regard to any such Bill that it shall be lawful for the Governor "to make such amendments therein as he may think needful and expedient, and to return such Bill with the amendments to the Superintendent, whose duty it shall be to transmit the Bill and amendments to the Provincial Council, and the consideration of such amendments by such Council shall take place in such convenient manner as the Council shall think fit; and on the Bill being again presented to the Governor, either amended or not, it shall be lawful for the Governor at any time within three months after he shall have received the same, to signify his pleasure thereon."

In this clause no provision is made for the consideration of, and concurrence in these amendments by the Superintendent; a new element is introduced, viz., the Governor, into the Legislation of the Provinces—but the Constitution Act (unalterable in this respect) vests the legislative power in the Superintendent and Provincial Council. It also appears to over-ride the power of the Superintendent altogether, whose concurrence in the Governor's amendments is not made essential.

Is the 13th clause of the New Provinces Act an infringement of the unalterable clauses, quoted above, of the Constitution Act? And, if so, how will that affect the validity of the New Provinces Act? In particular, could the General Assembly make the Governor a direct party to Provincial Legislation by enabling him to propose amendments to Provincial Bills? Could they exclude, or have they in fact excluded the Superintendent from taking part in the consideration of amendments so proposed. Could they extend the time within which the Governor's power of allowance or disallowance should be exercised, beyond three months from the first receipt of the Bills?

HENRY SEWELL.