

PAPERS

RELATIVE TO

THE APPOINTMENT OF MEMBERS

OF THE

LEGISLATIVE COUNCIL.

PRESENTED TO BOTH HOUSES OF THE GENERAL ASSEMBLY, BY COMMAND OF
HIS EXCELLENCY.

WELLINGTON.

—
1868.

PAPERS RELATIVE TO THE APPOINTMENT OF MEMBERS OF THE LEGISLATIVE COUNCIL.

COPY of a DESPATCH from Governor Sir GEORGE GREY, K.C.B., to His
Grace the Duke of BUCKINGHAM.

(No. 142.)
MY LORD DUKE,—

Government House, Auckland,
24th December, 1867.

I have been requested by my Responsible Advisers to bring under your Grace's consideration the enclosed copy of an opinion by the Attorney-General of New Zealand regarding the legality of the appointment of the Members of the Legislative Council in this Colony, with a view to the passing of an Act of the Imperial Parliament to validate all past Acts of the General Assembly of New Zealand, and to prescribe exactly the mode of summoning persons as Members of the Legislative Council of New Zealand, if, in your Grace's opinion, a necessity exists for an application being made to Parliament for an Act of this nature.

Memo. by Mr. Stafford, Dec. 16, 1867.
Sub-Enclosure,
Memo. by Mr. Prendergast, Dec. 5, 1867.

I have, &c.,

His Grace the Duke of Buckingham and Chandos.

G. GREY.

Enclosure.

MEMORANDUM by Mr. STAFFORD.

Wellington, 16th December, 1867.

THE enclosed copy of a Memorandum by the Attorney-General of New Zealand raises questions of the utmost importance as affecting the legality of the appointments of Members of the Legislative Council and consequently the validity of the Acts of the General Assembly, and it is requested that the question, as detailed in the Memorandum by the Attorney-General, may be brought forthwith under the consideration of the Right Honorable the Secretary of State for the Colonies, in order that, if necessary, an Act of the Imperial Parliament may be passed as early as possible in the ensuing session to validate all Acts of the General Assembly heretofore passed, and to prescribe exactly the mode of summoning persons as Members of the Legislative Council.

His Excellency the Governor.

E. W. STAFFORD.

Sub-Enclosure to Enclosure.

To the Hon. the COLONIAL SECRETARY.

As it appears to me that the course followed in summoning persons to the Legislative Council as members thereof is not in accordance with the Constitution Act (15th and 16th Vict.), I have thought it proper that the subject should be brought under the consideration of the Government.

The thirty-third section of the Constitution Act (15th and 16th Vict.), provides that for constituting the Legislative Council of New Zealand it shall be lawful for Her Majesty, before the time to be appointed for the first meeting of the General Assembly, by an instrument under the Royal Sign Manual, to authorize the Governor, in Her Majesty's name, to summon to the Legislative Council "such persons, being not less in number than ten, as Her Majesty shall think fit"—so much of the section applied to the first constitution of the Legislative Council. The section then proceeds to enact that it shall also be lawful for Her Majesty from time to time, in like manner, to authorize the Governor to summon to the said Legislative Council "such other person or persons as Her Majesty shall think fit."

The power given to Her Majesty is that of authorizing by a certain specified instrument (namely by instrument under the Sign Manual) the Governor to summon persons to the said Council, such persons being such as "Her Majesty shall think fit." The true construction to be put upon the enactment is, as I think, that the instrument whereby Her Majesty confers on the Governor authority to summon persons to the Legislative Council, must specify the persons to be summoned, otherwise Her Majesty does not authorize the summoning of those whom Her Majesty thinks fit. The Imperial Legislature imposed on Her Majesty, as it appears to me, the duty of selection and the power to authorize the summoning by the Governor, and on the Governor the Ministerial act of summoning.

There is in the Act no general provision enabling Her Majesty to delegate to any other the duties or powers imposed or conferred on Her Majesty.

By the seventy-ninth section Her Majesty is authorized by Letters Patent or instructions under Her Majesty's Sign Manual, as signified through one of Her Majesty's Principal Secretaries of State, to delegate to the Governor any of the powers reserved in the Act to Her Majesty respecting removal of Superintendents, regulation of sale of waste lands, establishment of Municipal Corporations, and preservation of Maori usages. The Legislature has therefore declared what powers may be delegated to Her Majesty, and in the absence of any general provision enabling Her Majesty to delegate the power conferred on Her Majesty by the Act, and of any express provision enabling Her Majesty to

delegate to the Governor the duty of selecting the persons to be summoned to the Council, it seems to me that such duty cannot be discharged by any other than Her Majesty; by this I mean that no persons can be legally summoned until Her Majesty has signified that the individuals are, in the estimation of Her Majesty, fit persons.

This power of selection is conferred by the Legislature, and is not one belonging to the Crown in right of the prerogative. It is true that certain powers which the Crown exercises in right of the prerogative may be delegated to Governors of Colonies, which, within the United Kingdom, could not be delegated to any, such as the prerogative of pardon and the assenting to Acts of Legislature.

There is no statutory authority for such delegation, the reason why such delegation may be lawfully made being, it is presumed, the inconvenience that would result from any other interpretation of the prerogative. But when the Legislature has expressly provided that only such persons shall be summoned as Her Majesty shall think fit, there seems no reason whatever, whether grounded on necessity or otherwise, which can justify the departure from the authority which the Legislature has given. It is a case in which a trust and confidence is reposed, and where the power of selecting to be exercised is discretionary; in such cases the maxim *delegatus non potest delegare*, applies, and it applies with the greater force inasmuch as the Legislature has specified powers as capable of delegation but has omitted this.

Instances will be found in which the Legislature has intended that the Governor should select, or that the Crown should have power to delegate the duty of selection, but in such cases the intention has been expressed. See 5th and 6th Vict., c. 76, section 12; and compare this with section 2 of Act of Governor and Legislative Council of New South Wales, 17th Vict., No. 41, in schedule to 18th and 19th Vict., c. 54. The provisions on this subject in the New Zealand Constitution Act seem to have been adopted from the Act to re-unite Provinces from Upper and Lower Canada, 3rd and 4th Vict., c. 35 section 4. See 31st George III., c. 31, section 3, which provides, first, for the first constitution of the Legislative Council; and secondly, for summoning additional members. With regard to the first constitution, the Governor may be authorized to summons discreet persons: that probably was intended to give him power to summons persons he might deem discreet. As to additional members, they were to be "such other persons as His Majesty might think fit." This provision, I think, points out the distinction between a selection to be made by the Governor and a selection by the Crown itself. See also the Act of the last Session of Imperial Parliament for the Union of Canada, &c.

I purpose now to state the practice which has hitherto prevailed in summoning Legislative Councillors.

Upon the Constitution Act becoming law, Sir J. Pakington, in his Despatch to Sir George Grey, dated 16th July, 1852, paragraph 13, informed Sir G. Grey as follows:—"The instructions will accordingly empower you to nominate not less than ten nor more than fifteen persons to the office of Legislative Councillor. And it is desirable that, without waiting for those instructions, you should at once proceed to make your selection, and to report it immediately to Her Majesty's Government."

It does not appear from this Despatch that the Secretary of State intended that the Governor should do more than submit to Her Majesty the names of such persons as the Governor would recommend to be appointed.

However, as it is stated that the instructions would empower him "to nominate," it appears probable that the Secretary of State was of opinion that by such instructions something more than the power or duty of recommending names could be given to the Governor.

The terms of the instructions themselves show clearly that the construction put upon the thirty-third section by the Secretary of State was, that the Governor could be empowered to nominate and summons such persons as he himself selected and thought fit, without first having the express authority of Her Majesty for summoning particular persons approved of by herself.

The instructions which were under the Royal Sign Manual, referred to in the Despatch of Sir J. Pakington, authorize the Governor, in the Queen's name, to summon to the Legislative Council such persons, not being more than fifteen in number, as "the Governor should deem to be prudent and discreet men."

It seemed to have been assumed, therefore, that by authorizing the summoning of persons deemed by the Governor "discreet and prudent," an authority was thereby given to summon persons Her Majesty thought fit, or that it was competent to Her Majesty to depute the selection of fit persons.

Accordingly in December, 1853, commissions were issued by the Governor calling to the Legislative Council thirteen persons. (See *New Zealand Gazette*, 3rd January, 1854.)

Her Majesty had not selected these persons; they were summoned under the general authority given in the instructions above referred to.

In May, 1854, two of the persons so summoned resigned their seats to the Governor; this, even if they had been legally summoned, would have been the proper course (see section 35 of Constitution Act, 15th and 16th Vict.), and two other persons were summoned by the Governor under the general authority already referred to. In July of the same year another person was summoned.

In September of the same year the General Assembly met and passed several Bills, which were assented to by the Governor.

In May, 1855, it was notified in the *New Zealand Gazette*, that a Despatch had been received conveying Her Majesty's approval of all these appointments except that which had been made in July 1854, and that warrants under the Royal Sign Manual and Signet had also been received by the Governor, authorizing the summoning of such persons.

The names of the two persons who had resigned did not appear on this list: it is possible that information of their resignations had been received by the Secretary of State at the time of sending away the Despatch and warrants last referred to.

It is to be observed, therefore, that notwithstanding that the instructions had assumed to authorize the Governor to summon such persons as he thought prudent and discreet, and notwithstanding he had so done and such persons had taken their seats in the Legislative Council during a

whole session, yet it was thought necessary or proper to send out warrants under the Sign Manual authorizing the Governor to summon these same persons to the Council, and with some of these warrants a Despatch has been sent speaking of the appointments as "provisional." Until lately the practice so commenced has been followed—the Governor's instructions have been under the Sign Manual, and have assumed to authorize the Governor to summon such persons as he thought prudent and discreet, a limit only being put upon the number; and the Governor has summoned from time to time such persons as he or his Ministers thought fit, and such persons have taken their seats in the Council, and afterwards warrants have been sent out authorizing the summoning of persons already summoned. Of late, however, no warrants under the Sign Manual have been sent out to the Colony. I believe the last warrant received in New Zealand was that authorizing the summoning of Mr. Sewell; it was received in 1862.

The instructions to Sir George Grey (17th August, 1861) limited the number of persons to twenty. By special instruction of the 28th March, 1862, this limit was revoked, and the number left unlimited.

Mr. Sewell was summoned by the Governor in August, 1861, and in April, 1862, it appears that a warrant was received authorizing the Governor to summon him.

The instructions of March, 1862, were received in New Zealand, in July, 1862, and in the same month three persons were summoned by the Governor to the Council: no warrant has been received authorizing the summoning of these persons.

From time to time, since July, 1862, the Governor has summoned other persons, but in no case has any warrant authorizing him to summon them been received. The practice of sending out warrants, which existed previously to the issue of the last instructions (28th March, 1862), ceased, therefore, upon the issue of those instructions.

Why it was discontinued does not appear. I have inquired, and am informed that up to the time the limitation upon the number of the Council was removed, it had been usual for the Governor, when he had appointed members to the Council, to inform the Secretary of State of the appointments made. It appears, however, that the practice ceased upon the limitation of the number of members of Council being removed; and it may be that no information having been given to the Secretary of State as to new appointments, the consequence has been that the attention of the Secretary of State has not been drawn to the matter, and the fact that no warrants have been sent authorizing the summoning of such persons is so accounted for; and that it is not to be inferred that there is any other reason for the discontinuance of the practice of sending out instruments under the Sign Manual.

I have felt much diffidence in expressing my opinion on this subject, but the importance of the question seemed to me to justify this expression and communication of my opinion. I think that the question should be brought to the attention of the Secretary of State, with a view to obtaining the opinion of the law advisers of the Crown in England. It may be that the question has been already considered in connection with the appointment of Legislative Councillors for Canada, under the 3rd and 4th Vict., c. 35. If the Secretary of State should be advised that the Royal Instructions have given a valid authority to the Governor, and that all appointments have been legally made, and that, notwithstanding that special warrants were not issued in the first place, or at all, the appointees have been capable of sitting and acting as members of the Council, no further consideration need be given to the question raised. If, however, the opinion of the law advisers of the Crown should be that special warrants were necessary, and that persons could not sit and act as Councillors, though summoned by Governor's warrants, unless Her Majesty had herself exercised her discretion as to the summoning the particular individuals, then an Act of the Imperial Legislature will be required to validate all Acts of the Assembly heretofore passed.

It will be necessary, I think, that a statement should be now forwarded to the Secretary of State, showing what persons have been summoned to the Council from the first; such statement should show whether these persons are still members, or if not, when and how they ceased to be members. I think, also, that for the future, until the Secretary of State has communicated with the Government on the subject, when new appointments are made by the Governor, they should be communicated to the Secretary of State. I think that the attention of the Secretary of State should be drawn to the terms of his Despatch, 10th December, 1861, accompanying warrants authorizing the summoning of several members; in this Despatch he treats the appointments made by the Governor as merely "*provisional*." I do not understand what is meant by the expression in a legal point of view. Is it to be received as indicating an understanding that until the appointments have been reported and sanctioned by the issue of special warrants, the persons whose names are reported have not been fully appointed?

The questions which appear to arise are as follows:—

1. Is it necessary that the instruments under the Sign Manual to the Governor, authorizing him to summon persons to the Legislative Council, should name the persons to be summoned?
2. If it is necessary that the instruments should name the persons to be summoned, have those persons been legally summoned who were summoned before the execution of such instruments, and who have not been re-summoned after instruments were received expressly authorizing the summoning of such persons?

5th December, 1867.

JAMES PRENDERGAST.

