

P A P E R S

RELATIVE TO THE

APPOINTMENT OF JUDGES

OF THE

SUPREME COURT OF NEW ZEALAND.

PRESENTED BY COMMAND TO BOTH HOUSES OF THE GENERAL ASSEMBLY.

PAPERS RELATIVE TO THE APPOINTMENT OF JUDGES OF THE SUPREME COURT OF NEW ZEALAND.

No. 1.

COPY OF A DESPATCH FROM GOVERNOR GORE BROWNE, C.B., TO HIS GRACE THE DUKE OF
NEWCASTLE.

No. 113.

JUDICIAL.

Government House, Auckland, New Zealand,
24th August, 1861.

MY LORD DUKE,—

I have the honor to forward copy of a resolution passed by the Legislative Council relative to the appointment of Judges of the Supreme Court, and a Memorandum upon that resolution signed by my Responsible Advisers. Resolution by Legislative Council, 13th Aug., 1861.

I should observe that Mr. Gresson was appointed to act as Judge at Canterbury, not on any formal advice of the Executive Council, but in accordance with the wishes of my Responsible Ministers: an extract from the Minutes of the Executive Council appointing him to a district is attached. Memorandum, Responsible Advisers, 19th Aug., 1861.

After passing of the Act 1858, the Attorney-General did not think it necessary to apply to Her Majesty's Government for confirmation of Mr. Gresson's appointment, and I heard nothing further of the subject until lately. Extract Minute of Council.

I concur with Chief Justice Arney in thinking that the appointment of Judges ought not to be made under the advice of Responsible Ministers, and doubt if it was intended by the framers of the Act in question that the Governor should be advised on this subject by his Ministers.

The advice of Responsible Ministers means honest, but not always impartial, advice. In a great country like England, no one would think of doubting the impartiality of a Judge because he had taken a prominent part in politics; but in a small community it is otherwise, and no one who has taken a conspicuous part in local politics could be secured against imputation however little he might deserve it.

It is very desirable also that Judges should be men of high standing in the Mother Country in order that they should exert a moral and social influence in the Colony, and in so doing they would confer as much good by example as by their legal acquirements.

Such men are most likely to be obtained by special reference to the Secretary of State; the permanent appointment of Judges ought therefore to be placed out of the reach of advice by Ministers who are not always qualified by their antecedents to give an opinion on such a subject.

The resolution passed by the Legislative Council was proposed by Chief Justice Arney, whose speech on that subject I enclose, together with a reply by Mr. Sewell, the present Attorney-General. Report of Debate, 13th Aug., 1861.

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

I have, &c.,

T. GORE BROWNE.

Enclosure 1 in No. 1.

MEMORANDUM FOR HIS EXCELLENCY RELATIVE TO THE APPOINTMENT OF JUDGES.

The resolution of the Legislative Council proceeds upon a misapprehension of the relations between the Government and His Excellency's Responsible Advisers in the matter of the appointment of Judges of the Supreme Court. Mr. Secretary Labouchere's Despatch of the 19th December, 1856, lays down with great clearness the true principle. In Colonies where Responsible Government is established, the selection of individuals for the office of Judge is subject to the ordinary rule. His Excellency's Responsible Advisers would, in my opinion, be entitled and bound to advise His Excellency upon such a question, and I apprehend that under ordinary circumstances His Excellency would act on their advice as in other matters.

I do not think the Government ought to surrender that right, or to relieve themselves from that responsibility. The true interests of the Colony are not likely to be consulted by devolving the nomination of Judges upon irresponsible individuals out of and unconnected with the Colony, however high in station and character.

If His Excellency's Responsible Advisers should be satisfied that any particular individual possesses the requisite qualification for the judicial office, it is in my opinion their duty to tender advice on that point to His Excellency, in accordance with their own judgment, without recourse to a Judge in England. Except in such a case and as a general rule, I think the practice of advising with some Judge or Judges in England or Ireland on the subject of appointments to the

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judicial office in the Colony, would (in the language of Mr. Labouchere's despatch) be highly advantageous to the Colony and that it will be well for the Government to act on that opinion.

The resolutions of the House of Representatives were superseded by the Supreme Court Act, 1858. The resolution of the Legislative Council would operate as a practical repeal of that Act. The Government is, in my opinion, bound to obey an Act of the Legislature, and the rule of the Constitution, in preference to a resolution of the Legislative Council.

It does not appear to me necessary or desirable that His Excellency should take any action upon the resolution of the Legislative Council. If His Excellency should think it right to communicate it to the Home Government, I respectfully submit that he should at the same time transmit the opinions of his Responsible Advisers thereupon.

HENRY SEWELL.

August 19th, 1861.

Enclosure 2 in No. 1.

MINUTE OF THE EXECUTIVE COUNCIL RELATIVE TO THE APPOINTMENT OF JUDGE GRESSON.

The question of the appointment of Mr. Gresson to hold sittings of the Supreme Court in the Southern Division was brought before the Council by the Colonial Secretary.

Council recommended that the Southern Division be assigned to Mr. Gresson, a Judge of the Court, and that a Circuit Court be appointed to be held before Mr. Gresson at the following places in the Southern Division on the following days, viz.:—

At Wellington, on 11th January next.

At Nelson, on 20th “

At Lyttelton, on 8th February next.

At Otago, on “ March “

—or at each of the said places as soon after the said days as conveniently may be.

Council adjourned.

T. GORE BROWNE, Governor.

Passed the Council on the 11th February, 1858.

J. Holt,

For the Clerk of Executive Council.

No. 2.

NEW ZEALAND.

No. 114.

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

Downing Street,
December 19th, 1861.

SIR,—

I have to acknowledge the receipt of Colonel Gore Browne's Despatch, No. 113, of the 24th August last, in which he enclosed copy of a resolution passed by the Legislative Council, and a Memorandum by his Responsible Advisers relative to the manner of appointing of Judges of the Supreme Court of New Zealand.

I can readily understand the opinion of Colonel Gore Browne, that the interests of the Colony would suffer from a system under which a seat on the Bench would be exclusively or generally attainable by those who have taken a prominent part in local politics. But it appears to me that if any such evil is really to be apprehended from this cause, it is for the colonists themselves to make provision against it, and until such a provision is made it will be as a general rule the duty of the Governor to accept the recommendation of his Ministry in making the appointments which he is authorised to make by the 2nd clause of the Act 21st & 22nd Vic., No. 22. I must add, however, that every such judicial appointment made by the Governor, though not requiring Her Majesty's confirmation, is of sufficient importance to require that it should be reported to the Secretary of State for his information.

You will understand, however, that the Secretary of State will at all times be happy, should the Colonial Government desire it, to procure from the English Bench assistance similar to that which has already been so usefully given in New Zealand.

I have, &c.,

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

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No. 3.

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

Downing Street,
16th March, 1862.

NEW ZEALAND.

No. 22.

SIR,—

I have received your Despatch No. 27, of the 25th November, requesting that I would advise Her Majesty to appoint Mr. Gresson to be a Puisne Judge in the Supreme Court of the Colony.

I do not accurately understand Mr. Gresson's position. The Attorney-General states that he was appointed under the Supreme Court Judges Act, 1858. On the other hand I see it stated in the Chief Justice's speech enclosed in Colonel Gore Browne's Despatch No. 113, of the 24th August, 1861, that he was appointed on December 11th, 1857, seven months before that Act was passed.

Be this as it may however, it appears to me since the passing of the Act of 1858, the Judges, or at any rate the Puisne Judges, are no longer to be appointed by Her Majesty, but by yourself, "in the name and on the behalf of Her Majesty."

If any authority is required for making such an appointment beyond an Act of the local Legislature, it appears to have been conveyed to you by the terms of your Commission, which expressly empowers you to constitute and appoint Judges.

I am therefore unable to advise Her Majesty herself to appoint Mr. Gresson: but I am to convey to you Her Majesty's authority to appoint him yourself, to be a Puisne Judge of the Supreme Court, if he is not already appointed, and Her approval of that appointment if it is already made. I am bound, however, to add, lest I should seem to throw doubts on appointments made in other of Her Majesty's Colonies, that I see no reason for supposing that this authority or approval is in any degree necessary in order to enable you to clothe Mr. Gresson with the powers of a duly constituted Judge.

I have, &c.,

Governor Sir George Grey, K.C.B.

NEWCASTLE.

