

As it is of great importance that all doubt on this question should be definitely settled, it is suggested that the question be submitted to the Right Hon. the Secretary of State, in order that the opinion of the law officers of the Crown in England may be obtained, and if necessary, such alteration made in the Commission of Governors of New Zealand as the form of Government in force in the Colony may require.

For His Excellency the Governor.

E. W. STAFFORD.

Enclosure 2 in No. 32.

MEMORANDUM by Mr. RICHMOND.

Wellington, 4th March, 1868.

ADVERTING to Mr. Stafford's Memorandum of the 14th ultimo as to the legal question which has been raised whether, on the arrival of a new Governor, a new appointment of members of the Executive Council is necessary, Ministers transmit a case, prepared by the Attorney-General of the Colony, which they request may be submitted for the opinion of Her Majesty's Attorney-General and Solicitor-General in England.

For His Excellency the Governor.

J. C. RICHMOND,
(for the Colonial Secretary.)

Sub-Enclosure to Enclosure 2 in No. 32.

Case for the opinion of Her Majesty's Attorney-General and Solicitor-General in England, stated by the Attorney-General in New Zealand.

ON His Excellency Sir George Bowen assuming the Government in New Zealand, the question was raised whether the members of the Executive Council, appointed by Sir George Grey, and being in office up to the time of the publishing of the Commission of Sir George Bowen, remained in office after the publication of that Commission until they resigned or were removed, or whether upon the publication of the Commission of Sir George Bowen they ceased to hold office as Executive Councillors.

The question arises upon the construction to be put upon those portions of the two Commissions which authorize the appointment of an Executive Council.

The Commissions are, so far as they provide for the appointment of an Executive Council, in similar language.

The second clause of the Commission of Sir George Bowen, is as follows:—

“And whereas it is expedient that an Executive Council should be appointed to advise and assist you in the administration of the Government of our said Colony: now we do declare our pleasure to be that there shall be an Executive Council for our said Colony, and that the said Council shall consist of such persons as you shall, by instruments to be passed under the public seal of our said Colony, in our name and on our behalf, from time to time nominate and appoint to be members of the same.”

These words seem to imply that the Executive Council shall consist only of persons appointed to it by the Governor for the time being, and shall not include persons appointed by his predecessor, and remaining in office up to the time of the termination of his predecessor's government.

No reference is made in any part of the Commission to any Executive Council which would be in existence at the time of the publication of the Commission. It seemed as if it were intended that it should, like the Privy Council, which, irrespective of statute, would expire with the reign of the Sovereign appointing it,—cease with the administration of the Governor by whom it was nominated.

On the other hand, as the Executive Council is the Council of Her Majesty, and not that of the Governor, as it is appointed in the name of Her Majesty, and on her behalf, and as appointments made by Governors of Colonies by Commissions under the public seal do not determine on the revocation of their Commissions, it would seem that the Commissions of Executive Councillors would continue, notwithstanding the determination of the Commission of the Governor who appointed them, unless it be that the duration of their Commissions is limited by the express language of the Governor's Commission.

Her Majesty, by her Royal Instructions accompanying His Excellency's Commission, seemed to have contemplated that Her Executive Council appointed by Sir George Grey would not determine by the publication of His Excellency's Commission, otherwise Her Majesty would not have directed that the solemn publication of the Commission should be in the presence of the Executive Council, and that His Excellency should then, after the publication, take the oath in the presence of the Executive Council. The Executive Council appointed by His Excellency's predecessor must have been intended, otherwise, in order to obey the instructions, Sir George Bowen would have been compelled to appoint an Executive before he had himself taken the oaths.

Moreover, it is observed that in the Colonial Regulations of 1867, Article 62, it is stated that “to the Executive Council, associated with the Chief Justice, is entrusted the duty of administering to the Governor the oaths of office; which being done the Governor administers to the Members of the Executive Council the oaths of office to be taken by them. Each new Member of Council on his appointment is also required to take the oaths applying to his particular case.”

This regulation seems to contemplate that the Executive Council shall be a continuing body.

In order that all doubt should be avoided, His Excellency Sir George Bowen, immediately after he had taken the oaths of office in the presence of the Chief Justice and of the Executive Council appointed by Sir George Grey, re-appointed the Members of that Executive Council.

It is believed that the practice in this matter in the Colonies is not uniform; in some the Executive are re-appointed, in others not.