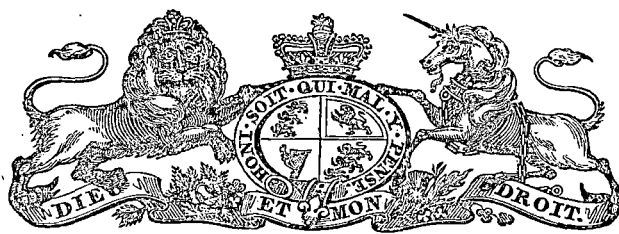


(No. 14.)



1859.

T A S M A N I A.

REPORT OF THE SELECT COMMITTEE.

**TIME AT WHICH FIVE MEMBERS OF THE LEGISLATIVE COUNCIL
WILL RETIRE UNDER THE 9TH SECTION OF THE CONSTITU-
TIONAL ACT.**

Brought up by Mr. Nairn, and ordered by the Council to be printed,
26 August, 1859.



REPORT

Of the Select Committee of the Legislative Council appointed, on the 24th August, 1859, to consider the question of the Time at which Five Members of this Council will retire under the 9th Section of the Constitutional Act.

YOUR Committee find that the Writs for the House of Assembly were dated the 27th day of August, 1856, and were issued the same day; and that the Writs for the Legislative Council were dated the 24th day of September, 1856, and issued on the 25th day of September, 1856.

Your Committee, having forwarded to His Honor the Chief Justice a copy of the Minute (A.) hereunto annexed, have received a reply from His Honor excusing himself, for the reasons therein stated, from returning any answer to the question proposed to him.—Letter annexed (B.)

Your Committee also forwarded a copy of the Minute before referred to to the Honourable the Attorney-General, and have received in reply an Opinion which is also hereunto annexed (C.)

THOMAS HORNE, *Chairman.*

August 26, 1859.

A.

CONSTITUTIONAL ACT. 18 VICT. No. 17.

By the 9th Section it is provided that Five Members of the Legislative Council shall retire at the expiration of Three years from a time therein mentioned.

The Writs for the House of Assembly were dated the 27th August, 1856, and issued the same day.

The Writs for the Legislative Council were dated the 24th September, 1856, and issued on the 25th September.

It is respectfully requested that His Honor the Chief Justice will be good enough to inform the Committee on what day, in his opinion, the first Five Members of the Legislative Council will retire under the above 9th Section.

In considering this question, the attention of the Committee has been directed to the 2nd, 9th, and 16th Sections of the Constitutional Act, and to the 50th and 73rd Sections of the Electoral Act, (19 Vict. No. 24.)

B.

Judges' Chambers, 25th August, 1859.

SIR,

I HAVE the honor to acknowledge the receipt of your letter of this date, enclosing a copy of a Minute of the Legislative Council, by which I am requested to give my opinion upon a point arising out of the construction of the Constitutional Act, 18 Victoria, No. 17.

In delaying to return an answer at once to this request, I hope it will not be considered that I have the slightest desire to withhold any benefit which it may be supposed would be derived from the opinion which I might express upon the question submitted to me. I am alone apprehensive lest I should set a precedent which may lead to most injurious results. I allude to the consequences which may flow from a recognition of the power of either branch of the Legislature in this Colony to call for extra-Judicial opinions from the Judges upon difficulties arising out of the exercise of Legislative functions. I am aware that there are some precedents in past ages where the Judges in England have been requested by the House of Lords to advise on *abstract* questions affecting the existing Law of the Land, in order that that body might correctly appreciate the effect of a *proposed* alteration of the Law; but I am unaware of any instance in which they have been required to give their opinions upon the construction and operation of a given Statute, where a particular line of action, consequent upon the interpretation which is adopted, may lead to the institution of proceedings which would bring the same question before them in their Judicial capacity. Suppose, in the present case, it should be resolved, in conformity with an opinion of the Judges, that the Five Members of the Legislative Council do not retire until the 25th September;—suppose a law passed between the 27th August and that day;—suppose a resistance to that law, as in the year 1847, under 10th Victoria, No. 5 (commonly called "The Dog Act"), and, as a consequence, the institution of legal proceedings,—would it be fitting that the Court should be hampered by a previously expressed opinion on the very issue to be determined? I conceive that it will be at once conceded to me that it would not; and, without resorting to further illustration of the dangers which may ensue from the establishment of such a precedent, I feel so strongly the undesirableness of mixing up the Judges, as such, with any question which may in the slightest degree be politically contested in either branch of the Legislature, and, above all, of committing them to the expression of an extra-Judicial opinion upon a matter which can in any shape form the basis of any proceedings in their Court, that I hope the Committee will recognise the reluctance which I manifest to adopt a course calculated, in my view, to impair my Judicial position, and relieve me from returning an answer to their inquiry.

I have the honour to be,
Sir,

Your obedient Servant,

V. FLEMING, C.J.

The Honourable
The President of the Legislative Council,
&c. &c. &c.

C.

Attorney-General's Office, 26th August, 1859.

SIR,

I HAVE the honor to acknowledge the receipt of your letter of the 25th instant, forwarding a Minute of the Select Committee of the Legislative Council appointed to consider the question of the time at which Five Members of the Council will retire under the 9th Section of the Constitutional Act, containing a request that I will inform the Committee on what day, in my opinion, the first Five Members of the Legislative Council will retire under the above Section.

Having given the question full consideration previously to the receipt of your letter, I proceed, without delay, shortly to state my opinion.

By the 9th Section of the Constitutional Act it is provided that the first Five Members of the Legislative Council on the Members' Roll shall retire at the expiration of Three years from the date of the issuing of the Writs for the first election under the Act.

It appears that, in point of fact, the Writs for the first election were issued on different dates,—those for the election of Members of the House of Assembly on the 27th August, 1856, and those for the election of Members of the Legislative Council on the 25th September, in the same year.

The question is, when does the period of Three years from the date of the issuing of the Writs for the first election under the Act expire, for the purpose of determining the time of retirement of the first Five Members?

This question principally turns upon the meaning of the words, "the first election under this Act;" the point being, whether they mean the first election, whether of Members of the Legislative Council or House of Assembly,—or the first election of Members of the Legislative Council.

It is to be observed that the Clause in which the words occur refers solely to the Legislative Council; and it would appear to be more reasonable to make the duration of the tenure of office by Members of the Legislative Council depend upon the date of the issue of Writs for that Council, than to make it depend on the issue of the Writs for a different body, the House of Assembly; and, unless the signification of the words used were clearly repugnant, the meaning assigned to them should be such as to carry out the more reasonable construction. It appears to me that the words are, in themselves, susceptible of either meaning, and are therefore to be construed according to the more reasonable interpretation; and that the election contemplated in the Section under discussion is the election of Members of that branch of the Legislature to which alone the provisions of that Section relate, and not the election of Members of an Assembly which is not even mentioned in the Section.

But if the considerations heretofore adverted to were not sufficient to clear up ambiguity, I conceive that all doubt is dispelled by the express declaration by the Legislature of its intention contained in a later portion of the same Section. "The intent" of the whole Section is expressly declared to be, "that one-third of the whole number of Members of the Legislative Council, consisting, &c., shall vacate their seats every Three years." The principle of construction, for the purpose of effectuating the intention of the Lawgiver, is well stated in a Book of Authority as follows:—"Provisions in Acts of Parliament are to be expounded according to the ordinary sense of the words, unless such construction would lead to some unreasonable result, or be inconsistent with, or contrary to, the declared or implied intention of the framer of the law, in which case the grammatical sense of the words may be modified, restricted, or extended, to meet the plain policy and purview of the Act. But in such a case the intent must be obvious, and must be collected from the words of the Act." (*Dwarris*, 582.) Applying this principle, there can be no doubt of the true construction of the words referred to. The intention of the provision being expressed to be that a certain duration of tenure shall be secured to the Members of the Council, it would obviously defeat that intention to refer the commencement of the tenure to the date of the Writs for a wholly distinct Assembly. It is clear that the date of the Writs for the Assembly can afford no criterion for the duration of the tenure of office by a Member of the Council; and that it would be highly absurd, and repugnant to the expressed intention of the Legislature, to adopt such a criterion. The ordinary sense of mankind must assent to the proposition that the intended duration of the tenure of his office by a Member of Council is more likely to be secured to him by dating its commencement from the issue of the Writs for the Council of which he is a Member, than from the issue of the Writs for a totally different and distinct body.

I am, therefore, clearly of opinion that the first Five Members of the Legislative Council will retire, under the 9th Section of the Constitutional Act, on the 25th September, 1859.

I have the honor to be,
Sir,

Your obedient Servant,
FRANCIS SMITH.

The Honourable
The President of the Legislative Council,
&c. &c. &c.