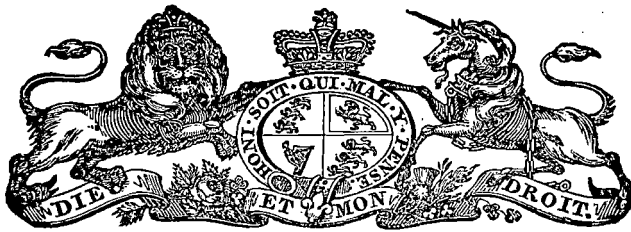


(No. 130.)



1881.

T A S M A N I A .

H O U S E O F A S S E M B L Y .

T A M A R A N D M E A N D E R E L E C T I O N S .

Laid upon the Table by the Attorney-General, October 26, 1881, and ordered by the House to be printed.



10th October, 1881.

DEAR ATTORNEY-GENERAL,

As I shall be absent from Hobart until next week I will feel greatly obliged by your sending to me your reply, *re* Tamar and Meander Elections by to-morrow's steamer from Launceston to Melbourne. Be good enough to ask the Speaker to allow the Motion which stands for Thursday of this week to stand for Thursday of next week.

Yours faithfully,

W. CAMPBELL SLEIGH.

Address me to "Melbourne Club."

Attorney-General's Office, Hobart, 10th October, 1881.

MY DEAR SERJEANT,

In the main I entirely concur in the opinion of Messrs. Webb & Hamilton; and should have advised much to the same effect had the same statement of facts been submitted to me. The whole aspect of the case is charged by the assumption of the fact that there never was a vacancy; and the perusal of the opinion of these gentlemen, which you have so kindly afforded me; does not alter the view I had previously taken.

I will have your Notices of Motion postponed as you desire.

Yours very truly,

J. S. DODDS.

Mr. Serjeant SLEIGH.

To the Honorable the Legislative Council of Tasmania.

The humble Petition of William Campbell Sleigh, Esquire, Serjeant-at-Law, Member of the House of Assembly, in the Parliament of Tasmania,

RESPECTFULLY SHOWETH:

1. That, by virtue of a Writ lawfully issued and duly executed, an election was holden in the District of the Meander, on or about the 22nd day of February, 1881, for the election of a Representative to your Honorable House for the said District.

2. That at the said election the Honorable F. W. Grubb was nominated as a candidate, but was, in fact, disabled and disqualified to be such candidate or to be elected.

3. That your Petitioner was duly nominated as a candidate at the said election, and was, in fact, the only qualified candidate thereat.

4. That the said F. W. Grubb had the majority of votes at the said election, and was declared by the Returning Officer to be duly elected, and the said Writ was so endorsed.

5. That your Petitioner has been advised, and verily believes, that the said F. W. Grubb was not qualified to be elected, and was not duly elected, at the said election; but that, on the contrary, he was absolutely disabled and disqualified to be elected thereat.

6. That your Petitioner was the only duly qualified candidate at the said election; and that he is *de jure* the Representative for the Meander in this Honorable House.

7. That your Petitioner being in Victoria when he heard that a Resolution was passed by your Honorable House, and was unable to consult members of the Tasmanian Bar, placed the facts connected with the said election before eminent members of the Bar of Victoria in the form of a "Case," and obtained their Opinion thereon from Mr. G. H. F. Webb, Q.C., and Mr. E. B. Hamilton, members of the Bar of Victoria.

23 Victoria,
No. 43, Sect. 1.

A copy of the Case is as follows:—

The Legislative Council of Tasmania is an elective body, consisting of sixteen Members, each of whom "shall hold his seat for the period of six years from the day of his election, at the expiration of which period his seat shall be vacant by effluxion of time." (23 Victoria, No. 43, Section 1).

18 Victoria,
No. 17.

The preamble to the statute cited declares "that it was the intention of the framers of the Constitution Act (18 Victoria, No. 17) that the tenure of seats in the Legislative Council should be more permanent and less precarious than the tenure of seats in the Legislative Assembly; but it has been found that the provisions of the said Act are insufficient to effectuate such intention, and it is desirable to provide a remedy by amending the said Act," &c. "Be it therefore enacted," *ut supra*.

18 Vict. No.
17, Sect. 13.

By Section 13 of the Constitution Act it is enacted that for any one of the following causes the seat of a Member in the Legislative Council "shall thereby become vacant":—

- a. Failing to give his attendance for one entire Session without permission.
- b. Taking an oath of foreign allegiance.
- c. Becoming a citizen of a foreign state.
- d. Becoming bankrupt or insolvent.
- e. Becoming a public defaulter.
- f. Being convicted of felony, &c.
- g. Becoming insane.

18 Vict. No.
17, Sect. 12.

By Section 12 of the same statute it is enacted, "That it shall be lawful for any Member of the Legislative Council, by writing under his hand addressed to the Governor, to resign his seat; and upon such resignation the seat of such Member shall become vacant.

18 & 14 Vict.,
c. 59, Sect. 12.

By Section 12 of 13 & 14 Victoria, chapter 59, certain provisions of 5 & 6 Victoria, chapter 76, and 7 & 8 Victoria, chapter 74, shall also apply to Van Diemen's Land.

23 Vict. No.
43, Sect. 3.

By Section 3 of 23 Victoria, chap. 43, it is enacted that "Every Member of the Legislative Council vacating his seat shall, if qualified, be capable of being re-elected."

This section read in *pari materia* with Section 1, cited *supra*, raises the very important question whether a Member of the Legislative Council can resign, having regard to the express provision of the statute that he shall hold his seat for six years from the date of his election; or whether the "vacating" contemplated in Section 2 is not such a "vacating" as would be created by causes specified in 18 Victoria, No. 17, Section 13, wholly distinct from a "vacating" by the voluntary act of a Member, as resignation would be. The "capability to be re-elected," within the meaning of 23 Victoria, No. 43, would, it is suggested, be the removal of the official disqualification: for example, the superseding of a bankruptcy, the pardon of a felony, &c.: in each of which cases, by the removal or disqualification, the statute would be satisfied, and the former Member would be again qualified and capable to be re-elected.

It may here be as well to remind Counsel that in the British Parliament a Member cannot resign his seat. It can be vacated only by some special act of disqualification, and accepting a place or office of profit under the Crown.

18 Vict. No.
17, Sect. 14.

By Section 14 of the Constitution Act it is enacted that, "Whenever any question shall arise respecting any vacancy in the Legislative Council, the same shall be heard and determined by the Legislative Council itself."

FACTS.

1875. F. W. Grubb, Esquire, was duly elected Member for the District of the Tamar, in the Legislative Council, 1875.

During the absence of Mr. Grubb from the Colony a writ was issued for the election of a Member for Tamar; and it may be taken as a fact, for the purposes of this case, that there was not, in point of law, any vacancy when the said writ was issued. It was supposed that the said F. W. Grubb had vacated his seat by being absent from the Council for one entire session without permission; but it is now clear and admitted this was an erroneous supposition. 1880. November.

In obedience to the exigency of the said writ, the form of an election was gone through, and John Scott, Esquire, who stood against the said F. W. Grubb, polled the majority of votes, and was accordingly declared the duly elected Member, and the writ was so endorsed. November 30.

In the month of February, 1881, an election was holden at the Meander, by virtue of a writ lawfully issued for the election of a Member to the Legislative Council, *vice* the Hon. T. W. Field, deceased. 1881. February 12.

At this election the said F. W. Grubb and W. C. Sleigh were nominated candidates, and were the only candidates.

The said F. W. Grubb, having polled the majority of votes, was declared to be duly returned, and the writ was so endorsed.

The Parliament of Tasmania re-assembled after the recess, when the said F. W. Grubb took the oaths and his seat for Meander in the Legislative Council, and the said John Scott did likewise, as Member for the Tamar. July 19.

The said F. W. Grubb, shortly after taking his seat as aforesaid, gave notice that on a future day he would ask the Honorable the Colonial Secretary, who represents the Government in the Legislative Council, by what authority the seat for Tamar had been declared vacant?

The said F. W. Grubb put this question in pursuance of notice; and, in doing so, denied that there had ever been any vacancy since his election. He affirmed that he was not "absent during one entire Session without permission;" and that, after the time of the issue of the Writ for the supposed vacancy he was in lawful possession of his seat; and, further, that he had continued to hold his seat until the day before the re-assembly of Parliament (18th July, 1881), when he sent in his resignation to His Excellency the Governor. August 3.

Considerable excitement was created by this statement, and much discussion ensued in reference to the manifold complications evolved thereby. It is not necessary to trouble Counsel with this discussion: sufficient to say, some honorable Members observing that, upon Mr. Grubb's own statement, he was already a Member of the Legislative Council for Tasmania when he was elected for Meander; and that, as such Member for Tamar, he was disqualified to be elected for Meander; and that, therefore, he was not the lawful Member for Meander, neither was the said Mr. Scott the Member for Tamar, inasmuch as there was no vacancy when he was elected.

The Honorable the Colonial Secretary gave notice that on Tuesday, the 10th August, he would move a Resolution "That the Writ issued for the Tamar was issued in accordance with the provisions of the Constitutional and Electoral Acts of the Colony." August 5.

Upon these facts becoming public, the said W. C. Sleigh addressed a letter to the Honorable the Premier, which, by order of the Legislative Council, was ordered to be printed and laid upon the Table of the House. (A copy of this letter accompanies this case, for the perusal of Counsel.) August 9.

The Honorable the Colonial Secretary said that, upon further consideration, he would ask leave to withdraw the Resolution of which he had given notice, and substitute another in these terms: "Resolved, that there exists no vacancy for the representation of the District of the Tamar in the Legislative Council." August 10.

The Honorable the Colonial Secretary said that, upon further consideration, he would ask leave to withdraw the Resolution of which he had last given notice, and substitute therefor a "Doubts Removal Bill," which, by leave of the House, was then introduced and read a First time. August 12.

The Honorable the Colonial Secretary said that, upon further consideration, he did not intend to proceed with the "Doubts Removal Bill." August 16.

The Honorable the Colonial Secretary said that, upon further consideration, he had determined not to proceed with the "Doubts Removal Bill;" and he would therefore move that the Order of the Day for Second reading should be discharged; and it was discharged accordingly. August 17.

The Honorable the Colonial Secretary said that, upon further consideration, he would ask leave to move, without notice, another Resolution in the place of those previously submitted, and of the "Doubts Removal Bill," which, if passed by the House, would be an effectual remedy for all the difficulties suggested. "It would," said the honorable gentleman, "have the effect of confirming both gentlemen in the title to their seats," (Mr. Scott for Tamar, Mr. Grubb for Meander.) August 18.

The honorable gentleman then tabled the Opinion of the Attorney-General and Solicitor-General (which are sent herewith), and moved the following Resolution:—

“That it being provided by Section 14 of the Constitution Act that whenever any question shall arise respecting any vacancy in the Legislative Council, the same shall be read and determined by the Council itself; and the question having arisen whether, on the 6th day of November, 1880, the seat for the District of the Tamar, lately filled by the Honorable F. W. Grubb, was then vacant, this Council hereby declares that such seat was vacant on that day.”

Notwithstanding earnest protest from some honorable Members, this Resolution was then and there adopted by the House.

Upon this state of facts Counsel are requested to give their Opinion—

1. Whether the Honorable F. W. Grubb was qualified and capable to be elected a Member of the Legislative Council for the Meander, he being at the date of such election a Member of the said Legislative Council for the District of the Tamar?

2. Whether, having reference to the provisions of the 13th & 14th Victoria, Chapter 59, Section 12; 18 Victoria, No. 17, Section 12; 23 Victoria, No. 43, Sections 1, 3, 4, the said Honorable F. W. Grubb could lawfully resign his seat for the District of the Tamar?

3. Whether, having reference to Section 18 of the 5th & 6th Victoria, Chapter 76, and Section 14 of 18 Victoria, No. 77, and to the fact that, although there did not exist any “vacancy” in the representation of the Tamar at the date of the issue of the Writ and subsequent election, it was within the power of the Legislative Council to declare and determine, by mere Resolution, that there was a “vacancy,” and thus substantially decide that the said Honorable John Scott was lawfully elected for the Tamar, and, further, that the Honorable F. W. Grubb was qualified and capable to be elected, and was duly elected, Member for the Meander?

If Counsel shall be of opinion that the Resolution as above set forth is valid, it would then seem that the Legislative Council has the power, by mere Resolution, *non obstante* Statute and Parliamentary Law, to create a vacancy when no vacancy exists; to give validity to a Writ which was illegally or improvidently issued; to create a disabled or disqualified person into a duly qualified candidate; and to declare that a Member, while in lawful possession of his seat, was not a Member, and so dispossess him of his seat, although he had not vacated it nor had it been vacated by process of law.

Counsel are, further, referred to May's Parliamentary Practice and Rogers on Elections, titles “Member,” “Qualification,” “Disqualification;” Duarris on Statutes, titles “Rules on Conflicting Statutes,” *et sequitur*; Lord Althorpe's Cases, 2, Astell, page 74; Todd on Parliamentary Government, volume 1, page 250.

Your Petitioner very respectfully submits that the Opinion of the said Counsel is,—

1. That Mr. Grubb was not qualified to be, or capable of being, elected a Member of the Legislative Council for the Meander, he being, at the date of that election, Member for the Tamar. It appears to us that to hold otherwise would be inconsistent with the existing statute law, for the number of Members of the Legislative Council is fixed by statute, 34 Vict. No. 42, Section 2; and there is no power of compelling any Member to resign. If, then, a Member for one constituency could be elected for another also, he could not be forced to resign either seat, and might, consequently, hold both at the same time. Similarly, if he could sit for two places he might sit for three, and so on; and thus the result might be that the statutory number of Members might be reduced until the whole representation is concentrated in the hands of a few individuals, or even of one, contrary to the manifest intention of the statute. Our opinion is corroborated by what appears to be the law of Parliament in Great Britain, where a person elected and returned a Member of the House of Commons for one constituency is not eligible for another unless he first resign the seat which he holds. This was settled in Lord Althorpe's case. He was elected for Northampton, and while a Member for that place was elected for Surrey also. It was, however, decided that he was not eligible for Surrey, as he had not previously vacated his seat for Northampton; and that the doctrine that a person elected for one place can be elected for another at the same time only applies to the case of a general election.

2. As to the resignation of Mr. Grubb, we are of opinion that he had no legal power to resign. This will, we think, appear the more clear by a short reference to the history of the legislation on the subject of resignation of their seats by Members of the Council.

By the combined effect of the 15th Section of 5 & 6 Vict., c. 76 (passed in 1842), and the 12th Section of 13 & 14 Vict., c. 59 (passed in 1850), a Member of the original Council of Tasmania was empowered to resign his seat by writing addressed to the Governor. This provision was re-enacted by the Tasmanian Legislature in 1854, by 18

Vict. No. 17. But it was found that this power to resign was productive of certain inconveniences, and accordingly an Act was passed in 1859 (23 Vict. No. 43), which, after reciting "that it is in the power of Members who are about to retire at any approaching triennial period of retirement by resigning their seats shortly before, instead of retiring at such period, to cause the retirement of other Members out of their proper rotation;" and also reciting that "it is desirable to provide a remedy" for the aforesaid inconvenience, proceeds to enact, by Section 1, that "every Member of the Legislative Council shall hold his seat for the period of six years from his election, at the expiration of which period his seat shall be vacant by effluxion of time."

From the preceding account of the Legislature we are of opinion that Parliament, by 23 Vict. No. 23, Sect. 1, deprived the Members of the Council of the power to resign, because it had been used in a manner injurious to the public interest. We therefore think that Mr. Grubb did not, and could not, by resigning, "vacate" his seat for the Tamar, and that he is still Member for the Tamar, unless the seat has been vacated by one of the events specified in Section 13 of the Constitution Act, which is still in force, or by the effluxion of time.

3. We are of opinion that it was not within the power of the Legislative Council to determine by Resolution that there was a "vacancy" for Tamar. The Statute 18 Vict. No. 17, by Sect. 13, specifies the events in which a "vacancy" shall occur; and, in our opinion, on the happening of any one of such events a "vacancy" *ipso facto* takes place. We do not think it was the intention of the Act to enable the Legislative Council to declare a seat vacant which was not in fact vacant under the Act. If such a power were vested in the Council, a majority might, by means of Resolutions, expel the minority, by declaring all their seats vacant, though no cause of vacancy existed. Section 14 provides that the Legislative Council may deal with any question "which shall arise respecting any vacancy;" but no such question can arise unless there be any actual "vacancy" with regard to which any question can be raised. The existence of a "vacancy" is, in our opinion, a condition precedent to the power of the Council to deal with any question respecting it; and we do not think that, under this Section, the Legislative Council can declare a "vacancy" to exist so as to give themselves jurisdiction to deal with a question relating to it. But even if the Legislative Council had power to determine the question of "vacancy" or no vacancy, which we do not think they have, the Resolution which was passed is, in our opinion, void, and a mere nullity. The Council is, under the 14th Section of the Act, to "hear and determine" questions relating to vacancies; but, in the present instance, the matter has been determined without a "hearing;" and it is manifest that such a procedure is in direct contradiction of the Statute, which obviously requires the determination to be preceded by a judicial or quasi-judicial investigation, in which all persons interested may be heard.

6. Your Petitioner submits, upon the facts hereinbefore set forth, and *inter alia* for the reasons given by learned Counsel, it is abundantly clear that there never has been any vacancy in the representation of Tamar since the election of the said Honorable F. W. Grubb, and that the said F. W. Grubb has always, since his said election, continued to be, and is now, Member for the Tamar; and that he never could, nor can he at any time, resign his seat therefor, but "shall hold his seat (unless removed by death or by one of the specified acts of disqualification, (18 Vict. No. 17, Sect. 13) for six years from the date of his election, when it shall become vacant by effluxion of time."

7. That the "vacating" a seat within the meaning of 23 Victoria, No. 43, Section 3, is not a "vacating" by death or resignation, but a "vacating" by reason of one of the special causes as defined in Section 13 of 18 Victoria, No. 17: for example, absence for one entire Session, without permission; bankruptcy; felony; insanity, &c.; and it is obvious that the 3rd Section of 23 Victoria, No. 43, was framed for the express purpose of enabling a person who should, after losing his seat by absence, bankruptcy, &c., to be capable of being re-elected if such cause of disqualification should be removed,—as by return, by superseding bankruptcy, &c.: in any such case he would "be capable of being re-elected," (Section 3.)

8. That this is so must be apparent, as your Petitioner ventures to submit, upon a careful consideration of the Statutes 5 & 6 Victoria, Chapter 76; 13 & 14 Victoria, Chapter 59; 18 Victoria, No. 17; and 23 Victoria, No. 43, Section 4, which must be read *in pari materia*, and be interpreted according to the well-known rule respecting conflicting, inconsistent, and repugnant clauses, and which is there stated by Duarris, page 514, "Where a general intention is expressed, and the Act also expresses a particular intention incompatible with the general intention, the particular intention is to be regarded as an exception."

9. Your Petitioner therefore respectively submits—

- a. That the said Honorable F. W. Grubb is Member for the Tamar.
- b. That the said F. W. Grubb was not qualified to be elected, and was not elected, for the Meander.
- c. That William Campbell Sleigh was the only qualified candidate, and that he is *de jure* the Representative in your Honorable House for the Meander.

10. That the Law Officers of the Crown have stated in their opinion that the subject in reference to these matters is not matter for the decision of the Electoral Act, but is entirely for the action of the Legislative Council alone; as May (page 670) says, "After the time (14 days) has expired for receiving election petitions, it holds itself not only free, but legally bound to determine all questions affecting seats of its Members, as numerous precedents attest."

11. That your Petitioner respectfully submits, in reference to Resolution, that Mr. Todd (on Parliamentary Government, vol. 1, p. 250) says, "No mere Resolution of either House, or joint Resolution of the two Houses, will suffice to dispense with the requirements of an Act of Parliament, even although it may relate to something which directly concerns only one Chamber of the Legislature."

12. That your Petitioner respectfully submits that the Honorable House has full power to order such rectification and amendment to be made in and on any writ which has been returned to your Honorable House.

13. That your Petitioner very respectfully prays that your Honorable House will do as may seem fit and proper to you.

And your Petitioner will, as in duty bound, ever pray, &c.

W. CAMPBELL SLEIGH.

Hobart, 9th September, 1881.