(No. 34.)

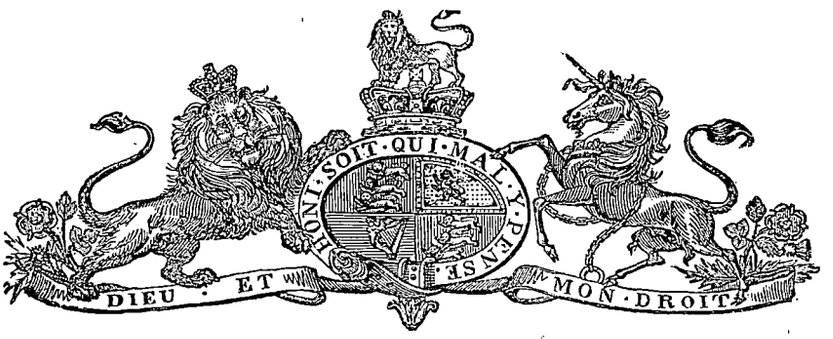
1859.

TASMANIA.

RESIGNATION OF MEMBERS.

LETTERS OF MR. JUSTICE HORNE, MESSRS. WHYTE, LOWES, WEDGE, CLEBURNE, AND J. C. GREGSON.

Laid upon the Table by Mr. Henty, and ordered by the Council to be printed, 20 September, 1859.



21, *Davey-street, Hobart Town,*
26th August, 1859.

SIR,

I CONSIDER it to be my duty, under present circumstances, to resign my seat in the Legislature; and I therefore hereby resign my seat in the Legislative Council as the Member for the District of the North Esk.

I have, &c.,
JNO. H. WEDGE.

His Excellency Sir HENRY F. YOUNG,
Governor.

Hobart Town, 26*th August,* 1859.

SIR,

I HEREBY declare my intention of immediately resigning my seat as Member for the County of Buckingham in the Legislative Council of Tasmania.

I have, &c.,
THOS. Y. LOWES.

Sir HENRY E. F. YOUNG, *Knt., C.B.,*
Governor-in-Chief of Tasmania.

Hobart Town, 26*th August,* 1859.

SIR,

I HAVE the honor to place in Your Excellency's hands the resignation of my seat as a Member of the Legislative Council in the Parliament of Tasmania, in accordance with the provisions of the 12th Section of the Constitutional Act.

Under ordinary circumstances I should not have thought it necessary or proper to obtrude upon Your Excellency's notice the reasons which induce me to adopt such a step; but I trust the gravity and the importance of the considerations I now propose to state at length in this letter will be deemed a sufficient apology for my departure, in this instance, from the usual practice.

The Legislative Council has this day decided, so far as a Resolution can determine the question, "That the period of three years from the date of the issuing of the writs for the first election under the Constitutional Act will be calculated from the 25th of September, 1856;" in other words, that the first five members on the Members' Roll of the Legislative Council will vacate their seats, under the provisions of the 9th Section of the Constitutional Act, on the 26th day of September, 1859.

As one of the "first five Members" whose position in Parliament is affected by this decision, I conceive it due to the Legislative Council and to myself to place on record in a permanent form the reasons which compel me to dissent from the decision arrived at by the Council, and to state the grounds on which I feel myself incapacitated from taking any part in the proceedings of the Council as one of its Members after the close of this day, the 26th of August, 1859. The vote of the Council has "resolved" that which in my opinion is not in accordance with the letter or the spirit of the Constitutional Act: and although I should be desirous at all times to bow, as an individual Member, to the judgment of the Council, I am not prepared, on a grave Constitutional question like the

present, affecting so nearly my position and duties as a Member of the Legislature, to sacrifice my own conscientious convictions, and abandon the conclusion at which I have arrived after a careful and deliberate investigation of the express enactments of the law as it stands, and, so far as they may be gathered from the letter of the Statute, the meaning and intention of its framers.

The expression upon which the solution of this question depends is to be found in the 9th Section of the Constitutional Act, which provides that "at the expiration of three years from the date of the issuing of the writs for the first election under this Act, and thenceforward at the expiration of every succeeding three years, such five Members as shall be the first five on such Members' Roll shall vacate their seats."

There is here neither obscurity nor ambiguity requiring illustration from any other source. The words are distinct, definite, and precise. "The writs for the first election" under the Constitutional Act can only mean either—1st. The writs for the first election of the Members of the whole Parliament, supposing such writs were, or were meant to be, issued simultaneously; or 2ndly. The writs for the first election of the Members of that branch of the Legislature the election of which should take place first: a third construction, which would interpret the words "first election under this Act" to mean any election for the return of a single Member, seems to be excluded by the use of the word "writs" in the plural.

It is in evidence before the Council, as shown by the Report of the Select Committee brought up this day, that the writs for the first election of Members of the House of Assembly were issued on the 27th day of August, 1856. The writs for the first election of Members of the Legislative Council are similarly shown to have been issued on the 24th day of September, 1856.

It seems to me impossible to entertain any doubt as to which of these two "elections" was "the first election under the Constitutional Act." I can come to no other conclusion than that such "first election" was that for the House of Assembly; the writs for which having been issued on the 27th of August, 1856, would give a period of three years from that date, terminating on the 26th August, 1859, or at 12 P.M. this night.

It is, no doubt, highly probable that the framers of the Constitutional Act intended that the writs for the election of Members of both Houses of Parliament should have been issued simultaneously. But this view of the intention of the Legislature in no way affects the question under review. A subsequent Act of the same Legislature expressly provided that the writs for the return of the Members of both Houses should not be issued simultaneously; and deliberately enacted that the writs for the election of the Council should not be issued until the writs for the election of the Assembly were returnable. (19 Vic., No. 24, Sec. 73.) It is thus manifest that the requirements of the law and the facts of the case indicate two separate and distinct elections for the several branches of the Legislature. Of these one must have been first in order of time, and that alone can be, and must be held to be, "the first election under the Constitutional Act."

The express enactment of a Statute must overrule any hypothetical or supposititious intention of the Legislature. I have, therefore, simply the clear words of the 9th Section, "the first election under this Act," to guide me in any opinion I may form or any course I may adopt. I know that such "first election" was that for Members of the House of Assembly; and I can consequently come to no other conclusion than that the period of three years, at the expiration of which the first five Members vacate their seats by law, must be computed from the issue of the writs for that election, namely, the 27th August, 1856.

If this be not a correct interpretation of the words now under consideration, the English language is incapable of clearly and distinctly expressing an idea. The expression, indeed, is to my mind so definite and precise as to leave no real ground for doubt or cavil.

The authority of a learned writer on the judicial interpretation of Statutes (*Dwarris on Statutes*) was quoted by the Attorney-General in his written opinion given in evidence before the Select Committee appointed by the Council to investigate this question, and much stress was laid upon the necessity of applying to this case the theory which pre-

scribes that Legislative enactments should be invariably construed in accordance with the presumed spirit and intention of their authors, rather than by a strict adherence to the letter of their provisions. But a closer and more attentive investigation of this branch of the treatise quoted, and of the language of other eminent jurists recorded by the same learned author, would have sufficed to convince the Attorney-General, as it must convince any candid and impartial enquirer, that it would be unwise to place entire reliance upon this isolated passage.

In proof of this position I will quote from another portion of the same treatise, (*Dwarris on Statutes*, p. 582): "As regard must always be had to the subject matter, so in construing a Statute we must never lose sight of its object and intent. 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 case the intent must be obvious, and must be collected from the words of the Act." "The Court," says Mr. Justice Coleridge, "will not attempt to mould the language of an Act for the sake of an apparent inconvenience without the clearest evidence of a corresponding intention in the Legislature." Have we, then, before us "the clearest evidence of an intention corresponding" to the conjecture which has been hazarded as to the original intention of the Legislature? Have we, in fact, any evidence whatever that the Legislature intended anything beyond or beside what the words used plainly import? Is there any possibility of divining that the Legislature, in using the words "the first election under this Act," intended "the first election of Members of the Legislative Council?"

But since Dwarris has been appealed to as an authority for the interpretation of Statutes according to the presumed intention of their authors, I may be allowed to quote another passage from the same work, in which very different and far more definite language is used to enforce the necessity and propriety of adhering strictly on such occasions to the words and letter of the law. "It has been hitherto propounded that words are to be taken in their ordinary sense; it now requires to be added, and not to be extended beyond it, to comprehend a case within the supposed meaning of the Legislature." And, in further enforcing this rule, the same author asserts that "the fittest course, in all cases where the intention of the Legislature is brought into question, is to adhere to the words of the Statute, construing them according to their natural import, in the order in which they stand in the Act of Parliament. The most enlightened and experienced Judges have for some time lamented the too frequent departure from the plain and obvious meaning of the words of the Act of Parliament by which a case is governed, and themselves hold it much the safer course to adhere to the words of the Statute construed in their ordinary import than to enter into any enquiry as to the supposed intention of the parties who framed the Act. They are not (as the most learned members of a learned body best know) to *presume* the intention of the Legislature, but *collect* them from the words of the Act of Parliament, and they have nothing to do with the policy of the Law. This is the true sense in which it is so often impressively repeated that Judges are not to construe Statutes by equity or views of policy, but to collect the sense of the Legislature by a sound interpretation of its language according to reason and grammatical correctness." (*Dwarris*, p. 583.)

The same author furnishes us in another place with equally precise language on the same point from the eminent Judge already quoted. "It is, in my opinion," (says Mr. Justice Coleridge), "so important for the Court, in construing modern Statutes, to act upon the principle *of giving full effect to their language, and of declining to mould that language in order to meet either an alleged convenience or an alleged equity upon doubtful evidence of intention, that nothing will induce me to withdraw a case from the operation of a Section which is within its words, but clear and unambiguous evidence that so to do is to fulfil the general intent of the Statute, and also that to adhere to the literal interpretation is to decide inconsistently with other and over-ruling propositions of the same Statute.*"

It is needless to multiply quotations from this well-known treatise. I have now sufficiently proved from the very authority which has been relied on by the Attorney-General, and adopted by the Legislative Council, that we are bound in this case to be guided by the clear and explicit words of the Act, and are not at liberty to *presume* the intention of its authors, or speculate upon the consequences of placing upon their plain language an interpretation conceived to be at variance with their hypothetical meaning.

It remains for me to notice two arguments which have been used in support of the view maintained by the Resolution of the Legislative Council, both of which I conceive to be inconsistent with a correct interpretation of both the spirit and the letter of the Act.

1st. It is alleged that to compute the issue of the writs for the "first election" from the 27th August rather than from the 25th September, 1856, would be to shorten the period of three years during which it was the intention of the 9th Section that the first five Members were to occupy their seats; and

2ndly. That it would obviously defeat the intention of the Legislature that a certain duration of tenure should be secured to the Members of Council, if the commencement of that tenure were to be referred to the date of the writs for a wholly distinct Assembly.

In the first place there is no intention, either expressed or intelligible, in the 9th Section that a certain duration of tenure should be secured to the Members of the Council. The plain words of the Section indicate that design to be, not that any five Members should occupy their seats three years, since vacancies from death, resignation, and other causes would at all times render this duration of tenure liable to interruption, but that one-third of the Members should vacate their seats every three years. The Section disregards altogether the supposed privileges of individual Members, and only seeks to provide that once in every three years five Members, or one-third of the whole Council, shall vacate their seats. And this design is plainly expressed in the 9th Section, as follows:—"To the intent that one-third of the whole number of Members of the Legislative Council, consisting of such five Members as have held their seats for the longest period, shall vacate their seats every three years."

It is further alleged that the date of the writs for the House of Assembly can afford no criterion for the duration of the tenure of office by Members of Council; and that such a view would be absurd, and repugnant to the expressed intention of the Legislature. What, I enquire, is the intention of the Legislature? and where is it expressed? The 9th Section of the Constitutional Act, taken in connexion with the 73rd Section of the Electoral Act, *has* made the tenure of office by Members of the Council dependent upon the issue of the writs of a totally distinct Assembly, since, as I have already stated, the Electoral Act provides that the writs for the Council shall not be issued till the writs for the Assembly are returnable. And it is worthy of remark that the 16th Section of the Constitutional Act, which prescribes the duration of the Assembly, provides that the period of five years shall date from the day when the writs for that House were made returnable; while in the case of the Council the period of three years is to date from the "issue of the writs for the first election under this Act."

It is clear that no injustice can be done to individual Members by making the tenure of their seats dependent on the issue of writs for the Assembly, inasmuch as that tenure was always liable to interruption from other causes, and because the commencement of that tenure is already by Law dependent upon the date when those writs were returnable. The object of the triennial vacation of seats, it must be borne in mind, is not to secure certain privileges to individuals, but to ensure a triennial modification of the composition of the Council to the extent of one-third of the whole body.

The consideration of this question may at first sight appear to be needlessly complicated by importing the Electoral Act into the present discussion. That Act, it must be remembered, is the creature and corollary of the Constitutional Act. Its preamble sets forth that its design is to carry into effect the objects detailed in the 2nd Section of its more important predecessor; any discrepancy, therefore, which may seem to exist between its regulation of the mere details of elections, and the general enactments of the Constitutional Act, cannot be held to contradict, as it is impossible they should vitiate, the provisions of an Act of so serious a character as that which creates the Constitution of the Colony. But the interpretation of the Constitutional Act must be sought for in its own clauses and derived from its own language.

I have dealt with this question as one requiring judicial consideration, and I assume that it was in this spirit that the Council undertook to decide it. By the 14th Section of the Constitutional Act the Council is empowered to "hear and determine" any question which may arise respecting any vacancy. Whether these five periodical vacancies come within the purview of this Section is not now to be considered, though I am strongly of opinion that they do not. But the Council, in passing the Resolution already referred to, was obviously acting in the exercise of the judicial functions with which that Section invests it. I may, therefore, be allowed to feel some surprise that the Council, when

acting in its judicial capacity, should have deferred so readily and so completely to the professional opinion of an individual who, however high he may stand in the confidence and estimation of Your Excellency's Government as the first Law Officer of the Crown, could only come before the Council on this occasion in the character of an advocate in a Court of Law. For myself, I am unable to attribute that weight and authority to the opinion of the Attorney-General which have been accorded to it by the Council. I cannot forget that the same Law Officer who now insists upon the construction of the Statute in accordance with the presumed intention of the Legislature, had, on a former occasion and in an analogous case, laid it down as a rule for the interpretation of this same Constitutional Act that, whatever may have been the intention of its framers, we can only be guided by a strict attention to the letter of its language.

The facts, then, are these :—The Constitutional Act declares that "the first five Members on the Members' Roll of the Legislative Council" shall vacate their seats "at the expiration of three years from the date of the issuing of the writs for the first election under the Constitutional Act." Those writs were issued on the 27th day of August, 1856. Three years from that date will be completed at 12 o'clock to-night; and at that time I am firmly of opinion that the seats of such five Members will be by law vacated.

When this subject was first mooted by myself in the Council I had no personal interest in the question beyond that concern which every member of the community at large, and especially any Member of the Legislative Council, must naturally feel in the settlement of a matter involving the Constitutional rights of four constituencies, the legal status of five Members of the Legislature, and it may be the very existence of Parliament itself. But the resignation of their seats this day by the Honorable Mr. Wedge and the Honorable Mr. Lowes has placed me in the category of Members personally and individually interested in a Constitutional solution of the important question.

It is, therefore, now a matter for my individual consideration whether or not I shall continue to be a Member of the Legislative Council after 12 o'clock P.M. this day. The Resolution of the Council may seem to justify or warrant myself and other Members similarly circumstanced in retaining our seats until the 26th of September; and for such of those Honorable Members as voted to affirm that Resolution there can exist no difficulty or obstacle in the way of complying with the decision of the Council, which is identical with their private opinions. Such is not my position. My conclusions are at variance with those arrived at by the Council and embodied in the Resolution now entered on its Journals; and while I admit the obligation, as a general rule, of the decisions of the Council upon its constituent Members, I am yet constrained to assert my right to think and act, in a matter personal to myself as an individual, in accordance with the words I have spoken, and the votes I have given, in my place in Parliament. I presume not to pronounce authoritatively that the Council is in the wrong, but I *protest* against the conclusion at which it has arrived, because I dispute the validity of the premises from which it is deduced, and the force of the arguments by which it is supported.

Impressed with this view of my position as a Member of the Legislative Council, the resignation of my seat seems the only safe course left open to me. By this step I free myself from the obligation of yielding obedience to the judgment of the Council in contravention of my own opinion, carefully formed and deliberately pronounced, and I relieve your Excellency's Government, so far as lies in my power, from any embarrassment which might hereafter be occasioned by their adoption of that interpretation of the Constitutional Act which I am unable to accept as consistent with the necessities of the case and the requirements of the Law.

I have, &c.,

JAMES WHYTE.

His Excellency Sir H. E. F. YOUNG,
Governor of Tasmania.

12th September, 1859.

SIR,

YOUR Excellency's Ministers having thought fit to introduce a Bill to make vital alteration in the Constitution of this Colony, and personally affecting myself, I think it right in the present state of the House to resign, and I do resign my seat in the Legislative Council.

I remain, &c.,

THOMAS HORNE.

His Excellency the Governor.

(No. 34.)

Hobart Town, 14*th September*, 1859.

SIR,

I HAVE the honor to forward to you the resignation of my seat as a Member of the Legislative Council in the Parliament of Tasmania.

Under the circumstances I consider that it is due to the Constituency which I represent, to the Colony with whose welfare my own interests are so closely identified, and to myself as a Member for a District which highly values Representative Institutions, to briefly explain to Your Excellency my reason for taking this step.

Sir, I could not consent to remain in a Council which would entertain for a moment a Bill of so pernicious a character as the Reform Bill which was introduced into the House by the Colonial Secretary; I decline to sanction, even by my presence, a measure which has for its object the violation of every principle of justice and equity, and is calculated to destroy the principle of our Constitution.

I can be no party to the consideration even of an Act which is brought in with the object of expelling the most valuable Member of the House on account of his independence, and of giving three years' duration of their seats to Members whose chief merit has been the unswerving support they have given to the Government.

It is, Sir, for these reasons I feel called upon to resign my seat and appeal to my constituents.

I have, &c.

R. CLEBURNE.

His Excellency the Governor.

22, *Macquarie-street*, 14*th September*, 1859.

SIR,

I FEEL constrained most reluctantly to resign my seat in the Legislative Council as Member for the District of Cambridge.

Your Excellency's Ministers have thought it right, in the present state of the Council, to bring in a Bill to amend the Constitution, and that Bill is not brought in at the call of any adequate expression of public opinion, but seems designed merely to attain party ends of a kind calculated to bring the Legislative Council into contempt and obloquy with the constituencies which it represents. I cannot consent to remain a Member of that Council under such circumstances.

I have, &c.,

J. C. GREGSON.

His Excellency the Governor of Tasmania.

JAMES BARNARD,
GOVERNMENT PRINTER, TASMANIA.