

APPOINTMENT OF QUEEN'S COUNSEL.

OTTAWA, 4th January, 1872.

MY LORD,—I have the honor to enclose for Your Lordship's consideration a report drawn up by the Honorable the Minister of Justice (Sir John A. Macdonald), on a question which has been raised as to the power of appointing Queen's Counsel for the Provinces.

2. I shall feel obliged if Your Lordship will have the goodness to procure the opinion of the Law Officers of the Crown, and communicate to me your decision on the question of Prerogative.

3. Questions will probably be put upon the subject to the Ministers soon after the commencement of the approaching Session of Parliament, *i. e.*, soon after the middle of next month.

I have, &c.,

LISGAR.

To The Right Hon. Earl of Kimberley.

DEPARTMENT OF JUSTICE,

OTTAWA, 3rd January, 1872.

The undersigned has the honor to report to Your Excellency that the question has been raised by the Government of the Province of Nova Scotia, as to whether they have the power of appointing Queen's Counsel for the Province, their opinion being that they have no such power.

The undersigned is of the opinion that, as a matter of course, Her Majesty has directly, as well as through her representative the Governor-General, the power of selecting from the Bars of the several Provinces, her own Counsel, and, as *fons honoris*, of giving them such precedence and pre-audience in her Courts as she thinks proper.

It is held by some that Lieutenant Governors of the Provinces, as they are now not appointed directly by Her Majesty, but by the Governor-General, under "The British North America Act, 1867," clause 58, do not represent Her sufficiently to exercise the Royal prerogative without positive statutory enactment.

This seems to have been the view of Her Majesty's Government in 1864, when they refused to confer the pardoning powers on the Lieutenant Governors.

(See despatch of Mr. Cardwell, of 3rd December, 1864; also, Lord Granville's despatch of 24th February, 1869.)

On the other hand, it is contended that the 64th and 65th clauses continue to the Lieutenant Governors the powers of appointing Queen's Counsel which they exercised while holding Commissions under the Great Seal of England.

Reference is also made to the 63rd section, by which the Lieutenant Governors of Ontario and

Quebec appoint Attorney Generals, and the Lieutenant Governor of Quebec also a Solicitor General.

However this may be, it will be seen that by the 92nd clause of the Act, it is provided that, "The Legislature of each Province may make laws in relation to the administration of justice in the Province, including the constitution, maintenance and organization of Provincial Courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those courts."

Under this power, the undersigned is of opinion, that the Legislature of a Province, being charged with the administration of justice and the organization of the Courts, may, by statute, provide for the general conduct of business before those Courts; and may make such provisions with respect to the Bar, the management of criminal prosecutions by counsel, the selection of those counsel, and the right of pre-audience, as it sees fit. Such enactment must, however, in the opinion of the undersigned, be subject to the exercise of the Royal prerogative, which is paramount, and in no way diminished by the terms of the Act of Confederation.

As the matter affects Her Majesty's prerogative, the undersigned would respectfully recommend that it be submitted to the Right Honorable the Secretary of State for the Colonies, for the opinion of the Law Officers of the Crown and for Her Majesty's decision thereon.

The questions for opinion would seem to be:

(1.) Has the Governor General (since 1st July, 1867, when the Union came into effect) power, as Her Majesty's representative, to appoint Queen's Counsel?

(2.) Has a Lieutenant-Governor, appointed since that date, the power of appointment?

(3.) Can the Legislature of a Province confer by statute on its Lieutenant Governor the power of appointing Queen's Counsel?

(4.) If these questions are answered in the affirmative, how is the question of precedence or pre-audience to be settled.

All of which is respectfully submitted.

JOHN A. MACDONALD.

DOWNING STREET, 1st Feb., 1872.

MY LORD,—In compliance with the request contained in your despatch, No. 1, of the 4th January, I have taken the opinion of the Law Officers of the Crown on the questions raised therein, with regard to the power of appointing Queen's Counsel in the Provinces forming the Dominion.