Queensland

Parliamentary Debates
[Hansard]

Legislative Assembly

TUESDAY, 4 SEPTEMBER 1888

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LEGISLATIVE ASSEMBLY.

Tuesday, 4 September, 1888.

The Case of Benjamin Kitt.—Resignation of the Government—Ministerial Explanation.—Adjournment.

The SPEAKER took the chair at half-past 3 o'clock.

THE CASE OF BENJAMIN KITT.

The PREMIER (Hon. Sir T. McIlwraith) said: Mr. Speaker,—I beg to lay upon the table of the House, correspondence between His Excellency the Governor and the Government regarding the case of Benjamin Kitt; and move that the papers be printed.

Question put and passed.

RESIGNATION OF THE GOVERNMENT.

MINISTERIAL EXPLANATION.

The PREMIER said: Mr. Speaker,—I rise to make an explanation to the House upon certain things that have taken place during the last month or two between the Government and His Excellency the Governor. Under ordinary circumstances a statement of this sort would be very short, because it rarely happens that a Ministry have tendered their resignation to the Governor without the public knowing the reasons and facts that have led up to it. As a matter of fact, the public know very little about the circumstances now. The fact is, at all events, that the present Government this morning tendered their resignation to His Excellency. The object of my explanation is to let the House know the circumstances which led up to it and the reasons which guided the Government in the action they have taken. I premise what I have to say with these few remarks, because this is quite an exceptional case. As an ordinary rule such a result as the resignation of a Ministry has usually been preceded by a vote of want of confidence of the House. No such vote has preceded the action of the Ministry in this case, and therefore it is necessary the House should know the facts. I shall be as brief and concise as I can, consistently with letting the House thoroughly understand what has taken place. It is in order that the facts may be known that I proposed the motion which has just been passed—that the papers I laid upon the table be printed. Those papers contain the correspondence between His Excellency and the Government, and hon. members will have an opportunity now of perusing them. At the same time it is my duty to read and comment upon that correspondence, and I think when I have done so, hon. members will have a knowledge, to a large extent, of the facts of the case. I do not deprecate any discussion on any remarks I may make. I have no objection whatever to any debate taking place on any remarks I may make on any motion of any hon. member, but at the same time I do not wish to push on a debate. As the facts will be laid before the House for the first time this afternoon, I desire myself to give hon. members every opportunity of knowing what those facts are. While, therefore, I say the Government do not desire to push on a debate upon this matter, they have no objection whatever to a debate taking place. The difference between His Excellency and the Government arose in the case of a criminal named Benjamin Kitt, who was sentenced to three years' penal servitude at Townsville some months ago for stealing two pairs of boots—he was accused of stealing three pairs, but he was convicted of stealing two, of the value of 40s. The Colonial Secretary, in whose department it is to investigate

any petitions for mitigation of sentences, considered the petition of this prisoner—not so much a Ministerial duty as a matter of departmental duty, though it went through the Cabinet. The Colonial Secretary advised the Governor to remit the sentence under the clauses of the Offenders Probation Act of 1886. Few members of the Cabinet, I may say, Mr. Speaker, knew much or anything of the merits of the case. As a matter of fact, when the matter was submitted to the Cabinet, as hon. members will see from paper No. 5 of the correspondence, few of the Cabinet knew much of the case when first submitted. I myself did not know the merits of the case; but in cases of that kind we rely on the judgment and discrimination of the Colonial Secretary. At the Executive Council, however, His Excellency declined to approve of the recommendation of the Ministry, and immediately afterwards, therefore, as is disclosed by the papers, the paper referred to was withdrawn, the object being to enable each individual member of the Ministry to examine into the merits of the case and act accordingly. We withdrew the paper, and each member of the Cabinet examined into the merits of this particular case of Benjamin Kitt, and we came to the conclusion which hon. members will see disclosed in paper No. 6, and which we put before His Excellency in a minute as follows:—

"The Colonial Secretary again submits for the consideration of Ministers the case of prisoner Benjamin Kitt, and in doing so informs the Cabinet that the previous minute recommending this prisoner's release under the provisions of the Offenders Probation Act of 1886 was withdrawn from the Council at the instance of His Excellency the Governor, who requested that further inquiries might be made as to the merits of the prisoner's claim to special consideration.

"The Colonial Secretary having again carefully perused all the papers relating to the case, is satisfied that it is one in which the clemency of the Crown should be exercised, and he has no hesitation in repeating his previous recommendation.

"Ministers accordingly advise that Benjamin Kitt be released under the provisions of the Offenders Probation Act of 1886, upon his entering into a bond in the sum of £40."

That minute is signed by all the Ministers, inclusive of myself. His Excellency, instead of approving of the advice tendered to him by his Ministers, wrote across the paper the following minute:—

"The Governor regrets that he must again express his inability to approve of the recommendation of the Council in the case of Benjamin Kitt.

"The case, in his judgment, presents no features which lead him to doubt that the verdict of the jury and the opinion of the Judge were right"—

And so on; but as I shall have again to quote it, in reading my next letter, I will not further quote the words of His Excellency just now. Having passed the preliminary stage, hon. members will get the facts of the case by reading the correspondence between the Government and His Excellency. That correspondence commences by a letter signed by myself on the 9th August, and is numbered "8" in the printed papers. It is as follows:—

"Chief Secretary's Office,
"Brisbane, 9th August, 1888.

"SIR,

"Before expressing the views of Your Excellency's Ministers upon the decision which you have recently arrived at in the case of the prisoner Benjamin Kitt, who is now in the Penal Establishment at St. Helena, undergoing a sentence of three years' penal servitude, passed upon him by Mr. District Court Judge Noel, under conviction of larceny, I have the honour to remind Your Excellency that on the 11th ultimo a recommendation in favour of the release of this prisoner under the provisions of the Offenders Probation Act of 1886 was presented for your approval. On that occasion Your Excellency declined to accept the recommendation of your Ministers, and the papers in reference to the case were withdrawn, with a view to further inquiry as to the prisoner's antecedents. That inquiry having been duly made, and all the circumstances attending the case carefully reconsidered, Ministers had again, on the 18th ultimo, the duty of submitting the same recommendation, to which your approval was again refused, and your decision recorded in the proceedings of the Executive Council in the following terms:—

'The Governor regrets that he must again express his inability to approve of the recommendation of the Council in the case of Benjamin Kitt.

'The case, in his judgment, presents no features which lead him to doubt that the verdict of the jury and the opinion of the judge were right.

'Judge Noel, before whom the prisoner was tried, has distinctly stated that he did not think at the time that the prisoner was a fit subject for release under the Offenders Probation Act, and that he has not altered his opinion. The Governor agrees with the Judge, and he regards it as highly inexpedient to shake the confidence of the public in the administration of law and justice by unnecessary interference with the sentences of the courts.

'The 7th section of the Offenders Probation Act expressly confides the authority to be used in this behalf to the Governor alone, and not to the Governor in Council; and as he is not satisfied that it should be used on this occasion, he feels bound to decline to use it against his own conviction.

'The real question at issue in cases such as this is whether the Royal prerogative is to be exercised by the Governor or by the Colonial Secretary for the time being, notwithstanding the language of the law. The Governor would have no objection to being relieved of the responsibility if this may legally be done. If the Council desire it he will readily refer the question to the Secretary of State, for the opinion of the law officers of the Crown and his instructions thereupon.'

"I have now the honour of pointing out to Your Excellency that this refusal to accept the advice of your Ministers is a grave departure from the principles of responsible government, and in direct opposition to the practice which has prevailed in this colony for many years past in dealing with cases in which the clemency of the Crown has been invoked.

"The details of this particular case are not of such importance as to warrant its consideration at any length, were it not for the grave censure upon your Ministers which is contained in the implication that the acceptance of their advice would have the effect of 'shaking the confidence of the public in the administration of law and justice by unnecessary interference with the sentences of the Courts.' Your Ministers cannot allow this censure to pass without again directing Your Excellency's attention to a few of the facts surrounding this case, which they consider will

clearly show that they have acted with the sole object of carrying out the good government of the colony.

"On the 28th of March last, Benjamin Kitt was convicted at Townsville of stealing two pairs of boots valued at 40s., and sentenced by the District Court Judge to penal servitude for three years. A careful perusal of the Judge's notes and a study of the prisoner's own statement show that it is quite possible that he may not have been guilty, and I think he should at least have been allowed the benefit of the doubt. The jury, however, having returned a verdict of guilty, Ministers dealt with the case on that assumption. Inquiry was instituted through the Inspector of Police, at Townsville, after conviction, as to the man's previous character, and it was ascertained that he had—up to the time of his trial—been considered a respectable member of the community. The Judge states in his report that he had come to the conclusion that he had been guilty of numerous thefts during the time he was in the service of the prosecutor Moore. There is, however, not one word of evidence in the Judge's notes to justify this statement, and the results of the inquiries subsequently made into the prisoner's character lead to a contrary conclusion. Moreover, he was accused of the larceny of a case and its whole contents, whereas it was distinctly proved at the trial that the case itself had not been stolen, and that some of the goods which he was accused of pilfering had been purchased at the shop of another storekeeper. It is, therefore, difficult to understand what could justify the Judge in making such a sweeping accusation. No doubt a judge in adjudicating upon cases has advantages that favour the formation of a correct conclusion which others who merely read an account of the proceedings have not; but in the present case the Judge's belief that the prisoner had been guilty of numerous other thefts finds so little justification that it would be grossly unfair to the prisoner to attach any weight to it.

"The plain case, therefore, is this: This prisoner, previously of good character, is convicted of stealing goods to the value of 40s. He is undergoing a sentence of penal servitude for three years. Ministers consider the sentence both unjust and unnecessarily severe, and accordingly recommend his release under the provisions of the Offenders Probation Act, by which he will still be under the surveillance of the police until the end of the sentence.

"Your Excellency does not approve of this recommendation being carried into effect, but insists upon the prisoner serving the whole of his sentence.

"After very mature consideration, Your Excellency's Ministers adhere to the advice previously given, and regard with regret the indication of want of confidence in them implied in Your Excellency's opinion that the action they recommend would be likely to 'shake the confidence of the public in the administration of law and justice.'

"Your Excellency says that the real question at issue is, 'Whether the Royal prerogative is to be exercised by the Governor or by the Colonial Secretary for the time being, notwithstanding the language of the law.' With all due deference to Your Excellency, I submit that this is not the real question at issue. During the whole of the administration of the late Governor Kennedy he acted, in every case in which the remission of the sentence of a prisoner was concerned, on the advice of his Ministers. During the whole term of your administration, you have up to the present followed the same practice, excepting in one instance, to which I will refer further on.

"The real question, I contend, is, Whether in the colony of Queensland, which has enjoyed the advantages of responsible government for nearly thirty years, and in which the prerogative of mercy has been exercised by the Governor, under the advice of his responsible Ministers for many years, we should, in the exercise of the prerogative, revert to the practice which exists in a colony the government of which is administered directly by the Crown. When I say that the prerogative has been exercised on the advice of responsible Ministers for many years, I confine myself to such limited expression because my examination has only extended to the period at which the late Governor Kennedy assumed the government of the colony. It is quite possible, and I think it is more than probable, that the prerogative has been exercised in the same way since the establishment of responsible government.

"I am aware that Your Excellency claims to exercise the prerogative as a personal duty which is imposed on you by your Instructions, and that you have hitherto exercised it as such. I am not prepared to admit that your Instructions impose upon Your Excellency any personal responsibility in cases other than those of capital offences, and even then I think it very doubtful whether you are required to accept any responsibility which does not involve the granting of a pardon or reprieve.

"The 6th clause of Her Majesty's Letters Patent of the 13th of April, 1877, merely empowers Your Excellency to grant a pardon or any respite of the execution of any sentence. In Your Excellency's Instructions of the same date, a reference to this power is contained in the 12th clause, which prescribes the conditions under which the power is to be exercised, and there it is very clearly confined to capital cases; while the 6th clause of the Instructions requires you '*in all cases* to consult with your Executive Council, except only in cases which may be of such a nature as our service would sustain material prejudice by consulting the said Council, or when the matters to be decided shall be too unimportant to require the advice or too urgent to admit of their advice being given by the time within which it may be necessary to act.'

"The contention that the prerogative of mercy delegated to the Governor of a colony is limited to the granting of pardon or absolute remission of sentence, and that apart from capital cases, it is not concerned with questions of mitigation of sentence (in which category the release of a prisoner on probation, but under surveillance, can easily be shown to be included) would find further support from the fact that any supposed necessity for the exercise of the personal responsibility in the mitigation of sentences is practically set aside by the Queensland Prison Regulations, made under the Gaols Act, and approved by the Governor in Council, which specify conditions under which prisoners become eligible to a fixed proportional remission, and on fulfilment of which conditions a prisoner is discharged without further direct reference to any higher authority than the Minister. In the approval of these Regulations by the Governor in Council there is nothing apparent in the way of a delegation of the personal prerogative from the Governor to the Council—in point of fact there is no question of the prerogative at all; but clearly there is an assumption that mitigation of sentence is a matter to be dealt with after the ordinary modes of Executive Council action.

"Your Excellency incidentally mentioned to me the recent case of the prisoner Müller, in which the majority of your late advisers were in favour of the man's execution, and in which you

differed from that opinion, and on your own authority granted a reprieve. This, however, your Ministers cannot accept as a case in point, because in clause 12 of your Instructions you are commanded by Her Majesty, in all cases where the offender is condemned to suffer death, to extend or to withhold a pardon, or to reprieve, according to your own deliberate judgment, whether the members of the Executive Council concur therein or not. With this exception—which I submit is not a case in point—you have exercised the prerogative invariably on the advice of your Ministers.

"During Your Excellency's administration of the Government you have remitted the sentences of no less than 169 prisoners. Of these 71 were tried in the Supreme Court, and 40 in the District Court. Of those tried in the Supreme Court you obtained a report from the judge in 39 cases only; of those tried in the District Court you received a report in 17 cases. Of those tried by a Supreme Court judge you remitted the sentence in 28 cases against the opinion of the judge; and of those tried by a District Court judge you remitted the sentences in 8 cases against the opinion of the judge.

"I enclose, for your information, a table showing these results, and they point to this: that the opinion of the judge has not been regarded by Your Excellency to be of such importance as to justify you in using it now as the only ground for differing from your Ministers in the case of Benjamin Kitt.

"From an examination of the cases in detail—which you will find in a return which accompanies this letter"——

I may here say that I have not published this return, but I am prepared to lay it on the table of the House if hon. members desire it—

"it will be abundantly evident that you have acted throughout consistently on the advice of your Ministers. The case of the prisoner Seth Peterson clearly illustrates what I mean. This prisoner was sentenced on the 8th October, 1878, to ten years' penal servitude for forgery. He was a man who occupied a high and trusted position in the public service. He committed numerous forgeries, which, in addition to the heinous character of the crime itself, had the effect of defrauding a number of people of large sums of money, and he added to his offence the further aggravation of endeavouring to have the charge transferred from himself to some young men who were subordinates in the same office. The papers submitted to you to justify the remission of nearly three years of this man's sentence consisted of several letters from his wife and a petition from his friends, on which two previous Colonial Secretaries had expressed the opinion that no remission should be granted. Yet this prisoner was ultimately released on the advice of your late Ministers without a single additional fact having been placed before you. Instances such as this, and an examination of the whole of the other cases, clearly show that the practice hitherto has been to place implicit reliance upon your Ministers, to accept every reasonable recommendation which they have made, and to act upon their advice. This was in accordance with the principles of constitutional government; but an entirely different practice seems to have been initiated and insisted upon in Benjamin Kitt's case.

"As regards the historical aspect of the question, of the exercise of the prerogative of pardon by Colonial Governors I would invite Your Excellency's attention to the following statement of the results of similar discussions in other portions of Her Majesty's dominions:—

"In Canada, prior to 1867, the Governor was bound to consult with his Ministers in all cases of application for the mitigation or remission of sentences, but he remained at liberty to disregard their advice, and to exercise the Royal prerogative according to his own judgment, and upon his own personal responsibility as an Imperial officer.

"In 1874, during Sir Hercules Robinson's administration of the Government of New South Wales, the exercise of the prerogative frequently formed the subject of correspondence between the Governor and his Ministers and the Secretary of State for the Colonies. The correspondence on the subject was sent to the Governor-General of Canada and subsequently laid before the Dominion Parliament.

"This led to a careful examination of the question by the Dominion Minister of Justice (Mr. Blake), who, at the request of Lord Carnarvon, proceeded to England in June, 1876, for the purpose of personally conferring with Her Majesty's Ministers on the subject. A conference took place, and certain alterations in the Commission and Instructions to Governors was the result. The Commission and Instructions thus amended gave the power to Governors to act against the advice of their Ministers; but at the same time practically conceded what Your Excellency contends is your own personal right—namely, that 'in all cases of a purely local nature the advice of the Canadian Ministers in respect to the exercise of the prerogative of pardon should not only be taken, but should prevail'; thus sufficing 'to extend to the Canadian Government upon such questions the same freedom of action as in all other matters, which concern solely the internal administration of the affairs of the dominion. * * * The independent judgment and personal responsibility of the Governor-General of Canada as an Imperial officer are relied upon to decide finally after consultation with his Ministers in all cases of Imperial interest or which might affect any country or place outside of Canada; while he is at liberty to defer to the judgment of his Ministers in all cases of merely local concern.'

"In New South Wales the practice is to treat the prerogative of mercy as a departmental matter within the province of the Minister for Justice, who submits his recommendation to the Governor direct, without the intervention of the Cabinet. Should there be any point in connection with his recommendation requiring further consideration, the Governor then refers the case to the Premier, who advises him thereupon, and whose advice is invariably followed.

"At the Colonial Conference held in London in 1887, a discussion took place as to whether the pardon clause in the Instructions to Colonial Governors ought not to be altered as far as colonies enjoying responsible government were concerned. I do not myself consider the provisions of the clause at all inconsistent with the conditions of responsible government, because occasions may arise in which the Executive may advise you in opposition to Imperial interests, or to interests affecting other countries or colonies. In such cases you would be clearly within your Instructions in declining to act upon the advice of Ministers, but the natural effect would, no doubt, follow of a change in the *personnel* of your advisers. The general result of the debate was, that in the colonies the exercise of the Royal prerogative, so far as it affected local concerns, should be treated in the same way as any other acts of the Government and left to the responsible advisers of the Governor; but opinion differed as to whether this rule should apply to capital offences or not. As, however, this is not material to the present issue, I leave it out of consideration. The colonies were practically unanimous—and, as far

as I can see, it is the opinion of the present Secretary of State—that, as in local concerns, the remission of sentences should not in any way differ from any other of the acts of a Government, and that the Governor should, as a general rule, follow the advice of his Ministers. Some of the colonies evidently desire that the responsibility should be left with the Imperial Government or their representative here; but their arguments apply chiefly to capital offences. These arguments, however, have no bearing on the position in this colony, where the prerogative has almost invariably been exercised under the advice of the Executive Council.

"We are also supported in our contention by the Chief Justice of Victoria, the highest recognised authority in Australia on constitutional law, who, in connection with the recent case of Chun Teong Toy *versus* Musgrove, the Commissioner of Customs (*vide* Melbourne *Argus* of the 16th July, 1888), says: 'In a country where there is responsible government the law does not recognise any personal duty in the Sovereign, and the law therefore says that she is absolutely irresponsible to human law. She can do no wrong. Does not that imply that there is no duty recognised by law on the part of the Sovereign—no duty existing on her to do any act apart from her responsible advisers? The reason is that every act is done by the responsible advisers, who are responsible for the acts. * * * Although there may be no means of enforcing the duty, if it is a legal duty she is subject to the judgment of her subjects. I do not know of any act done by a Sovereign, where there is responsible government, which is the legitimate subject for human judgment, for which the Sovereign is amenable to human criticism.' No language could indicate more clearly that in all things Her Majesty must act through her responsible advisers, and as a matter of fact in England and in the colonies, where there is responsible government, she does so act. Should there be a difference of opinion between her responsible advisers and herself, the remedy is pointed out to us clearly. The Chief Justice of Victoria goes on to say: 'The Crown need not take the advice, but it cannot act without advisers. When the Sovereign is *inops consilii*, when she has no advisers, she must get others; she may consult her footman if she pleases as to what she should do, but she must have advisers responsible to Parliament for her acts.'

"Although in England the prerogative of mercy is by statute in the Sovereign, yet, as Todd says: 'This, like every other prerogative of the British Crown, is held in trust for the welfare of the people, and is exercised only upon the advice of responsible Ministers.' The Home Secretary seems to 'assume full and sole responsibility for the advice he tenders to the Sovereign; and although dissatisfaction is occasionally expressed in regard to the decisions of the Home Office when the prerogative of mercy is invoked, the current of enlightened opinion is decidedly opposed to any change in the present practice.' And I would here point out, in connection with this portion of the subject, that in the exercise of the Royal prerogative in England the Secretary of State is required not only to consider the moral aspect of the case as contrasted with the legal, but he is also required to consider to some extent the popular feeling in the community at large.

"Your Excellency observes that 'the 7th section of the Offenders Probation Act expressly confides the authority to be used in this colony to the Governor alone, and not to the Governor in Council,' and as you are not satisfied that it should be used on this occasion, you feel bound to decline to use it against your own convictions. Although I was not a member of the Legislature when the Offenders Probation Act was passed, I am convinced that if there had been the slightest doubt as to whether 'Governor' meant 'Governor alone' or 'Governor in Council,' the clause would have been so framed as to make it clear that the latter was the meaning intended. I would point out, also, that if by his Instructions the power of independent action in cases of mitigation of sentence be vested in the Governor alone, and if the meaning attached by Your Excellency to the section of the Act referred to be the correct one, then we have here the anomaly of a provision making it legal for the Governor to do conditionally that which he has already the power to do unconditionally. Were Your Excellency, moreover, to place the same construction on other Acts of Parliament, or upon other portions of your Instructions, you would be interfering, without the advice of Ministers, with a great part of the administration of the colony. For instance, by your Instructions, you are authorised and empowered in Her Majesty's name, and on her behalf, to appoint all judges, commissioners, justices of the peace, and other necessary officers and Ministers of the Crown. Were you to attempt to carry into effect the literal interpretation of these directions without the advice of Ministers you would either fail or succeed in abolishing our present system of responsible government.

"In a colony possessing responsible government a Governor must be prepared on many occasions to give his official endorsement to acts of which his private convictions would lead him to disapprove. In the present case, the question is not whether Your Excellency approves of the remission of the prisoner's sentence, but whether you consider the case of sufficient importance to warrant you in allowing your personal convictions to determine a course of action which might possibly lead to the retirement of your Ministers.

"Your Excellency observes that you have no objection to be relieved of the responsibility of exercising the Royal prerogative personally, if it could legally be done; but in determining this legality you do not indicate whose advice you are prepared to take. You have had the advice of the Minister of Justice, who says that it *can* be legally exercised by accepting the advice given you by your Council. Your proposal to submit the question to the Secretary of State for the opinion of the law officers of the Crown, your Ministers must decline to accept, because they consider the point has been practically determined by the decision of the Secretary of State in the case of Canada and by the practice which has hitherto prevailed in this colony, and which you seek now to change. We have hitherto enjoyed the privilege of having the prerogative exercised only upon the advice tendered by the Executive Council, and we see no reason now to refer the question to the Colonial Office with a view of determining whether the privilege is to be withdrawn.

"In conclusion, I desire to place clearly before Your Excellency the grave responsibility you are undertaking if you insist upon carrying out your views. By so doing you will be subject to a criticism in Parliament in which your Ministers cannot offer you any assistance—a position which cannot but be adverse to the maintenance of good government. Nor can this issue between yourself and your Ministers be confined to this particular case in regard to which our recommendation has been set aside. At the present time you have sought our advice in the cases of several other prisoners now undergoing various terms of imprisonment. That advice, under a condition which allows to it a merely consultative

significance, your responsible advisers must decline to give, as it is clear that no responsibility can be attached thereto, unless the subsequent action is to be determined thereby.

"I have, etc.,
"THOMAS MCILWRAITH.

"His Excellency
Sir Anthony Musgrave, G.C.M.G.,
Governor.

"HIS EXCELLENCY THE GOVERNOR TO THE CHIEF SECRETARY.

"*Minute for the Hon. the Chief Secretary.*

"The Governor has had the honour to receive the Chief Secretary's letter of the 9th August, on the subject of the case of the prisoner Benjamin Kitt, in which the Governor felt himself unable to declare that he approved of the recommendation of his advisers.

"2. The questions presented by this communication include points touching the Royal prerogative, constitutional law, and the construction of statutes, upon which the Governor does not feel that it is competent to him to pronounce a decision, or to undertake to establish a precedent which may not be in accordance with correct principles. The Governor will, therefore, transmit a copy of the Chief Secretary's letter to Her Majesty's Secretary of State, for Her Majesty's instructions.

"3. The Governor hastens, however, at once to repudiate any intention to imply censure of Ministers in declining in this instance to be governed by their advice. He does not doubt that they have acted with the sole object of carrying out the good government of the colony, but he thinks himself at liberty to entertain the opinion that unnecessary interference on his part with the sentences of the Courts might have the effect of shaking the confidence of the public in the administration of law and justice.

"4. There would seem to be no utility in discussing previous cases in which the Governor may or may not have assented to the recommendation of Ministers in the exercise of the Royal prerogative. They do not touch the real point in the question under consideration, which scarcely seems to the Governor to be clearly apprehended.

"5. He is not unacquainted with the historical aspect of the question of the exercise of the prerogative of pardon by Colonial Governors. All the arguments referred to by the Chief Secretary had regard only to questions as to the propriety of the exercise of the prerogative by the Governor without obtaining the advice of the Council. The Governor readily concedes that he ought in no case to use it without first consulting his Council. The question now under consideration is quite a different question—it is whether it is his duty to use the prerogative at the bidding of Ministers contrary to his own conviction of what is right. For this the Governor ventures to believe there is no authority and no precedent whatever. The Royal prerogative of pardon, which is ancillary to the administration of justice, has never been in England exercised by the Cabinet—a body unknown to the law—but has, during the Queen's reign, been confided to the Home Secretary, as one of Her Majesty's confidential Secretaries of State, as Her Majesty's delegate. The Governor believes—but he cannot be absolutely certain without reference—that this delegation is an innovation attributable to the fact that the present Sovereign is a woman, who might reasonably desire to be relieved of peculiarly disagreeable details of duty. Before Her Majesty's reign, the Governor is under the impression that this function of the Royal Office was discharged by the Sovereign himself with only the assistance of his Secretary of State, as might be done by the Governor of a Crown colony, and has never in law or in principle been considered as included in the range of responsible government for which Ministers were answerable. In principle the prerogative of mercy is a pendant to the administration of law and justice, which it has always been the boast of the British Constitution is above the control of any party government.

"6. The Governor has only further to say, therefore, that he hopes he could scarcely be subjected to unfriendly criticism in Parliament for simply doing nothing. He is not seeking to use the prerogative or carry out any view. He only demurs to being required, contrary to his own opinion, to carry out the views of others by interfering with the sentence of a court of law. If the prerogative of pardon, conditional or otherwise, could be exercised by the Council without the concurrence of the Governor, there would be no further observation to make; but it seems to him to be out of the question, if his assent is necessary, that by any Royal Instructions, or by any Act of Parliament, or by any system of government, a servant of the public could be required to prostitute his own personal convictions at the direction of any other man or body of men.

"7. If it be thought desirable that the prerogative of mercy should be vested in the Council independently of the Queen's Representative, this must be done by an alteration of the delegation, if such a course should be thought to be legally and constitutionally possible; and for consideration of this point the Governor will transmit the case to the Secretary of State.

"(Signed) A. MUSGRAVE.

"Government House,
"Brisbane, 14th August, 1888.

"THE CHIEF SECRETARY TO HIS EXCELLENCY THE GOVERNOR.

"Chief Secretary's Office,
"Brisbane, 29th August, 1888.

"SIR,

"My Ministerial and Parliamentary duties, as well as the state of my health, have prevented me from replying at an earlier date to Your Excellency's minute of the 14th instant, with reference to the question which has arisen between yourself and your Ministers in connection with the case of the prisoner Benjamin Kitt.

"I regret that at the outset of your communication Your Excellency should have felt called upon to state that, in regard to the question under discussion, you do not consider that it is competent to you to pronounce a decision or to undertake to establish a precedent which may not be in accordance with correct constitutional principles, as it lays me under the necessity of submitting, with all due deference, that the latter is precisely the form under which your action in this case may be most correctly described. The practice hitherto observed has been for the Governor to follow the advice of his Ministers in cases where the exercise of the prerogative is concerned; and in declining to continue the observance of this practice, your Ministers consider that you are undertaking to establish a precedent which is inconsistent with the conditions of responsible government.

"When Your Excellency observes that 'there would seem to be no utility in discussing previous

cases in which [you] may or may not have assented to the recommendation of Ministers in the exercise of the Royal prerogative,' I am unwillingly led to conclude that Your Excellency has not clearly apprehended the argument which I supported, by statistics, of previous cases of pardon and mitigation of sentence dealt with by Your Excellency in Council. There was no intention to criticise the judgment which you had formed upon any of those cases which were adduced to prove the point that in cases not capital you had invariably acted upon the advice of your Ministers. Upon them, therefore, the responsibility of the decisions rested.

"There was no attempt made at discussing the cases referred to, their argumentative use in statistical form being quite independent of the merits of each particular case. They were also adduced to show that in taking up your present position on the strength of a judge's report you were introducing as an argument a principle by which your practice had not hitherto been guarded.

"Your Excellency states that the question under consideration is, 'Whether it is a Governor's duty to use the prerogative at the bidding of Ministers contrary to his own conviction of what is right,' and although this appears to represent the case in a somewhat extreme form, yet, as Your Excellency has selected this mode of expression, I am bound to direct your attention to the consequence involved in adopting the other extreme of refusing 'to follow the bidding of Ministers.' There can be only one way of dealing with advisers whose recommendations are repudiated by 'your own conviction of what is right.'

"I beg once more to invite Your Excellency to contemplate the serious position in which your Ministers are placed. Your Excellency declines to follow their advice in a certain case, and the government is being carried on by Ministers who, therefore, decline to give further advice in connection with any case coming under the same category. These cases are sure to accumulate, and there can be no doubt that this lapse of an entire department of the consultative functions of the Ministry will have an effect upon the conduct of the public business which cannot be satisfactory either to Your Excellency or to them.

"With regard to Your Excellency's anticipation that 'you could scarcely be subjected to unfriendly criticism in Parliament for simply doing nothing,' I would respectfully point out that what practically amounted to a veto upon a course which your Ministers had decided to be right can hardly be regarded in the merely negative light of abstinence from action, nor does such a mode of stating the case in any way meet the question of who is to defend in Parliament your attitude towards a matter in which a difference of opinion forces your responsible advisers into a position adverse to that assumed by Your Excellency.

"So far as Your Excellency's position in the matter is concerned, the solution of the question is to be found in the terms of the circular despatch from the Secretary of State, dated the 30th of April last. In that despatch the Secretary of State informs you that he declines to advise Her Majesty to alter the clause under which you act in regard to the exercise of the prerogative of mercy, and your Ministers were perfectly satisfied that it should remain unaltered; as from Lord Knutsford's remarks in the despatch, they were of opinion that it exactly met their views as to the mode of procedure in dealing with the class of cases under consideration. They are aware that the clause, standing as it does, and read in the light of Lord Knutsford's comments thereupon, indicates that a Governor ought to have power to protect Imperial interests, and the interests of other colonies or countries, against the advice of Ministers. From the 4th paragraph of the despatch it is equally plain that due authority is conferred upon you to act fully according to the advice of your Ministers in all other cases.

"Seeing, therefore, that the opinion of the Secretary of State upon the general question has been sufficiently disclosed to other colonies, and to Queensland through the despatch referred to, it appears to your Ministers to be a waste of time to refer to him for his opinion in this special case. If Your Excellency has any doubt as to whether your advisers have the confidence of the country in the action they are now taking, I will immediately bring the whole subject before both Houses of Parliament, which, after all, constitute the real and immediate authority to which Ministers must look for approval or otherwise of any advice they may tender to Your Excellency.

"I have, etc.,

"THOMAS MCILWRAITH.

"HIS EXCELLENCY THE GOVERNOR TO THE CHIEF SECRETARY.

"*Minute for the Hon. the Chief Secretary.*

"The Governor has received the Chief Secretary's letter of the 29th instant in further reference to the question as to the exercise of the Royal prerogative which has arisen in connection with the case of the prisoner Benjamin Kitt.

"2. Upon that question the Governor has already addressed a despatch to the Secretary of State, in obedience to the 7th clause of the Royal Instructions of 13th April, 1887, which enjoins upon the Governor, in any case where, in exercise of the power committed to him, he acts in opposition to the advice of the Executive Council, to report any such proceeding by the first convenient opportunity, with the grounds and reasons thereof. It is not usual that despatches should be published before they have been received and acknowledged by the Secretary of State, but the Governor thinks that there will be no objection to his communicating that despatch confidentially to Ministers, and he annexes a copy for their information.

"3. It appears to the Governor that the Chief Secretary scarcely appreciates the difficulty and the importance of some points touched by the question under examination; vague references to so-called 'responsible government' give very little assistance. The 7th clause in the Royal Instructions to which he has referred, and which explicitly authorises the Governor in his discretion to act in opposition to the advice of the Council, in itself shows that it has not been recognised as a matter of course that the advice of the Council should always prevail in questions under the consideration of the Government. As regards the present question in particular, the Governor knows from his own experience as Governor in two Governments—Newfoundland and South Australia—where the undefined system known as 'resposible government' was in operation, that the view there maintained and acted upon, and which it is still desired to maintain and act upon, is not the view contended for by his Ministry here. He is also aware that the practice in New South Wales is in accordance with the view prevalent in South Australia. This shows, at least, that there is no established law or consensus of opinion

upon the subject in support of the view of the Ministry; and it is plain from the discussion at the Colonial Conference that it is even broadly disputed by some, on constitutional grounds, that there is any right on the part of Parliament to enter into discussions as to the mode in which the prerogative is exercised by the Crown as an independent branch.

"4. Moreover, the Governor does not draw the same inference which is drawn by the Chief Secretary from Lord Knutsford's confidential despatch of the 30th April. After referring to the discussion at the Colonial Conference as having plainly supported 'the retention of *the personal decision of the Governor*,' Lord Knutsford added that he concurred in the views then expressed as to the advantage of the Governor's personal judgment. This would be wholly inconsistent with the view that this personal judgment is to give way to the advice of others, whose opinions the Governor does not share.

"5. For these reasons the Governor is of opinion that he would be incurring the risk of doing an illegal thing if, by his action in Kitt's case, he admitted the validity of the contention that the Governor is in all such cases bound to act upon the advice of the Council for the time being. And it is not necessary to go further back than to the well-known case of Sir Chas. Darling, when Governor of Victoria, to obtain evidence that the Governor is not protected from the consequences of his acts, even by having followed the advice of his Ministry, but that a very painful and peculiar personal responsibility does rest upon him.

"6. With regard to the inutility of discussing the Governor's action in the previous cases referred to by the Chief Secretary in his former letter, what the Governor means is simply that assent to recommendations of Ministers in ninety-nine cases in which he saw no reason for dissent, although he may sometimes have been wrong, would not relieve him of the duty nor deprive him of the privilege of using his own judgment in the hundredth case. The amount of weight accorded to a judge's report would obviously depend upon its character and special considerations in each case. Nor would an almost uniform assent to the advice of Ministers in any class of cases establish as a legal principle that such advice should always prevail.

"7. The Governor thinks that it can scarcely escape observation that the claim of any local administration to exercise the Royal prerogative, apart from the Governor as the Royal Commissioner, amounts to the setting up a form of government un-English in character, and so detached from the parent state as to suggest the question whether any political connection in the fact would under such circumstances remain between the colony and Great Britain.

"8. But there can be little doubt that upon that connection the financial credit and status of the colony rests. Anything apparently shaking this foundation or tending to discredit the law or administration of justice might raise inconvenient doubts as to the security for the immense advances made to this community by the parent state. And public discussion of these questions of constitutional law, which are beyond the control of colonial legislatures—or, indeed, of the popular branch alone of any legislature—might be attended with unfortunate results to the community.

"9. The Governor cannot see, therefore, that any advantage could attend the bringing of the whole subject before the Houses of Parliament, who, notwithstanding ample powers of local legislation, are not tribunals competent to pronounce decisions upon the construction of statutes, upon questions of constitutional law, and the Imperial prerogative of the Sovereign, and the legal duties of the Governor as Her Majesty's Commissioner.

"10. The Governor is glad to say that he does not see that the Ministry is placed in any serious position. He is not aware of the slightest public sympathy having been manifested on behalf of the prisoner Kitt. No petitions in his favour have even been presented. The only newspaper notices seen by the Governor were adverse to any claim of the prisoner to consideration. There has been no indication of any disposition to censure the Ministry in respect to their conduct with regard to that or any other criminal case; the Governor is not dissatisfied with the general policy of his Advisers because he differs from them in judgment upon a special point; and he does not know a single precedent in England or elsewhere where the action of the Executive or the Officers of the Crown has been called in question for *not* interfering with the sentences of the courts.

"11. The Governor still thinks that the case of Benjamin Kitt is not one of those to which the Offenders Probation Act was intended to apply. But this case is of very little importance by itself. It is manifest that the question involved is that respecting the important principle arising out of it, which may shortly be applied in other cases of much greater consequence.

"12. Having referred to the Secretary of State, the Governor is therefore absolutely unable to take any further action in the case of Benjamin Kitt until he receives the Instructions of Her Majesty through the Secretary of State. In the meantime, he would regret to be deprived of the advantage of consultation with his Ministers upon any petitions for the Royal clemency which may be laid before him; but he should not think it at all necessary, at least in the great majority of cases, to act without consultation with them, as he hopes, for the character of the administration of justice in the colony, that the cases are rare where any injustice would result from leaving untouched the decisions of the courts.

"(Signed) A. MUSGRAVE.

"Government House,

"Brisbane, 31st August, 1888."

In continuing my explanation of the position to the House, I have only to say that the Government, after mature consideration, did not consider it worth while to reply to the last despatch from His Excellency to his Ministers. One of my most serious arguments in favour of the rights of responsible government being maintained in the colony, was met by two sneering allusions about "so-called 'responsible government'" in the different colonies. I did not think it worth while to carry on correspondence in that way; and, when I was covertly accused of trying to bring about the disruption of this colony by insisting on our rights to have this prisoner Kitt brought under the provisions of the Offenders Probation Act, I did not think it worthy of serious argument, or that I should reply to a charge of that kind; but what I did do was to call the Cabinet together, place the whole matter before them, and we unanimously decided to take into consideration the second last paragraph, which is as follows:—

"But this case is of very little importance by itself. It is manifest that the question involved is that respecting the important principle arising out of it."

I will not trouble the House any longer with this case of Kitt's, because the Government is perfectly safe. I have argued right through that

the Governor was violating a sound constitutional principle. He has evaded the question all through, and I have thrown upon him the responsibility, which he ought to have undertaken by dismissing us, and getting other Ministers. At first, as you will notice, the case was entirely a personal matter, and entirely a matter of conscience in deciding on a particular case. The Governor's conscience would not allow him to decide that Benjamin Kitt was worthy of the consideration asked for. Of course the answer to that was: If you consider it a matter of such importance —if it is a matter of conscience with you—you must secure Ministers whose consciences agree with your own. There is no getting round that argument; but His Excellency got away from it altogether, and made it a fundamental matter of importance to the whole colony, and said it is simply an inroad that we are going to make on the rights of England. Another point I will just mention, by way of explanation, is that I do not wish to introduce a debate, as the leader of the Opposition has intimated his wish to have time to digest the matter, and as, moreover, the Ministry might be regarded as precipitate in their action if they pushed on a debate. The Governor has asked me inferentially here to defer the matter till he has received the decision of the Secretary of State, Lord Knutsford. I declined to do that for two reasons—on the Governor's account and on my own account. It does not matter to me what the decision of the Secretary of State is; I hold exactly the same position. If the Secretary of State writes out and says, "You are wrong, and the Governor is right," I should have to take up the same position, and place my resignation before the Governor. It does not alter my position in the slightest so far as he is concerned. The Governor is equally illogical in waiting until he gets the decision of the Secretary of State. It cannot affect him, because he has told us that even Instructions from Her Majesty herself could not affect him in a matter of this sort. He says:—

"It seems to him to be out of the question, if his assent is necessary, that by any Royal Instructions, or by any Act of Parliament, or by any system of government, a servant of the public could be requested to prostitute his own personal convictions at the direction of any other man or body of men."

Why should we wait for Lord Knutsford's views? What does it matter to me what they may be? I am perfectly sure that it does not matter a straw to me. Our position is quite plain. We have acted constitutionally, and it is quite impossible for a Governor to get on with a Ministry if he does not accept the advice of that Ministry. Hon. members must not be under the delusion that this is a mere quarrel about the remission of a sentence or the pardoning of a prisoner. The Instruction under which the Governor assumes to act is a general Instruction, and applies to every act he does in the colony. It applies to his sanction for such a work as the building of a bridge at Breakfast Creek, of a railway being built in some other part of the country, of a judge being appointed in the Supreme Court, of a police magistrate being appointed, or even a justice of the peace. The Instructions are the same in all those cases, and the Instructions apply as much to every one as to the remission of a sentence to a prisoner. By clause 7 of his Instructions he is told most distinctly that he has full power to decline or accept the advice of his Ministers at any time. I do not quarrel with that, or with those Instructions. In fact when the Secretary of State lately wrote out to ask the advice of the Governor and his Ministers as to whether this clause in the Instructions ought to be retained, I said at once it could be retained by all means. I do not offer any objection to the fact of his being instructed to decline the advice of his Ministers. He might have a man in his Ministry some day who would advise him in such a way that he would refuse to take that advice. But he must take the consequences. Let him take the actual constitutional consequences, and send them about their business. The Governor should have done that a month ago, and we came to the conclusion, when I placed the matter before the Cabinet on Monday last, and when we considered the matter fully, that there were only two ways out of the difficulty. The one was by the Governor signing the papers granting a remission of Kitt's sentence, and the second was that he should accept the resignation of the Ministry. That resignation was sent to him this morning.

The HON. SIR S. W. GRIFFITH said: Mr. Speaker,—I think it would be very inconvenient that any discussion should take place this afternoon upon the statement made by the hon. gentleman. I rise to make a brief statement myself. This morning I was sent for by His Excellency the Governor, who informed me that his Ministers had tendered their resignation, and asked me if I would undertake the responsibility of forming a Government. I asked for time to make myself acquainted with the facts which led to the resignation of the Ministry, and His Excellency was good enough to grant me time to do so. I had not then seen the papers, nor have I had an opportunity of learning what they contained until the hon. gentleman read them just now. I desire time to consider them, and also a paper which is referred to in them, but which is not printed with this correspondence.

The PREMIER: Certainly.

The HON. SIR S. W. GRIFFITH: I think it is only fair both to the Governor and to myself that I should have an opportunity of becoming acquainted with all the circumstances of the case, before arriving at any conclusion.

The PREMIER: Hear, hear!

The HON. SIR S. W. GRIFFITH: Under the circumstances, I presume the hon. gentleman will move the adjournment of the House?

The PREMIER: Yes.

ADJOURNMENT.

The PREMIER said: Mr. Speaker,—Hon. members will, of course, understand plainly that the course I have adopted this afternoon was the only course open to me—putting the matter, not in an argumentative form, but placing the whole case before the House. I desired to do it as soon as possible, and I think this was a much better way in which to do it than to have hon. members getting it in print in the morning in the usual way. I have taken the earliest opportunity of putting the facts of the case before the House, because in similar cases the House is usually acquainted with the facts leading up to the resignation of Ministers before their resignation is tendered. When I came to the House this afternoon nobody knew anything about this matter, but they know a great deal about it now. What the hon. gentleman opposite asks for I, of course, intend to concede at once, and will move the adjournment of the House until he has made his arrangements with His Excellency. I beg to move that this House do now adjourn. We will meet to-morrow as a matter of course.

Question put and passed, and the House adjourned at thirty-two minutes past 4 o'clock.