

No. 49.

COPY of a DESPATCH from Governor Sir G. F. BOWEN, G.C.M.G., to the  
Right Hon. the Earl of KIMBERLEY.

(No. 15.)

Government House, Wellington,

MY LORD,—

New Zealand, 18th January, 1872.

At the instance of my Responsible Advisers, and in consequence of a resolution passed by the Legislative Council of New Zealand, I have the honor to transmit herewith a Ministerial Memorandum, covering an opinion of the Attorney-General of this Colony, and other documents.

Memo. by Mr.  
Gisborne, Jan. 18,  
1872.

2. It will be perceived that your Lordship is requested to obtain "the opinion of the Law Officers of the Crown in England on the question whether, in the case of a marriage between a man and the sister of his deceased wife, both being English subjects, in a Colony in which an Act authorizing such marriage had been passed, such marriage between such English subjects would in England be held to be valid."

I have, &amp;c.,

The Right Hon. the Earl of Kimberley.

G. F. BOWEN.

## Enclosure in No. 49.

MEMORANDUM by Mr. GISBORNE.

THE Colonial Secretary presents his compliments to His Excellency the Governor, and begs to transmit a printed paper containing a copy of a resolution passed by the Legislative Council during the last Session of the General Assembly, requesting that the opinion of the Law Officers of the Crown in England be obtained on the question whether, in the case of a marriage between a man and the sister of his deceased wife, both being English subjects, in a Colony in which an Act authorizing such marriage had been passed, such marriage between such English subjects would in England be held to be valid.

The printed papers also contain a copy of the opinion, obtained at the request of the Legislative Council, of the Attorney-General in New Zealand on the same question, and a copy of the Bill brought last Session by a private member before the Legislative Council, intituled "The Deceased Wife's Sister Marriage Act, 1871."

The printed paper is forwarded in quadruplicate.

The Colonial Secretary respectfully asks that His Excellency will be pleased to transmit the enclosed paper to the Right Hon. the Secretary of State for the Colonies, with a request that the opinion of the Law Officers of the Crown in England may be obtained on the question raised.

Wellington, 18th January, 1872.

## Sub-Enclosure to Enclosure in No. 49.

A resolution having been passed by the Legislative Council in the words following:—

"That it is desirable, that the Government should obtain the opinion of the Attorney-General upon the question whether, in the case of a marriage between a man and a sister of his deceased wife, (an Act authorizing such marriage having been passed by the Legislature of the Colony) such marriage between English subjects would in England be held to be valid; and that the further opinion of the Law Officers of the Crown in England be obtained upon the same question."—

I am called upon to give my opinion on the question proposed in the resolution. It should be observed, that though a Bill to validate and authorize marriages between a man and his deceased wife's sister was introduced, it was not passed, and therefore the question is founded on a supposed case.

A copy of the proposed Bill is attached.

The resolution is not put so definitely as could be desired. I understand it to mean that, assuming an Act be passed in New Zealand expressly authorizing marriage between a man and his deceased wife's sister, would that marriage be recognized as valid in England, if the parties were English subjects?

The further question might have been raised on the proposed Bill, whether, if the Colonial Legislature validates a marriage celebrated in New Zealand between a man and his deceased wife's sister previously to the passing of the Act, has that validation an effect beyond the Colony or within it?

The question put in the resolution is not so much whether the legislation would be void as being beyond the Legislative power of the Colonial Parliament, but rather as to the operation of such legislation with regard to English subjects.

It appears to me, however, that the validity of the legislation should first be considered.

According to the decision in the case *Brook v. Brook* (9 House of Lords Cases), if a man and woman being English subjects, and at the time of the celebration of the marriage in a foreign country where marriage between a man and his deceased wife's sister is allowed are domiciled in the foreign country, the marriage would be recognized in the Courts of law in England, but otherwise if domiciled in England. But it does not follow from this that an Act passed in New Zealand authorizing such marriage would be valid. The Legislature of New Zealand cannot pass laws which are repugnant to the laws of England (section 53, Constitution Act).

By the 28th and 29th Victoria, c. 63, section 3, no Colonial law is to be deemed to be void on the ground of repugnancy to the law of England, unless the same is repugnant to the provisions of some