MESSAGE.

A. Bannerman, Lieut. Governor.

In Compliance with the Assembly's Address, the Lieutenant Governor sends, herewith, the Copy of the Hon. William Young's opinion on the Sheriff's Return for the First District of Queen's County.—In regard to the cases laid before Mr. Young, the Lieut. Governor refers the House of Assembly to the annexed Letter, from the late Attorney General, Mr. Young, also, a Copy of a Letter to the same gentleman from the Lieut Governor on the issuing of the Commission. The Lieut. Governor required no *legal* opinion on this subject, as there is no doubt, in his mind, as to the precise terms to be used in such a Document, it being the duty of the Lieut. Governor only to take care, according to the Royal Instructions, that the Oaths required by law should be administered to all Members of the Legislature. But the Lieut. Governor did wish to have the opinion of a gentleman of Mr. Young's great parliamentary experience whether it would be deemed by a Commission consistent with the Sheriff's Return? which the Lieut. Governor thinks might have been easily obviated (although he did not suggest it to Mr. Young) by ordering the 24 every Four Members *returned* to be sworn, omitting, in the latter part of the Commission, the words "duly elected and qualified." Mr. Young, however, referred to his opinion of the 24th October, and recommended that the Commission should be issued in the usual form, and the Lieut. Governor acted on that advice; but having done so, he considered it to be his duty, at the opening of the Session, to notice the Sheriff's return for the First District of Queen's County, as being an unusual one, expressing no other opinion on that Document, his object being to protect those privileges which might have been compromised, even without the knowledge of the House, by so unusual a Return.

Government House, 5th April, 1854.

The papers accompanying the said Message having been read,

Hon. Mr. Whelan rose and moved That the Message and the Papers accompanying it be submitted to a Committee of the whole House on Friday next.

A motion was then made, That the House do now adjourn.

The House divided on the question the adjournment:

Yeas—Hon. Attorney General, Hon. Colonial Secretary, Hon. Mr. Conroy, Hon. Mr. Macaulay, Hon. Mr. Macsachen, Hon. Mr. Montgomery, Mr. Douse, Mr. H. Haviland, Mr. Macgowan, Mr. Beer, Mr. Yeo, Mr. Goff, and Mr. Clark—14.

Nays—Hon. Mr. Whelan, Hon. Mr. Warburton, Hon. Mr. Lord, Mr. Mooney, Mr. Fraser, Mr. McGill, and Mr. Hensley—7.

So it was carried in the affirmative; and the House ajourned accordingly.

OPINION OF HON. WM. YOUNG, ON THE RETURN OF THE WRIT OF ELECTION BY MR. SHERIFF BINNS.

I have considered the return of Mr. Sheriff Binns on the Writ of Election for the first District of Queen's County, dated the 9th August last, and the Act of the Prince Edward Island Legislature 11 Vict. Cap. 21, referred to therein; and taking the facts as they are set out in the Return, I perceive no strange a misapprehension of the objects and meaning of the Act and the powers of the Sheriff, that I shall be more explicit on those points than I should have, otherwise, thought it necessary to be. The Act is evidently founded on the Nova Scotia Act of 1847, and the two principal Sections in our present enquiry, to wit, the 40th, and 42d of the Island Act, are transcripts of the 37th, and 38th, Sections of the Nova Scotia Law. Now it is a distinguishing feature of both Acts which was carefully preserved and guarded in the passage of the Nova Scotia Bill, that the powers of the Sheriff and presiding Officers should be exactly defined, and no larger discretion entrusted to them than was indispensable for the working of the Law. The House of Assembly having a just regard to its own rights and those of the Constituencies, would transfer to a subordinate officer powers that belong only to themselves, and are among their most valued privileges. In this light nothing can be more clear than the duty of the Sheriff after the Poll Books are returned. We have never had a doubt of it in our own Province, and looking to the 10th Section, I am at a loss to conceive why any doubt could have arisen. The Poll Books being all returned, the Sheriff shall openly break the seals thereon, and cast up the numbers of Votes, as they appear on the said several Poll Books, and shall then openly declare the state of the Poll; and, if within one hour thereafter no objection shall be made on the ground of persons having voted out of their proper polling division, or more than once for the same election, the Sheriff shall forthwith thereafter make proclamation of the Members chosen, and shall forthwith return such persons as have a majority of votes. It is difficult to imagine in what way the intention of the Legislature could have been expressed more clearly. The Sheriff is to be governed by the number of votes, as they appear on the Poll Books. Whether they are good or bad, objected to or not, whether they are sworn, is no enquiry of his—he is to cast them up as he finds them; and is, forthwith, to make proclamation of the Members chosen, and forthwith to make return of the person or persons having the majority. If, indeed, within one hour after the state of the Poll is declared, objection is made by a candidate, or any three electors, upon the two grounds mentioned, electors having twice voted, or voted at a wrong polling place, or upon either of these grounds, the Sheriff is to investigate such objections, and, for that purpose, is to postpone his return. The time within which such objection may be made is limited in the Act; and I take it to be perfectly clear that the instant the hour after the state of the Poll has been declared expires, the right to interpose such objection and stay the return is at an end. If it could be made one minute or five minutes after, why not one hour, or the hour? The Sheriff, after the expiration of the hour, is forthwith to make proclamation—that is, he is required to do it immediately, without any thing else intervening. He is legally bound to proceed, and be legally receiving or listening to an objection, when the law requires him to be in the act of making the return. The expiration of the hour has given the Candidate having the majority of Votes on the Poll Books, and his party whoever they may be, a vested right, subject to enquiry by the House, not by a Sheriff. Now, it appears by this return that the Hour elapsed without objection having been made, and that the Sheriff did thereupon forthwith thereafter proceed to make proclamation and return of Messrs. Coles and Macleod, when Mr. Beer demanded a scrutiny of Votes polled for Mr. Coles which had been marked objected to on the Poll Book. This Mr. Beer had a perfect right to do after the hour, for the purpose in the 42d. Section, but his demand ought to have had no effect on the return. The Sheriff has entirely misapprehended his duty and the scope and meaning of the Act. When objection is duly made of Votes having been twice polled or polled at the wrong place, and it shall appear to him after hearing evidence that such objection is sustained, he is empowered to strike out such Votes from the Poll Book; and, for that purpose, he is a judicial officer. But he has no authority to strike out or expunge votes upon any other ground, except indeed, under the 14th Section, when he is casting them up; and his functions, in the prosecution of a scrutiny are totally different from any other power, than the receiving or rejecting of such evidence. Mr. Coles' demand of a Scrutiny, though after the hour, was also regular; and he might prosecute it, as he thought fit. Of course, it could have no effect on the return to which he was already entitled. Such being the view which I take of the return, I am now to enquire how it may be amended by the House. It is perfectly clear that this can only be done by the House itself. It would be unconstitutional, and dangerous for the Governor, or his Executive Council to interfere with the return of an Election Writ, nor has any such attempt ever been made, that I am aware of, either in England or the Colonies. If the election had taken place in the House, such interposition they might possibly have interposed in the first instance, and refused to allow the returned Member to take his seat, though of that course I find no example in Hansard. But the present being a new House, I know of no constitutional method by which Mr. Beer can be prevented from taking the Oath and his seat, if he so determine. The law as to admission of the House of Commons is to be found in Rogers' Law of Election, seventh edition, and the cases cited therein. "When a return has once been made no power is left to proceed to make any any alteration in it without the express order of the House." "If a man be duly elected and yet not well returned, he cannot sit in the House until the return be amended;" and a distinction is taken between a petition against the return only, and a petition against the sitting Member upon the merits; and returns wrongfully made are not unfrequently amended by order of the House, or of an Election Committee, giving the party thereby ejected time to petition upon the merits. The leading case upon this subject is that of Middleton & Peckwell, to which I have turned. The case of Caunarvon, in Cockburn and Rowe, is also to be found in our Library. The other cases cited in Rogers are not within our reach, but the rule is well established; and, therefore, however anomalous it may be thought that a return, bad in itself, should entitle the returned Member to a seat in the Assembly, where is vote may be of great moment, I cannot advise His Excellency the Governor, or the Executive Council of Prince Edward Island, to undertake to amend the return or to issue a Commission inconsistent therewith, and for which there is no authority to be found.

WILLIAM YOUNG.

Hon. Joseph Hensley, &c. &c. &c.
Halifax. 14th Oct., 1853.

Letter of Sir A. Bannerman, Lieut. Governor, to be transmitted for the opinion of the Hon. William Young.

Government House, 20th Oct. 1853.

Dear Attorney General:

I have read Mr. Young's opinion on the election of the First District of Queen's County. It is such as I quite expected from a gentleman of his great parliamentary experience. The Governor or Council could be justified, if they ventured to amend a return, which is entirely the province of the House of Assembly—nor should *a Governor*, I think, issue a Commission at *variance* and *inconsistent* with such a return.

It is, therefore, to the *issuing of the Commission* alluded to by Mr. Young that I wish to direct his attention, and, with that view, I send a copy of the proceedings which take place at the opening of a newly elected Assembly in this Colony. What says the Governor's Commission? "Whereas our said Sheriffs have made and returned, have the said elections, and returned to our Secretary, &c., &c., the names of twenty-four proper and fit persons, *duly elected* and *qualified* to serve as in our said Assembly."

Now, at the recent election, our Sheriffs, in strict conformity with the foregoing, did return the names of twenty-three Members, but our Sheriff for Queen's County, did not return the name of one other Member for the First District of that County, to be *duly elected*, as having the majority of votes, *subject to the determination of the House of Assembly*, as to the *facts therein mentioned, and of the facts herein before set forth*. It appears to me, therefore, that, by following the usual course, I do issue a Commission *inconsistent* with the return made by our Sheriffs—Commissioners that twenty-four Members have been *duly elected* to serve in the Assembly, and *command* them to be sworn, while the Sheriffs' return declares one of the twenty-four elected subject to the determination of the House of Assembly; and, yet *before* the House can possibly determine on the validity of a return, in which *facts* are left for its consideration, I should be acting in virtue of *my Commission!* takes the oaths and his seat, and may vote in cases of great importance!

In the House of Commons, at the opening of a new Parliament, the Chief Clerk, a ministerial officer, is furnished, by the Clerk of the Crown, with a list of the Members returned, and all of them may vote for the choice of a Speaker; but after that, no Member can sit or vote until the Oaths are administered to him; and had such a case as the present, occurred in England, I think the Speaker would have directed the attention of the House to so anomalous a return, and, if it had continued against—and *before* the Oaths were administered to the Member so returned. The return for Queen's County at the recent election, involves, important consequences. Similar cases may, hereafter, be made, and when parties are nearly balanced, and party spirit runs high, the consequences are easily foreseen—public business neglected, from political struggles in the Assembly, and no alternative left to the Lieut. Governor, but dissolution. The Law of Election in Prince Edward Island, is nearly the same as that in Nova Scotia, and, in the Young struggle, great pains seem to have been taken, clearly to define the duties of a Sheriff, who, I see, is subject to a penalty for *wilful* neglect of duty. The law I think requires