

Prevost administered the Government in 1811, and I think all of them, except such as were framed to meet the requirements of statute 31 George III., chap. 31, were of a much earlier date than the statute.

The Commission to Sir John Colborne, as Lieutenant Governor of Upper Canada, is printed in page 98 of the evidence.

It shows us that we are to look at the Royal Commission to the Governor General for the time being, in order to find what powers could be exercised in his absence by Sir John Colborne as Lieutenant Governor.

The Commission to Lord Gosford is set out in page 71, and some following pages; it authorised (page 75) Lord Gosford, with the advice of the Executive Council for each Province respectively, from time to time to form, constitute and erect *townships or parishes* within the said Provinces, and also to constitute and erect within any township or parish which then was or thereafter might be formed within the said Provinces, one or more *Parsonage or Rectory*, or *Parsonages or Rectories*, according to the establishment of the Church of England, and from time to time by an instrument under the great seal of the said Provinces respectively, to endow every such *Parsonage or Rectory* with so much, or such part of the said land so allotted as by the said Act (31 Geo. III., chap. 31) is mentioned, in respect of any lands within such *township or parish*, which shall have been granted subsequent to the commencement of the same acts, or of such lands as may have been allotted and appropriated for the same purpose by, or in virtue of any instructions which shall be given by his Majesty in respect of any lands granted before the commencement of the said act, as the Governor General, with the advice of the Executive Council of such Province, shall judge to be expedient under the existing circumstances of such townships or parish, "subject nevertheless (the Commission adds) to such instructions touching the premises as shall or may be given to you by us under our signet and sign manual, or by our order in our Privy Council, or through one of our principal Secretaries of State." And then the Commission proceeds thus:—"And we do also by these presents authorise and empower you to present, subject to the provisions in the above mentioned act in that behalf, to every such *Parsonage or Rectory*, and to every Church or Chapel, or other ecclesiastical benefice according to the establishment of the Church of England, within either of the said Provinces, an Incumbent or Minister of the Church of England, who shall have been duly ordained according to the rites of the said church, and to supply from time to time such vacancies as may happen of Incumbents or Ministers of the said *Parsonages, Rectories, Churches, Chapels or benefices*, or any of them respectively."

I find nothing else in the Commission to Lord Gosford which bears particularly on the subject of erecting or endowing *Parsonages or Rectories* in Canada.

But the Commission contains also this clause—"And in case of your death or absence out of our said Province of Lower Canada, we do by these presents in either of such cases give and grant all and singular the powers and authorities herein to you granted, to our Lieutenant Governor for the time being of such Provinces respectively, or of either of them, as the case may be."

If we compare with the Statute 31 Geo. 3, chap. 31, this commission to Lord Gosford, which, in the absence of any royal instructions to the contrary, was to be the guide of Sir John Colborne's conduct in his government, we shall find that the passages which I have extracted amount to much the same things as a mere direction or authority to him to carry those provisions of the act into effect which related to the erection

and endowment of *Parsonages and Rectories*, and the presentation of Incumbents. But there are two peculiarities in the commission on which points have been raised in the discussion of this case.

1st. The Statute 31 Geo. 3, gave no directions respecting the formation of parishes or of Townships: It mentioned them as divisions of territory which it was assumed did then exist or might thereafter be created in both or either of the Provinces. But the commission to Lord Gosford we see authorises his Lordship, with the advice of the Executive Council, &c., "to form, constitute, or erect townships or parishes within the said Provinces."

2ndly. The statute merely makes it lawful for his Majesty "to authorise" the Governor, &c., to erect and endow *Parsonages or Rectories*, not expressly saying that such authority, when once given, is to be subject to instructions that may be afterwards given by his Majesty to the Governor. The commission to Lord Gosford, however, as we see, did in express terms make the authority which his Majesty conveyed to him in regard to these matters, *subject to such future instruction touching the premises* as shall or may be given to the Governor under his Majesty's signet and sign manual, or by his order in his Privy Council, or through one of his Majesty's principal Secretaries of State.

I am only pointing out this diversity in the language without saying at present whether it does, or does not, create any difference in substance.

Then as to the Royal instructions to which Sir John Colborne was bound to conform, none are shown to have been addressed to himself, personally, but Lord Gosford, whose commission and authority he was to execute in his absence, was referred for his guidance to the instructions which had been given to his predecessor, Lord Aylmer, which again we see were in reality the same as those which had been communicated to a former Governor-General, the late Lord Dalhousie.

This body of instructions, which has been handed over by one Governor General to another, is admirable for the judgment and care with which it was framed. It is an exact transcript of the Royal instructions which accompanied the commission to Sir George Prevost, in 1811; and I have no doubt that with some exceptions they are to be traced back to a period long antecedent to the passing of the Statute 31 Geo. 3, chap. 31.

The instructions sent to Canada after the passing of the act, were necessarily somewhat modified, to suit its requirements; but in the main they were, I have no doubt, the same that had for a long period before accompanied the Royal Commissions to the Governors of Colonies.

The articles which relate to religion and religious establishments are the 11st and twelve following articles; none of which it appears to me have any legal bearing upon the questions raised in this suit. I refer, however, to the 47th article, because it was a good deal adverted to in the argument, it runs thus "you shall recommend to the Legislative Council and General Assembly of the Province of Upper Canada, to settle the limits of *parishes* in such manner as shall be deemed most convenient."

I take that to be probably mere repetition of an article, which has long formed part of the code of Royal Instructions; and that it was not inserted with a view to any peculiarity in regard to the erection of parishes supposed to have been created in Canada by the Statute 31 Geo. III. I infer this, because we know that in many of the colonies, as for instance in Virginia and South Carolina, while they were British Colonies; in Nova Scotia, and, I believe in our West India Islands, Acts of Assembly were passed from time

to time dividing the colony into parishes; and Mr. Stokes, in his work on the British Colonies, published in 1783, tells us that in most of the colonies before the civil war (except in the New England Provinces, where the Independents had the upper hand), an Act of Assembly was passed to divide the colony into parishes, and to establish religious worship therein, according to the rites and ceremonies of the Church of England.

It seems to have been left to two Colonial Legislatures so to create the parochial divisions in such manner as it might seem to them would best accommodate the inhabitants; but I do not imagine that things took that course because it was considered that parishes could not be constituted by his Majesty alone in the exercise of his Royal Prerogative; and there seems no ground whatever for supposing that the 47th article of the Royal instructions was framed with any idea of carrying out what was supposed to be required by the Statute 31 Geo. III.; for that act makes no provision whatever respecting the formation of parishes, *ex nomine*, but provides for the creation and endowment of *Parsonages or Rectories* in *parishes or townships*.

There is nothing to be noticed, I think, under the head of instructions, or authority, besides what I have stated, except that we have some account in the documents before us of an instruction having come from the Secretary of State to Mr. President Smith, dated 2nd April, 1818, (conveying the authority of his Royal Highness the Prince Regent, for erecting "*Parishes*" (or *Parsonages*), and *Rectories* in conformity to the Statute 31 Geo. III, ch. 31.

We have not before us the copy of that official document; but we have in evidence the following despatch from Earl Bathurst, then Secretary of State for the colonies, to Major General Sir Peregrine Maitland, dated 22nd July, 1825.

"Sir,

"I have received His Majesty's commands that you do, from time to time, with the advice of the Executive Council for the affairs of the Province of Upper Canada, constitute and erect within any township or parish which now is, or hereafter may be formed, constituted or erected within the said province, one or more *Parsonage or Rectory*, or *Parsonages or Rectories*, according to the establishment of the Church of England; and that you do from time to time by an instrument under the Great Seal of the said province, endow every such *Parsonage or Rectory* with so much, or such parts of the land so allotted and appropriated, as aforesaid, in respect of any lands within such *Township or Parish*, which shall have been granted subsequently to the commencement of a certain Act of the Parliament of Great Britain passed &c., (31 Geo. III, chap. 31) or of such lands as may have been allotted and appropriated for the same purpose, by or in virtue of any instruction which may have been given by his said late Majesty before the commencement of the same act, as you shall, with the advice of the said Executive Council, judge to be expedient under the existing circumstances of such *Township or Parish*.

"You shall also present to every such *Parsonage or Rectory* an Incumbent or Minister of the Church of England, who shall have been duly ordained according to the rites of the said Church; and supply from time to time such vacancies as may happen therein.

(Signed)

BATHURST."

It has been said of this formal and separate instruction, which was given in 1825 to Sir John Colborne's immediate predecessor, that it could not be acted upon by Sir John Colborne, because it was given by a Sovereign who was no longer reigning, and to a Governor who was not governing at the time of the *Rectories* being established.