

COURT OF APPEAL.

THE RECTORY CASE.

JUDGMENT OF CHIEF JUSTICE ROBINSON.

The British Statute 31 Geo. III., ch 31, provided for the support of a Protestant Clergy in Upper and Lower Canada, by directing a reservation or allotment to be made for that purpose out of the then ungranted lands of the Crown within each of the said Provinces, which reservation was to be in a proportion, as nearly as could be estimated, equal in value to the seventh part of the lands which had theretofore been granted, and of such lands as should thereafter be granted within each Province respectively.

The 37th clause of the same statute enacted that the rents, profits and emoluments which should at any time arise from such lands so allotted and appropriated, should be applicable solely to the maintenance and support of a Protestant Clergy, within the Province in which the same shall be situated.

The 38th clause provided for turning this allotment of the lands to account in supporting a Protestant Clergy; and as the question brought before us in this appeal mainly turns upon that clause, I shall give it in its very words.

And be it further enacted by the authority aforesaid that it shall and may be lawful for his Majesty, his heirs or successors, to authorise the Governor or Lieutenant Governor of each of the said Provinces respectively, or the person administering the Government therein, from time to time, with the advice of such Executive Council as shall have been appointed by his Majesty, his heirs or successors, within such Province for the affairs thereof, to constitute and erect within every township or parish, which now is, or hereafter may be formed, constituted, or erected within such Province, 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 such Province, to endow every such Parsonage or Rectory with so much or such part of the land so allotted and appropriated as aforesaid, in respect of any lands within such township or parish, which shall have been granted subsequent to the commencement of this Act, or of such lands as may have been allotted and appropriated for the same purpose by or in virtue of any instructions which may be given by his Majesty in respect of any lands granted by his Majesty before the commencement of this Act, as such Governor, Lieutenant Governor, or person administering the Government, shall, with the advice of the said Executive Council, judge to be expedient under the then existing circumstances of such township or parish."

The 39th and 40th clauses contain provisions not directly bearing upon the question to be determined by us, but applying to the presentation of incumbents or ministers of the Church of England to such Parsonages or Rectories, the rights they shall enjoy, the duties they are to perform, and the Ecclesiastical jurisdiction to which they are to be subject.

And the 40th and 41st clauses provide that the Legislature of each Province shall have the power, under certain restrictions, to vary or repeal these enactments for the maintenance of a Protestant Clergy; for the erecting and endowing Parsonages or Rectories, and respecting the presentation of incumbents, and their rights and duties.

To return to the 38th clause, it will be seen that the effect of that clause is to make it lawful for his Majesty to authorise the Governor or Lieutenant Governor of each Province, from time to time, with the advice of his Executive Council,

to constitute or erect the Parsonages or Rectories spoken of; and by an instrument under the great seal of such Province, to endow every such Parsonage or Rectory with so much of the lands reserved in respect of the lands granted within the Township or Parish in which such Parsonage or Rectory has been established, as the Governor or Lieutenant Governor, with the advice of his Executive Council, shall think fit. The statute does not of itself direct or allow the Governor of either Province to create Rectories, or endow them; but it empowers his Majesty to give to the Governor authority to do both or to do either.

On the 16th of January 1836, during the administration of Major General Sir John Colborne, Lieutenant Governor of Upper Canada, letters patent were issued under the great seal of that Province, and like other letters patent, in the name of the Sovereign, setting forth the ecclesiastical arrangement by which Upper Canada had been made part of the diocese of the Bishop of Quebec, and also the provisions of the British statute 31 George III., chapter 31, respecting the constitution of Parsonages or Rectories, and then proceeding as follows:—"And whereas we," (that is our late Sovereign King William the Fourth, in whose name the patent issued), "having due regard to the spiritual welfare of all our loving subjects resident within the Township of York, in the Home District (of Upper Canada), and being desirous of making a permanent provision for their instruction according to the doctrine and discipline of the Church of England, and also for the support of a Protestant Clergyman, duly ordained according to the rites of the said church here, pursuant to the provisions of the said recited act, and by and with the consent and advice of our Executive Council of our said Province of Upper Canada, determined to erect and constitute, and by these presents, and by and with the advice and consent aforesaid, do erect and constitute a Parsonage or Rectory at the City of Toronto, within the said Township, according to the establishment of the Church of England, to be hereafter known, styled, and designated as the first Parsonage or Rectory within the said Township of York, otherwise known as the Parsonage or Rectory of St. James, and by virtue of the same authority, and by and with the advice and consent of our said Executive Council, we do hereby command that there shall be henceforth, and for ever, set apart out of the lands which we now hold in our said Province, by virtue of our royal prerogative, certain parcel or parcels of land situated in the said township, composed of—(here specifying the lands)—as a glebe and endowment to be held appurtenant with the said Parsonage or Rectory; we intending, and willing by virtue of our royal prerogative, forthwith to present an Incumbent or Minister of the said established Church of England to the said Parsonage, so (hereby) created, and constituted as aforesaid, with its appurtenances; saving nevertheless to ourselves the right of hereafter erecting and constituting one or more Parsonages or Rectories in the said township. Given under the great seal of our Province of Upper Canada, Witness our trusty and well-beloved Sir John Colborne, K. C. B., Lieutenant Governor of our said Province and Major General commanding our forces therein, this 16th day of January, in the year of our Lord, 1836, in the sixth year of our reign."

Into the Parsonage and Rectory thus constituted, one of the defendants, the Rev. Mr. Grassett, has been inducted not being, (as we all necessarily know,) the first incumbent, and after the lapse of more than sixteen years, this suit has been brought, not to call in question on any ground the validity of his title to the enjoyment of the rights or emoluments of the Parsonage or Rectory,

but to try the validity of that act of the Governor of Upper Canada by which the Parsonage or Rectory was created.

An information in the name of the Attorney General was filed in August, 1852, which was answered in January following. Whatever may have been the cause of the delay, the suit was not heard till September, 1855, when the Court of Chancery, by the unanimous opinion of the three Judges, sustained the validity of the Patent creating and endowing the Parsonage or Rectory; and dismissed the information with costs.

This judgment being appealed from, the case was argued before us at the sittings of this Court in December last. The suit, it is well understood, has been instituted by the Crown, not for the purpose of attacking this particular Rectory, but in order, as we are told in the argument, to have certain questions of general interest settled by a judicial decision.

Forty-four Rectories, it seems, were at the same time created in Upper Canada by the Lieutenant Governor, Sir John Colborne, with the consent of his Executive Council, by patents similar to that which is set out in the present case; and they have been endowed in all, I think, with somewhere between 15 and 20,000 acres of the two or three millions which had been set apart under the British Statute, 31 Geo. 3, for the support of a Protestant Clergy.

The objections which have been taken to this measure of the Colonial Government are stated as follows, in the reasons of appeal. It is maintained that the Judgment of the Court of Chancery in favour of the defendants is erroneous.

1st. Because the Lieutenant Governor, Sir John Colborne, had not at any time authority to issue the patent in question, or to establish the said Rectory of St. James, in the Township of York, or to endow the same with the lands contained in the said Patent.

2nd. Because if he ever had such authority it was, before issuing the Patent, revoked, nullified, or suspended expressly, or by implication.

3rd. Because the issuing of the Patent and the erection and endowment of the Rectory, at the time it took place, "were all against the mind and intention of his Majesty and his Government."

4th. Because the transactions complained of took place under such circumstances of mistake as are sufficient to avoid the Patent.

5th. Because the Patent is void for not defining the boundaries of the Parish, and for not naming the grantee.

These are the objections; and first as to the authority to the Governor. In order to see upon what foundation Sir John Colborne's authority in this matter stood, we are to consider first the statute 31 Geo. III., chap 31.

2nd. The Commission to Sir John Colborne, as Lieutenant Governor of Upper Canada, (page 98 of the evidence), which empowered him, during the absence of the Governor General from Upper Canada, to execute in the Province the powers of the Royal Commission to the Governor General for the time being.

3rd. The Commission to Lord Gosford, who was the Governor General at the time when Sir John Colborne, as Lieutenant Governor, erected and endowed these Parsonages or Rectories—(page 71).

4th. The King's instructions which accompanied the Commission to Lord Gosford—(page 215).

5th. The instructions to his predecessor, Lord Aylmer, to which instructions Lord Gosford was referred—(page 214).

6th. The instructions to Lord Dalhousie, to which Lord Aylmer was referred—(page 194)—especially the 47th.

These instructions are a mere transcript of the body of instructions under which Sir George