

he is told that he is to execute his powers according to the directions contained in his commission, and in the Statute 31, Geo. 3, and according to the instructions which were then given to him, "or which may from time to time be hereafter given to him under his Majesty's sign manual, &c."

Those last words only express what would at any rate have been implied; and if this could be held to have the effect of keeping all his authority in abeyance till he should receive some further instructions, which might never come, there would be little use in the commission and instructions delivered to him.

It is not an uncommon thing for Legislative bodies, when they pass acts creating Joint Stock Companies with corporate powers and privileges, to reserve to themselves the power of modifying by future acts certain provisions of the charter.

This was done in order to give fair warning to persons taking stock, of the position in which they will stand; and that it may not be imputed to the legislature that they have acted improperly by the stockholders if they afterwards make any substantial alteration in the terms of the charter.

So also in many acts of Parliament we find a clause reserving the power of amending it by any act to be passed during the same session.

But it was never imagined that such reservations had the effect of making the first Statute inoperative until some later Statute on the subject had passed; in other words, of suspending it indefinitely, for there might be no further occasion found for recurring to the subject.

This seems to be so plain that I should have treated the point as one too clear to be discussed, which is the view taken of it in the Court below; but in the argument before us, it was insisted upon with so much earnestness that I cannot doubt it was meant seriously to be relied on.

When it is stated in the information that Sir John Colborne issued the Patents without any authority or instructions from his Majesty, what is meant, I think, is that he issued them without any other authority or instruction than such as was in its terms suspended until he should receive further instructions; and that no further instructions ever came.

But this is surely taking an incorrect view of Lord Gosford's Commission. And if this cannot be denied, as I think it cannot, then it is abundantly proved, and is in fact admitted in the information itself, that so far from the Lieut. Governor of Upper Canada never having been authorised to grant and endow Parsonages or Rectories, he really was at no time without such an authority.

The 2nd, 3rd and 4th grounds of objection, as stated in the reasons of appeal, all turn upon the effect of the despatches, addresses, and other documents in evidence, as being equivalent to a recall of the authority given in Lord Gosford's Commission to act upon the Statute in erecting and endowing Rectories.

The effect that could fairly be given to the correspondence and documents relied upon for supporting that point in the argument, was carefully considered, and is clearly stated by the Learned Judges of the Court of Chancery, in whose view of the matter I entirely concur.

I shall therefore say but little upon it.

As to this measure of the Colonial Government in 1836 being "against the mind and intention of His Majesty's Government," if that were the fact, it could not be made to affect the validity of the patent on any principle of law or equity, unless it were shown that before the patents were issued, the Lieutenant Governor had been put in possession of the pleasure of his Majesty, decidedly expressing that his royal authority which had been given, should not be acted upon; but was to be considered as annulled or suspended.

The Commission to Lord Gosford, and the instructions to which it referred, were the rules by which Sir John Colborne was to govern himself in his administration; and they were the latest declaration of his Majesty's will on the subject, which we are discussing; the latest, I mean, of which we have any knowledge.

They came to the Province long after those despatches of the Secretary of State written in 1832, which it has been urged ought to have given the Governor of Upper Canada to understand, that the power given by Statute to establish and endow Rectories should be regarded as having been withdrawn, or suspended.

Without desiring to add to what has been observed in the Court below, upon the reasonableness of any such inference being drawn from the correspondence referred to, it seems obvious to remark that the question is not what Lord Goderich or Lord Glenelg thought or wrote in 1831, or 1832, but what was the expressed intention of his Majesty's Government up to, and at the time of the Patents being issued, (which was in January, 1836,) of which there could be no better evidence than the commission to Lord Gosford in 1835, there being nothing in the mean time that I can discover in the evidence to indicate a withdrawal of the express authority given by that commission.

As to the alleged mistake on the part of the Government of Upper Canada, in misconstruing the terms of Lord Goderich's despatch of 5th April, 1832, any misapprehension of the kind supposed could signify nothing unless it could be properly made to affect the validity of the act done.

The Governor of Upper Canada cannot be supposed to have been ignorant in 1836, of the Commission and instructions under which he was then daily acting.

In a legal point of view those were more material than a correspondence with the Secretary of State, which had taken place more than three years before, and whatever authority those formal acts of Government contained, can upon clear legal principles, which are constantly acted upon, be advanced in support of the act, even though they were absent from mind of the person acting at the moment, which we have no right to conclude these were.

It was made necessary by the 38th Clause, that the Governor should advise with the Council before he acted in this matter. This, it is clear from the evidence, he did; and if it were indispensable that the Council should concur in opinion with the Governor upon the steps to be taken, it is clear that they did so concur.

It would be a dangerous doctrine to hold that the validity of any act required to be done with the advice of the Council, should be liable to be questioned in a Court of Justice many years afterwards, upon an allegation that the Council, in making up their minds upon it, appeared to have been influenced by a misconception, either of law or fact; especially when the despatch or document which they are supposed to have misapprehended, was fully before them, and called for, and could receive the same deliberate consideration from them as it can since have received from others.

If we read the despatches alluded to, and if we suppose that the Executive Council was certainly under the impression that Lord Goderich meant that despatch to be in itself, and without reference to any other document or correspondence, an authority to create and endow Rectories, rather than an approbation of what Sir John Colborne had suggested on that head, and an expression of a willingness to concur with him in approving the condition of the Rectors, they would seem to have misunderstood the letter. But the Council can hardly have been ignorant, (and we may assume they were not) that authority of the most formal

kind to erect and endow Rectories was already in the possession of the Government, and of a recent date, I mean in the commission to the Governor General issued six months before.

And unless the Council had some other reason for imagining that the Secretary of State was unfavourable to the measure, they were certainly not likely to receive such an impression from perusing the despatch of 5th April, 1832; for they could scarcely have imagined that Lord Goderich was contemplating with satisfaction the proposed endowment of Rectories that neither had been, nor were ever likely, to be established, or that he was desirous of aiding by his suggestions in making the endowments more valuable, in order to increase the future comfort of Rectors, who were to have no real existence.

A great deal of the evidence before us consists of proceedings in the House of Assembly; but the votes or resolutions or addresses of either branch of the Legislature can furnish no ground of legal argument on a question of right to property; however they may seem to exhibit the temper and feelings of the time.

Such of them as were of later date than the issuing of the Patent before us, can have no possible effect upon the question of its legality; and such as preceded it, could not in themselves be material, unless they led to some such act of his Majesty's Government as can affect the question by its legal operation; and then it would be that act, and not what moved to it, that it would be the duty of the Court to consider.

The communication which came from the Secretary of State in November, 1831, if it had led to legislative measures such as his Lordship advised, would no doubt have placed the whole subject upon a new footing, and produced a decisive change; but as his Lordship's recommendation was not adopted, it ended in nothing; and his Lordship, it is plain from the subsequent despatches, considered himself in consequence relieved in a great measure from responsibility as to the issue of the question, and absolved from the necessity of making further attempts at a settlement.

And after all there is this fact, that his Majesty's commission under which the Government of Canada was conducted in 1836, contained an express authority to the Governor in the very words of the act to constitute and endow Rectories; which authority could not be affected by any thing that is shown to have proceeded from his Majesty between the time of the commission being sealed, and of the authority which it contained being acted upon by Sir John Colborne.

Within that short period (about seven months) a letter was written by Lord Glenelg, [that of 5th December 1835,] which treated of the Clergy Reserves, and a variety of other matters; but it contained no restriction upon the constitution of Rectories, or the endowment of them; and announced no system of policy on the subject, neither did it make any allusion to the authority which a few months before had been given in unequivocal terms by his Majesty's Commission to Lord Gosford.

And besides this despatch being addressed to Sir John Colborne's successor after his recall, could not have been seen by either of them till after the Patents had issued.

On a review of this part of the case, I will add to what I have said that in pages 64 and 65 of the evidence we see the considerations stated, which induced Sir John Colborne to desire the Rectories should be established, in the form in which they were established, and the date of this document then printed, 8th May, 1835, shows that the measure which he carried into effect in January, 1836, was not hastily resolved upon, but had been long in preparation; and that he had, as he asserts, the