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Clergy Reserves (Canada) Act.

OPINIONS OF THE JUDGES

ON

The QUESTIONS propounded to them on the
13th of April last.

Ordered to be printed 4th May 1840.

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Clergy Reserves (Canada) Act.

OPINIONS of the JUDGES on the QUESTIONS propounded to them on
the 13th of April last.

(Delivered by the Lord Chief Justice of the Court of Common Pleas.)

MY LORDS,

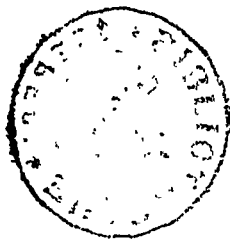
ON the Part of Her Majesty's Judges I have the Honour to represent to your Lordships that all the Judges of England, with the Exception of Lord Denman and Lord Abinger, have met together in Serjeants Inn, for the Purpose of taking into Consideration the several Questions which your Lordships have been pleased to propose to us; and that after Discussion upon the Subject, and Deliberation, we have agreed, unanimously, upon the Answers to be returned to those several Questions, as follows:

In answer to the First Question, we are all of Opinion that the Words "a Protestant Clergy" in the Statute 31 Geo. III. c. 31. are large enough to include, and that they do include, other Clergy than those of the Church of England, and Protestant Bishops, Priests, and Deacons, who have received Episcopal Ordination.

For those Words, which are first to be met with in the Statute 14 Geo. III. c. 83. (recited in the Act now under Consideration), appear to us, both in their natural Force and Meaning, and still more from the Context of the Clauses in which they are found, to be there used to designate and intend a Clergy opposed in Doctrine and Discipline to the Clergy of the Church of Rome, and rather to aim at the Encouragement of the Protestant Religion in opposition to the Romish Church, than to point exclusively to Clergy of the Church of England. And although the Legislature, in passing the Statute 31st Geo. III., appears to have had in its View the Establishment of the Church of England, primarily, and in a more especial and immediate Manner, as is evident from this, that the only detailed Provisions for carrying the Object of the Act into effect are confined to the Erection and Endowment of Parsonages and Rectories according to the Establishment of the Church of England, the presenting thereto Incumbents or Ministers of the Church of England duly ordained according to the Rites of the said Church, and the subjecting of them to all Spiritual and Ecclesiastical Jurisdiction and Authority, according to the Laws and Canons of the Church of England which are lawfully made and received in England (Sections 38, 39, 40, of the said Act); yet does it appear to us, that the Legislature, by employing the more general and comprehensive Term "Protestant Clergy" in the same Statute in which they also use the Expression "Incumbents or Ministers of the Church of England," must be intended to have included within the former and larger Expression other Clergy beside those who are comprised within the Limit of the latter.

And when your Lordships desire the Judges to state, if any other Clergy are included, what other? we answer, that it appears to us that the Clergy of the Established Church of Scotland do constitute One Instance of such other Protestant Clergy.

For by the Act of Union of the Two Kingdoms of England and Scotland it is made a fundamental Article of such Union, "that the true Protestant Religion as then professed within the Kingdom of Scotland, with the Worship, Discipline, and Government of the Church, should be effectually and unalterably secured within the Kingdom of Scotland." And when a subsequent Act of the *British* Legislature, relating to the Government, Laws, and Religion of a *British* Colony, acquired by Conquest since the Union, and forming Part of the Dominions of the *British* Crown, employs, with reference



to that Colony, the Terms "a Protestant Clergy," there being no Words in the Statute which necessarily restrain and limit the Meaning of the Expression, we think it must be held to include the Clergy of the Protestant Church established in Scotland; and we feel ourselves confirmed in this Opinion by observing that on several Occasions the precise Expression is to be found in the Statute Book, "the Clergy of the Established Church of Scotland." The 48 Geo. III. c. 138. in its very Title mentions "the Clergy of Scotland." In the 50 Geo. III. c. 84. "the Rights and Interests of the Clergy of Scotland" are repeatedly spoken of; and in the 5 Geo. IV. c. 72. s. 7. a Reference will be found to several Acts of Parliament which make mention of the "Poor Clergy of the Established Church of Scotland."

And although in answering your Lordships Question we specify no other Church than the Protestant Church of Scotland, we do not thereby intend that besides that Church the Ministers of other Churches may not be included under the Term "Protestant Clergy." At the same Time, as we do not find on the Statute Book the Acknowledgment by the Legislature of any other Clergy answering that Description, and as we are not furnished by your Lordships with any Information as to the Doctrine or Discipline of any other Denominations of Protestants to which the Statute of the 31st Geo. III. can by possibility apply, we are unable to specify any other to your Lordships as falling within the Statute.

My Lords,—In answer to the Question secondly put to us, we are all of Opinion that the Effect of the Forty-first Section of the Statute is prospective only, and that the Power thereby given to the Legislative Council and Assembly of either of the Provinces cannot be extended to affect Lands which have been already allotted and appropriated under former Grants; for the manifest Import of the Forty-first Section appears to us to be limited to this, namely, "the varying or repealing the Provisions respecting the Allotment and Appropriation of Lands," and not to comprehend "the varying or repealing Allotments or Appropriations which have been already made under Provisions of the Act, whilst such Provisions continued unrepealed and in full Force." The Provisions of the Statute of Wills might be varied or repealed without affecting the Devises of Land already made under it.

My Lords,—In answer to the Question lastly proposed, we all agree in the Opinion that the Legislative Council and Assembly of the Province of Upper Canada have exceeded their Authority in passing the Act "to provide for the Sale of the Clergy Reserves, and for the Distribution of the Proceeds thereof," in respect of *both* the Enactments specified in your Lordships Question. As to the Enactment "that it should be lawful for the Governor, by and with the Advice of the Executive Council, to sell, alienate, and convey in Fee Simple all or any of the Clergy Reserves," we have, in answer to the Second Question, already stated our Opinion to be such, as that it is inconsistent with any such Power in the Colonial Legislature; and as to the Enactment "that the Proceeds of all past Sales of such Reserves, which have been or may be invested under the Authority of the Act of the Imperial Parliament passed in the 7 & 8 Geo. IV. for authorizing the Sale of Part of the Clergy Reserves in the Provinces of Upper and Lower Canada, shall be subject to such Orders and Directions as the Governor in Council shall make and establish for investing in any Securities within the Province of Upper Canada the Amount now funded in England, together with the Proceeds hereafter to be received from the Sales of all or any of the said Reserves," we think such an Enactment is in its Terms inconsistent with and contradictory to the Provisions of the Statute of the Imperial Parliament 7 & 8 Geo. IV., and therefore void, there being no express Authority reserved by that Act to the Colonial Legislature to repeal the Provisions of such latter Statute.
