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FURTHER CORRESPONDENCE

RELATIVE TO THE

LAND TENURE QUESTION

IN

PRINCE EDWARD ISLAND.

(*In continuation of Command Paper* [C. 1351], *August* 1875.)

Presented to both Houses of Parliament by Command of Her Majesty,
April 1876.

LONDON:
PRINTED BY GEORGE EDWARD EYRE AND WILLIAM SPOTTISWOODE,
PRINTERS TO THE QUEEN'S MOST EXCELLENT MAJESTY.
FOR HER MAJESTY'S STATIONERY OFFICE.

1876.

[C.—1487] *Price* 6*d*.

The EARL OF DUFFERIN to the EARL OF CARNARVON.

Ottawa, February 24, 1876.

My Lord, (Received March 9.)

I have the honour to enclose herewith for your Lordship's information a report signed by the Attorney-General, the Solicitor-General, and the Solicitor for the Commissioner of Public Lands of Prince Edward Island, detailing the proceedings before the Commissioners under the "Land Purchase Act, 1875," and the subsequent action in the matter before the Supreme Court of that Province. January 27.

2. Your Lordship will perceive from this Report that the cases adjudicated upon while Mr. Childers acted as Commissioner were those of the proprietors whose names are here noted in the margin. William Cundall, Eliza M. Cundall, Charlotte A. Sulivan, Robert B. Stewart, Sir Graham Montgomery, The Hon. S. P. Fane, Lord Melville, James F. Montgomery, Colonel Cumberland, Miss Fanning.

3. That of these proprietors Miss Sulivan and Mr. Fane, having applied to the Supreme Court of Prince Edward Island for a rule setting aside the award made to them, obtained on the 17th of November last a rule *nisi*, which rule the Court on the 17th of January following made absolute, declaring the award *in toto* void; and that an appeal has been entered from this decision to the Supreme Court at Ottawa.

4. That Mr. R. B. Stewart's counsel, having applied first to the Court for a rule setting aside his award, withdrew the application, and pressed only for the continuance of an injunction restraining the Public Trustee from executing a conveyance of the property; and that finally the court having directed the awarded money to be paid into the Treasury in gold to the credit of the estate, Mr. Stewart was on January 27th served, pursuant to the Act, with a notice that within 14 days a conveyance of his estate would be executed by the Public Trustee to the Commissioner of Public Lands.

5. It was upon the consideration of these three cases, as your Lordship will remark, set forth in paragraphs 11 to 16 of the Report, that the Supreme Court discovered the most radical defects of the disputed awards.

6. The Report further shows that Lord Melville, Sir G. Montgomery, William Cundall, and Eliza M. Cundall applied to the Court on December 7th for an order for the payment of their awards, the deeds conveying away their estates having been executed on November 27th; that an order *nisi* was given, and that subsequently no cause against it having been shown, the Court ordered the awards in these four cases to be paid on the 1st of April, unless cause should be shown on or before that day.

7. That Mr. James Montgomery finally obtained a rule absolute referring back his award to the Commission on the ground of mistake committed by the Commissioners, and that it is probable, in the view of the absence from the Commission of Mr. Childers, the Chairman at the making of the award, fresh legislation will be required to authorise the re-hearing of the case.

8. That the cases of Lieut.-Colonel Cumberland and Miss Fanning were deferred until the decision of the Court was made known in those of Mr. Fane and Miss Sulivan.

9. At paragraph 19 the Report commences to notice the condition of the cases which came before the Commission after the appointment of Mr. Wilmot in the place of Mr. Childers, and your Lordship will learn that in these cases the Commissioners, awaiting probably the judgment of the Supreme Court on the applications before it, have filed no awards.

10. The Report mentions further some legal difficulties which appear likely to impede the settlement of more than one case that will come before the Commission when it re-assembles on the 26th of July, the day to which it now stands adjourned.

I have, &c.

The Right Hon. the Earl of Carnarvon, (Signed) DUFFERIN.
&c. &c. &c.

Enclosure.

Sir, Charlotte Town, January 27, 1876.

In reply to your letter of the 18th instant asking us to furnish you with a report of all proceedings before the Commissioners under the Land Purchase Act, 1875, and also embracing therein the subsequent action of the several proprietors in the Supreme Court who may either have applied for the amounts of their awards or have moved the Court to have the award set aside, we beg to submit the following Report:—

1°. The assent of the Governor-General to the Land Purchase Act, 1875, was published in the Canada Gazette on the 26th of June 1875.

2°. On the 2nd day of August 1875 the Commissioner of Public Lands, under the second section of the Land Purchase Act, 1875, notified George W. De Blois, Esq., the known and recognized agent of Charlotte Antonia Sulivan, that the Government of this Island intended to purchase her township lands in this Island under the said Act.

3°. A similar notice was also served upon the under-mentioned proprietors or their agents on the dates set opposite their respective names; that is to say, on—

Robert Bruce Stewart on the 20th July 1875.
S. C. B. P. Fane per G. W. De Blois, Agent, 2nd August 1875.
Sir Graham Graham Montgomery per S. H. Hanland, Agent, on 2nd August 1875.
Right Hon. Lord Viscount Melville per John Longworth, Agent, on 26th July 1875.
Lt.-Col. Cumberland and wife per E. J. Hodgson, Agent, on 26th July 1875.
Maria J. M. Fanning per E. J. Hodgson, Agent, on 26th July 1875.
John A. MacDonell on 23rd July 1875.
James F. Montgomery on 24th July 1875.
William Cundall on 24th July 1875.
E. M. Cundall on 24th July 1875.

4°. The Right Hon. Hugh C. E. Childers, the Commissioner appointed by the Governor-General in Council, arrived in this Island to enter upon his duties on or about the 29th day of July 1875. J. T. Jenkins, Esq., had been previously appointed Commissioner on behalf of the Government of this Island by the Lieutenant-Governor in Council.

5°. J. S. Carvell, Esq., was on the 31st day of July 1875 appointed Commissioner on behalf of William Cundall and Eliza Mary Cundall, two of the proprietors, and on the same day the three Commissioners under the 13th section of the Act notified the Commissioner of Public Lands of Mr. Carvell's appointment. On the same day the Commissioner of Public Lands presented a petition to the Commissioners under the 14th section of the Act. The notice required by the 14th section of the time and place of hearing the matters referred to, the Commission was in these two cases published in the Royal Gazette of the date of 31st July 1875, and the time of hearing was fixed for Monday, the 16th August 1875.

6°. On 5th August 1875 the Commissioner of Public Lands was notified of the appointment of R. G. Haliburton as Commissioner on behalf of the following proprietors, namely:—Charlotte A. Sulivan, R. B. Stewart, S. C. B. P. Fane, Sir Graham Graham Montgomery, Right Hon. Lord Viscount Melville, Lieut.-Col. Cumberland and wife, Maria S. M. Fanning, John A. MacDonell, and James F. Montgomery. Petitions were immediately presented to the Commissioners by the Commissioner of Public Lands, and an advertisement in each case published, appointing Monday, 23rd August, as the day for hearing the matters referred under the Act.

7°. The Commission met for the first time on Monday, August 16th, in the matter of the estates of William Cundall, and Eliza Mary Cundall, and sat till Wednesday (inclusive), when it adjourned till August 23rd.

On 23rd August Court again met and sat continuously until Friday, the 3rd day of September, during which time the estates of Charlotte A. Sulivan, R. B. Stewart, Sir Graham G. Montgomery, Hon. Spencer, C. B. P. Fane, Lord Melville, James F. Montgomery, Col. Cumberland and Miss Fanning were brought before the Court in rotation, and the evidence and addresses of counsel heard.

On the 3rd day of September the Court adjourned till Monday, the 11th day of October; the Chairman, Right Hon. H. C. E. Childers, stating that he would be unable to act as Commissioner any longer.

On Saturday, the 4th September, awards were made by the Commissioner in all the before mentioned estates adjudicated upon by them, the proprietors' Commissioner declining to join in those of R. B. Stewart and Charlotte A. Sulivan.

On Monday, 6th September, all these awards were filed with the Prothonotary as required by the Act, and copies thereof served on the proprietors on or before the 9th September.

The amounts awarded were as follows :—

William Cundall - - - -	$9,200
Eliza M. Cundall - - - -	$4,450
Charlotte A. Sulivan - - - -	$81,500
Robt. B. Stewart - - - -	$76,500
Sir Graham G. Montgomery - - -	$12,400
Hon. S. C. B. P. Fane - - - -	$21,200
Lord Melville - - - - -	$34,000
James F. Montgomery - - - -	$15,200
Col. Cumberland - - - -	$31,900
M. S. M. Fanning - - - -	$20,200
Making a total of - - -	$306,550

8°. At the October sittings of the Supreme Court James F. Montgomery, on his own affidavit, and that of R. G. Haliburton, arbitrator, obtained an order *nisi* to refer the award made in his case back to the Commissioners to correct an alleged mistake made by the Commissioners in making up their award. Cause was shown on behalf of the Government against this order at the Michaelmas term, but the order was made absolute by the Court, and the award referred back. As Mr. Childers the Chairman is in England, and in all probability will not return here, legislative action will probably be required to enable this case to be re-heard by the present Commissioners and brought to a final end.

9°. On the 29th day of October 1875 the Colonial Treasurer certified, pursuant to the Act, that the amount of each of the foregoing awards had been paid into the Treasury to the credit of the several estates, and between that day and the 3rd day of November, the Public Trustee notified Miss Sulivan, R. B. Stewart, Lord Melville, Sir Graham Graham Montgomery, S. C. B. P. Fane, William Cundall, and Eliza M. Cundall respectively, that within 14 days thereafter he would execute a conveyance of their estates to the Commissioner of Public Lands pursuant to the Act.

10°. In the cases of Col. Cumberland and Miss Fanning it was found impossible to get correct descriptions of their estates until after the rules to set the awards aside in Sulivan's and Stewart's cases had been obtained, and after that it was deemed advisable to await the decision of the courts in those cases before giving the notices in those of Cumberland's and Fanning's.

11°. On the 10th day of November 1875 an application was made by Robert B. Stewart to the Supreme Court, to set aside the award made with reference to his estate, and to restrain the Public Trustee from executing a deed thereof to the Commissioner of Public Lands pursuant to his notice. The Court granted a rule *nisi* to set aside the award returnable on the 1st day of December on the grounds following :—

1. That the award was not final.
2. That it was uncertain.
3. Because a delegated authority must be exercised under it to ascertain metes and bounds of lands to be conveyed by Public Trustee to Commissioner of Public Lands.
4. Because the money paid into the Treasury was in legal tender notes of the Dominion of Canada, which are not legal tender in this Island.

The Court at the same time granted an *interim* injunction restraining the Public Trustee from executing a conveyance.

12°. On the 17th day of November similar applications were made on behalf of Charlotte A. Sulivan and S. C. B. P. Fane, and rules *nisi* were obtained to set aside the awards in these cases on the same grounds as those expressed in the rule in Stewart's case.

13°. On 1st December the Court adjourned the argument to the 4th December, and on the 4th December cause was shown on behalf of the Government against the rules *nisi*. As the grounds were the same in each of the three applications of R. B. Stewart, S. C. B. P. Fane, and C. A. Sulivan (excepting one additional one in Fane's case, which his counsel withdrew before the argument), it was agreed to argue the cases as one at the

commencement of the argument. R. B. Stewart's counsel withdrew his rule in so far as it applied to set aside the award, and confined his application simply to continue the injunction restraining the Public Trustee from executing a deed of his estate.

The arguments lasted four days.

14°. On the 17th day of January the Court gave judgment in Stewart's case, directing the money awarded to be paid into the Treasury in gold within 14 days to the credit of the estate, with liberty to Stewart to apply to make the injunction perpetual if the gold was not paid within that time.

15°. On the 18th day of January the Treasurer certified pursuant to the Act that the amount of the award in Stewart's case had been paid into the Treasury in gold, and on the 27th day of January R. B. Stewart was served with a fresh notice, that within 14 days from the service of that notice upon him the Public Trustee would execute a deed of his estate to the Commmissioner of Public Lands.

16°. The Supreme Court also gave judgment on the 17th day of January in Sulivan's and Fane's cases, making absolute the rules *nisi*, and declaring the awards absolutely void. On several grounds, among others for not describing the lands for which they awarded compensation, and for not finding specifically a number of points which the Court held it necessary the award should find *on its face;* such as the performance or non-performance of the conditions of the original grants, the payment or non-payment of quit-rents, the number of acres held by squatters and their names, &c., &c.

17°. On the 27th day of November the Public Trustee, pursuant to the notices served by him, executed deeds to the Commissioner of Public Lands of the respective estates of Lord Melville, Sir Graham G. Montgomery, William Cundall, and Eliza Mary Cundall.

On the 7th day of December following, applications were made to the Supreme Court in behalf of the last four named proprietors, to obtain an order for the payment of the amount awarded them.

The Supreme Court in each of the four cases granted an order *nisi*, calling upon the Commissioner of Public Lands to show cause, on the 10th December, why the several amounts awarded to the said four proprietors would not be paid to them respectively.

No cause was shown on behalf of the Commissioner of Public Lands, but the Supreme Court made a second order in each of the four cases (which is to be published in England and this Island as directed by the Court), that the amounts of the awards will be paid to the respective proprietor applicants on the 1st day of April next, unless cause to the contrary be shown on or before that day.

18°. The above statement concludes my report of the cases heard before the Commissioners while Mr. Childers presided as Chairman. With respect to the remainder of the proprietory estates, I beg to submit the following statement of facts.

19°. The Hon. L. A. Wilmot, appointed Commissioner by the Governor-General in Council in lieu of Mr. Childers who had resigned, opened the Court on the 11th October.

20°. The estate of John Apollenarius MacDonell, which had been docketed before Mr. Childers, was first heard and disposed of.

The Court then took up and heard the following estates in the order herein inserted. The usual and necessary notices had all been given as required by the Act, and the hearing in succession had been properly advertised in each case:—

J. A. MacDonell; H. J. Cundall, guardian of heirs of Winsloe estate; H. J. Cundall, Trustee of Louisa Montgomery; John Alister MacDonald; Margaret Stewart; H. J. Cundall; Albert Hinde Yates and Mary J. Yates; Phillips F. Irving and George W. De Blois; Arthur Irving; Thomas Wright and Anne C. Wright; R. Rennie and others; Mary Anne and Jane H. Traverse; Agnes C. and Robert Bellin; Edward J. Hodgson; Daniel Hodgson, Trustee of Charles Wright; William C. MacDonald; Henry Palmer; Henry C. Douse; Esther Douse; Mrs. Duncan McMillen, guardian of Henry Winsloe, Stanley Winsloe, and Agnes Winsloe; Helen Diana Wiggins and Caroline M. Wiggins, and Flora Townshend Wiggins; William Campbell, Robert Longworth, and Henry Jones Cundall, Trustees under the will of late William Douse; Sydney Tudor Evans and Amelia Evans; Mary Crooke and Frances Crooke; Anna Maria Lawton, Margaret Gordon Lawton, Catherine Lawton, Mary Bushe Lawton, and Mary Lawton Clarke.

21°. On the 20th day of November, after the hearing of the above cases, the Commissioners adjourned the Court until the 26th day of July next 1876.

No awards have been filed by the Commissioners as yet in any of the above cases. I presume they were awaiting the decision of the Supreme Court on the form of the awards before signing theirs.

Some time before the adjournment of the Court on the 9th day of November 1875, advertisements had been published by the Commissioners appointing the 3rd day of December at the House of Assembly Room as the time and place for proceeding with the hearing of the applications in the four estates following, viz.:—Augustus E. C. Holland and Mary Holland his wife, Frederick F. Holland, John Roach Bourke, and George Augustus MacNutt, Trustee of Marguerite S. Stevens.

22°. It will be necessary to re-advertise these cases again when the Court re-assembles, and indeed some questions may arise as to whether the proceedings have not entirely lapsed, and the powers of the Commissioner been exhausted *quoad* these four estates.

23°. The estates of James Douse and Arthur Irving were found on the hearing thereof not to be within the Act, and were abandoned.

24°. The estate of the Bishop of Nova Scotia and Theophilus Des Brisay was called on for hearing, but an objection was taken that Des Brisay was a relation of Dr. Jenkins, the Commissioner of the Local Government, and as it appeared the relationship actually did exist the case had to stand over. Legislative action will be required in this case also to enable it legally to be adjudicated on.

25°. A number of other estates, most of them small in area, remain to be advertised and brought to a hearing, but of course nothing can be done in them until the return of Judge Wilmot next spring.

26°. In the estate of H. J. Cundall, Committee of John Winsloe, a lunatic, as the Master of the Rolls decided that the Act did not extend to estates held by committees of lunatics, proceedings were stayed after the initiatory notice of the intention of the Government to purchase the estate was served; and it will be necessary to provide for this case in any amended Act that may be passed.

27°. We annex hereto copies of the judgments delivered by the judges of our Supreme Court in the three cases of Sulivan's, Stewart's, and Fane's, and the Commissioner of Public Lands has appealed from the judgment given in Sulivan's and Fane's cases to the Supreme Court at Ottawa.

We have, &c.

FREDK. BRECKEN, Attorney-General.
W. W. SULLIVAN, Solicitor-General.
LOUIS H. DAVIES, Solicitor for the Commissioner of Public Lands.

To the Honourable T. Heath Haviland,
Provincial Secretary.

PROVINCE OF PRINCE EDWARD ISLAND.

JUDGMENTS of the SUPREME COURT, delivered in Hilary Term 1876, on Appeals from Awards of the Commissioners appointed under the Provisions of "The Land Purchase Act, 1875," with the Act published as an Appendix:—

In the case of the Estate of Charlotte Antonia Sulivan and the Commissioner of Public Lands; also in the case of the Hon. Spencer Cecil Brabazon Ponsonby Fane and the Commissioner of Public Lands.

Chief Justice Palmer.—This is rule to set aside two awards or inquisitions of the Commissioners appointed under the "Land Purchase Act, 1875."

The awards are in the following form:—

"Dominion of Canada,
"Province of Prince Edward Island.

"In the matter of the Application of Emanuel MacEachen, the Commissioner of "Public Lands, for the purchase of the estate of Charlotte Antonia Sulivan, and the "'Land Purchase Act, 1875.' The sum awarded under sec. 26 of the said Act is "eighty-one thousand five hundred dollars ($81,500).

"(Signed) HUGH CULLING EARDLEY CHILDERS,
"Commissioner appointed by the Governor-
"General in Council.
"JOHN THEOPHILUS JENKINS,
"Commissioner appointed by the
"Charlottetown, 4th September 1875. Lieut.-Governor in Council.

The grounds set forth on obtaining the rule are—

First. The award is not final, as the 28th section of the said Act requires the Commissioners to take into their consideration (sub-section *e*) the number of acres of land possessed or occupied by any persons who have not attorned to or paid rent to the proprietor, &c., who claim adversely, &c. (Sub-section *f*.) The quitrents reserved in the original grants, and how far the payment of the same have been waived or remitted by the Crown.

Second. The award is uncertain, as it does not show for what the money is awarded,—either the number of acres, or for whose estate,—or quality thereof.

Third. The Public Trustee has, in his 14 days' notice, described, by metes and bounds, certain lands therein, which he is not authorised to do by statute.

Fourth. This is alleged a delegated authority which does not appear, and it is not known whence derived.

Fifth. The money alleged to be lodged in the Treasury is of a species not a legal tender in this province.

Before proceeding to consider these points, it will be well to notice the general objects of the Act of Assembly in question. On the face of the Act the object is expressed to be "to convert the leasehold tenures into freehold estates, upon terms just and equitable "to the tenants as well as to the proprietors." The term "proprietors" also received legislative definition, and is expressed to include and extend to any person for the time being, receiving or entitled to receive the rents, issues, or profits of any township lands (exceeding 500 acres in the aggregate) in his own right, or as trustee, guardian, or administrator for any other person, or as a husband in right of or together with his wife.

The lands to be dealt with are declared to be leased or unleased, occupied or unoccupied, cultivated or wilderness,—saving always any estate not exceeding 1,000 acres when in the proprietor's actual occupation, but not otherwise tenanted. Exception was taken by counsel for the Rule, that the "Land Purchase Act, 1875" was passed contrary to the "British North American Act, 1867"; but I am of opinion that it comes within section 92 of the last-mentioned statute, where, in sub-section 13, authority is expressly given to the Province to legislate exclusively on "property and civil rights "in the Province."

It may properly be asked, in the first instance, what estates, in point of quality, the Local Act is intended to embrace and operate upon? By sections 32 and 33 it is very plainly expressed that the estate to be conveyed to the Commissioner of Public Lands is to be an estate *in fee simple*, and *nothing* less. Whether it is intended that the Commissioners, by the uniting or compounding of *lesser* estates, in some manner represented or brought before the Court, are to convert them into a fee-simple for the purposes of the Commissioner of Public Lands, does not, by any means, appear so clear. It was urged by one of the counsel opposed to the rule that tenants for life, remainder-men, and reversioners in any one certain tract of land, if entitled together to the fee-simple estate therein, would each one be bound by the statutory notice being duly published; and that, therefore, whether appearing before the Commissioners or not, would be one and all bound by a conveyance in fee-simple executed by the Public Trustee. The total absence, however, of all special provisions or machinery in the Act to give effect to such an important power as this, is itself sufficient to warrant the conclusion that such could never have been the intention of the Legislature. The Act, in terms, it is true, provides for the dealing with estates held by husbands in right of, or together with, their wives, respectively; but this evidently means instances where the wife is the owner in fee, and it legalises the necessity of dealing with the husband as representing by his marital right the fee-simple of his wife, while he is in receipt of the rents, issues, and profits of the estate. A party coming before the Commissioners' Court as tenant for life only, although, unquestionably, in receipt of the rents, issues, and profits of the estate; yet, if the remainder-man should keep aloof, it does not appear by the Act how the fee-simple is to be transmitted to the Commissioner of Public Lands. Does the Act of Assembly intend that the Land Court Commissioners should deal with a case of this kind manifestly appearing to them, and yet award the fee-simple value of the estate, and leave the tenant-for-life and remainder-man to obtain the proportions of their money through the medium of the Supreme Court? I do not think so.

The Commissioners power, at least their compulsory power, is confined only to estates in fee-simple. My object in inquiring into and considering this point now will appear as I further proceed in my judgment; and, while remarking on it, I may here refer to the cases of *Regina* v. *London and N. West. Rail. Co.*, 22 L. T. 346, and *Brandon* v. *Brandon*, 11 L. T., (N. S.) 673, in both of which cases the Jury summoned under land

compensation statutes cannot decide upon questions of title; they are only to assess the value of land claimed.

The mode which our Land Purchase Act prescribes for bringing an estate into the Commissioners' Court is enacted in a very summary manner by the second clause, which states merely that the Commissioner of Public Lands, after 60 days publication of the Governor General's assent to the Act, shall "notify any proprietor or proprietors that "the Government intend to purchase his or their Township lands under this Act."

The Commissioners being all appointed and the day of holding their Court published as the Act directs, nothing more appears necessary than the above notice to enable the Commissioners to proceed upon their enquiry: there are no pleadings, no record, no submission in writing under the hands of the parties, and the Commissioners are left to shape their course of adjudication by the Act itself.

The 2nd section, it will, doubtless, be observed, does not require that the Commissioners of Public Lands in his notice should be bound to set forth, by any certain description, the lands or local situation of the estate referred to. Had the Act intended he should do so, it would surely have prescribed such a direction in express terms; but the extreme, if not insuperable, difficulties which such a duty would impose on this officer, it may be concluded, were present in the mind of the Legislature, and when we refer to the ample powers which are conferred upon the Arbitrators, especially by the twentieth section of the Act to compel the production of plans, instruments, documents, &c., &c., it may fairly be presumed that the Legislature never intended to impose such a task upon that officer. Indeed, were the officer to undertake such a duty, and from lack of information which he could not acquire, omit some portion of the proprietor's lands, or mistake the course of some one or more of its boundaries, such error might exclude a portion, if not the whole of a particular estate from the scope of the Act, although in point of fact doubtless within its operation.

In the absence, then, of any record or written submission to start with, the Arbitrators can only refer to the statute itself, and here, as it appears to me, we find in the 28th section the matters of submission upon which those functionaries are to base their judgment and finding. This section is as follows (here the learned Judge read the section), now the language of the section is imperative, viz.:—

"The Commissioners *shall* take the following facts or circumstances into their "consideration."

Can the Commissioners, then, venture to make a final and just award, and at the same time totally disregard these elements, or at least various of them which must forcibly strike the mind of every reader of the statute, whether learned or layman, as testing the real value of the estate while in the possession and enjoyment of the owner; for instance, the gross rental paid by the tenants; the actual net receipts of the proprietor. The number of acres occupied by persons holding adversely to the proprietors. The performance or non-performance of the original grants from the Crown, and how far the despatches of the Colonial Secretaries of State have operated as waivers of any forfeitures. The quitrents reserved in the original grants. The number of acres of vacant or unleased lands.

Now a proprietor may own 20,000 acres of land, whereof he has leased 12,000 acres, and the other 8,000 remain freely at his own disposal. The leased land may yield him at its maximum an income of 500*l.*, a year. The *unleased* has become the most valuable part of the Township, and he knows that he can at any time he chooses lease it out in farms to produce from it a rental of 700*l.* a year; ought not this to show the necessity of a separate and distinct valuation of these lands:—

If he and his ancestors have taken that estate subject to its forfeiture to the Crown in case certain specified conditions be not performed, if those or any of those conditions have been violated and he holds the estate by the uncertain clemency of the Crown, the estate must be much less in value than if such conditions were all duly performed, or being broken were waived by the Crown.

Further, if there be a lien on the estate for quit rents, past or present, would it be of no greater value to the owner than it would were all such quit rents duly paid or remitted; and is the Commissioner of Public Lands to take a conveyance of the estate and sell it out in small tracts without knowing whether these conditions attach to it or not?

Again, if a certain number of persons have got into and hold adverse possession amongst them of a block of seven or eight hundred acres of land in different parcels or tracts, would not the value of the proprietor's estate be increased by the certainty of their not having a legal title, or diminished if it were certain they *had* gained such title. Now, to satisfy the statute are we assured that all these things were entered upon and duly considered by the Arbitrators in the words of the 28th section "*in estimating the amount*

of compensation?" Have they duly considered the tracts of land held adversely, the lands claimed by purchasers under the Land Assessment Acts, or under other Acts by which strangers or third parties hold *primâ facie* titles by, and if so what lands are they? What quantity do they amount to? How are they distinguished or bounded? The validity of title to these tracts of land *cannot* be decided by the Arbitrators. The Supreme Court is the tribunal for that; but, what assurance does the award give that these matters have been duly considered? Not the slightest. Suppose that the Arbitrators have calculated on a certain quantity of land being held by squatters or under land tax sales, &c., and disallowed the proprietor the price of these; and suppose they mistook the law regarding these species of title. How is the proprietor or the Supreme Court to arrive at a knowledge of this, and of the amount, if anything, deducted for such tracts of land? or of their localities or descriptions? The award on the subject is perfectly silent and thereby equally uncertain. The award gives no boundaries for either freehold or leasehold land, nor what land in any form or of any kind the Arbitrators have given compensation for; all is left in uncertainty. It was argued by Counsel that the Public Trustee is as capable of finding the boundaries as the Commissioners. He might be, but in the first place it does not appear to be his duty: nor is he invested with the necessary power to enable him to do so. He is not authorised to sign a deed until the sum is awarded to the proprietor, and not until 14 days even after that. He must convey according to the boundaries which the Arbitrators have adjudicated upon. He must convey the whole land they have valued and *no more*, and he ought first to have some assurance and certainty that what he does convey was the land of that proprietor brought into Court, and that for which he has been compensated. The Island Act of Assembly, 27 Vict. cap. 2, commonly referred to as the "Fifteen Years' Purchase Act," confirms the former Land Commissioners' award made previously to that Act, and settles the question of the arrears of quit rents with respect to the estates whose owners are named in such Act; but notwithstanding this, there is no telling whether the present Arbitrators, in their award, were guided as regard the quit rents, by this Act or not. Counsel opposed to the rule have agreed that section 26 of the Land Purchase Act, fully enables and only requires the Arbitrators merely to award the sum they have agreed to as a money compensation and nothing more; and that those matters in subsections of said section 28, are merely matters directory of what the Arbitrators shall or shall not consider of in deliberating; but I wholly differ from this, and consider these matters as subjects to be arbitrated upon, as much so as if they were drawn up in a written submission to which each of the parties had assented and subscribed with their own hands. Nor are they, by any means *collateral* matters, not requiring to be stated by the Arbitrators as further argued by Counsel, who cited in support of that, the case, viz., "In Re. Byles 25 L. J., Exch. 53, where under the Lands Clauses Consolidation (Imperial) Act, 1854, an arbitration was held where some damages had accrued by the foundering of a river embankment built by private agreement, and compensation for taking land connected with the embankment was found by an arbitration; there the damages arising from the giving way of the wall was, and very properly, considered a question quite collateral to the damage arising from the works of the Company, coming under the head of compensation. But, in the present case, the subjects specified in section 28 of our statute, are the very vitals of the award.

In the case of *Round* v. *Hatton*, 10 M & W., cited by Counsel, an action of trespass to plaintiff's house and lands was, by an order of Nisi Prius, referred to an Arbitrator who was "*to settle at what price and on what terms the defendant should purchase the "plaintiff's property.*" The order of reference enjoined nothing further, no particular *circumstances* for the Arbitrator's consideration in computing the amount, *and it gave him no power* to determine which were the premises in question, *and no dispute existed on the subject.* And the affidavits, as remarked by Lord Ch. B. Abinger, *did not show any dispute as to what was the property to be adjudicated upon.* And the Arbitrator awarded that after deducting certain sums he settled the sum of 153*l.* odd, to be the price at which defendant should purchase the plaintiff's property: in this the case was one plain and almost isolated fact, differing materially from the one in question, which is constituted of several disputed facts of great diversity in character, and several of them most material and important as regards the main subject to be decided.

With reference to the case of *Wrightson* v. *Bywater*, 3 M. & W., 199, the law, as there laid down, does not appear to me in favour of the present award, for while the award in that case was upheld, yet the grounds of the Court's decision, as clearly enunciated by Baron Parke, show that the case is one which ought by no means to apply to the present one. "The question, therefore," he says, "is reduced to this,—whether, "under this reference, it is necessary to the validity of any award to be made pursuant

"to it, that it should decide all the matters in dispute." And this is *a mere question of construction*, for there is no rule of law requiring it; *its necessity arises from the contract of the parties.* The old rule was, that unless the *submission* expressly made it conditional with an "ita quod," an award of part only was good. This was laid down by Lord Coke, and it was so held in Dyer and many other cases. In more modern cases it has been said that an *express* condition is not required; for in *Bradford* v. *Beavan*, Willes 270, Ch. J. Willes says: "I am willing to carry it as far as it has been carried already, "because, were it not for the cases, I should be of opinion that, when all matters are "submitted, though *without such condition*, all matters must be determined; because it "was plainly not the intent of the parties that some matters only should be determined, "and that they should be at liberty to go to law for the rest." But beyond this the cases have not gone; *and it is still the question, whether the parties intended all to be decided.* So here we should look to find what is the submission or the contract of the parties; that is to be found in the Act of Assembly,—a compulsory one, no doubt,—yet such as the Court must be governed by to decide whether it was intended by the Legislature that one or more, and how many, and which of the subjects in section 28 and its sub-sections were intended to be decided by the Arbitrators.

The case of *Willoughby* v. *Willoughby*, 12 L. J., 280, was cited to show that an *award*, made under a private Act of Parliament, for dividing and allotting lands and creating a rentcharge in lieu of tithes, on the owner's lands, the award was held good although the Arbitrators awarded a yearly rentcharge of one entire sum on all the lands of the said owner, in a certain parish instead, as it was contended he ought to have done, awarded a separate part of the land and thereby made an apportionment of the whole sum. But the objects of the two Acts, that of the above private Act of Parliament and the Land Purchase Act, and the offices and powers of the Arbitrators appointed under each, respectively, are very different, and render it very easy to comprehend the distinction between the two cases. The private Act of Parliament, in the Willoughby case, was substantially for the commutation of tithes, and the 31st section of that Act, at once declared that all the lands of Sir H. Willoughby, in a certain parish, should be subject to a certain rentcharge in exoneration of the lands of all other proprietors in the same parish. Section 30 authorised a Barrister to fix the amount of this rentcharge *in money*, and section 34 enacted "that it shall be lawful for the said Barrister, by his said award, "to divide and apportion the said rentcharge into so many parts or proportions *as he shall think fit*, and to charge each such part or proportion on a separate and distinct part of the lands and grounds of the said Henry Willoughby.

Now, the clear object of the Act in this respect, was to commute the tithes of this particular parish; to establish a fixed sum of money in lieu of them, and to secure this sum to the Rector and charge it *on all* the lands of Sir H. Willoughby in that parish, and then the object of the Act would be fulfilled. The *apportioning* of the tithes among the distinct tracts of land, was left in express terms, *at the discretion of the Arbitrator*; the doing of this was not necessary at all to enable him to decide what, in money, the commuted amount in the whole should be. It was not necessary that he should make *any apportionment.* That work was an accommodation merely to the occupiers of the lands, and was in a measure *collateral* to his duty. A description of each piece of Sir H. Willoughby's land was, in like manner, no matter of necessity; neither he nor the Rector would thereby be the more secure in their respective rights, nor would it afford either any assurance at all that the Arbitrator, in selling the commutation, had the more carefully or the more conscientiously discharged his duty.

In the case of *Mays and another* v. *Cannel*, 24, L. J., (C. P.) 41. There was an action of ejectment, after issue joined, referred by a Judge's order to a Barrister who had power, if he found in favor of the lessors of the Plaintiff, to order immediate possession to be given of the land, &c., in question, to the lessor of the Plaintiff, and also how and in what manner such possession should be given, and if not given, how it should be taken. The Arbitrator awarded, viz.:—

"I award in favour of the lessors of the Plaintiff, and order that immediate possses-"sion be given of the land and premises in question, in this action, to the lessors of the "Plaintiff."

Objections were taken to the award as not being final or certain, the principal one being that it did not find what land and premises the lessors were entitled to receive, and what were to be given. It was decided that, although there were two demises, there was only one real Plaintiff, and the Arbitrator ordered possession of the premises to be given to him, namely, Thos. Mays; that he, Mays, was to take it at his peril just as he would have to do if there had been a verdict in the action of ejectment. That although the Arbitrator had power to award how possession was to be given, *he was not bound to*

exercise it. There was, therefore, neither difficulty nor risk of injustice in allowing the award to operate.

The next case referred to by Counsel against the rule is *Wilcox* v. *Wilcox*, 4 Exch. 499, where, in a case of trover, a verdict was agreed to by consent for the damages claimed, subject to be reduced by an Arbitrator. There were several pleas, viz.: not guilty, not possessed, and payment of money into Court. The Arbitrator's award was that the verdict should stand, but the damages were to be reduced to a sum he named. A rule *nisi* was moved for to set aside the award, the Arbitrator not having disposed of the issues. The rule was refused, because the Arbitrator had, in *legal effect*, disposed of each issue.

This authority, I think, has very little application to the present case.

The case of *Taylor* v. *Clemson*, 2. 2. B. 339, is the only case cited in support of the award, which, in my view of it, would appear to have any material bearing on the present case. It arose under a railway Act (Imperial, 6 & 7 Will. 4. cap. 191,) by which, if it became necessary under any one of certain circumstances set forth in section 138, gave jurisdiction and authorised the Railway Company to issue their warrant to the Sheriff to summon a compensation jury. This had to be done in the case, and compensation was assessed. Objections were afterwards taken to the warrant and inquisition (and which latter the Act declares shall be a record) that they did not show which of the cases or circumstances, specified in said section 138, had occurred to justify the taking compulsory means, &c., and it was there held that the Company's warrant and Sheriff's inquisition, being annexed together, might be considered as one entire proceeding, and any deficiency existing in the one might be aided by reference to the other. In this case *the warrant*, it will be observed, stated that it *was issued pursuant to the Act*, and commanded the Sheriff to summon a compensation jury, &c., the *inquisition* stated that the jury had been returned in obedience to the warrant, the amount of purchase money awarded, *and judgment given by the Sheriff pursuant to the Act.* The principal objection taken to the jurisdiction of the Sheriff's proceeding in this case was that, looking at the face of the inquisition, no previous dispute about the value or compensation for the land, as required by said section 138, appeared to have occurred *before resorting* to the Sheriff's jury, Chief Justice Tindall in giving judgment, observed as follows:—"We "think the very circumstance of recourse having been taken by the Company to the "compulsory means of ascertaining the amount of the purchase money, by summoning "the jury and the proceeding to judgment in the regular mode pointed out by the "statute, affords the natural and necessary inference that a previous agreement for the "purchase could not be made."

Now if we refer to the form of the award of the Commissioners, the subject in question, it does not even express, as in the inquisition in the case just mentioned, that the purchase money was awarded and judgment *given pursuant to the Act;* its insufficiency and defects, tested even by the decision of this last-mentioned case, would show that it cannot be consistently sustained.

The case of *Ostler* v. *Cooke*, 13, Q. B. 143, is in some respects similar to *Taylor* v. *Clemson*. In the former, the very matters which were urged as exceptions to the validity of the sheriff's inquisition were decided to be matters into which the sheriff *and jury could not inquire*, and which, therefore, it was not necessary to mention in the warrant or inquisition; hence a very wide distinction between that case and the one now under discussion, where the subject matters objected to by Counsel in support of the Rule are of such a character as the 28th section of the Land Purchase Act, 1875, enjoins upon the consideration of the arbitrators.

In the case of *The Duke of Beaufort* v. *Swansea Harbour Trustees*, 29 L. J. (N. S.), Com. P. 241, there was a submission concerning the compensation price to be allowed for land taken; also the amount of damages to be given for the severance of the land from the rest of the estate. Chief Justice Erle, in giving his judgment remarked "that the "umpire, in drawing up his award, *recited the submission*, and in which reference was "made to the compensation price, as also *what other*, if any, sum or sums of money "should be paid by the said trustees in respect of damages for the severing the lands," &c. The award, after *reciting the submission, &c.*, the umpire went on to say, "having "viewed the premises and heard the parties, and weighed and considered the evidence "*and matters so referred to me as aforesaid*" (that is, how much is to be given for the value of the land, and how much *for severance damage*, if anything), he awards the sum to be paid for the value of the land, but is entirely silent as to damages for the severance; his silence does, therefore, express that as regards severance damage, he gives none. "I think," continues Ch. J. Erle, "*from the nature of the claim*, it did not require an "affirmative decision." This is not like the case where the question referred is, what is

the title to land, or how much rent is to be paid *in future, or any matter of that sort, &c., &c.*

In the case of *Tribe* v. *Upperton*, 3 Ad. & E. 295, a Bill in Chancery was filed to rescind an existing agreement for the sale of a partnership business and some leasehold premises where the same was carried on. Afterwards the parties to the suit executed mutual bonds of submission to arbitration of all matters in difference, including said suit. The award made, although it adjudicated fully and specially on all the matters in dispute, did not award what was to be done with the chancery suit, although it did award that each party was to bear his own costs of said suit. Lord Denman, Ch. J., considered the matter of the chancery suit *a subject of express reference*, and that the omission to award on it was fatal, and that although the award might in substance decide upon every point in the agreement *and in the chancery suit*, such an award may leave a perpetual source of litigation open, and it was set aside.

The case of Doe dem: *Madkins* v. *Horner*, 8 Ad. & E., was similar to the above, and the award was declared bad, because, while it awarded to the plaintiff a certain part of the premises sued for, giving the metes and bounds, the award said nothing as to the residue, thereby leaving the matters neither final nor certain. It was decided *that there should have been an express decision* as to the residue of the land; and Patterson J. said he thought the residue should have been set out by metes and bounds.

In the case of *Randall* v. *Randall*, 7 East. 81, the parties went to arbitration under mutual bonds of submission of all actions, controversies, &c., depending between them; *also* of and concerning the value of certain hop-poles and potatoes in *certain lands*, and taxes and rates, &c., and *also* the rent to be paid annually for the said land. The arbitrators awarded on all the above matters but *the rent*. Lord Ellenborough, Ch. Justice, says: "*As it appeared* that there was *another* matter referred on which there "was no arbitrament," the award was held bad.

In the case of *Price* v. *Popkin*, 10 Ad & E. 139, an action of covenant was brought by the lessee *v.* landlord, for not repairing demised premises. The cause was referred to arbitration by a judge's order. The defendant (the landlord) had taken away from the demised premises certain gates, locks, bolts, and fastenings, and applied them to his own use. The award, amongst other things, awarded that the plaintiff should fix and set up other gates, locks, bolts, and fastenings, in the place and stead of such as were removed. One of the grounds alleged for moving to set aside the award was that the arbitrator had not stated the number, price, quality, description or value of those articles ordered to be set up anew; and on this ground principally the award was set aside.

In the matter of *Riders and Fisher*, 3 Bing. N. C., 874, an award between these parties was made under Bonds of Arbitration: the dispute arose out of a contract, entered into, by which the Riders agreed to build a house, offices, and out-buildings for Fisher; but the latter alleged the work to be defective and imperfect, both in respect of materials and workmanship, and the Riders on their part claimed something for extra work and deductions, in regard to omissions of work dispensed with. These matters were specified in the submission, the Arbitrators awarded a named sum to be paid the Riders, in full satisfaction and compensation of and for all the matters in difference between them, and so referred to them the said arbitrators. Tindall, C. J.: "Upon reading the order of "reference and the award, it appears the arbitrators have not done that which they "were authorised and required to do. They were to determine concerning all claims, "differences and disputes relating to the alleged defects in the building, relating to "the charge for *extra* work and to deductions for omissions; and to ascertain what "balance might be due in respect of the extras and omissions. On the award they "have taken no notice of the two first subjects of dispute; and it remains doubtful "whether the *sum* awarded is to be applied in discharge of extra work or to a general "balance of account."

The award was set aside.

In the case of *Robinson* v. *Henderson*, 6 M. & S. 276, an award was made by certain Arbitrators, by which they found 230*l.* to be due from the Defendants to the Plaintiffs, and out of that sum they awarded that Defendant should pay the Arbitrators 93*l.*, being the expenses of preparing the agreement of reference and their award, and for their charge trouble, and attendance on the reference and arbitration, and certain costs which they awarded to be paid to the Solicitors of Plaintiffs, in respect of certain actions mentioned in the agreement of reference, leaving the sum of 136*l.* which they awarded to Plaintiffs. It was held by the Court that, the award was void for uncertainty in directing a sum in gross to be paid to the Arbitrators, for the objects above mentioned, without specifying the particular sum to be appropriated to each object.

In the case of *Wakefield* v. *Llanelly*, 3 De G. J. & S., a company having given notice to take a leasehold hotel, belonging to and occupied by the Plaintiff, it was referred to arbitration to ascertain the value of the hotel and premises, and the damages sustained or to be sustained by the Plaintiff, by reason of the Company's works, and the amount of compensation to be paid by the Company to the Plaintiff in respect thereof. The Arbitrator awarded a sum to the Plaintiff, as the compensation to be paid by the Company to him for all his interest of whatever nature in the leasehold. It was held that it was impossible to say certainly whether the Arbitrator intended or not to include the *damages* in this award, and that the award was too uncertain for the Court to act upon, and that the bill for specific performance of it had rightly been dismissed, though the Plaintiff offered to waive all claims for damages beyond the award.

I have now noticed all the authorities that were cited by Counsel for and against the rule and some few in addition, all as bearing on the first four grounds on which the Rule was granted, pointing out the distinction of those which I conceive differ from the cases in question; and on the subject and law of *awards*, there is no doubt that numerous other authorities may yet be found equally applicable, but I consider the Land Purchase Act, 1875, to be one very anomalous in character, strictly analagous to few, if any, to be found in the books, and therefore to be construed in a great measure upon its own elements, aided of course by those constitutional principles and established rules which at all times guide and bind the Judges of British Courts of Law. In some respects this Act has been assimilated to the Lands Clauses Consolidation Act of the British Parliament, although materially different in this respect, that by that Act the compulsory power of obtaining land for public purposes is intended to operate upon estates of almost every quality known to the law, and has provided machinery for the deciding of different titles, which provision has not been introduced or, as it appears was ever intended to operate in this province.

It has been urged by Counsel that section 45, after the period of 30 days from the making of the award precludes all inquiry into its validity by taking away the right of appeal and of Certiorari, &c., and rendering it final and conclusive; there can be but little doubt that where the Arbitrators have, within their jurisdiction, fully and fairly proceeded according to the intention of the Act, and duly exercised their judgment on the matters of fact presented to them their judgment is intended to be and must be deemed binding; but where they have manifestly erred *in law* the section referred to does not in my opinion preclude either party from seeking the intervention of the Supreme Court of the Province to correct their error. In the words of Lord Denman "the clause "which takes away the Certiorari does not preclude our exercising a superintendence "over the proceedings, so far as to see, that what is done shall be in pursuance of the "Statute. The Statute cannot affect our right and duty to see justice executed."

If the proceedings of the Arbitrators prove to be void in law or *ultra vires*, the party whose right would otherwise be bound is not compelled either within or after the 14 days to apply to the Supreme Court to set them aside. He may lie by and await his opponent's action.

I regret very much the decision which must follow from the views I have expressed, as there must have been a large amount of expenses incurred on the country in the proceedings of the Commissioners; but we are bound to administer what we conscientiously believe to be the law applicable to each case. We are not permitted to depart from the decisions of Judges in superior positions, and of higher authority than ours, however much we may be sensible of the inconvenience or disappointment that may ensue from our judgment.

The awards in these two cases, I hold to be void and must be set aside.

The Commissioner of Public Lands v. *R. B. Stewart.*
The Commissioner of Public Lands v. *Hon. Spencer Cecil Brabazon Ponsonby Fane.*
The Commissioner of Public Lands v. *Charlotte Antonia Sulivan.*

Mr. Justice Peters.—These three cases embracing the same points were, at the wish of Counsel on both sides, argued as one case, subject to some exceptional questions applicable to some or one of them singly, which are therefore to be separately considered, after those common to all have been disposed of. The cases themselves from the interests involved, are important, while some of the points invoke the discussion of constitutional questions of the highest importance, and I must say that during the long

argument of four days, the Counsel on both sides have displayed a research and knowledge of principles of law, backed by a calm, dispassionate, but close and able reasoning, highly creditable to them, and which has greatly assisted me in coming to a conclusion, on the many different points on which I am called to express an opinion.

The general facts are well known and may be thus briefly stated. This Island long, ago granted in large blocks of about 20,000 acres each, was, as time went on, let by the grantees, in small parcels, generally for long terms of 100 to 900 years, reserving an acreable rent of about 1*s.* The grant contained conditions, for a breach of which the Crown might have entered and avoided the grants, and they also reserved a quit rent. Out of these tenures sprung an agitation which, under various names, for many years occasioned much discord in the Colony, and in the year 1862 an Act was passed, under the provisions of which a large portion of the Island was purchased by the Government from its owners. But a considerable portion remained in the hands of others who declined to sell, and the Compulsory "Land Act of 1875" was passed. Under its authority a tribnual called the Commissioners Court was organised, aud it is out of proceedings instituted in that Court, for obtaining a compulsory transfer of these Lands to the Government, that the present questions arise. As it will be necessary in giving a construction to various parts of this Act, to consider its character, *i.e.* how far its provisions are of a penal or arbitrary nature, it will be convenient to state its provisions and effect in the first instance.

The preamble recites "that it is very desirable that the leasehold tenures should be "converted into freehold estates, upon terms just and equitable to the tenants, as well "as the proprietors." It then, by its 1st section, defines that the word "Proprietor" shall be construed to include and extend to any person for the time being receiving or entitled to receive the rents and profits of any Township lands exceeding 500 acres in the aggregate, whether such lands be leased or unleased, occupied or unoccupied, cultivated or wilderness; *provided*, that nothing therein contained shall be construed to affect any proprietor whose lands in his actual use and occupation, and untenanted, do not exceed 1,000 acres. The effect of this is not only to subject proprietors, usually so called—to be deprived of their reversionary interest in their leased lands and of their unleased lands—but also to deprive all owners of lands in fee simple, no matter how acquired, of all they hold over that quantity. It, then, after providing for the appointment of the tribunal, and pointing out the mode of procedure by its 28th sec., enacts, that in estimating the amount of compensation to be paid to proprietors for their interest or right to the lands, the Commissioners shall take the following facts and circumstances into consideration, and sub-sec. (e.) of this 28th sec., on which many questions arise, is as follows: "The number of acres possessed or occupied by any persons, who have not "attorned to or paid rent to the proprietor, and who claim to hold such land adversely "to such proprietors, and the reasonable *probabilities* and expense of the proprietor "sustaining his claim against such persons holding adversely in a Court of Law, shall "each and all be elements to be taken into consideration by the said Commissioners, in "estimating the value of such proprietor's lands; (1.) the conditions of the original "grants from the Crown; (2.) the performance or non-performance of these conditions; "(3.) the effects of such non-performance, and how far the Despatches from the English "Colonial Secretaries to the different Lieutenant-Governors of this Island, or other action "of the Crown or Government have operated as waivers of any forfeitures; (4.) the quit "rents reserved in the original grants, and how far the payment of the same have been "waived or remitted by the Crown." It must be observed that this 28th sec., and its sub-sections, directs the Commissioners to consider many matters involving very nice and difficult questions of law, which, according to the opinion they form, may materially reduce the amount of compensation they award, and yet no provision is made by the Act that they shall be persons possessing the legal knowledge qualifying them to decide such questions. The 29th, 30th, & 31st sections are as follows: The 29th enacts "when "the award shall have been made, it shall be published by delivering a copy to the pro-"prietor or his agent, duly authorised, as aforesaid, and filing the original with the "Prothonotary." The 30th section provides "that at the expiration of sixty days from "such publication of the award the Government shall pay into the Colonial Treasury "the sum so awarded by the said Commissioners, or any two of them, to the credit of "the suit or proceeding in which such award shall have been made." By the 31st section "the Colonial Treasurer shall, immediately after such payment, deliver to the Pro-"thonotary of the Supreme Court a certificate of the amount paid into the Treasury, "as aforesaid, which shall be in the form of this Act, annexed, marked A."

On the construction of these three sections another important question depends.

The whole award is as follows:—

In the matter of the application of Emanuel McEachen, the Commissioner of Public Lands, for the purchase of the Estate of Robert B. Stewart, and the Land Purchase Act, 1875.

The sum awarded under section 26 of the said Act by us, two of the Commissioners appointed under the provisions of the said Act, is Seventy-six thousand five hundred dollars ($76,500).

Signed, &c.

The first objection is that the award does not show how the Commissioners have adjudicated on matters they were bound to adjudicate upon. It is urged by the proprietors, that by the 28th section the Commissioners are directed to take the matters mentioned in the sub-section into consideration for the purpose—if determined adversely to him—of reducing his compensation, and, therefore, the award or judgment should inform him how they were determined. The Counsel for the Plaintiff contend that the whole duty of the Commissioners is contained in the 26th section, which enacts "That "after hearing the evidence adduced, the Commissioners shall award the sum due to "such proprietor as the compensation or price to which he shall be entitled, by reason "of his being divested of his lands and all interest therein and thereto," and that the 27th and 28th sections are merely directory, and the only power the Commissioners had was to award a sum of money. But it is difficult to see how this last contention can be sustained. It is, we know, usual in awarding compensation for lands compulsorily taken for public purposes, to add to the value an allowance on account of the sale being compulsory; the 27th section prohibits the making such allowance; now the thing here forbidden to be allowed for, was a known subject matter, of the existence of which there could be no doubt, and therefore it is positively forbidden, but there were other subject matters, *i.e.* probabilities and expense of sustaining claim against squatters, conditions in original grants, and quit rents, the existence of which was uncertain and could not be ascertained, until the Commissioners had heard evidence respecting them, examined documents, and considered the legal questions raised by such evidence and documents. But with regard to these the power of the Act could give no positive injunction, but necessarily leaves their *existence*, as well as the extent of their depreciating effect on the value of the proprietor's interest, to be determined by the Commissioners. It is a rule in the construction of Statutes, that no clause, sentence, or word, shall be held superfluous, void, or insignificant unless it be so repugnant to other parts, that the two cannot stand together. Now the words of the 28th section are, that in *estimating the amount of compensation* to be paid to any proprietor for his interest, the Commissioners *shall* take the following facts or circumstances into their consideration. What are these facts or circumstances? The number of acres possessed by persons who claim to hold adversely, and the reasonable probabilities and expense of the proprietor in sustaining his claim against them in a Court of Law, shall be taken into consideration, in *estimating* the value of such proprietor's lands. Then, must they not inquire and determine whether any and what persons hold adversely, and what quantity each person so holds, before they can decide whether any and what deduction should be made on that account? The section then proceeds, either as part of the same sub-section or as a distinct sub-section, it is not clear which, to specify further matters which the Commissioners are to take into their consideration. (1.) The conditions in the original grants. (2.) The non-performance of these conditions. (3.) Effect of such non-performance. (4.) Quit rents reserved in the original grants, and how far the payment of the same have been waived by the Crown? Must they not inquire and determine whether the conditions were broken, and the effect of such breach, and whether any and what amount of quit rents are due, before they can decide whether any and what amount shall be deducted on that account? Now, if these matters are not directed to be taken into consideration, that they may if determined one way operate to cut down the amount of compensation, what possible meaning can be attributed to them? It is quite true that the Commissioners' investigations would result in awarding a sum of money. But as a preliminary to ascertaining the amount of that sum, they had to decide on these several subjects which they are thus imperatively directed to take into their consideration, and the decision on all or some of those matters may, therefore, materially have affected the ultimate amount awarded.

Then, is it necessary to give validity to the award that their decisions on these matters should appear on its face? From silence respecting a subject matter, before an Arbitrator, other than those on which he has expressly adjudicated, a decision on it will sometimes be presumed. In *Harrison v. Creswick*, 13 C. B., 399, a cause and all matters in difference was referred; the Defendant set up a cross claim before the Arbi-

trator. The award professed to be made *de præmissis*, and directed a gross sum to be paid to the Plaintiff, but said nothing about the cross claim; yet it was held good, for it must be presumed, from the silence of the Arbitrator on the subject, that he had negatived the cross claim, and Baron Parke says: "The rule is this, when there is a further "claim made by the Plaintiff, or a cross demand set up by the Defendant, and the "award professing to be made of and concerning the matters is silent respecting such "further claim or cross demand, the award amounts to an adjudication that the Plaintiff "has no such further claim, or that the Defendant's cross claim is untenable. But "where the matter so set up *requires to be specifically* adjudicated more silence will "not do." Thus, in doe dem, *Madkins* v. *Horner*, where the Plaintiff claimed to be entitled to recover lands upon two separate demises, and the Arbitrator, to whom all matters in difference in the cause were referred, awarded of and concerning the matters referred, that the Plaintiff was entitled to the possession of a certain part of the lands sought to be recovered, but did not say upon which demise. The Court held the award bad for not deciding upon which demise the Plaintiff was to recover, and also *for not awarding* for the residue of the lands. "There are many other cases," B. Parke continues, "which might be put where the Arbitrator's silence would not be decisive, if an "Arbitrator be called upon to decide whether or not a partnership existed between two "two persons, or, *what was the interest which a party took in certain property, whether* "*an estate in tail or an estate in fee*, a general award would be insufficient." So in the *Duke of Beaufort* v. *Swansea Harbour Trustees*, 8 C. B. N. S., 756, though under the Land Clauses Consolidation Act the Arbitrator, in estimating compensation, is to have regard to the value of the land, and also damage (if any) by severance. An award giving compensation for the land only was held good, for the Court must presume, from the silence of the Arbitrator, that, in his opinion, there was no damage from severance. Now why, in these cases, was a decision on a matter not mentioned presumed? Because the very terms of the finding implied it. But in the present case there are not two separate heads of demand, but one demand only—"*the value of the land*," with a direction to ascertain the existence of certain facts, which, if found, are to be considered in estimating the value of the proprietor's interest in it. Now, if the Commissioners found these facts against the proprietor, they would find only *one* sum, it might be $70,000. And if they found them in favour of the proprietor, they would still find only *one* sum, it may be $70,000. Then how can the bare award of only one sum raise any presumption whether they did or did not decide the questions respecting these "facts or circumstances," or how they decided them? It seems to me clear that silence here will not do.

Another strong reason why the manner in which the Commissioners have dealt with these facts should appear on the award, is this: The 45 sec. enacts that "no award made "by the Commissioners shall be held or deemed to be valid or void for any reason, "defect, or informality whatsoever; but the Supreme Court shall have power on the "application of either the Commissioner of Public Lands or the Proprietor, to remit to "the Commissioners any award which shall have been made by them, to correct any "error, or informality, or omission made in their award: provided always, that any such "application to the Supreme Court to remit such award shall be made within thirty "days from its publication." Now, to enable a proprietor to avail himself of the privilege of having an award sent back to the Commissioners, to rectify a mistake injuriously affecting his interest, it might be absolutely necessary to find out what their decision in some of these facts really was; but where is he to look for it? If he cannot find it on the award, what means has he of finding it out at all? No judgment appears to have been pronounced by the Commissioners; everything is locked up in their own breasts, and they themselves, from lack of legal knowledge, must have been *inopes consillii* in dealing with many of these questions. When, in addition to this, we find the avenues to every Court of Review carefully closed, and the door even to this power of sending it back to the Commissioners also closed, after the expiration of thirty days from publication of the award. It does seem to me, if ever there was a case where an award should show a specific dealing with each preliminary matter submitted, it is this—I will put a case to illustrate what I mean—suppose the Commissioners find a large part of a township covered with squatters, there is no privity with the proprietor, what course of investigation must the Commissioners pursue? They must proceed to examine, not only how long each squatter has held possession, and the extent of land occupied, so as to decide whether the proprietor is barred by the Statute of Limitations, but also the extent of the *possessio pedis* 20 years ago, as distinguished from the extent of a *possessio pedis* commencing within that period. Now, every lawyer knows that this may involve very difficult legal questions, and suppose the Commissioners (being wholly unacquainted with

the law relating to the Statute of Limitations) in such case, to hold the greater part of a township to be irretrievably lost to the proprietor, by reason of adverse possession, when in law he is not barred at all, and in consequence award him only $5,000 compensation, when but for this mistake in law they would have given him $20,000. Surely it would be very important in such a case that the proprietor should be at once informed of this, so that he might come to this Court and ask to have it remitted for re-construction and correction, before the thirty days expire. The Plaintiff's Counsel, in showing cause, offered an affidavit with the short-hand writer's notes of the trial before the Commissioners attached; it was objected to, but we admitted it; I am not quite sure we were correct in doing so. But there is a part of Mr. Davies' speech which shows so clearly what the contention about squatters was, and how materially it must, if sustained, have affected the amount of compensation, that I extract it. He says, page 185, that the question about conditions will be spoken to in closing, and that Stewart has no title to Lot 47. "We will show that the Lot is held adversely, and that his Schedule of tenants and "arrears is merely fictitious. We will show that the persons against whom he claims "these large arrears he has never been able to put in possession of the farms. They "are not legally bound to pay, and Mr. Stewart has added these fictitious sums to "increase his claims. We will submit that these farms were, at the time he leased "them, held adversely by other parties. We contend, therefore, that the Court cannot "allow him for these arrears, and we contend also that if he is allowed anything for that "part of the Lot upon which he has obtained a foothold, the allowance should be but a "very small sum indeed, as against the Crown he has no title, and he has already drawn "from the Township much more than the value of any precarious possessory interest of which he may be supposed to be the owner. On Lot 30 we will show that a large "quantity of land has been held adversely for many years by those who came there "before Mr. Stewart himself got possession of the Lot. We will show that, with one "or two exceptions, they have remained in possession, that in some instances he has "brought actions against them, but has not succeeded in ousting them. The contention that their possession is to be confined to land which they have had actually under "cultivation for twenty years has never been sustained in any Court of Law in which "the whole question has been brought up. We will show that those persons have held "the rear of their farms by open notorious possession, that their lines have been run "out, and that they have openly exercised over the land the rights of ownership, and in "every way have treated it as their own. It is not necessary that people should have "land under crop for twenty years to acquire possession of it. That is not the law. "It is quite sufficient if the possession is open, and marked by clear boundaries, that "give notice to the world. On Lot 40 we can show that the holders had a possession "of that kind. Mr. Stewart might as well claim the land at the bottom of the sea, as "the land which has been thus held for twenty years." And the Attorney-General, in his closing speech, insists on the breach of conditions in the original grants, quit rents, as matters which should diminish the compensation. At page 186 the Court says, "We "do not wish you to argue the question of forfeiture now, if you will do so at the close, "but we will be glad to know from you then what you consider to be the distinct effect "of your argument; we would like to know whether, if we think your argument sound, "you consider that we should give Mr. Stewart nothing for his land, or should make a "deduction, and if so, what deduction." Mr. Brecken, in his reply to this question, page 233, says Mr. Stewart is not in a position to take advantage of any concessions. Your Honours are sitting here under a special Act of the Legislature, and *part of your instructions is that you shall consider the performance or non-performance of the original grants.* A great many squatters appear to have been examined. Some say they hold 100, some 50 acres; one says he had 12 acres cleared or fenced 20 years ago; some, they cannot say how much, perhaps 15 or 20. This seems to have been the contention and the nature of the inquiry. Now, what is the law as to acquiring title by adverse possession? Briefly this, that a squatter is not considered in possession of anything, except what he has fenced, cleared, or cultivated, or appears to occupy in some way as open and notorious as if he had fenced, cleared, or cultivated it; he is said to acquire title inch by inch, *i.e.*, it must appear that each acre claimed has been so held for 20 years, and if it appears that he held 5 acres in that way for 20 years, and the next 5 only for 18 or 19 years, he can only hold the first, and the proprietor (if he make out a *primâ facie* title) will recover the other. How did the Commissioners decide this contention? Who can answer the question? The reference made by section 28, subsection (e), obviously might bring two classes of squatters' claims before the Commissioners; one where the occupants had not held for 20 years, another where they had, and thus raise two distinct questions; admitting that as regards the first, they had a

right, by some mere guess or approximation, to decide conclusively, as a matter of fact, for with respect to such cases there could be no question of law, what the proprietor's expense in ejecting that class of squatters would be, and to deduct it from the intrinsic value of his land, without giving him any information as to how much they did deduct on that account—yet surely with respect to the other, whether they sustained.* Mr. Davies' contention, that Stewart had no title to Lot 47, and a large part of Lot 30, either on account of breach of condition or adverse possession or not, they should have stated how they did decide it; otherwise, by a plain mistake in law, Stewart might be wronged out of thousands. Even a common award *inter parties*, which failed to dispose of such a contention, would be bad. Thus Russel awards, 253, "If the fact that a "matter submitted has *not* been decided be brought before the Court in any regular "manner, as by plea or affidavit, according to the nature of the proceedings, the award "will be deemed invalid, however good it may be on its face." So in *Stone* v. *Phillipps*, 4 Bing. K. C. 37, four actions of ejectment and all matters in difference were referred; but there was a fifth action brought before the Arbitrators, which they omitted to notice in their award; on this being shown by affidavits, the Court held that, as the matter omitted was not capable of being severed, the award was bad in toto. In *Ross* v. *Boards*, 8 A. & Ell. 295, there was a contention before the Arbitrator, whether the Defendant who had agreed to sell a piece of land to Plaintiff, had a good title to it, the award directed Defendant to convey the land to Plaintiff, but omitted to find whether Defendant had a good title or not. Littledale says, "The Arbitrator should have stated in "his award whether the title was good or bad;" it is said he has done so in effect. I had some doubt, but I am of opinion that he ought to have proceeded in a direct way to determine the question as it arose out of the agreement; he should have said whether the title was good or not. What is the law with respect to the liability of a vendor who cannot make out a marketable title? Dart, V. & P., 871, says, "On a contract for the "sale of land, the purchaser, as a *general rule*, is only entitled to *nominal damage for* "*the loss of his bargain*, where the vendor, through want of title or otherwise, having "acted *bonâ fide*, is unable to convey the estate." And in *Angel* v. *Eitch*, L. Rep. 3. Q. B., 314, Chief Justice Cockburne says, "That in the complicated state of the law "of real property the owner of an estate is often unable to make out such a title as a "purchaser is compellable to accept, and it is, therefore, only reasonable, if the purchaser "refuses the title, that the vendor's liability should be limited to repayment of the "deposit and expenses." So in equity a purchaser cannot claim a conveyance of an interest to which a vendor shows a doubtful or defective title, with an abatement in respect of the imperfection of title extending to the whole estate, Dart. V. & P., 979. And in Loyd on Compensation it is laid down that if a Railway Company contracts for the purchase of land, they may claim a 60 years' title. But if they refuse to accept the *best title the vendor can make*, the latter may call on them to complete or *abandon* the contract. Now the Statute which deprives a man against his will of property he has long possessed, and at the same time authorises deductions from its value on account of real or fancied defects of title, which never injured, and which each year became less likely to injure him, is certainly hard enough, and contrary to the principles which govern like questions regarding voluntary and compulsory sales at law and in equity, where the doctrine is, if you do not like the title you need not accept it, but if you do accept it you must pay the full value. But we are asked in effect to put a much harder construction on the Statute, by holding that those who make the deductions may so frame their award as to conceal from the owner the *grounds* on which they are made, and thus in the shape of deductions really make the owner pay thousands of dollars damages on account of *supposed* defects which, it stated, he might have shown to be unreal; would not this be the height of injustice? But it is a rule that the Court must not put a construction on a Statute which is unjust and absurd, if it will bear a construction which is reasonable and just. Here the Legislature no doubt saw that it was leaving difficult questions of law affecting property of very great value to a tribunal quite incompetent to decide them, and therefore provided the appeal to this Court, to have the award remitted back, so that by the light reflected on the question by the discussions here, it might better discern its duty and correct its errors. We cannot suppose the Legislature did not know that, when preliminary questions were raised affecting the amount to be awarded, the Commissioners were bound to decide them, and there is nothing to show an intention in this respect to set aside the usual mode of proceeding in such matters by permitting the necessary requisite of stating how they did decide to be dispensed with. But it is said the Act makes the Commissioners the sole Judges of the *value of land*, and also of the *amount* which, after a consideration of the "facts and circumstances" mentioned in the Act (when correctly ascertained to be 66 facts) they will

* Sic.

deduct from the value, but in my judgment it does not make them the absolute judges of any questions *of law* necessary to be decided, before determining whether any and what amount is to be deducted. There is not, and never was, any rule of law restraining the Court of Queen's Bench from correcting a mistake *in law* of an inferior Court; it is a part of its inherent jurisdiction to do so. In *Regina* v. *Bolton*, 14 Jur., 432, Coleridge says: "Now there can be no doubt that when the Court of Quarter Sessions acts "under a mistake of *the law*, in coming to a conclusion upon certain facts brought "before them, this court will direct a mandamus to issue, but when the sessions, having "had the facts before them, exercise their judgment upon them, and decide a question "arising out of these facts, it is otherwise." Where ordinary Arbitrators make a mistake in law, the Courts generally refuse to correct it, but this is because the parties, having chosen to withdraw their dispute from the Court, and appointed their own judges, they must submit to the consequences of their miscarriage. *Fuller* v. *Fenwick*, 3 C. B., is a strong instance of this. But these Commissioners are not ordinary Arbitrators, or anything like them. None of them, as in ordinary Arbitrators, are *voluntarily* appointed by the Defendant; one is *nominally* appointed by the proprietor; but he only appoints "least a worse thing come unto him." This distinction is pointed out by Mr. Hodges, in his book on Railways, 325, he says: "The reason why awards cannot be impeached "for errors in fact or errors *in law*, not apparent on the face of the award, seems to be "founded on the principle that the Arbitrators are judges of the *parties' own choosing*. "A distinction on this point seems, however, to exist in the case of awards made under "the Consolidation Acts, because, as we have seen, if either of the Arbitrators refuse to "concur in the appointment of an umpire, the Board of Trade are empowered to appoint "him without any previous communication with any of the contending parties." Under this Act the Governor-General appoints the umpire, without any communication with either of the parties. I would remark, that in the preceding observations I have excluded the effect of the restraining clauses, reserving the discussion of that until I consider how the case is to be disposed of.

Quit Rents.

But there is another and distinct point made by Mr. Hodgson as to the quit rents, which I have not noticed. He contends that the quit rents are a charge on the land, and therefore, unless the Commissioners give an express decision, finding that none are due, or that they have been taken into account in awarding compensation, the proprietor might be sued for them, and therefore the proprietor was entitled to have this fact found. The Counsel for the Government contend that this rent is merely a charge on the land, and that no action will lie against the proprietor. By the Island Act, 14th Vict. c. 3, in consideration of the Island Government undertaking to pay the civil list, the quit rents were, amongst other things made over by the Imperial Government to the Government of this Island; before this period there had been a correspondence with the Imperial Government respecting them, but there is nothing before the Court to show what the correspondence was; but at the end of sub-section (e) of the 48th section, the last question the Commissioners are to consider is "the quit rents reserved in the original grants and "how far payment of the same have been remitted by the Crown." This is a Legislative declaration that there is a question whether the quit rents are due or not; these two facts, therefore, are all that is before us,—first, that the quit rents, if due, belong to the Government of this Island; secondly, that there is a question existing whether they have been waived or remitted by the Crown or not. That the quit rents and arrears are a charge on the land there is no doubt, but although they are only a charge on the land, yet the proprietor may be indirectly liable; for if there be a tenant or purchaser, with whom he has covenanted for quiet enjoyment or against incumbrances, either could maintain an action against the proprietor. The tenant, if distrained on, or the purchaser for that, or because the land being liable to this rent, was not free from incumbrance. The case of *Hamond* v. *Hill*, 1 Coyn, Rep. 180, is so very applicable to this point that I have extracted it:—

"This was an action of debt upon a bond, where the condition was, that the defen- "dant should keep harmless the plaintiff from all jointures, decrees, annuities, damages, "claims, and all other incumbrances, and should perform the covenant in the indenture "dated the 2nd of May, 1702,—whereby the defendant conveyed to the plaintiff and his "heirs a messuage and lands, called Little Brusby, in the County of Sussex, and by the "same deed the defendant covenanted, *that the plaintiff should have, use, possess, and "enjoy, the premises aforesaid quietly and peaceably without any impediment from the "defendant, his heirs or assigns, or* any other person, and that clearly *acquitted and*

" *exonerated of and from all former and other grants, &c., rents, rentcharges, arrears of* " *rent, statutes, &c., charges and incumbrances* whatsoever. The plaintiff assigns for " breach, that the tenements aforesaid were charged and chargeable with one annual " rent, *viz.*: a rent of 11*s.* 6*d.*, to be paid to the Lord of the Manor of W. in the said " County, of whom the said tenements then and before were and are held under the " said rent and other services. The defendant, by his rejoinder, says that the rent of " 11*s.* 6*d.* aforesaid, was payable to the Lord of that Manor as a quit rent, incident to " the tenure of those lands, and that the plaintiff was not molested, &c., for any arrears " of that rent payable before the making of the indentures aforesaid. The plaintiff " maintained his replication, and the defendant his rejoinder; and upon this there was a " demurrer; and the question was, if the covenant was broken? And it was resolved " by the whole Court without any difficulty, that it was. For the defendant had " expressly covenanted with the plaintiff upon his purchase that he should have the " lands discharged of all rents; and, therefore, they ought to be discharged of this rent " as well as of all others; for a quit rent is a rent." In 3 Cruse. Dig. 514, sec. 52, it is said, " it has been stated in sec. 44 that quit rents and other customary and prescriptive " rights are comprised within the Statute of 32 Henry 8th. But Lord Coke lays it " down that this Act does not extend to a rent created by deed, nor to a rent reserved " upon any particular estate; for in the one case the deed is the title, and in the other " the reservation." I may observe that the Statute of 32 Henry 8th only requires that arowries conusances for rent, suit or service due by *custom or prescription* must be made within 50 years. In *Eldridge* v. *Knott*, Comp. R. 214, it was held that more length of time, short of the period fixed by the Statute of Limitations, and unaccompanied with any circumstances, was not in itself a sufficient ground to presume a release or extinguishment of a quit rent. The quit rents in the present case is due to the Crown, under a *reservation* in the grants.

It will be observed that in the other facts or circumstances, contained in sub-section (*e*), which I have already considered, a positive refusal—if such appeared—of the Commissioners to consider any of these questions, would have the same effect as a finding in all of them in favour of the propretor, that is, would leave the Commissioners to act as simple valuers and could not injuriously affect the proprietor's interest, as the amount awarded would then be what they considered the intrinsic value of the land, unreduced by any depreciatory effect, which might have resulted from any of those facts or circumstances being found against him. But the neglect or refusal to consider whether the quit "rents had been waived or remitted by the Crown," might result in depriving him of protection against a claim, he had a right (whether they had been waived or not) to be protected against, by their decision, which would then—the Government being party to the proceedings and owners of the " quit rents "—be a good plea in Barr to an action of covenant by a tenant or purchaser, alleging liability to these " quit rents " as a breach. This distinction might be found material in considering whether the Court should set aside the awards, or leave the proprietors to insist on their invalidity in an ordinary suit. Now, if I am correct in my view of this question, it is plain that the Commissioners have been passive as to a jurisdiction when they should have exercised it actively. Then comes the question: does the passiveness of an inferior tribunal, when it should have been active, render the proceedings void in the same way as action on a subject matter, *ultra vires*, would have done? *Thorpe* v. *Cooper*, 1 Bing, 127, is a direct authority that it does. That was the case of an award by Inclosure Commissioners, where the Commissioners had *omitted* to make an allotment or compensation in respect of tithes, in Waddington (a township in the parish to which the Inclosure Act applied). The Court say " the Commissioners, not having made any compensation for the tithes of Waddington, " must either have *rejected a claim* which they were directed to compensate, or from " inadvertence, have *omitted* to make compensation for it. In the first case they have *ex-* " *ceeded* their authority, in the second they have omitted to do what they were expressly " required to do. In *either view of the case* their award is *void, as to all such interests* " *as are affected,* by their *exceeding* their jurisdiction or by their *omission.*" In that case there was a clause in the statute which saved the rights of all persons except those to whom compensation was awarded, but Ch. J. says, if there had been no saving clause, the decree would, on principle, have been the same, and in *Bunbury* v. *Fuller*, 9 Exch. 136, where this case is relied on by the Court on a similar point. The facts in *Cooper* v. *Thorpe* are said to be distinguishable in this, that the plaintiff in *Bunbury* v. *Fuller* could *not rely* on the operation of the saving clause, which was so narrowly worded that it would not embrace his case, but still the decision was notwithstanding the same. In *Cooper* v. *Thorpe*, the commuted tithes in respect of other places were enjoyed by the plaintiff, and the award was only held *protanto* void. But in the present case the

omission, for the reason already stated, affects the proprietor's interest in the whole subject matter, and also fails to provide him with a protection against future claims on account of quit rents to which, under the Act, he was entitled.

Description.

The third ground is that the award is uncertain, because it gives no description of the lands in respect of which compensation is awarded, and which are to be conveyed by the public trustee to the Commissioner of Public Lands. The Counsel for the Plaintiff argue, that as the award states the compensation to be given for all the lands owned by the proprietor on the townships named in the Commissioner of Public Lands, notice of intention to take it is sufficiently certain, inasmuch as the lands to be conveyed by the "Public Trustee" can be ascertained by showing what lands the proprietor owned at the time of making the award, but the notice of the Commissioner of Public Lands only states all the Proprietors Township Lands in this Island *liable to be taken under the Act*, including Lots 7, 10, 12, 30, and 47. The caption to the award is "in the matter of "the Commissioner of Public Lands for the purchase of the Estate R. B. S., and the "Land Act of 1875, and the award is *The sum awarded under the Act is* $76,500." This is the whole award, and there is, as it appears to me, nothing to show in respect of what lands the compensation is awarded, for it is consistent with the award that the Commissioners may have thought that R. B. S. had no title to Lots 10 and 47, and, therefore, they had do jurisdiction over them, or that they awarded no compensation for them. Or to put it in another way. The notice is, I will take all your lands liable, treat this as the submission, then the first question is, what lands are liable? Does an award simply saying $76,500 is awarded answer the question, by showing what lands are liable? But assuming, for argument sake, the award may imply that compensation was awarded for his lands in all the Townships named. In considering this point, we must first see whether, looking at the general provisions of the Act, any *intention* regarding this matter of description is manifested. It is evident that when under Sec. 2, the Commissioners give notice of intention to purchase, they cannot be possessed of the information necessary to give a particular description of the land, and, therefore, a general notice of all lands liable to be taken under the Act, must of necessity be sufficient. But when the proprietor has appeared in Court, then the Act provides that, "the said Commissioners shall have full power and authority to examine on oath any "person who shall appear before them, either as a *party interested* or as a witness, and "to summon before them all persons whom they or any two of them may deem it "expedient to examine upon the *matters submitted to their consideration, and the facts* "*which they may require to ascertain in order to carry this Act into effect*, and to require "any such person to bring with him and produce before them any book, paper, plan, "instrument, document, or thing mentioned in such subpœna, and necessary *for the* "*purposes of this Act.* And if any person so subpœned shall refuse or neglect to appear "before them, or appearing, shall refuse to answer any lawful question put to him, *or to* "*produce any such book, paper, plan, instrument, document*, or thing, whatsoever, which "may be in his possession or under his control." The 24th Sec. authorises the *Commissioners* to enter upon all lands concerning which they shall be empowered to *adjudicate*, in order to make such examination thereof, as may be necessary, without being subjected to obstruction, with a right to command the assistance of a Justice of the Peace and others, in order to enter and make *such examination* in case of opposition. Here, then, we see the Act, by the 20th Sec., gives the Commissioners ample power (to quote the words of the Act) to ascertain all facts which they may require *in order to carry the Act into effect.* While the 24th Sec. clearly confers authority which would enable them not only to examine the quality of the land, timber, &c., but also to cause such surveys to be made as might be necessary for *carrying the Act into effect.* Surely those powers were given not only to enable them to value the land, but also to frame such an award *concerning it* as would enable all others who had to aid in working out and *giving effect to their decision* to perform their parts also. Then, when we look at the 32nd Sec., we find it provided, that when the sum awarded is paid into the Treasury, the "Public Trustee" shall "execute a conveyance of the Estate of such "proprietor." What Estate and what proprietor? Why, of the Estate of a proprietor whose lands the Commissioners have adjudicated upon, and which the 20th and 24th Sections gave them ample means of accurately describing for the Public Trustees' information. But this is not all; the 32nd Sec., goes on, "which said conveyance may "be in the form to this Act marked (B)." When we turn to this form after reciting the payment into the Treasury, it proceeds: Grant unto X. Y., Commissioner of Public

Lands, and his successors in office all that (here describe the land particularly by meets and bounds). This form is a part of the Act, and the direction contained in it. To describe the land by meets and bounds is as binding and imperative as if it had been contained in the body of the Act. It is only where the Schedule is repugnant to the enacting part of a Statute that it loses its force as an enactment; see *Reg.* v. *Baines*, 12 A. & Ell. 227, and *Allen* v. *Flicker*, 10 A. & Ell. 640. The Commissioners were, therefore, bound to read and be governed by this direction as much as if it had been contained in the 26th or 32nd sections, or any other part of the Act, and were, therefore, in my opinion, bound in their award to give such a description as would enable the Public Trustee to fill up the form in the manner directed. But it is said the "Public Trustee" can make out a description from plans and documents; but his duty is only ministerial, how can he know what lands the Commissioners adjudicated upon, and gave compensation for? There is no authentic record of their proceedings to show what plans they adopted they may have excluded thousands of acres shown on the proprietor's plans and claimed by him, to which squatters had, or the Commissioners thought they had, acquired a good title by possession against the proprietor. A squatter is defined by Webster to be one "Who settles on new land without a title;" but as soon as the Statute of Limitations has run he ceases to be a squatter and becomes a proprietor, because he has then a good title in fee simple. How can the Public Trustee find out what parcels the Commissioners decided to be so held, and what they decided to be held by squatters, with a possession short of 20 years? It is true a conveyance of lands for which no compensation was awarded, would carry no title to the Commissioner of Public Lands. But should those squatters who were thus held to have acquired a good possessory title, be subjected to the danger, expense, and annoyance of having actions brought against them by the Commissioner of Public Lands, merely because the "Public Trustee" has chosen to include their names in the deed? The confusion and trouble this would occasion is shown in Robert Bruce Stewart's case, where the Public Trustee has, in his notice of intention to convey, included many farms conveyed by Mr. Stewart between 1856 and September last—in one case a farm sold and conveyed by him nearly 20 years ago is included. How many persons who may have purchased from proprietors, but who have omitted to record their deeds, may, in like manner, be included? It must be recollected that the conveyances to be executed by the "Public Trustee" will cover a large part of the Island, and any person whose land is improperly included in such conveyance—though it may give no title to the Commissioner of Public Lands—will have a cloud thrown upon his title, which might prevent his borrowing money on the security of his farm, and very likely impede or injure its sale if he wished to dispose of it. It is said by Pollock B., in the famous case of *Attorney General* v. *Sillem*, 2 H. & C. 421, "that in order to know what a statute does mean, it is "important to know what it does not mean." I think it certain that the Legislature never meant to authorise conveyances from which such mischievous consequences might result, to be made under the authority of this Act. Again, the 33rd section of this Act provides that the lands conveyed to the Commissioner of Public Lands, shall be held and *disposed* of by him, as if such lands had been purchased under the provisions of the Land Act of 1853. On turning to the 38th section of that Act, I find it provided that if the Commissioner of Public Lands conveys to a purchaser, lands in possession of a squatter, and the squatter shall refuse to pay rent to such purchaser, "he shall be liable "to be ejected on demand of possession being made, *and the only evidence required to* "*be given by the purchaser*, in the trial of such ejectments, to *entitle him to recover a* "*judgment therein, shall be the deed to himself hereunder from the Commissioner of* "*Public Lands*, comprising the land for which the ejectment is brought, the non-payment of rent, or refusal to take and execute the lease, or counterpart thereof, as aforesaid, when tendered; and the demand of possession, "saving to the occupier or "tenant the benefit of the Statute of Limitations, and also the right to show in himself "otherwise a good title, documentary or otherwise. But the burthen of proof *in such* "*case to be on the occupier or tenant.*" Now, at common law—and but for this Act every squatter has two defences—1st, he may remain quiet and make no defence, and if the proprietor does not make out a *primâ facie* case he will be non-suited, and the squatter keeps his land; 2nd, if the proprietor make out a *primâ facie* case the squatter can then answer it by proving a possession of 20 years. But under this Act of 1853, the deed from the Commissioner of Public Lands *is itself made primâ facie* evidence of title, thus his first defence is swept away. Now, it is impossible to read the printed minutes of the Commissioners' proceedings to which I have already adverted, without seeing that it is not only possible, but very probable, that the Commissioners have held the whole or a part of a *great many* farms occupied

by squatters, to belong absolutely to them, and have awarded no compensation for them, and therefore, did not, and could not, adjudicate them to be transferred to the Government. Yet if the Court hold this award valid, the Public Trustee may, by a stroke of his pen, convey the lands of these squatters to the Commissioners of Public Lands, and thus bring them under the stringent provisions of the Land Act of 1853. I have said that the deed from the Public Trustee of land for which no compensation was given would convey no title. But how could the squatter avail himself of that? The deed to the plaintiff is *primâ facie* evidence of title against him. The duty of proving everything to make out *his defence* is thrown on him. And how can he or any one else prove what the Commissioners decided about his possession. To put a case. I recollect a few years ago, trying a case brought by Mr. Stewart against a squatter on Lot 30. Mr. Stewart failed to establish a *primâ facie* case. I non-suited him; the defendant therefore kept his land without being called on to prove his possession. A non-suit does not prevent a fresh action. Now let the Public Trustee include this same squatter's name in the deed. If an ejectment were brought against him for the land twelve months hence, the plaintiff's title would be *presumed* good, and that squatter would lose every acre of his land, of which he could not prove a twenty years' possession. The common saying, that "possession is nine points of the law," is really only another way of expressing a well established legal maxim, viz: "That possession is good against all "who cannot show a better title." It is, no doubt, very convenient, and may be very proper, that the Government, when it becomes possessed of the estates, should be enabled to deprive the squatters of the benefit of this maxim, which heretofore has shielded them against the claims of a proprietor who could not show a good title. But I don't think this Court can allow the Public Trustee, either through accident or caprice, to do so, without itself being guilty of a dereliction of that supervisory duty over matters subsequent to the award, which the law and this Act itself casts upon it.

Setting Aside.

Assuming the awards for all or some of the reasons I have pointed out to be invalid, the next question is, how are we to deal with them? The 45th sec., in the most emphatic manner, declares that no award shall be deemed void for "any reason, defect, "or informality whatever." That no appeal shall lie to any tribunal, nor shall the award or proceedings be removed by Certiorari or any other process, but with the exception of the power of the Supreme Court to send it back, it shall be binding, final and conclusive on all parties. No doubt such restrictions are binding on this Court, and prevent its inquiry into the correctness of any decision made by the Commissioners on subject matters within their jurisdiction, and which, it appears by the *express words* of the award or by *necessary implication*, they have decided upon, But the whole current of authorities show that where an Inferior Court exceeds its jurisdiction, by taking upon itself to decide on a matter over which it has no jurisdiction, or declines, or neglects to exercise a jurisdiction which it should have exercised, a statutory prohibition of this kind does not apply, and the power of this Court to interfere remains unrestrained. The authorities, on this point, were very fully discussed by Sir James Colvill, in giving the Judgment of the Privy Council in the *Colonial Bank of Australasia* v. *Willian*, 5 L. Rep. P. C. 442; in some respects that case resembles this. A Colonial Act had created a tribunal called the Court of Mines, with jurisdiction over all disputes arising out of mining affairs. Certiorari was taken away, and its decisions, subject to appeal to the Chief Justice of the Mines Court, were declared final. Two questions were raised before the Privy Council. First, that the Mines Court was not an Inferior Court. Secondly, that the Supreme Court was restrained from interfering with its decisions. The Privy Council held it was an Inferior Court, because every court whose jurisdiction, however wide, is limited both as to persons and things, must be inferior to the Supreme Court of the Colony. As to the second question, he says, "Their Lordships are, therefore, of "opinion that the winding up orders must be taken to be within the scope of the 244th "sec. of the Act, and that the power to remove the proceedings relating to them into "the Supreme Court has been taken away by Statute. It is, however, scarcely neces- "sary to observe that the effect of this is not absolutely to deprive the Supreme Court "of its power to issue a Writ of Artiorari to bring up the proceedings of the Inferior "Court, but to control and limit its action on such Writ. There are numerous cases "in the Books which establish that, notwithstanding the privative clause in a Statute, "the Court of Queen's Bench will grant a Certiorari; but some of the authorities "establish, and none are inconsistent with the proposition, that in any such case that "Court will not quash the order removed, except upon the ground either of a manifest

" *defect of jurisdiction* in the tribunal that made it, or of manifest fraud in the party " procuring it." And then, after saying that it did not appear that the Supreme Court had asserted a right to exercise power in excess of what he had laid down, but to have quashed the proceedings on the ground that the Court of Mines had acted without jurisdiction, and had been misled by fraud of the petitioning creditor, on both which points the Privy Council drew a different conclusion from the Supreme Court on the facts stated in the affidavit. He proceeds—

"In order to determine the first question, it is necessary to have a clear apprehension " of what is meant by the term, 'want of jurisdiction.' There must, of course, be " certain conditions on which the right of every tribunal of limited jurisdiction, to " exercise that jurisdiction depends. But these conditions may be founded either in " the character and constitution of the tribunal, or upon the nature of the subject " matter of the inquiry, *or upon certain proceedings which have been made essential* " *preliminaries to the inquiry, or upon facts, or a fact to be adjudicated upon in* " *the course of the inquiry.* It is obvious that conditions of the last differ materially " from those of the three other classes, objections founded on the personal incom- " petency of the Judge, or on the nature of the subject matter, or on *the absence* " *of some essential preliminary,* must obviously, in most cases depend upon matters " which, whether apparent on the face of the proceedings, or brought before the Court " by affidavit, are extrinsic to the adjudication impeached. But an objection that the " Judge has erroneously found a fact in which, though essential to the validity of his " order, he was competent to try, assumes that, having general jurisdiction over the " subject matter, he properly entered up the inquiry, but miscarried in the course of it. " The Superior Court cannot quash an adjudication upon such an objection without " assuming the functions of a *Court of Appeal,* and the power to re-try a question " which the judge was competent to decide." And after some other observations he cites a passage from *Bunbury* v. *Fuller.* It is a general rule that no Court of limited jurisdiction, can give itself jurisdiction by a wrong decision in a point collateral to the case upon which the limit to its jurisdiction depends, and however its decision may be final on all particulars making up together that subject matter which, if true, is within its jurisdiction, and however necessary in many cases it may be for it to make such a preliminary inquiry, yet upon this preliminary question its decision *must always be open to inquiry in the Superior Court.* In *Bunbury* v. *Fuller,* the Commissioners had jurisdiction over the matter, and were the sole judges of the amount of compensation, but to ascertain the exact amount, they had to decide whether the defendant's lands in Milden Hall were subject to tithes; if they were not, the amount of compensation would be less than if they were; he *decided* they were not, and although the Act said the award should be final and conclusive, and gave an appeal to the Quarter Sessions, the Court held that it was not conclusive. That the party injured was not bound to take the remedy provided by the Act and appeal to the Quarter Sessions, as "*no one is bound* " *to appeal against a nullity,*" and that the correctness of the Commissioners' decision must be inquired into, and after quoting the passage I have already quoted from *Thrope* v. *Cooper,* that the omission to exercise jurisdiction, if injurious to either party, has the same effect as exceeding it, say "this is extremely reasonable." If the Commissioners in the present case have, for any reason, omitted to take a district of 9,700 acres of titheable land into account, nothing could be more unjust than that the plaintiff should be barred by this award, as to an unquestionable right before it was made, simply because it awarded him a compensation for tithes of land of a different class situate in other parts of the parish. So here, if the proprietor could show that an error in deciding in some of these preliminary questions, such, for instance, as if the award had stated that he had lost his right to 47 and part of 48 by adverse possession. Could he not have had it quashed? and had he not also a right (if he chose to exercise it) to apply for that reason, or because some other preliminary question was wrongly decided, to have the award sent back? Then, is it just to permit the silence of the Commissioners to deprive him of his right to those remedies? In *Richards* v. *The South Wales Railway Co.,* 13 Jur. 1097, the verdict of the Jury under the Land Clauses Consolidation Act was as follows:—

	£
Value of land purchased - - - - -	305
Severance on 13½ acres - - - - -	157
Loss of water on 25 acres - - - - -	112
Severance of a road owing to crossing and expense incurred thereby - - - - - - -	450
	1,024

The Court held that the Jury had no right to give the 450*l.* for severance of the road, and that doing so was an excess of jurisdiction in a substantial matter injurious to the Company, and say that, "Where it appears that the Inferior Court has taken upon itself to "decide matters over which it had no jurisdiction, the statutory prohibition does not "apply, and the inherent jurisdiction is unrestrained;" nor need the excess of jurisdiction appear in every part of its proceedings, for it cannot give validity to one act in itself beyound the power of the Court, because it has done another it was competent to do. "The writ must therefore go, but as the proceeding was well commenced, and in "three particulars out of four, it was well conducted, and the fourth *can be certainly* "*and distinctly separated from the rest* owing to the verdict having been special, and in "writing, we should not think it necessary to quash the whole, if the claimant were "content to let it stand for the unobjectionable parts. This suggestion may, perhaps, "lead to arrangements and amendment of the verdict by consent, otherwise the rule "must be absolute." Suppose in this case the error had been neglecting to award compensation for loss of water, or something which the claimant had a clear right to be compensated for, would it not have been held equally bad, as against the Company on account of not exercising jurisdiction in a matter where its non-exercise was injurious to the claimant? In the present case, as in that, the Commissioners had jurisdiction over the main subject matters, and their proceedings were well commenced, but here the good cannot be separated from the bad, because a lump sum is given for compensation, and no one can tell how much it has been reduced in consequence of an erroneous decision on some of the preliminary questions they had to decide before fixing the exact amount. The principle on which the Court held itself bound to set aside or hold the awards bad in the above cases must, I think, govern this case. But before deciding that the whole awards must be quashed, the effect of the 32nd Sec. should be considered; it provides "that the Public Trustee when the sum so awarded shall have been paid into the "Treasury as aforesaid, shall (unless restrained by the Supreme Court, or a Judge "thereof) after fourteen days' notice to the proprietor, execute a conveyance of the "Estate of such proprietor to the Commissioner of Public Lands, &c." Now what do these words, "unless restrained by the Supreme Court or a Judge thereof," mean? What power do they confer on the Court? and what state of circumstances is sufficient to invoke its exercise? Do they cut down or modify the stringent restrictive provisions of the 45th Section, so as to give the Court, notwithstanding those restrictions, some power to interfere in cases when the literal observance of them would permit consequences contrary to justice and equity to result from the Commissioners' proceedings? Or do they merely authorize the Court temporarily or perpetually to restrain the Public Trustee from conveying, in consequence of circumstances arising after the award made, or with which the Commissioners had nothing to do? If a power such as the first question implies be conferred, then the two sections are, in material points, repugnant to each other, but it is a rule in construction of Statutes, that each part of it is to be construed with reference to other parts, so that the whole may if possible stand. Now if we construe these words, "unless restrained by the Supreme Court or a Judge thereof," to imply merely an authority to restrain for causes similar to those in which a Court of Equity usually restrains between delivery of abstract and execution of conveyance, there will be ample subject matters for this part of the 32nd Sec. to operate upon, without being driven to the necessity of declaring either it or any part of the 45th Section invalid, for repugnancy to each other. For example, so long as the amount of compensation is sufficient to pay off incumbrancers they have nothing to do with the proceedings of the Commissioners, but if a less sum than the amount due to a mortgagee, be awarded a Court of Equity at his instance would restrain the Public Trustee from conveying, because the mortgagee not being notified, could not be injured by an award made behind his back. See *Martin* v. *London, Chatham and Dover Railway Co.*, Ch. Ap. L. R. 510, and a mistake in paying notes into the Treasury, and various other cases, where a Court of Equity would restrain the Public Trustee might be put, in all which cases it seems to me this clause would empower this Court, in a summary manner, to grant the same relief as a Court of Equity would have done. We must, therefore, exercise the power of this Court in the present case in the same manner as we would exercise it (when similarly restrained) over the proceedings of any other Inferior Court. It is said the Court may refuse to set aside the award though it be void. But I think it is clear, that where (even in ordinary submissions) the award is void and something may be done under it, the party who may be injured as a *right* to call on the Court to set it aside. Russel, on awards, 649, says, that if an award be altogether void and nothing can be done under it, the Court will not usually interfere to set it aside. "But there is an *exception* "*where something may be done under the award* which renders the interference of the "Court necessary. For instance, where the award *orders a verdict to be entered*, the

" Court will set it aside, since if the award be allowed to stand, the party would be entitled " to judgment, and might issue execution." So in the *Queen* v. *Justices West Riding*, 7 A. & Ell. 588, where it was contended that the order of Sessions being a nullity, therefore the Court would not set it aside. The Court say we were in doubt whether the order was not harmless, but we think, on further consideration, that what has been done is a grievance to the party applying. The effect of allowing these void awards to stand will be, that the Public Trustee may convey estates of very great value away from their owners. The collection of all arrears of rent would also remain indefinitely suspended, while the proprietors were engaged in law suits against the Government to get back their land; the compensation money remaining all the time locked up in the Treasury, of no use to any one. To decline to exercise our jusisdiction in such a case would, in my opinion, be contrary to all law, reason, and justice. I think, therefore, that these awards must be set aside,—first, because they do not show how they decided the several preliminary matters they had to consider before ascertaining the amount of compensation; secondly, for not deciding the question of quit rents, so as to protect the proprietor after being stripped of his land from suits in respect of its liability to those rents; thirdly, for not setting out in their award, or by reference to any particular plans or documents, any certain description of the lands claimed before them by the Commissioner of Public Lands under his notice to the proprietors, and adjudicated by them to be transferred to him, and in not showing for, or in respect of, what particular parcels of land the compensation, mentioned in the several awards, was respectively given. The setting aside of these awards may, I am well aware, cause much disappointment, as well as render useless the large expense attendant on the proceedings. But this, to use the words of Lord Denman, in *The Queen* v. *The Eastern Counties, R. W. C.*, 10 A. Ell, 565, " is a con- " sideration which certainly ought to induce great caution in assuming jurisdiction, but " cannot justify us in declining it where the law has lodged it with the Court. We " have no more right to refuse to any of the Queen's subjects the redress which we are " empowered to administer, than to enforce against them such powers as the constitution " has not confided to us." In Hodges, on R. W. 324, it is remarked that as laymen are frequently selected to be arbitrators and umpires, there cannot be any doubt that they are entitled to avail themselves of professional assistance in conducting the inquiry and preparing the award; and I must say it is very unfortunate that in such an important matter as this the Commissioners should not have been authorised to engage such assistance, at least, in drawing up their awards, a matter with which they could scarcely be supposed to have much acquaintance.

Imperial Act, ultra vires.

The next objection is, that under the provisions of the British North American Act, the Island Legislature had not power to pass this Act.

By the 92d sect. of the Imperial Act, it is enacted that in each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next herein-after mentioned, " and the 13th class mentioned in this section is, property " and civil rights in the Province."

Mr. Hodgson contends that the power of making laws in relation to property, does not give the right of taking away the property of one person for the purpose of giving or selling it to another; that the power is restricted to the taking of private property for public uses only where a public necessity for so doing exists, and that the existence of such public necessity is a condition precedent to the right to exercise it, and that no such necessity existed with regard to the subject matters dealt with by this Act. The Attorney-General, on the other hand, contends that the Legislature are the judges whether such necessity exists, and therefore, have a right to pass any law they please. If the Provincial Legislature is restricted to subjects coming under what American jurists call the right of Eminent Domain, it seems to me that this Act, at least in some of its provisions, would be an excess of Legislative power. So far as the leasehold tenures are concerned, it might be said that when a man parts with his property for 100 or 900 years, reserving a small yearly rent, the transaction really is, that he gives away the land in consideration of a small annuity secured on it, a commutation of which, if *fairly made*, could work no appreciable injury to the lessor; and if from any cause, such tenures were found to operate injuriously to the public welfare, it might, perhaps, be argued that a public necessity existed which required to be met by their abolition. But, as to the necessity of argument regarding the residue, it must in the first place be observed that the preamble of the Act only says that it is desirable that the *leasehold* tenures should be converted into freehold. There is not a word about its being necessary to take property

which had been purchased on the faith of existing laws, and long enjoyed in the fancied security that in this Province it would be as safe as property has heretofore been considered to be in other parts of the British Dominions. There is no doubt that although the preamble of an Act is said to be the key to its intention, its grasp may, by the enacting clauses, be extended to subjects not within the preamble. But still, in considering the question of public necessity which was so much discussed on both sides at the Bar, we may look with much confidence at the preamble; and if we do, and apply the maxim, *expressio unius est exlusio alterius*, instead of finding in the Act evidence of necessity, the implication rather is, that the Legislature felt it could not say that there was any. But putting that aside, if, as contended for, the Imperial Act does act restrictively on the power of the Provincial Legislature, then it would be the duty of this Court, in the same way as it is the duty of Courts in the United States, on similar questions, to decide whether such a public emergency existed as would justify Legislative interference under the right of Eminent Domain. Now, to put a strong case, but one which might occur, suppose A. and B. had come to this Island two years ago, and that A. had purchased 1,000 acres of wild land, and B. had purchased 2,000 of cultivated land, that A. did not occupy his, but that B. was in actual use and occupation of his 2,000 acres. The Act authorizes the Government to take 500 acres from A. and 1,000 acres from B. There can be no doubt of this, the words are too plain to admit a doubt.

The first Sect. is, "the word Proprietor shall extend to and include any person "receiving or entitled to receive the rents, issues, and profits of any township lands in "this Island (exceeding 500 acres in the aggregate), whether such lands are leased or "unleased, occupied or unoccupied, cultivated or wilderness, provided that nothing "herein contained shall be construed to affect any proprietor, whose lands in his actual "use and occupation, and untenanted, do not exceed 1,000 acres." And what is the Government to do with the unleased lands when it gets them? Simply sell them to others. In every case that I am aware of, either English or American, the property was taken for the purpose of being used by or for the convenience or benefit of the public, or of such considerable numbers of persons, as with respect to some certain locality, might be called the public, and not for the purpose of being afterwards appropriated exclusively to the use of one or a limited number of such public, whether such exclusive appropria- "tion took place through sale, gift, or otherwise. Ch. Kent, Vol. 2, 340, says, it un- "doubtedly res's, as a general rule, in the wisdom of the Legislature to determine when "public uses require the assumption of private property, but if they should take it for a "purpose not of a public nature, as if the Legislature should take the property of A. and "give it to B., or if they should vacate a grant of property, or of a franchise, under the "pretext of some public use or service, such cases would be gross abuses of their discre- "tion and fraudulent attacks on private right, and the law would clearly be unconsti- "tutional and void." It must be remembered that no amount of compensation can condone the impropriety of taking private property when no such public necessity exists, for the right to take is founded on public necessity alone, but the right to compensation rests on very different grounds, in the words of Ch. Kent. "It is a necessary attendant "on the *due and constitutional* exercise of the power of the law, given to deprive an "individual of his property without his consent, and is founded in *natural* equity, and "is laid down by jurists as an acknowledged principle of *universal* law." Now, could any Court hold that any public necessity existed for giving the Government of this Island such a power over private property, in the case I have supposed, as this Act gives. When I put the case, the Attorney-General replied, that whatever the effect of the words might be it was not intended by the Legislature that the Act should apply to such a case. Perhaps it was not, it is possible that the policy stated in the preamble so exclusively occupied its attention, that it served as a veil to conceal the real effect of some of its enactments. It may be said I have put an extreme case, but *Lord Denman in Reg.* v. *Arkwright*, 13 Jur. 303, when supposing an equally strong case to test the construction of an Act, says, "that a case so extreme is not likely to happen, in fact is "no answer to the argument against the construction which makes it possible. Without "supposing any ill-intention in the Commissioners and scarcely any negligence, they "may be deceived, and at all events the rights of others ought not to be left unpro- "tected." So here, without supposing the Government would apply the powers of the Act to such a case, where was the necessity for subjecting the rights of all owners of property to such interference, besides, it must be recollected that when a constitutional question regarding the validity of an Act of this description is raised, the Court are bound to decide on what it finds within the four corners of the Act, not importing anything that is not there, and not excluding anything that is. The Imperial Act has bone and sinew, but like the dry bones of the valley, it has yet to be clothed by many a

judicial decision from all parts of the Dominion, tempered and corrected by the Supreme Tribunal, before its true form and features will become perfectly developed, and therefore every question concerning its construction should be carefully considered, and amongst the many questions that may be raised none, perhaps, will be more important than those concerning the distribution of Legislative power. Now it seems to me that if this Island had been a new country, or one, on its entry into the Dominion, possessed of no Legislative power, a grant of power to make laws in relation to property would be understood to apply to regulations respecting property still continuing vested in its owners, and would confer only a limited jurisdiction as contended for by Mr. Hodgson, a jurisdiction amply sufficient for securing to them the full enjoyment of it, for regulating the manner in which it should be held, transferred, or devolve, and at the same time of imposing such restraints on the use of it as the public good might require, and also the further power of depriving owners of their property for *public* uses, but for *public* uses only, when and only when some "great "public emergency, which could reasonably be met in no other way," rendered it necessary to do so, but would not confer that omnipotent sovereign power which acknowledges no restraint but its own discretion, and whose acts (unlike these of a body with limited power) can never be "*ultra vires*," and therefore cannot be questioned before any tribunal. But this Island had a constitution similar to that of the other B. N. A. Provinces when it entered the Confederacy, and the powers of its Legislature over property and civil rights were as sovereign as those of the British Parliament itself, save only where its enactments happened to conflict with the Imperial Statutes, or were repugnant to the established law of England, though this last restriction seems to be abolished or greatly modified by the Imperial Acts 26 & 27 Vict. c. 48 & 28, and 29 Vict. c. 63. The B. N. A. Act of 1864 does not abrogate these Provincial constitutions, but merely withdraws from them the power of making laws regarding certain matters enumerated in the 91st section, over which they previously had jurisdiction. But as to all matters not so withdrawn, the Provinces remain in —— of their "old "dominion," and retain their jurisdiction over them in the same plight as it previously existed, and therefore I think we cannot hold this Act to be "*Ultra Vires*."

Stewart's Deeds to Children.

I must now turn to points applicable to the particular case of R. B. Stewart. His Counsel, while insisting on all these objections, states that he does not desire to have the award quashed, but only to have the injunction continued until legal money be paid to the Treasurer in his case; and secondly, that the Public Trustee be entirely restrained from including in his conveyance to the Commissioner of Public Lands certain parcels of land conveyed to his children. The facts, so far as I can gather them from the very loose and uncertain statements of his affidavit, are these, that before the case came before the Commissioners for hearing, he conveyed 1,499 acres of land on Lot 7, 500 of which were leased, and 999 unleased, to his son, James F. Stewart. That he also conveyed 4,000 acres on Lot 30 to his son, Robert Stewart, or to his sons. This would make 5,500 acres, but in the affidavit of Mr. Davies, the Plaintiff's Solicitor, he says he has conveyed 7,000 acres, but the affidavits are so confused that one cannot ascertain what the exact quantity is, and, what in my view of the case is more important, with the exception of the 500 acres of leased land conveyed to James F. Stewart, I cannot find how much of what he did convey was *leased*. I can, therefore, only state generally what in my opinion Mr. Stewart's right and power over his property was, between the service of the notice of intention to purchase and the hearing of his case, and in this point my opinion, and that of my learned brothers, is entirely different.

The notice of intention to purchase, in my opinion, does not, so far as any *provision in the Act is concerned* (except as regards the arrears of rent), in any way interfere with the proprietor's dominion over his property. The 49th Sec. enacts that, "after the "Commissioner of Public Lands shall have given notice to any proprietor under the "2nd Sec. of this Act, no such proprietor to whom any such notice shall have been "given, shall maintain any action at law for the recovery of more than the current year "and subsequent accruing rent due to him." There is not a word in the Act which prevents his selling, leasing or disposing of it. When the case comes before the Commissioners, proof of perception of the rents and profits by the proprietor named in the notice, or of his right to them, makes a *primâ facie* case giving the Commissioners jurisdiction to proceed, but if during the trial it appeared that the proprietor had sold or conveyed portions (not in trust for himself) but to actual settlers, and that they were then the *bonâ fide* owners, then (as to the portions so sold) the case would fall within

the third class of cases mentioned by Sir James Colville in his judgment in the *Bank of Australasia* v. *Willian*, and their jurisdiction for anything contained in the Act would, as to those parcels, be at end. But there is a well established rule of law, that agreements or deeds contravening the policy of enactments of the Legislature are void. "Thus contracts made by a trader, giving a preference to particular creditors, although "not forbidden by the letter of the enactment, violate the policy of the Bankrupt Laws, "the first object and policy of those laws being to make a rateable distribution of the "bankrupt's property amongst all his creditors." So deeds framed to avoid the Mortmain Acts, as in *Jefferies* v. *Alexander*, *H.L.*, 13 *J. J. Ch.* 9, and numberless cases might be cited where deeds and contracts have been held void for this reason. Thus Mr. Smith, speaking of contracts invalid on these grounds, says, "The Judges in con-"struing a particular law, look at the object and policy with which it was framed, and "the evil which it was apparently intended to remove; they use the policy of a parti-"cular law as a key to open its construction." Now, the policy of this Act declared in its preamble, as regards one of the subject matters with which it deals, is to convert the leasehold tenures into freeholds,—suppose then, that at any time between notice and hearing, the tenants had purchased from Mr. Stewart his reversion in their several farms, I think his deeds to them would have been valid, because there is nothing in the Statute prohibiting his selling to any one, and the sale to his tenants, instead of contravening the policy of the Act, would be carrying it into effect. But I think deeds of such reversion to a stranger would have to be looked on as tending to *defeat* the policy of the Act, inasmuch as if held valid, they would, as to the farms the reversion of which was so conveyed, destroy the jurisdiction of the Commissioners, and thereby prevent the leaseholds being converted into freeholds. With regard to unleased lands, it is difficult to say what the policy or object of this part of the Act is. It cannot be to prevent the creation of new leasehold tenures, because a single clause making it unlawful in future to grant leases of wild land, would have effectually prevented that. It can scarcely have been to prevent land being held up at high prices, and thus retarding the settlement of the country, because a tax on the anticipated profits arising from increasing value would have been a sufficient check to a system of that kind without violating sound principles of jurisprudence. Besides, it is well known that persons with rising families acquire and hold often more than 600 or 700 acres of land, so that they may have farms for their children when they come of age. It can scarcely be supposed that the Legislature desired to prevent the farmers of this Island from exercising a parental providence so commendable for the welfare of their children. Then it seems that the Legislature, for some reason or other which, though we cannot discern, we must of course suppose to be a very sound and good one, thought it desirable that the Government should be empowered to deprive every person in this Island who owned over 300 acres of land of the excess beyond that, and that it should be vested in the Government to resell to whosoever would buy it. True, by the provisions of the Land Purchase Act, under which the Government sell, it can only convey 300 acres to one person, no doubt a very wise and necessary precaution to prevent jobbery by officials, or in favour of political friends or supporters, but evidently not intended to prevent one person acquiring and holding any quantity he pleases; because if A and 20 others on the same day purchase 300 acres each, there is nothing to prevent A the next day purchasing from the other 20 and thus becoming the owner of 6,000. The policy of the Act was, therefore, only to get the land to sell, and after the sixty days for initiating proceedings against property had expired, the law returned to its normal condition and every one had, as before, a right to hold any quantity he pleased. Now, if a number of persons between the notice and hearing had purchased from Mr. Stewart (not to hold in trust for him) but as *bonâ fide* purchasers for value with intention of settling on it, or keeping it for the use of themselves or their families; even if some of the Lots exceeded 500 acres, how would that have been against the policy of the Act? Mr. Stewart would only be doing with the land what the Government proposed to do when they acquired it. If the Legislature intended to prevent all sales after notice of intention to take, it should have expressly prohibited it, as it did the collection of rents, which last itself according to the maxim, "*Exceptio* "*probat regulum de rebus non Exceptis*," shows that such sales were not intended to be prohibited. Besides, every Act that takes away rights or property acquired under existing laws is, Mr. Broom observes, opposed to sound principles of jurisprudence and must be construed strictly, *i.e.*, shall not be extended by implication to anything which its express words may not comprehend. And in *Sparrow* v. *Oxford R. W. Co.*, 16 Jur. 707, the Lord Chancellor says: "If this be a *casus omissus*, I think it ought to be "construed in a way most favourable to those who are seeking to defend their property "from invasion." Now, if he might sell to others, why should he not give farms to his

sons, who we all know as a fact, have been brought up to farming avocations? I do not mean to say that if all or a large portion had been conveyed, evidently to evade the Act and oust the Commissioners' jurisdiction, it would have been valid—that is quite another question. But there is nothing to lead me to believe such is the case with regard to these wilderness lands conveyed to his children; and looking at the matter in a plain, common sense way, does it not seem very unjust when you are arbitrarily taking 80,000 acres of land from a man on the plea that you want to have the selling of it, that you should prevent him from allotting farms to his children, and thus perhaps compel them to buy back from you farms which, according to the statements he had promised and they had always expected, he would give them? Can I believe the Legislature ever intended to do so hard and unjust a thing? I think, therefore, that the deed of 999 acres of unleased land, or some part of it on Lot 7, to his son, J. F. Stewart, is valid, and that the Commissioners had no jurisdiction over the land conveyed by it. With respect to the 500 acres of leased land on Lot 7, conveyed to J. F. Stewart, as I have already said, I think it void as contravening the policy of the Act; but Mr. Stewart had a right to retain 500 acres of leased or unleased land. In my opinion it was only against the excess that the Commissioners could proceed, and, therefore, if this 500 acres of leased land be the 500 he elects to retain, of course the deed is good for that also. With respect to the other lands the facts must be made more clear before I can give any opinion respecting them, or the actual quantity J. F. Stewart can retain.' It was said the Commissioner of Public Lands cannot after notice retract, and the case was likened to R. W. Companies, where it is said the notice to treat raises the relation of vendor and vendee. But it is a mistake to say that the notice to treat by Railway Companies creates the relation of vendor and vendee; the authorities, though somewhat conflicting, do not warrant the proposition. In 1 Readfield on Railways, 358, it is said, "But it seems to be considered that *mere notice* by a Railway Company of an "intention to take the land may be withdrawn, if done before the Company have taken "possession of the land, or done anything in pursuance of the notice." In *King* v. *Wycomb R. W. Co.*, Sir J. Romilly, M. R., says, "With respect to one messuage, I am "of opinion that they were entitled to abandon the notice which they gave to take it. "A Railway Company is entitled to abandon at any time before they actually take "possession of the land comprised therein." Dart. V. & P., 195, 4 E. It is laid down that "notice given by a Railway Company or other Public Company of their intention "to exercise a power of compulsorily taking land constitutes a contract binding on the "*Company* to the extent of fixing what land is to be taken, and cannot be withdrawn "by the Company without the consent of the owner for the sale of his land. *But the "mere service of the notice does not constitute a contract by the landowner for the sale "of his land;* nor is there, strictly speaking, any contract between the parties until they "have come to some definite arrangement as to terms, or until the value of the land has "been ascertained by arbitrators or by a jury." In *Haynes* v. *Haynes*, 30 L. J., 570, where all the cases were considered by V.-C. Kindersley, he says,—It was contended that the notice to treat formed a contract, and having attached the name of a contract to it, it was a short and easy step to the conclusion that there was a conversion. It was justly said that if A. and B. entered into a contract for the sale and purchase of land, the Court of Chancery would grant specific performance of it regarding the subject of the contract as the property of the purchaser, and the vendor as a trustee for him, and only entitled to the purchase money; in other words, that there was a conversion. The question, therefore, is, how far the Plaintiffs, the residuary legatees, are justified in that contention, and that is the only question in which they have any concern. What is the effect, then, of the notice as to the land? Has the landowner, after having done no act, entered into a contract for the sale of his land? What is a contract? According to Sir William Blackstone, a contract is an agreement, on sufficient consideration, to do or not a particular act; and therefore, according to this definition, an agreement, in order to constitute a contract, must necessarily consist of two things, a will, and an act whereby the will is communicated to the other party, who engage to carry it into effect; and not till then is the agreement complete. This is not a theoretical principle, but one of universal law, and of the law of England in particular; that is a proposition that will not be disputed. The Legislature even cannot coerce a man's will; it cannot compel him to be willing; he might be compelled to do a thing against his will, but as long as he is unwilling, his will remains the same. To apply this:—A company, being invested by the Legislature with power to take the lands of others, serve a notice to treat upon a landowner, and call upon him to state what his interest is, and what he claims as compensation, and so far as the Company had a will they notified it to the landowner; and assuming that such a notice was an agreement *by the Company*, how was it as to the

landowner? Has he contracted? No one can say what his will was, because no one could read his thoughts; but if you cannot, you must take him to be unwilling. He has not communicated his will to the Company; there is, therefore, a total absence of both requisites to form a contract on his part. How can it be said that he has contracted? He might be obliged, and therefore compelled, to sell his land, but it is against reason and law to say that he has contracted; and if it is said that a contract must be implied, it must be understood from some conduct of his own. But it never was heard that an implication of conduct could be raised from the conduct of another party, not the landowner's agent. Having regard, then, to the essential nature of a contract, it is impossible to hold that a simple notice to treat constitutes a contract as to the landowner. In the *Metrop. R. W. C.* v. *Woodhouse*, 34 L. J., 297, an injunction was granted to prevent the landowner from selling land comprised in the notice to treat. In *Binney* v. *Hammersmith & City R. W. Co.*, 9 Jur., N. S., cited by Rodford, 358, the tenant, coming into possession of land *after notice to treat* and before proceedings taken, was held entitled to notice so as to make him a party. In Loyd on Compensations, 47, it is said Commissioners appointed under a public Act to do, on behalf of the Executive Government, certain things for the benefit of the public, are not liable in the same manner as a private Company are held to be in consideration of the statute granted to them. In *Reg.* v. *Commissioners of Woods and Forests*, the Defendants, who were authorised to purchase lands forming a Royal Park, gave notice under the provisions of the Act, that certain lands would be required, it was held to be a good return to a mandamus requiring the Commissioners to summon a jury to assess the value of the lands, to show that the undertaking had been abandoned for the want of funds. Parke Barron says, "If this were a Railway case, or other private company, no doubt the "return would be insufficient, because notice having been given that the lands were "required, and a claim sent in accordingly, a contract is entered into, and the parties "stand in the relation of vendor and purchaser; but a private company, to whom an "Act is granted for their profit, differs materially from Commissioners appointed under "a public Act to do on behalf of the Executive Government certain things for the "benefit of the public." In *Richmond* v. *North R. W.*, 5 L. Rep., 358, the M. R. says:—It is quite settled that a notice by the Railway Company to take land does not by itself create a contract, and that it does not alter the character of the property until some further Act has been done which has not taken place in the present case. From the authorities it appears that notice to take does not constitute the relation of vendor and vendee. But at the same time some of the consequences flowing from that relation do flow from a notice to treat. The *particular* lands become fixed; neither party can get rid of the obligation—the one to take and the other to give up. But to what description of cases do these authorities apply? Are they decided on statutes having the same provisions, and intended to accomplish ends similar to those intended to be accomplished by the statute we are considering? Instead of that being the case, the object of the statutes in which those cases arose are as dissimilar from this as it is possible to be. Both in the railway case and in that against the Commissioners of Woods and Forests the particular land described in the notice to treat was taken *to be specifically applied to a particular use*, viz., to some *work* of a public nature, which work would be defeated or delayed if the owner were allowed to transfer the land, and therefore not because the relation of vendor and purchaser existed, but because, as observed by the V.-C. in *Metrop. R. W. Co.* v. *Woodhouse*, he would be *contravening the law*, he was restrained from doing so. Here there is no particular piece of land mentioned in the notice, nor until the hearing. Could it be known what particular land the Government were to get or claimed, and the reducing the quantity by sales to settlers, would not defeat or delay any public work; and if, as I have already shown, the sales were such as would not contravene the object and policy of the Act, then "*Cessante ratione legis cessat* "*ipsa lex*," and the Railway cases do not apply and cannot govern this case. And if the Government had, as in the *Metrop.* v. *Woodhouse*, found Stewart selling to actual settlers, and had applied for an injunction to restrain him, the answer would have been, the relation of vendor and purchaser does not exist, the owner's title is not therefore yet disturbed. Such sales only tend to settle the country, they do not contravene the object of the law; true when you get the Estate you will have less to sell, but you will have also less to pay for; they work the Government no injury and, therefore, no injunction can be granted. The truth is, this statute is one entirely "sui generis," and it must therefore be construed by the application of general principles of construction and law, and the labouring to compare it with what it has no resemblance to, is, in my opinion, much more likely to lead to error than help to a correct conclusion. If the notice in this case created the relation of vendor and purchaser the property would be converted. And in case of the

proprietor's death the day after notice, the property would go, not to his heirs, but to his personal representatives. Could the Act intend that? And if it did not, then it is only acts which tend to defeat the objects or policy of the Act that the proprietor is restrained from doing. It is said that though a man who holds only 500 acres of leased or unleased land is not within the Act, yet if he hold over that quantity the Act not only operates on the excess, but that he loses all. The words of the 1st Sec. are: "proprietor shall be construed to include and extend to any person receiving or entitled "to receive rents of lands exceeding 500 acres in the aggregate." Now surely if I say you shall not hold over 500 acres, the plain and necessary implication is that you may hold 500. But what is the antecedent of the words 500 acres? It is the lands exceeding, *i. e.*, lands in excess of that 500 acres. But put it in another way, "proprietor" shall mean every person receiving rents of lands exceeding 500 acres in the aggregate. Now what lands? It seems to me it can mean nothing else but the lands which he holds in excess of the quantity of 500 acres, which by necessary implication the Legislature says every man may hold. And then it follows, that it is only with *regard to this excess* that the compulsory clauses of the Act were intended to operate. But there is a well known rule of construction that, "where the language admits of two constructions, "according to one of which the enactment would be unjust, absurd, or mischievous, and "according to the other it would be reasonable and just, it is obvious that the latter "must be adopted as that which the Legislature intended." Now put this case:— Suppose that 20 men, intending to emigrate to this Island, had come here last year, and contemplating the future settlement of their families around them, and informed of the comparatively small quantity of unoccupied land in this Island, and of its fast decreasing quantity, had prudently secured a larger tract than they would respectively require while their families were growing up, and that ten of them had purchased 500 acres each, and the other ten 525 acres each, what would be the effect of the construction contended for? Why when they arrived with their families, the ten with the 500 acres each would find their lands secure and safe, while the ten who held 525 each would find themselves deprived, not only of the 25 acres excess, but of the whole 525, and thus left without an acre to settle upon. Is it probable that any Legislative body in the world could have intended to enact a law producing such absurd and ridiculous results? In *Boon* v. *Howard*, 8 L. Rep., C. P., 308, where a question arose on the construction of the representation of the Peoples Act of 1867, the Court were equally divided. But there is a passage in the judgment of Mr. Justice Keating very applicable to the present point; he says: "I feel the full force of what has been said by my brother Brett, that if the "Legislature says a thing shall be so, we are bound to give effect to it. But I hold it "to be an essential canon of construction, that if the words are susceptible of a reasonable and also of an unreasonable construction, the former construction must prevail. "I cannot see that any violence will be done by reading the words of S. 61, 'and "'separately rated to the relief of the poor' (which, it is conceded, is an inapt mode of "expression) as if they were, 'and the occupier of which is separately rated to the "'relief of the poor in respect of such separate occupation;'" and in *Perry* v. *Skinner*, 2 M. & W., B. Parke says: "If the construction contended for was considered the "right construction it would lead to the *manifest injustice* of a party who might have "put himself to great expense in making machines and engines—the subject of the grant "of a patent, *on the faith of that patent being void*, being made a wrong-doer by "relation. That is an effect the law will not give to any Act of Parliament unless the "words are manifest and plain. *We must engraft therefore, upon the words of the Act* "in this case, for the purpose of its construction, and read it as though it had been, "shall be deemed and taken as part of the said letters patent, *from henceforth*, so as "not to make the defendant a wrong doer." Now here, if it were necessary to avoid attributing such an absurd intention to the Legislature (which I think it is not, as the words in my opinion are plain enough in themselves) what violence will be done by reading the words exceeding 500 acres in the aggregate, as if they were rents, issues, and profits of the excess of any lands he may hold over and above 500 acres in the aggregate in his own right, &c. It is said the Legislature must draw a line somewhere. Well, does not this construction draw a sharp line enough? only it draws it between the 500 and the excess, instead of the absurdity of drawing it between the owner and any land at all; and therefore, unless this Court takes upon itself to do what the Statute has not done, viz.: to make one rule for the owner of 525 acres and a different rule for the owner of 60,000 acres. Mr. Stewart, in my judgment, is clearly entitled to retain 500 acres of leased or unleased land wherever he pleases.

Dominion Notes.

The next question is, that when the Treasurer gave his certificate the money had really not been paid in, the fact being that the Government, under a mistake of the law, supposed that Dominion notes were a legal tender here, and the amounts were paid to the Treasurer in those notes; the Counsel for the Government admit that it was a mistake, and this is one of the grounds on which an injunction was granted. The 30th sec. enacts, "that *at* the expiration of 30 days from the publication of the award, the Government "shall pay the *amount awarded* into the Colonial Treasury," "*to the credit of the suit* "*or proceedings in which such award shall have been made.*" The 31st sec., that the Treasurer shall immediately after such payment deliver a notice to the Prothonotary that the amount awarded has been paid in, and that notice is to be in the form Schedule (D.) which is, "I certify that the sum of ————has been placed to the credit "of the account opened in the above matter, which said amount will be paid to such "party or parties as the Supreme Court shall, by rule in the above matter, order and "direct." And the 32nd sec. provides: that when the sum is so paid in, the Public Trustee shall, before conveyance, give 14 days notice of his intention to convey. It was contended that the Act, requiring the money to be paid at the expiration of sixty days, is imperative, and that by the error the whole proceedings fall to the ground; I incline to think this is not the case; but at present it is unnecessary to decide it. When the money is paid in, new notices can be given, and then the objection can be taken and argued. At present the notices are void, and just as if they never had been given; and we can only say that as yet no money has been paid in. But if the Act don't make payment at the end of sixty days imperative, yet it must mean very promptly, and it would be most unjust to allow the Government, by an indefinite delay in paying in the money, to keep the proprietor out of the use of it, while at the same time it deprives him of his right to arrears of rent. The Act itself works great injustice to those who, like Mr. Stewart, hold very large quantities of unleased wild land, for it prevents the recovery of all except the rents current since the notice of intention to take; but that, at the most only represents the income from the leased lands, but if compensation has been justly made, a large part of the $76,500 must represent the unleased wild land. No interest is allowed by Government to the proprietor on any part of the sum awarded, from the time of the award until he receives his money; and yet in large wilderness estates, the receipts from sales of wood and stumpage must have been considerable. But in this point we are acting under the injunction power given by the 32nd section. If I am correct in my construction of that section, we must exercise the same power as equity would do in like circumstances; in using that power, equity lays down no rule which shall limit its power or discretion in particular cases; it takes care to mould its decrees so as to meet the ends of substantial justice; it is very careful how it interferes, merely on account of some mere non-observance or disregard of a strict legal right. In such cases, while it acknowledges the jurisdiction, it declines to exercise it further than is necessary to prevent real injury being done; and in this case, if the parties don't come to ome amicable arrangement, and we can finally mould our decree so as to prevent Mr. Stewart sustaining actual loss, I should be very unwilling to permit this mere mistake to upset the proceedings if they were otherwise valid. But, at the same time, we must take care not to add to injustice by allowing such indefinite delay. I think, therefore, that the order in Mr. Stewart's case should be that the injunction should be continued for a very short time, and if at the expiration of that time the Treasurer shall not certify that $76,500 in lawful gold coin has been paid in to the Court in this case, that then Mr. Stewart may move to have the injunction made perpetual.

With regard to Miss Sulivan, I am satisfied that the quit rent question was withdrawn, but the Boundary question is as fatal to her case as to the other.

Future Awards.

As I understand there is a large number of awards not yet made, I will, therefore, before closing briefly state some particulars which I think the awards, to be valid, must contain. I think there should be a distinct finding that the breach of conditions in the original grants were waived, or that they were not; and if not, whether any deduction (I don't say that it need state how much) was made on that account, and the same with regard to quit-rents. I think it should also, by reference to schedule or otherwise, show the names of each person whom they hold has acquired a title by possession and the quantity and particular parcel he has so acquired by bounds. I think it should also

show the names and quantity held by squatters, who have held for less than 20 years, and whether anything (I don't say how much) has been deducted on their account. There should also be a schedule showing the amount of arrears due from each tenant and how much of these arrears has been allowed to the proprietor in each case. I think this last necessary. There are two lines in the 20th sec. which I think have been very much overlooked. They are these, "*and the facts which they may require to ascertain in* "*order to carry this Act into effect.*" The meaning of these I take to be, is facts which it is their duty to ascertain in order to give full effect to this Act. This goes far beyond what they themselves have to perform; it points to all that has to be afterwards done by others to carry out what they have begun. To what the Public Trustee has to do, and to what this Court has to do in making distribution, I see it stated that in our case the arrears are assigned to Cardinal Manning. If the award finds a lump sum, and the Cardinal's claim comes in to participate in the distribution, how could we ascertain how much of the lump sum was awarded in respect of the land, and how much in respect of arrears of rent? We could make no distribution in such a case, and the same thing may happen in other cases, where arrears are due to a deceased proprietor, and the present proprietor is not his personal representative; we would be compelled to hold the award void in such case: because the Commissioners had not made it so that the Court could "*carry it into effect.*"

Whatever may be thought of the character of this Act, I think it very unfortunate that such important and expensive proceedings should be rendered nugatory for want of proper care in conducting them, and I have made these last observations in the hope that they may assist in preventing these yet to be made from running on the rocks on which their predecessors have suffered shipwreck.

I have only stated some matters which at present strike me as essential to the validity of the award; there may be many other things which circumstances may render necessary, but the direction that the Commissioners are to do and find every thing necessary *to carry the Act into effect*, if carefully borne in mind, will enable any draughtsman to avoid the omission of anything that is necessary.

Mr. Justice Hensley.—In giving my decision upon the present occasion, I shall follow the course pursued by the Chief Justice, in alluding only in the first instance to the estate of R. B. Stewart (the award in respect of which is not sought to be set aside), which involves two points only, which, although taken in the two other cases of the estate of Charlotte Antonia Sulivan and the Hon. Spencer Cecil Brabazon Ponsonby Fane, may not require to be decided upon in them, in arriving at a judgment. The application in this case of R. B. Stewart is simply for the purpose of restraining the Public Trustee from conveying upon two grounds: (1.) That the Public Trustee has included in his notice, given under the 32d section of "The Land Purchase Act, 1875," to Mr. Stewart of his intention to convey his estate more land than belonged to Mr. Stewart, or more than under the circumstances of the case as detailed in several affidavits filed, the said Public Trustee had a right to convey to the Commissioner of Public Lands as belonging to the estate, under the provisions of the Act in question. (2nd.) Because the money paid by the Government into the Colonial Treasury to the credit of this estate, under the 30th section of the Act, as certified to by the Colonial Treasurer under the 31st section, was not so paid in legal tender money, and therefore, in fact, has never yet been legally paid in. As regards the first ground this again resolves itself into three divisions: 1st, Lands *bonâ fide* conveyed by Mr. Stewart before the original initiatory notice, given to him under the 2nd section of "The Land Purchase Act, 1875," by the Commissioner of Public Lands, to the effect that the Government of this Province intended to purchase his Township Lands under its provisions. On this division I may at once state that it appears to me no difference of opinion can exist, and that of course the Public Trustee's deed must not include any such lands as those just described. The description of the lands to which this division relates, can be settled on reference to the affidavits, and need not here be further referred to. (2nd.) Excess in the statement in Trustee's notice of the actual area of the land to which Mr. Stewart was entitled. This, involving no attempt to except any particular farm or piece of land but merely to correct an over estimate of area (which, from the affidavits filed on behalf of the Public Trustee, would seem to have arisen from his having estimated each Township in accordance with the original grants to contain 20,000 acres, whereas the actual area in some cases, according to the boundaries, has turned out to be less) involves no legal point requiring consideration; and being simply a matter of detail, can also be settled in accordance with the facts ascertainable on reference to the affidavits. (3rd.) Lands conveyed or attempted to be conveyed by Mr. Stewart to several of his

children, to the extent in the whole of about 1,000 acres of leased, and 3,000 acres of wilderness land, after the notice of the intention of the Government to purchase his Township lands, under the 2nd section already referred to, had been given to him. This latter division raises very important questions and requires careful consideration. The first question is, whether the notice to purchase when served binds the proprietor's lands, and prevents his afterwards disposing of them or dealing with them himself? and I am of opinion that it does. It is manifest that if any other doctrine should be entertained, the objects of the Act could not be carried out, or might at any time be defeated by the acts of the proprietor to whose estate the proceedings relate. If he could, at any time pending the investigation by alienation, pass the title to another, the powers of compulsory purchase contemplated by the Statute could never be carried out to any practical conclusion. In fact, it would reduce the Act to the position of a measure which, although it had declared objects, had no vital force, and had not provided or contemplated providing any machinery to attain them. It was, however, argued on behalf of the Government, that this notice was binding on the Proprietor; first, in the same way as in England, somewhat similar notices have been held to be binding on the land-owner whose lands have been required, and have been authorised to be taken by Railway or other Companies, under the general statutes empowering them to acquire them. Many of these statutes contain no express enactment that the lands required shall be bound by the notice, but they empower the Companies to acquire by valuation and compulsory sale the land which they need, and regulate the modes and proceedings for the purpose, but the Court hold that it is a necessary incident in the case to enable the objects of the Act to be carried out, that the land indicated in the notice shall be held bound by it, and not afterwards be disposed of by the land-owner. In some cases the Courts have held that the service of the notice at once places the Company and the proprietor in the position of vendor and purchaser, in others the doctrine has not been carried so far, but in all, as it appears to me, it has been held that whether the position of vendor and purchaser is established or not, yet still the lands are fixed and bound in the hands of the proprietor until the objects of the Act have been secured. A distinction was attempted to be made by the Counsel for Mr. Stewart between a case where a Railway or other Company was concerned, and where a Public Officer was concerned, because it was argued that the Company having once given a notice to the proprietor could not countermand it or draw back, but were compelled to go on and complete the purchase of the land referred to in the notice, and could not plead in excuse deficiency in funds, and therefore, the position of vendor and purchaser might well be held to exist, but that a public officer, having only a limited amount of funds under his control (as in this case it was argued he had only $800,000) might draw back and refuse to complete the purchase, and that therefore the Proprietor must be held to be equally free, and his land not bound until the final conclusion of the proceedings and the acceptance of the money awarded to him. In support of both these views of the matter a large number of cases and authorities were cited upon both sides, and I will now proceed to review those which appear to me to be the leading decisions having the most bearing upon the points in dispute. In the case of *Haynes* v. *Haynes*, 30 L. J., C. 578, it was held that the notice was binding and prevented the proprietor afterwards disposing of his land, yet it also was held in this case, that the parties only in a qualified sense occupied the position of vendor and purchaser, with only some of the incidents of such a position; one incident being wanting that it did not operate (the question coming up between the devisee of the real estate in question, and the residuary devisee of the personal) as an immediate conversion of the real estate into personalty, so as to give as personal estate to the residuary legatee the compensation for the land taken, but that it belonged to the devisee of the realty, as any other conclusion would, free of all action on the part of the land-owner, have been unjust and inequitable. In this case Vice-Chancellor Kindersley, in giving judgment, says, " I consider that a notice to treat constitutes the relation of vendor and purchaser *to a* " *certain extent and for certain purposes*, and some of the consequences following from " an actual contract also follow from the notice to treat. *The particular lands are fixed,* " *neither party can get rid of the obligation, the one to take and the other to give up,* " but to no further extent is it a contract on the part of the land-owner." In the case of the *Metropolitan Railway* v. *Woodhouse*. 34 L. J., Chancery 297, a notice to treat had been served upon the land-owner who afterwards attempted to sell it but had been prevented from so doing by an injunction obtained on behalf of the Company, and Woodhouse's Counsel in arguing for a dissolution of the injunction cited, *as in his favour*, the case of *Haynes* v. *Haynes*, to which I have just alluded, but the Judge, V. C. Stewart, in giving judgment, said, " I think the authority, *Haynes* v. *Haynes*, cited, *is decisive* " *of the question.* Vice-Chancellor Kindersley, in the case referred to, although he

" makes use of some expressions to the effect that a notice to treat does not constitute a " contract in the strict sense of the law, yet says, *that after service of notice to treat,* " *neither party can get rid of the obligation, the one to take and the other to give up the* " *lands specified in the notice,* according to these views the defendant (in this case) is " contravening the law of the land, he cannot, as the Vice-Chancellor says get rid of the " obligation to give up to the Company the lands comprised in the notice to treat, " &c.," and the injunction was continued. The case of the *Queen* v. *the Commissioners of Her Majesty's Woods and Forests*, 19 L. J., B. 497, was, however, cited to show that in the case of a Public Officer, with only limited funds at his disposal, he might after service of notice to treat and other subsequent proceedings still draw back for want of funds, and it was argued that in such a case (which the present one was intended to be) the position of vendor and purchaser could not in any case exist, or any of its incidents, and that therefore the obligation on the owner of the land sought to be purchased could not be held to exist. But on examination it will be found that the decision in this case does not establish at all the latter principle, but that although the Judge held that a Public Officer with limited funds at his disposal, might draw back from completing the purchase after notice to treat given, *yet until he had done so the obligation on the proprietor not to part with his land existed.* Judge Patterson laid down the law thus: " If " this were the case of a Railway or private Company, no doubt the return would be in- " sufficient, because notice having been given that the lands were required and a claim " sent in accordingly, a contract is entered into and the parties stand in the relation of " vendor and purchaser. If the Company had not the means of paying for the land they " should not have given the notice to the owner. But a private Company, to whom an " Act is granted for their profit, differs materially from Commissioners appointed under " a public Act to do, on behalf of the Executive Government, certain things for the " benefit of the public, and the principle that imposes liabilities upon a private Company, " as arising in consideration of the statute granted to them, has no application to the " case of Public Commissioners." And he held that the latter were not bound to complete the purchase, but yet, that the land was bound by the notice. His words on this point are thus reported, " It has been contended that the Proprietor suffers a hardship " by reason of the notice, *inasmuch as his property is rendered unsaleable and unim-* " *provable thereby*, but these results arise in fact from the passing of the statute and not " from the giving of the notice. The statute places the land at the option of the Commis- " sioners, the title is at once affected thereby, and the motive for improvement taken away. " No material addition to these inconveniences arises from the Commissioners opening a " treaty for the purchase of the land so placed at their option by giving the notice, &c."

On a careful review of these and other authorities, cited at the argument, I consider that in this case, upon the service of the notice upon Mr. Stewart *an obligation was imposed upon him to give up his estate to the Commissioner of Public Lands which he could not get rid of by any subsequent alienation or disposition;* that to hold any other doctrine would be contrary to reason and subversive of the statute, and so defeat and render utterly unattainable its declared objects. But, then again, it is argued that inside of all these decisions, and their reason and objects, a special right ought to be declared to belong to, or be retained by, Mr. Stewart, in view of the declared policy and objects of the Land Purchase Act, to the extent of retaining or exercising acts of ownership over 500 acres of leasehold land to be selected by him, and over 1,000 acres of wilderness land to be actually in his occupation, because it is said that the Act does not extend to the case of persons " receiving or entitled to receive the rents, issues, or profits of any " Township lands (not exceeding 500 acres in the aggregate) or to any proprietor whose " lands, in his actual use and occupation, and untenanted, do not exceed 1,000 acres." But what is really the policy of the Act on both the points of leasehold and unleased land? The policy as regards leasehold, is unreservedly declared in it to be based upon its being desirable " to convert leasehold tenures into freehold estates, upon terms just " and equitable to the tenants as well as to the proprietors." This is only a new declaration of the same policy which was in 1853 by statute 16 Vict. cap. 18 (yet unrepealed, and which may for brevity be called The Land Purchase Act, 1853), set forth as the avowed policy of the Legislature at the time in passing that Act, which remains yet the law of the land, and which, being referred to in the present Land Purchase Act, 1875, and the land to be acquired under the latter, having to be held under the provisions contained in " The Land Purchase Act, 1853," may well be also considered in arriving at a conclusion as to the objects, intentions, and policy of the Act now under consideration. The Land Purchase Act, 1853, in its preamble, also declares that one of its objects is " to enable the tenantry to convert their leasehold tenures into freehold " estates." Would the allowing Mr. Stewart, the owner of a much larger estate, to

to retain 500 acres of rent paying land be in accordance with that policy?—I cannot see that it would. Would it be in accordance with it to allow a proprietor invidiously to single out and keep back from the benefits expected to be derived from the conversion of their leaseholds into freeholds, some five or six particular farms or tenants? I fail to see that it would. On the contrary, to allow of such a reservation would be to recognise *pro tanto* a defeat of the objects of the statute, and as it is to be supposed that the Commissioners allowed compensation for the whole, there can be no just, as well as no legal grounds, it appears to me, for putting the construction contended for on this branch of the Act. The declaration that the Act was not to extend to persons receiving the rents of Township lands not exceeding 500 acres in the aggregate, was, as I view, inserted merely to guard the Government from being involved in innumerable proceedings against small holders, and incurring inadequate expense and loss of time in so doing, but by no means to give a right to large proprietors invidiously to select out and retain a few tenants from participating in the objects of the Act. It seems, however, that Mr. Stewart has lands not exceeding 1,000 acres (constituting his homestead at Strathgartney) *in his actual use and occupation, and untenanted* (except by himself), and this, I think, it would be quite consistent with the policy of the Act to allow him to retain. The present Land Purchase Act, 1875, grasps within its objects cultivated leased lands, and also, unoccupied or untenanted and wilderness land, although it has no precise declaration of policy with respect to the latter contained in it. But the Land Purchase Act, 1853, declares that it would conduce to the prosperity of the Island if wilderness and unoccupied lands were rendered more easily attainable for settlers, than at present is the case. That object and policy, it appears to me, would be well answered by holding that the proprietor himself, in actual personal occupation, being a settler in the fullest sense of the word, is entitled to retain for his own use this his farm and homestead. It would, it seems to me, be harsh to put any other construction upon this point, or to hold that the Legislature, without declaring it in express terms, intended to oust a man from his homestead and family residence. Therefore, I think (and the Government appear to concede the point) that Mr. Stewart is entitled to retain his estate at Strathgartney to the extent of 1,000 acres, if it amounts to that, in his own occupation, untenanted; but I hold as invalid all and every disposition or conveyance of any other part of his estate, made or attempted to be made by him, since the notice of the Government's intention to purchase the estate was served upon him. The 2nd objection—that the money paid into the Treasury by the Government, under the 30th section of the Act, ought to have been, but was not so paid in in legal tender money, has already been alluded to by the Chief Justice. It was conceded on the argument, that the sum so paid in was not in legal tender money. At the first hearing of the case I was strongly inclined to the opinion that this question had been raised prematurely, and that if the Government had placed in the Treasurer's hands the amount in such a shape as to enable him, in his opinion, safely to certify that he had the necessary funds to the credit of the estate, that the matter should remain so until the final day of payment to the proprietor arrived. For, until the proprietor had proved himself entitled to the satisfaction of the Supreme Court, to receive the sum awarded, and receive its certificate, he was not in a position to demand payment from the Treasurer; *non constat;* but that some other party as a mortgagor or incumbrancer might be entitled to receive the payment; and should the question respecting the money as a legal tender be allowed to be raised by one whose right to payment had not been tested and might never arrive? There can be no doubt, however, that any party who ultimately obtains the certificate of the Court will, if he elect, be entitled to demand payment in legal tender money, and therefore, as to some extent this point may only after all involve a matter of time, as to when legal money will have to be found, I shall not refuse to concur in making the order in this branch of the case, that before further proceedings for conveyance be taken by the Public Trustee, it shall be certified by the Treasurer that he has the sum awarded, in his hands, to the credit of this estate, in legal tender money of this Province.

Mr. Justice Hensley delivered an unwritten judgment in the cases of Miss Sullivan and Ponsonby Fane, concurring with the Chief Justice and Mr. Justice Peters.

APPENDIX.

Land Purchase Act, 1875.

(Reserved for Governor-General's assent, 27th April 1875. Proclamation ssued by Lieutenant-Governor, 30th June 1875, declaring that the Administrator of the Government of Canada in Council had assented to this Act on 15th June 1875.)

Preamble. Whereas the Government of Prince Edward Island is entitled to receive from the Government of the Dominion of Canada the sum of Eight Hundred Thousand Dollars, under the terms on which this Island became confederated with Canada, for the purpose of enabling the Government of this Province to purchase the Township Lands held by the Proprietors in this Island.

And whereas it is very desirable to convert the Leasehold tenures into Freehold Estates upon terms just and equitable to the tenants as well as to the proprietors.

Be it enacted by the Lieutenant-Governor, Council, and Assembly, as follows :—

Definition of the term Proprietor. I. The terms and expressions herein-after mentioned, which, in their ordinary signification, have a more confined or different meaning, shall in this Act, except where the nature of the provisions in the context shall exclude such construction, be interpreted as follows: "Proprietor" shall be construed to include and extend to any person for the time being receiving or entitled to receive the rents, issues, or profits of any Township lands in this Island (exceeding five hundred acres in the aggregate) in his or their own right, or as Trustee, Guardian, Executor, or Administrator for any other person or persons, or as a husband in right of or together with his wife, and whether such lands are leased or unleased, occupied or unoccupied, cultivated or wilderness, provided that nothing herein contained shall be construed to affect any proprietor whose lands in his actual use and occupation, and untenanted, do not exceed one thousand acres.

The Commissioner of Public Lands to notify Proprietor of intention to purchase his lands. II. The Commissioner of Public Lands shall, within sixty days after the publication of the Governor-General's assent to this Act in the *Canada Gazette*, notify any proprietor or proprietors that the Government of this Province intend to purchase his or their Township lands under this Act.

What is to be sufficient notification to Proprietor. III. Every such notification may be served upon a proprietor either by delivering the same to him personally, or in his absence from this Island to his known agent or attorney, or in any case by posting the same to such proprietor through the General Post Office in Charlottetown, addressed to him at his last known place of abode, and by publishing a copy of such notice for twelve consecutive weeks in the *Royal Gazette* of this Province, and the posting of such notice and the publication of the same as aforesaid shall be deemed and held to be as good and valid notice as if the same had been personally served on such proprietor or his known agent.

Amount to be paid to Proprietor—how ascertained. IV. The amount of money to be paid to any such proprietor shall be found and ascertained by three Commissioners, or any two of them, to be appointed as herein-after mentioned.

Government of P. E. I. to appoint a Commissioner. V. The Lieutenant-Governor of this Island in Council shall, within sixty days after the publication of the Governor-General's assent to this Act in the *Canada Gazette*, nominate and appoint one Commissioner on behalf of the Government of this Island, for the purposes of this Act.

In case of vacancy to appoint a successor. VI. In case of the death, neglect, refusal, or incapacity to act of the Commissioner so appointed by the Lieutenant-Governor in Council, he shall appoint a successor or successors as often as may be.

Governor-General to appoint a second Commissioner. VII. The Governor-General of the Dominion of Canada in Council shall, within sixty days after the publication of his assent as aforesaid, nominate and appoint the second Commissioner for the purposes of this Act.

In case of vacancy to appoint a successor. VIII. In case of the death, neglect, refusal, or incapacity to act of the Commissioner so appointed by the Governor-General in Council, he shall in Council nominate and appoint a successor or successors as often as the case may be.

Proprietor to appoint third Commissioner. IX. Any proprietor who shall have been notified under the second section of this Act shall, within sixty days thereafter, nominate and appoint the third Commissioner on his

Proviso.

or her behalf to act with the Commissioners so to be appointed as aforesaid: Provided that such Commissioner shall not be deemed to be a Commissioner under the terms of this Act until he shall have first given notice to the Commissioner of Public Lands of such his appointment.

Vacancy of third Commissioner—how filled.

X. In case of the death, neglect, refusal, or incapacity to act of the Commissioner so to be appointed by any proprietor as aforesaid, any such proprietor may appoint a successor or successors as often as may be.

Supreme Court to appoint third Commissioner in case Proprietor refuses to do so.

XI. If any proprietor shall not, within sixty days after the notification prescribed in the third section of this Act, appoint a Commissioner, or should not within thirty days of the death, neglect, refusal, or incompetency to act of any Commissioner appointed by any proprietor as aforesaid appoint his successor, then and in either of such cases application shall be made by the Commissioner of Public Lands to the Supreme Court of Judicature of this Island to nominate a Commissioner on behalf of such proprietor.

No precedence to be claimed by one Commissioner over the others.

XII. No precedence shall be claimed by one Commissioner over the others of them merely because he may have been appointed by the Governor-General in Council, or the Lieutenant-Governor in Council, but the three Commissioners so appointed as aforesaid shall elect which one of them shall preside at the meeting of such Commission, to take into consideration the matters referred to them under the provisions of this Act: Provided that in case the said Commissioners shall be unable to agree upon a presiding Commissioner, then such presiding Commissioner shall be the Commissioner who shall have been appointed by the Governor-General in Council.

Presiding Commissioner—how appointed.

Proviso.

Commissioner of Public Lands to be notified.

XIII. When any third Commissioner shall have been appointed, the said Commissioners, or any two of them, shall, within thirty days after the appointment of the said third Commissioner, notify the Commissioner of Public Lands in writing of such their appointment.

Notice of sitting of Commissioners.

XIV. The said Commissioners, or any two of them, shall, upon the petition of the Commissioner of Public Lands, publish a notice in the *Royal Gazette* newspaper of this Province of a day and place in Charlottetown when and whereat they will hear and consider the matters referred to them under the provisions of this Act, relating to the lands of the proprietor whose Commissioner shall have been appointed, and in such notice shall specify the name of the proprietor or proprietors whose lands the Commissioners are empowered to value, and such notice shall be published for three consecutive weeks in the *Royal Gazette* newspaper of this Island.

Commissioner of Public Lands to be claimant in all proceedings.

XV. All proceedings under this Act shall be entitled, in the name of the then Commissioner of Public Lands, who in his official capacity as such Commissioner of Public Lands shall be and be considered the claimant or applicant, and shall be subject to process of contempt, and shall be personally liable for the performance of all duties imposed upon him under the provisions of this Act, and for the costs of all proceedings, in as full and ample a manner in all respects as though he were a Plaintiff in the Supreme Court, or a Complainant in the Court of Chancery in any suit in either of said Courts.

Supreme Court to appoint guardian for lunatic Proprietor.

XVI. In case any proprietor shall be a lunatic, a person of unsound mind, or a minor, or labouring under any other disability, and has no guardian, an application shall be made by the Commissioner of Public Lands to the Supreme Court for the appointment of a guardian for such lunatic, person of unsound mind, or a minor, or such other person.

Supreme Court to appoint guardian *ad litem*.

XVII. Upon such application the said Court may appoint a guardian, *ad litem*, for such lunatic, person of unsound mind, minor, or other person.

Commissioner of Public Lands to appoint a Solicitor.

XVIII. The Commissioner of Public Lands may appoint a solicitor to act for him in all matters required to be performed by him under the provisions of this Act, and any proprietor or party in anywise interested in the matter then pending may be represented by Counsel before the Commissioners.

Subpœnas.

XIX. Either party shall have power to issue Subpœnas and Subpœnas *duces tecum* to witnesses to give evidence before the Commissioners, which Subpœnas shall be issued from the Prothonotary's office upon payment of the usual fees.

Commissioners to have power to examine on oath.

XX. The said Commissioners shall have full power and authority to examine, on oath, any person who shall appear before them, either as a party interested or as a witness, and to summon before them all persons whom they or any two of them may deem it expedient to examine upon the matters submitted to their consideration, and the facts which they may require to ascertain, in order to carry this Act into effect, and to require any such person to bring with him and produce before them any book, paper, plan, instrument, document, or thing mentioned in such Subpœna, and necessary for the purposes of this Act; and if any person so subpœnaed shall refuse or neglect to appear

To compel production of books, &c.

before them, or appearing, shall refuse to answer any lawful question put to him, or to produce any such book, paper, plan, instrument, document, or thing, whatsoever, which may be in his possession or under his control, and which he shall have been required by such Subpœna to bring with him or to produce, such persons shall, for every such neglect or refusal, incur a penalty of not less than five dollars, or more than fifty dollars, payable to Her Majesty, to be recovered with costs in the names of the Commissioners, or of any or either of them, upon bill, information, or plaint, before the Supreme Court, and in default of payment, shall be imprisoned for a period not exceeding three months, in addition to any punishment for contempt which the Supreme Court may inflict.

Penalty for refusing.

XXI. The Commissioners when appointed as aforesaid shall make oath before one of the Judges of the Supreme Court that they will well and faithfully discharge the duties imposed upon them under this Act and adjudicate on all matters coming before them, to the best of their judgment, without fear, favor, or affection.

Commissioners to be sworn.

XXII. If any proprietor shall either by himself, his agent, guardian, committee, trustee or counsel, neglect to appear before the Commissioners pursuant to notice, under the provisions of this Act, the Commissioners shall be at liberty to proceed *ex parte*.

When Commissioners may proceed *ex parte*.

XXIII. The Commissioners may, upon application made by any proprietor upon cause being shown to the satisfaction of the Commissioners, grant an extension of time to such proprietor before entering upon the hearing of such proceedings before them.

Commissioners may extend time to Proprietor before entering on case.

XXIV. It shall be lawful for the Commissioners to be appointed under the provisions of this Act to enter upon all lands concerning which they shall be empowered to adjudicate in order to make such examination thereof as may be necessary without being subjected in respect thereof to any obstruction or prosecution and with the right to command the assistance of all Justices of the Peace and others, in order to enter and make such examination in case of opposition.

Commissioners to have power to enter on lands.

XXV. The Commissioners or any two of them may adjourn the hearing of any matter from time to time as they may deem necessary and expedient.

Commissioners may adjourn proceedings.

XXVI. After hearing the evidence adduced before them the Commissioners or any two of them shall award the sum due to such proprietor as the compensation or price to which he shall be entitled by reason of his being divested of his lands and all interest therein and thereto.

After hearing evidence, Commissioners to award compensation.

XXVII. The fact of the purchase or sale of the lands of any proprietor being compulsory and not voluntary shall not entitle any such proprietor to any compensation by reason of such compulsory purchase or sale, the object of this Act being to pay every proprietor a fair indemnity or equivalent for the value of his interest and no more.

No allowance to be made on account of sale being compulsory.

XXVIII. In estimating the amount of compensation to be paid to any proprietor for his interest or right to any lands the Commissioners shall take the following facts or circumstances into their consideration:

Matters to be taken into consideration by Commissioners in estimating compensation to Proprietors.

(*a.*) The price at which other proprietors in this Island have heretofore sold their lands to the Government.

(*b.*) The number of acres under lease in the estate or lands they are valuing, the length of the leases on such estates; the rents reserved by such leases; the arrears of rent and the years over which they extend, and the reasonable probability of their being recovered.

(*c.*) The number of acres of vacant or unleased lands, their quality and value to the proprietor.

(*d.*) (1.) The gross rental actually paid by the tenants on any estate yearly for the previous six years; (2) the expenses and charges connected with and incidental to the recovery of such rent, and its receipts by the proprietor; and (3) the actual net receipts of the proprietor for the said period of six years.

(*e.*) The number of acres possessed or occupied by any persons who have not attorned to or paid rent to the proprietor, and who claim to hold such land adversely to such proprietor, and the reasonable probabilities and expenses of the proprietor sustaining his claim against such persons holding adversely in a court of law, shall each and all be elements to be taken into consideration by the said Commissioners in estimating the value of such proprietor's lands; (1) the conditions of the original grants from the crown; (2) the performance or non-performance of those conditions; (3) the effects of such non-performance and how far the despatches from the English Colonial Secretaries to the different Lieutenant Governors of this island, or other action of the Crown or Government, have operated as waivers of any forfeitures; (*f.*) the quit rents reserved in the original grants, and how far the payment of the same have been waived or remitted by the Crown.

Award of Commissioners—how to be published.

XXIX. When the award shall have been made by the Commissioners or any two of them, the same shall be published by delivering a copy thereof to the proprietor, or to his agent, duly authorised as aforesaid, and filing the original in the office of the Prothonotary of the Supreme Court.

Government to pay amount of award into Colonial Treasury.

XXX. At the expiration of sixty days from such publication of the award, the Government shall pay into the Colonial Treasury the sum so awarded by the said Commissioners, or any two of them, to the credit of the suit or proceeding in which such award shall have been made.

Notice to Prothonotary that award has been paid in.

XXXI. The Colonial Treasurer shall, immediately after such payment, deliver to the Prothonotary of the Supreme Court, a certificate of the amount paid into the Treasury, as aforesaid, which certificate shall be in the form of this Act, annexed, marked A.

Public Trustee to be appointed.

XXXII. It shall be the duty of the Lieutenant Governor in Council to nominate a fit and proper person to be called the "public trustee," who, when the sum so awarded to the proprietor as aforesaid shall have been paid into the Treasury as aforesaid, shall (unless restrained by the Supreme Court, or a Judge thereof), after fourteen days' notice to the proprietor or his agent authorised as aforesaid, execute a conveyance of the estate of such proprietor to the Commissioner of Public Lands, which said conveyance may be in the form to this Act annexed, marked B.

Conveyance from Public Trustee to vest Lands in Commissioner of Public Lands to be held and disposed of under provisions of 16th Vict. cap. 18.

XXXIII. The conveyance mentioned in the last preceding section shall vest in the Commissioner of Public Lands an absolute and indefeasible estate of fee simple, free from all incumbrances of every description, and shall be held by and disposed of by him as if such lands had been purchased under the provisions of the Act passed in the sixteenth year of the reign of Her present Majesty, Queen Victoria, chapter eighteen, intituled "An Act for the purchase of lands on behalf of the Government of Prince Edward "Island, and to regulate the sale and management thereof, and for other purposes therein "mentioned," and shall also vest in the Commissioner of Public Lands all arrears of rent due upon the said lands.

Appointment of Public Trustee to be under great seal.

XXXIV. The appointment of the Public Trustee shall be under the great seal of this province, and shall be registered in the office of the Registrar of Deeds.

Party entitled to sum awarded—how to proceed to obtain the same.

XXXV. The party entitled to the sum awarded or any party or parties entitled to a portion of such sum for the lands so conveyed by the Public Trustee to the Commissioner of Public Lands, may receive the same by obtaining an order from the Supreme Court, upon presenting a petition, and upon proving his or their right to such sum, or any portion thereof: Provided that the Commissioner of Public Lands be made a party to such application.

Supreme Court to make proper persons parties to proceedings.

XXXVI. It shall be the duty of the Supreme Court upon any such application, to require that all proper persons shall be made parties to such proceedings, and to apportion such sums in such shares and proportions as such parties shall be entitled to receive.

Conveyance from Public Trustee to exonerate Government from all claims on the estate.

XXXVII. When the full sum for any lands shall have been paid into the Treasury, and the conveyance executed by the Public Trustee to the Commissioner of Public Lands, the Government shall be absolutely exonerated from all liability to any person or persons whomsoever who may claim any estate so conveyed as aforesaid, or any interest therein except as is mentioned in the next section.

Party obtaining amount of award to be paid his costs for application.

XXXVIII. The party obtaining an order from the Supreme Court for any money to which he shall be entitled for his estate so vested in the Commissioner of Public Lands, or any interest therein, shall be indemnified in his costs incurred in making such application: Provided always, that no party shall receive or be entitled to any costs who has made an unsuccessful application to the court for an order for the money so paid into the Treasury, as aforesaid, but such party shall pay to and reimburse the party who has received such order, such costs as he shall have been put to by reason of such unsuccessful application.

Proviso.

When lands taken from any Trustees purchase money—how to be invested.

XXXIX. When any estate shall be vested in the Commissioner of Public Lands under the provisions of this Act, which shall, previous thereto, have been vested in the name or names of any trustee or trustees, the Court shall order the purchase money of such estate to be invested in the name or names of such trustee or trustees upon trust to pay the interest arising from such investment, in the same manner and to the same parties as the rents, issues, and profits of the said land were payable previously to the sale thereof.

Supreme Court to make orders as to investment of pur-

XL. It shall be the duty of the said Court to make such order as to the investment and payment of the purchase money and the interest arising therefrom, as may meet the circumstances of each case, so that widows entitled to dower, infants, judgment

creditors, mortgagees, and all persons entitled to any estate or interest in the said lands, or the rents arising or to arise therefrom, or the arrears thereof, may receive either the interest of the said purchase money when invested, as aforesaid, or the purchase money or shares thereof, as shall represent their estate or interest in said lands, or the rents arising therefrom, or the arrears thereof, previous to the vesting of the same in the Commissioner of Public Lands, as aforesaid.

chase money to meet the case of dower estates, &c.

XLI. In every case when such lands have been vested in trustees, the purchase money shall be paid to such trustees, to hold the same upon the same trusts as they held the lands; and when there are no trustees the Supreme Court shall have power to appoint trustees, and shall, by an order or rule of Court declare the trusts upon which they shall hold the said purchase money, and the manner in which the purchase money shall be invested.

Trustees to hold purchase money upon same trusts as they held the lands.

XLII. The Supreme Court shall have power to dismiss any Trustee or Trustees so appointed by them, and appoint a Trustee or Trustees in the room or stead of the Trustees so dismissed.

When Supreme Court may appoint Trustees. Supreme Court may dismiss Trustees.

XLIII. The said Commissioners shall be paid by the Government of this Province for their services under and by virtue of this Act, ten dollars per day for each and every day such Commissioners shall actually be engaged in duties imposed upon them by this Act or by any reference in pursuance thereof, and such other reasonable remuneration as the Lieutenant Governor in Council shall consider them entitled to.

Remuneration of Commissioners.

XLIV. The Public Trustee shall be allowed such remuneration for his services as the Lieutenant Governor in Council shall deem him entitled to under the circumstances of each case, which shall be paid by the Government of this Province.

Remuneration of Trustee.

XLV. No award made by the said Commissioners, or any two of them, shall be held or deemed to be invalid or void for any reason, defect, or informality whatsoever, but the Supreme Court shall have power, on the application of either the Commissioner of Public Lands or the proprietor, to remit to the Commissioners any award which shall have been made by them to correct any error or informality or omission made in their award: Provided always that any such application to the Supreme Court to remit such award to the Commissioners shall be made within thirty days after the publication thereof as aforesaid; and provided further, that in case any such award is remitted back to the Commissioners, they shall have full power to revise and re-execute the same, and their powers shall not be held to have ceased by reason of their executing their first award, and in no case shall any appeal lie from any such award either to the Supreme Court, the Court of Chancery, or any other legal tribunal; nor shall any such award or the proceedings before such Commissioners be removed or taken into or inquired into by any Court by *Certiorari*, or any other process, but with the exception of the aforesaid power given to such Supreme Court to remit back the matter to such Commissioners, their award shall be binding, final and conclusive on all parties.

When Supreme Court may remit award to Commissioners.

When application to remit shall be made.

Commissioners have power to revise award.

No appeal.

No Certiorari or other process.

XLVI. The Supreme Court shall have power to make any rules and regulations not inconsistent with the provisions of this Act, for the purpose of more effectually carrying out the requirements of this Act, which rules shall be published in the *Royal Gazette* newspaper.

Supreme Court power to make rules.

XLVII. Inasmuch as it is expedient that the matters referred to the Supreme Court under this Act, shall not interfere with the ordinary business of the said Court during term time, the said Court may, from time to time, appoint sessions for the purpose of hearing proceedings under this Act: provided always, that one week's notice of such session be given in the *Royal Gazette* newspaper.

Supreme Court may appoint special sessions.

XLVIII. If the Commissioner of Public Lands shall neglect to proceed with any case pending before the Commissioners, or shall refuse to petition the Commissioners to appoint a time and place to hear the matters referred to them under the thirteenth section of this Act, when requested by any proprietor who shall have appointed a Commissioner so to do, or who shall delay or impede the proceedings in any way, such Commissioner of Public Lands shall, upon proof thereof, before the Supreme Court, be punished by fine or imprisonment.

Penalty on Commissioner of Public Lands for neglecting to proceed under the provisions of this Act.

XLIX. After the Commissioner of Public Lands shall have given notice to any proprietor, under the second section of this Act, no such proprietor to whom such notice shall have been given, shall maintain any action at law for the recovery of more than the current year and subsequent accruing rents due to him from any tenant or occupier upon his lands, and in case any such action is brought against any tenant by any such proprietor, such tenant may plead this Act in bar of such action, nor shall any execution issue on any judgment recovered or to be recovered for rent by any such proprietor

After Commissioner of Public Lands shall have given notice to Proprietor, he shall not collect more than current year and subsequent accruing rents.

against any tenant on this Island except the current year's rent and subsequent accruing rents, and in case any such execution is issued the Supreme Court or a Judge thereof, shall, on application, stay any such execution until the award of the said Commissioners shall be made.

Title of Act.

L. This Act shall be cited and known as "The Land Purchase Act, 1875."

Schedule A.

(A.)

Dominion of Canada,
Province of Prince Edward Island,

In the matter of the application of X. Y., the Commissioner of Public Lands for the purchase of the estate of A. B., and "The Land Purchase Act, 1875."

Form of notice from Treasurer to Prothonotary that amount awarded has been paid into treasury.

I certify that the sum of has been placed to the credit of the account opened in the above matter, which said amount will be paid to such party or parties as the Supreme Court shall, by rule in the above matter, order and direct.

Dated this day of 187 .

Treasurer.

Schedule B.

(B.)

Dominion of Canada,
Province of Prince Edward Island,

In the matter of X. Y., the Commissioner of Public Lands for the purchase of the estate of A. B., and "The Land Purchase Act, 1875."

Form of Deed from Public Trustee to Commissioner of Public Lands.

Know all men by these presents that I, C. D., the Public Trustee, duly appointed under the provisions of "The Land Purchase Act, 1875," do by these presents and by virtue of this Act, (the sum of $ having been paid into the Treasury of this Province in the above matter as appears by the certificate of the Treasurer of said Province hereto annexed), grant unto X. Y., the Commissioner of Public Lands and his successors in office, all that (here describe land particularly by metes and bounds) to have and to hold the same, together with all arrears of rent due thereon to the said X. Y., Commissioner of Public Lands, and his successors in office in trust for such purposes, and subject to such powers, provisions, regulations, and authorities in every respect, and to be managed and disposed of in such modes as are set forth, declared, and contained in an Act passed in the sixteenth year of the reign of Her present Majesty Queen Victoria, cap. 18, intituled "An Act for the purchase of lands on behalf of the "Government of Prince Edward Island, and to regulate the sale and management "thereof, and for other purposes therein mentioned," and of all other Acts in amendment thereof and concerning lands purchased thereunder by and conveyed to the Commissioner of Public Lands therein mentioned.

In witness whereof I have hereunto set my hand and seal this day of A.D. 187

Witness to the execution by the said C. D.

No. 2.

The EARL OF DUFFERIN to the EARL OF CARNARVON.

Canada, Government House, Ottawa,
March 2nd, 1876.

My Lord, (Received March 16th.)

I now beg leave to enclose for your Lordship's information the judgment* of the Prince Edward Island Supreme Court on the appeals from the awards of the Land Act Commissioners, as well as a Memorandum thereon by the Right Honourable Hugh Childers, one of the Commissioners.

I have, &c.

To the Right Hon. the Earl of Carnarvon, &c. &c. &c. (Signed) DUFFERIN.

* Inclosure in No. 1.

MEMORANDUM.

This memorandum is written at the request of his Excellency the Governor-General, with a view to explain what is the effect of the recent judgment of the Supreme Court in Prince Edward Island on the proceedings of the Land Commission of which I was lately chairman.

I have no official papers to refer to, except a copy of the Act and of the judgment, but I will state what has happened as accurately as I can.

We decided in September last ten cases, eight unanimously, two by a majority of the Commission. Of the eight unanimous awards six have been accepted, one has been referred back for reconsideration on a point of minor detail (not argued before the Commission) and one (Mr. Ponsonby Fane's), although appealed from, has (I hear from the Provincial Secretary) been now accepted on condition of immediate payment. Of the two awards, as to which the Commissioners were not unanimous, one (Mr. Stewart's) has been accepted in substance; but Mr. Stewart has raised two points of law, namely, whether certain lands recently conveyed to his sons should be included in the sale, and whether the payment should be in gold or Dominion notes. On the first point the Court decided against him, and as to the second I learn from the Provincial Secretary that arrangements have been made for payment in gold.

There remains therefore only one case, Miss Sulivan's, affected by the judgment of the Supreme Court, and in this case our award has been set aside. In order to explain the exact purport of the judgment I must refer to the Act and to our proceedings under it. The object of the Act was to revest in the Crown the township lands belonging to proprietors who owned beyond a certain amount, and ultimately to convert the leasehold tenure into freehold estate. The amount of money to be paid to each proprietor was to be ascertained by commissioners, who were empowered to take evidence on oath, and to compel the attendance of witnesses and the production of papers; and the 26th section of the Act provided that "after hearing the evidence adduced before them, the Commissioners shall award the sum due to the proprietor as the price to which he shall be "entitled by reason of his being divested of his lands, and all interest therein and "thereto." By the 30th section the Government were required to pay the sum so awarded into the Treasury, and a special office of Public Trustee was created whose duty was to execute in due time the conveyance of the estate to the Commissioner of Public Lands. By the 30th and 36th sections the Supreme Court were to decide who might be the party or parties entitled to receive the sums awarded or portions of them; and by the 45th section no award could be held to be invalid or void for any reason, defect, or informality whatever; but the Supreme Court was given power to remit to the Commissioners any award in order to correct any informality or omissions. Every other appeal was taken away. By the 28th section the Commissioners in estimating the amount to be paid to any proprietor were to take into their consideration certain special facts and circumstances. These were:—

(*a.*) The price paid by Government for other lands.
(*b.*) The particulars of the lease, the amount of arrears, and the probability of their being recovered.
(*c.*) The particulars of the unleased land.
(*d.*) The actual gross receipts, charges, and net receipts.
(*e.*) The acreage claimed to be held adversely, and the probabilities of the proprietor enforcing his claim. The conditions of the original grants, and their performance, the effects of non-performance, and how far any forfeitures had been waived. The quit rents reserved, and how far their payment had been remitted.

The Commissioners fully complied with all these requirements. They inquired into all the circumstances to which their attention had been directed by the Act, hearing counsel and examining witnesses on each point; and after the cases were closed they awarded the sums due to each proprietor in the following form:—

"In the matter of the application of *A. B.*, the Commissioner of Public Lands for the purchase of the estate of *C. D.*, and the Land Purchase Act, 1875, the sum awarded under section 26 of the said Act is dollars."

The Supreme Court of Prince Edward Island (nominally in two, practically in one, Miss Sulivan's case,) have not remitted the awards to the Commissioners for reconsideration, but have gone so far as to set them aside altogether. This they have done on the following grounds as to each:—

The award does not express that judgment was given pursuant to the Act.

It should have shown that the Commissioners decided the several preliminary matters, a, b, c, d, &c., they had to consider.

It did not decide the question of quit rents.

It did not set out the metes and bounds of the farms, or show in respect of what particular parcels of land leased or unleased the compensation was respectively given.

It should have stated whether any breach in the original conditions of the grants was waived or not.

It should have shown the names of all persons who had acquired, in the opinion of the Commissioners, a title by possession to any of the proprietor's land, and how much in each case.

It should have shown the names of all squatters and how much land each held for less than twenty years.

It should have set out the name of every tenant, how much he was in arrear, and what was allowed in respect of the arrears in each case.

In other words the Court have held that instead of simply awarding in each case the sum due to the proprietor, it was our duty to incorporate in our awards some hundreds, if not thousands, of decisions on matters, some small, some great, some of law, some of fact, and some of mixed law and fact, apparently in order that each of them might, if necessary, be considered by the Supreme Court in the event of proceedings being taken to send back an award for correction.

Unless this judgment should be reversed on appeal I must of course assume that it is sound in law; but had the Commission imagined that it was their duty to frame their awards as the Court have indicated, I do not think that any one of us would have consented to act. Our inquiries for instance, in Miss Sulivan's and Mr. Stewart's cases, instead of occupying four days each would have extended to at least as many months. It would have been necessary to appoint an army of surveyors to examine minutely the proprietor's accounts for many years past with above a thousand farmers, and to inquire on the spot as to the actual particulars of squatting operations by several hundred persons during the last thirty years.

Whatever may be the merits or demerits of the Act, it would be absolutely unworkable under the interpretation put upon it by the Supreme Court.

What I undertook to do at Lord Dufferin's request was simply to decide as between the proprietors and the Local Government, what sum should be awarded to each for their estates, and I was told that if I devoted a month or six weeks to this inquiry I should be able to settle the principal cases with the assistance of a Commissioner appointed by each side. I completed what I had undertaken, and it is satisfactory to find that in every case but one our award has been virtually accepted. In that one case it has been set aside, not upon the merits, but on technical grounds, which if foreseen would (I fear) have prevented the Act from being put into operation at all.

I learn, however, that the Island Government have decided to appeal to the Supreme Court of the Dominion. I hope that this may lead to some settlement with Miss Sulivan, as I cannot conceive any Commissioners being likely to increase the amount of the award in her case.

I may add that the form of the award, to which the Supreme Court takes exception, was only settled after much consideration, and on the advice of a most experienced lawyer, formerly a judge, whom I was able (unofficially) to consult.

Before we commenced our proceedings I was anxious that the Supreme Court, which under the 46th section had power to make "any rules for the purpose of more effectually "carrying out the requirements of the Act," should adopt some rules for the guidance of the Commissioners, inasmuch as though not necessarily lawyers, we had to act as a Court, and I pressed this on one of the judges. No such rules, however, were made, and all our regulations, notices, and forms, were settled by ourselves.

Ottawa, 1st March, 1876. HUGH C. E. CHILDERS.

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