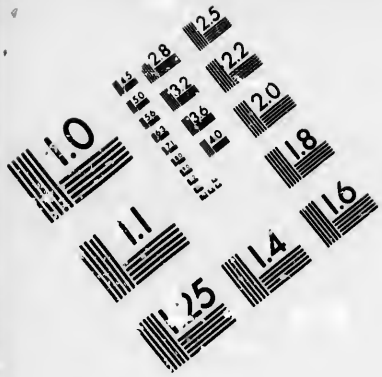

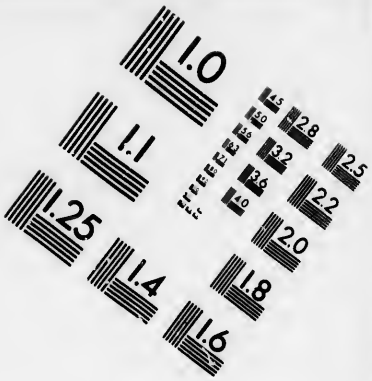

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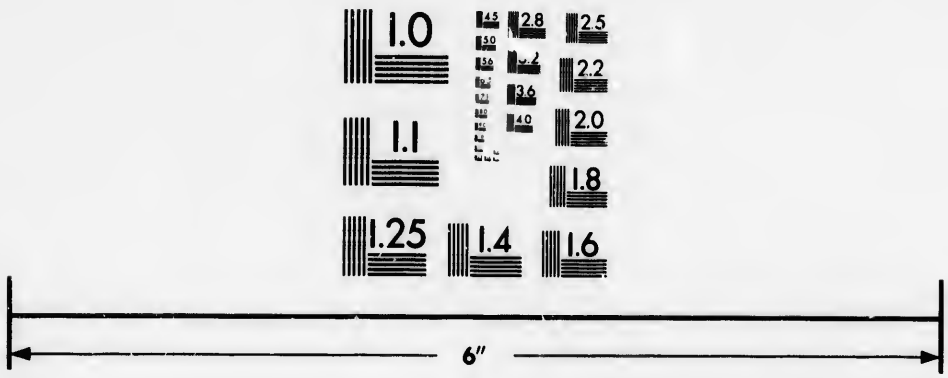

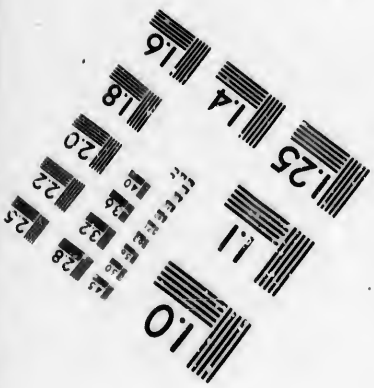

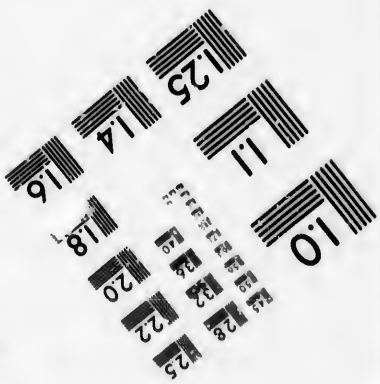

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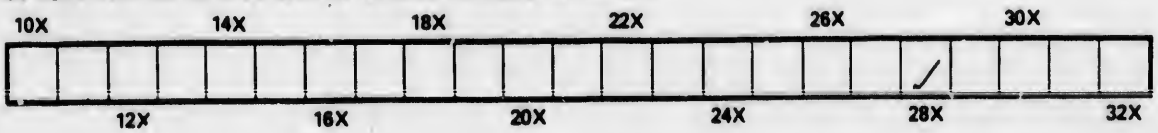

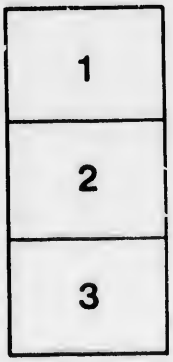

MR. LAPORTE'S CASE.

STATEMENT

OF THE

CASE OF MR. JEAN B. LAPORTE,

HEARD BEFORE HIS EXCELLENCY LORD METCALFE AND THE HONOURABLE THE EXECUTIVE COUNCIL OF CANADA, NOW UNDER RECONSIDERATION OF THE RIGHT HONOURABLE LORD STANLEY, H. M. SECRETARY OF STATE.

THE merits of the judicial contestation, between the Crown and the Ursuline Nuns, are sufficiently developed in Mr. Laporte's printed case, and the Appendix, of which copies were transmitted to Mr. Ogden.

Although the course, directed by the Governor General, that the parties should be heard by Counsel, before His Excellency and the Executive Council, was unprecedented, and seemed unnecessary, after the Attorney General's report in Laporte's favour, it was deemed expedient that Counsel should accordingly appear in support of Mr. Laporte's claim.

The only point in issue, as appeared to Laporte's Counsel, was, the condition, attached to the grant ordered by Lord Stanley, in favour of Laporte, in these words, "assuming that no legal "question can arise as to the right of the Crown to the property," (Appendix No. V,) and the impression in that respect was confirmed by the remonstrance of the Nuns, against Lord Stanley's decision, (Appendix No. VI.) wherein they obstinately and disingenuously persevere in denying the title of the Crown to the Beach, while they inconsistently pray for a grant of the property, in dispute, at the hands of the Crown, on the score of their being the Riparian owners.

"Mais vos suppliantes representent de plus, que même d'apres *le strict droit*, les rivages des "fleuves appartiennent à ceux qui sont propriétaires des héritages voisins, sauf toutefois qu'ils sont "assujettis à un droit *de servitude naturelle*, qui consiste dans la faculté que chaque individu a, de "passer et repasser librement sur ces rivages, pour se rendre au fleuve, pour les fins de commerce "et de la navigation."

"*Ils ne sont donc pas une véritable propriété* dans les mains du souverain, mais ce n'est qu'un "depôt qui lui est confié; et il n'exerce sur ces rivages que les droits qui appartiennent à tous ses "sujets qu'il represente."

"Si ces principes sont corrects, il s'en suivera que le souverain, en alienant les rivages du fleuve, "ne peut ceder plus de droit qu'il n'a lui même," &c.

Therefore it created no little surprise, when the Counsel, in the name of the Nuns, but in fact on behalf of the Messrs. Fraser's, their assigns, descanted on the subject *ab initio*.

His arguments may be thus su[illegible]ctly stated:—

That the Nuns purchased fro[illegible] De Villeray in 1725, their purchase being bounded by the River St. Lawrence.

That the Nuns, by their title, had the *droit de pê[illegible]he*, which was emblematical of possession, and gave them a right to preference.

That the name of the place, *l'Ance des Mères*, evinced that the Beach had been always considered theirs.

That, in 1808, the Nuns took possession, and granted an emphyteutic lease to Messrs. Coltman. Counsel gave definition of the emphyteutic contract, and stated that all improvements, at its termination, devolved on lessor.

In 1816, assignment of lease by Coltman to Laporte, who ceased in 1827 to pay rent to the Nuns.

In 1827, information for intrusion exhibited by the Attorney General *pro Rege*.

That the laws and usages of the country, established their right of ownership in the Beach, in consequence of their holding the Riparian property.

20th April, 1831, judgment of the King's Bench awarded the property, as well above as below high water mark, to the Crown.

That in 1839 the Crown granted a lease of the property to Laporte for 21 years.

30th July, 1840—Judgment of the Court of Appeals restricting the right of the Crown to the Beach, a space between high and low water mark.

Stated the report of Council of 11th May, 1841, (confirmed by Lord Sydenham 11th June, 1841,) and of the 13th December, 1841, confirmed by Sir Richard Jackson, whereby it was decided that the Beach should be granted on certain terms to Laporte.

That the Nuns, having submitted a memorial to the Right Honourable Lord Stanley on this subject, his Lordship's decision was unfavourable to them; whereupon they addressed the House of Assembly, for relief, in 1842, which body, since that period, had not taken any definitive measures.

That the Nuns do not pretend to be the proprietors of the Beach, but the Crown is not the owner of it, having, for the public, only a servitude on it for navigation, &c.

Stated the report of Governor and Council of 20th September, 1843 (drawn by Mr. Solicitor General Aylwin,) with the subsidiary reports of 11th November and 13th December, 1843; subverting the former reports of the year 1841.

Recited—Lord Stanley's dispatch of June, 1844, and the romonstrance of Nuns of 16th September, 1844, in answer to it.

That, as Riparian proprietors, the Nuns, in law, equity and usage, were entitled to the Beach; that the *rives*, *rivages* of the river belong to the subject, and of the sea to the Crown. As to law and equity he cited.—Angell on Tide Waters, 197-232.—(Levingston's and President Jefferson's Case.)

3 Toullier, p. 24.—Nouv. Den. Domaine de la Couronne § V. p. 609.—Delaporte, Pandectes Francaises V. p. 10.—Merlin Qu. de droit Vol. XIV. Rivages, p. 116.

As to usage—it was contended that there was no precedent of a grant of the beach, except to Riparian proprietors, and Lord Stanley's dispatch, 11th September, 1833, about the granting of beach lots was relied on.

That Laporte's possession was merely that of a tenant, and not of an owner. That, if the title were confirmed to Laporte, the line of division between high water mark and the Riparian property of the Nuns, would intersect many buildings belonging to persons, who had built on the Beach reclaimed from the tide waters.

It was argued by Laporte's Counsel, as follows:—That all questions as to title, and the circumstances of the case prior to the Judgment of the Court of Appeals, (30th July, 1840,) should be discarded; for, as that judgment had not been appealed from, but had been acquiesced in, by the Nuns, it constituted *res judicata*, and the property in the Beach was irrevocably confirmed to the Crown.

That the conduct of the Nuns was rather inexplicable, for, while they, by their written remonstrance of September, 1844, asserted their right to the Beach (which they erroneously call *rivages*:—see Lefevre, vol. 1, p. 16, n. a.) as Riparian owners, and, despite the judgment of the Court of Appeals, deny the Title of the Crown, their Counsel had orally admitted, though in an equivocal manner, the right of the Crown.

That Laporte, although not possessed of Royal Letters Patent, should be regarded as the absolute owner of the property, by grant from the Crown, which was bound, *ex debito justitiæ*, to confirm the contract by an instrument of record.

That his title was founded on the Reports of 11th May and 13th December, 1841, with the confirmatory dispatch of Lord Stanley of June 1844; and on the facts of Laporte's having been continued in possession by the Inspector General of the Royal Domain, and other officers who acted on behalf of the Crown, who fixed boundaries of the grant to Laporte, and admeasured its superficial contents, conformably to the said reports, and of Laporte's subsequent acceptance of the terms, and his readiness and offer to pay the purchase money.

That two questions only should be brought under the consideration of His Excellency and the Council:—

1st. Whether the objections and arguments contained in the adverse report of the Council, of 26th September, 1843, were tenable.

2nd. Whether there be any reason to doubt the Title of the Crown to the Beach of navigable waters in Lower Canada.

As to the first question, Counsel took up the prominent statements and arguments of that Report, as follows:—

That the argument, founded on the nature of the Emphyteutic Lease, might hold good, if the land leased below high water mark belonged to the Nuns; but *that* property was adjudged to the Crown, and the improvements made on it belonged to Laporte; who, according to our law, could not be dispossessed, even by the Crown, without indemnification for them.

That to deny the value of the information given by Laporte was unjust; for, until he urged the matter on the attention of the Provincial Authorities, the interests of the Crown, as to that valuable part of the Royal Domain, had been neglected, and the question, as to the Title of the Crown to it, had been suffered to continue a matter of doubt; his conduct strikingly, and favourably to him, contrasting with the demeanour of the Nuns, who concealed and pertinaciously disputed, and even to this moment impeach, the Title of the Crown

That as to the existence of an invariable rule to grant the Beach to the Riparian owner, nothing could be so untrue, or more destitute of any foundation, because grants of Beach Lots, adjoining the Riparian land of the Nuns of the Hotel Dieu, River St. Charles, were made to Messrs. John Anderson, John Bell, Jacob Pozer, James M'Callum, against one of whom (Anderson), those Nuns had brought an action of ejectment, founded on their supposed right, which was afterwards hopelessly abandoned; and other Beach Lots in the Port of Quebec, adjoining the land of the Seminary, had been granted to Messrs. Bell and Sheppard. Besides, it appeared from the highest authority on such a subject, (that of the Hon. F. W. Primrose, Inspector General of the Queen's Domain, Appendix, No. 9), that the invariable rule had been, to grant the Beach to the persons who had improved and reclaimed it.

That, with respect to the position that the Nuns were on the same footing as other subjects as to preference in this matter, its truth was very questionable; and even if such equality existed, it might be applicable to those parts of the navigable waters, where agricultural operations were carried on down to their margin, but not to the Beach, in such a port as that of Quebec; and particularly as the Riparian property of the Nuns was a cliff of 300 feet altitude, rendering all access to the waters of the St. Lawrence impracticable; and that it was the duty of the Crown to grant such property to persons in secular life, who would render it useful for the purposes of commerce and navigation, and not to a body in Mortmain, composed of members, supposed in their seclusion from civil life, to be dead to all worldly and speculative pursuits.

That, as to the sale of Laporte being incomplete, as pretended by the Report, enough had been said on his part to shew, that, independently of the preference due to him as having improved and reclaimed the soil, all the elements required to form a valid Contract of Sale, were there. *Res pretium et consensus.* And that, even looking at the orders in Council of 1841, and Lord Stanley's dispatch, and the proceedings of the Government, as only *a promise of sale*, the laws of Lower Canada regard a promise of sale, followed by tradition and the possession of the grantee, as equivalent to an absolute sale.

That the argument derived from the order in Council, of the sale being made by Government to Laporte *sans garantie*, by which the weakness of the Crown's title was admitted, is unfounded and absurd; for, how could the title of the Crown to the Beach be reasonably, for a moment, doubted, when it had been solemnly confirmed by two concurring judgments, unreversed to that extent, and recognized and acquiesced in by those very Nuns? In truth, the object of the recommendation of the Council, was to avoid incurring costs, by investing Laporte with all the rights of the Crown, leaving him, at his own expense, judicially or otherwise, to ascertain the true line of division between high water mark, and the adjoining property of the Nuns.

That the plan proposed by the Report (26th September, 1843) of exposing the property to public sale, would not only be illegal and unjust, as depriving Laporte of his vested preference and title, but would be futile and onerous to the Government, who would be obliged to indemnify Laporte for his improvements, and could not, without oppression, withhold from him the price to be obtained, which would represent the property substantially, if not formally by Letters Patent granted to him.

Counsel further said that the conduct of the Nuns, throughout the whole transaction, exhibited gross *malafides*. They disputed, and still impugn, the title of the Crown, while they seek, from H. M. Government, a grant of the property,—by which they would enrich themselves, out of Laporte's improvements, made at his sole expense, on the property of the Crown, and defeat his claim, preferable not only according to the practice prevalent as to grants of such property, but in law and equity, and under every imaginable view of the case. Conscious of the infirmities of

their pretended title to the Beach, the Nuns, having sold to the Messrs. Fraser, 11th June, 1832, between the date of the Judgment in the King's Bench and the Judgment of the Court of Appeals, the Beach-Lot in question, caused Messrs. Frasers to execute a deed of the same date—whereby they were absolved from any obligation of *garantie*, and the Messrs. Frasers bound themselves to prosecute the appeal in the name of the Nuns, but free of expense to them.

That these Contracts, on the part of the Nuns, constituted a sale of a disputed Title, *droits litigieux*, which was severely reprobated, by our Civil Law, and penally condemned by the Statute of 32 Henry VIII, ch. 9.

That this piece of misconduct, if not of moral turpitude of the Nuns, was the consummation of their bad faith; and they forfeited all pretensions to the consideration or favour of the Queen's Government.

On the second point, Laporte's Counsel observed that the perverse adherence of the Nuns to their supposed title to the Beach, notwithstanding the judicial decisions to the contrary, had its source in a total misapprehension of the terms *rive*, *rivages*, *ripa*, erroneously and inexcusably applied to signify the *Beach* or space between high and low water-mark; whereas, the *rive* or *ripa* forms no part of the *Beach* (for which word the French language did not afford any precisely corresponding term) but is the bank (*bord*) of the river.

He argued that, according to the French Law, from time immemorial, the right of the Crown, founded on the Roman Law, to Rivers, Ports and Highways, had always been recognized; so much so that, by the provisions of the Ordinance of 1669—and of the Edict of 1683 (not in force in Lower Canada), such property was declared inalienable; but all the grants of the Crown, of such property, made, according to the prerogative as it had existed, previous to the Ordinance de Moulins 1566, were ratified. So that the condition of our law is that of France before the Ordinance 1566.

The property of the Crown in Rivers extended over the *alveus*, the whole bed between the banks, *ripæ*.

" *Tribus flumina constant, alveo ripis aqua.*" The *ripa*, *rive*, is the bank and margin of the river, down to high-water mark. *Ripa est quæ plenissimum flumen coutinet;* and it undoubtedly belongs to the proprietor of the adjoining soil, subject to a servitude or easement in favour of Her Majesty's subject, for the purposes of navigation and land carriage.

" Riparum quoque usus publicus est jure gentium, sicut ipsius fluminis. Itaque naves ad eas " appellere, funes arboribus ibi natis religare, onus aliquod in his reponere, cuilibet liberum est, " sicut per issum flumen navigare; sed proprietas earum illorum est, quorum prædüs haerent; " qua de causa, arbores quoque in eisdem natæ eorumdem sunt"—*Justinian Institutes—Lib. II. tit.* 1, § 4.

These are the relative rights of the owner of the *ripa* and of the public, and their very nature and the mode of enjoying them, wholly exclude any supposition that the land, on which they are to be exercised, is at any period covered with water.

The reservation of the road or *chemin de hallage* of twenty four feet, above high water mark, existed from time immemorial along the banks of rivers in France (see Ordinance Charles VI. in 1415), and it was a *public highway*, vested like all other highways and rivers, in the Crown.* It formed a space or band of public property, between the soil of the adjoining owner, and high water mark, all below which belonged to the Crown.

That, upon the same principle, the rights, of the Crown to the space of 24 feet above the highest tides, had been asserted and recognised in Canada, as necessary for the purposes of navigation and communication by land carriage—(Ordinances, 13 May, 1665, apud edits et Ordonnances II, p. 126)—and the erection of any fence within that space, by the adjoining proprietor, was declared a nuisance, abateable by any subject of the Crown.

Independently of the decisions in the Provincial Courts in the contest between the Crown and the Nuns as to the Beach, and of a recent judgment of the Queen's Bench at Quebec, in a case between other parties, Sir James Stuart, Baronet, presiding, rendered in June, 1845, (see Appendix, No. X.), fully establishing the indubitable right of the Crown to property of that description; we find that the Provincial Legislature, by Statute of Will. IV. c. 38, a temporary act made permanent by 6 Will. IV., c. 55, exercised the ownership of the public in the Beach of the Saint Lawrence between high and low water mark. That the assertion by the Nuns, that the Cove, where the Beach in question is situated, was always known as *l'Ance des Mères* is

* Loisel Inst. Cout. Tit. 2. Art. 5, 6. Daviel Tr. des Cours d'Eau

untrue, for the name had always, until the Nuns chose to alter it for the purposes of this present controversy, been written *l'Ance des Mers*, or the Cove of Tides.

Respecting the authors cited for the Nuns, Laporte's Counsel observed, that the passage quoted from Angell on Tide Waters, had reference to the case of the *Battures* on the Mississippi, (between Mr. Livingston and President Jefferson, contained in Hall's Law Journal, Vol. 5,) and was a case of alluvion,—an authority wholly inapplicable,—for the alluvial property is not covered by the tide, and, being an increment of the *ripa* from natural causes, it became the property of the Riparian owner, subject to public use, according to the admitted principle of the Roman Law, governing as well in that country as in Lower Canada.

With the exception of Toullier, the other authors cited were also treating the matter of alluvion—a subject quite distinct from that now under consideration.

Then as to Toullier, he is only speaking of "*terres situées le long des rivières*"—of which (*de ces terres*), under the old Government, greedy persons had obtained grants from the Crown, in fraud of the true proprietors.

But, assuming that Toullier's language can be distorted to signify that the preferable rights of the Riparian owner were admitted by the French Government, as a general principle in the country parts; it cannot reasonably be contended, that this rule alone shall not be subject to any exceptions, although the situation of the property, in the greatest port of British North America, and peculiar circumstances affecting the case, would, from expedience and in justice, withdraw the matter from the operation of such rule.

And so the general rule laid down by Lord Stanley's dispatch, 11th of September, 1833, is not inconsistent with his determination on Laporte's claim, being an exception justified by considerations of paramount importance.

A. BUCHANAN.

Montreal, 10th October, 1845.

Memorandum of Authorities in the matter of J. B. Laporte, Claiming a Beach Lot.

As to the right of the Crown to all Rivers, their Beds, including the Beach, and to all Ports, Highways, &c.

"Tout ce qui est destiné et delaissé à l'usage du public est censé appartenir au Roi. Telle-
" ment que la loi *adeo—paragraph si insula D. de acq. rer. dom.* et autres semblables; qui attri-
" buent la propriété des isles, javeaux, atterissemens, et assablissemens, aux détenteurs et proprié-
" taires des héritages adjacens, proches et contigus des fleuves et rivières navigables, ne sont reçus
" ni pratiqué en France."—*Bacquet, Dts. de Just. ch.* 21, *Nos.* 4 & 6.

"Aujourd'hui en France, les fleuves navigables appartiennent au Roi. (Cites Bouteiller, Bac-
" quet, le Bret. de la Souv.)"—*Depeisses, vol.* iii. *p.* 212 *des Droits Seig. tit.* 5, *art.* 3, *sec.* 9.

"On distingue deux sortes de fleuves, les navigables et non-navigables. Les premiers appar-
" tiennent au Roi, avec tout ce qu'il renferme, comme isles, moulins, ponts, pêches, &c."—*Renauld Dict. des Fiefs et Fleures*, No. 130.

"Cette déclaration, du mois d'Avril 1683, veut donc que particuliers puissent jouir des fleuves
" navigables, lorsqu'ils sont fondés en titres authentiques anterieurs à l'année 1566, ou en possession
" dont le commencement remonte avant la dite année, pourvu qu'elle ait été continuée sans
" trouble."—*Renauld ibid No.* 133. *Dictionnaire du Domaine v. Riviere*, 490 to the same effect.

"Le Procureur du Roi en la Cour de Parlement de Paris (c'est Chopin qui parle) demanda
" que les isles du Rhone et de la Saone fussent réunis au domaine du Roi, et tous les moulins à
" bled, les pêches, et autres droits qui étaient établis en l'une et en l'autre rive de ces deux
" rivières, contre l'Archevêque et clergé de Lyon. Mais la Cour ordonne, sur une si grande af-
" faire, qu'elle verrait les titres, et en délibererait plus amplement, et cependant donna mainlevée
" provisionnelle pour l'archevêque, et clergé de Lyon, par arrêt du 2 Oct. 1536. Quoique cet
" arrêt ne soit que provisoire, cependant il est vrai de dire qu'" juge très disertement que le
" Roi peut aliener le sol des rivières navigables, comme toutes les autres parties de ses do-
" maines."—*Henrion de Pansey, Dissert. Feodales des Eaux, sec.* ii. *p.* 641.

"Les fleuves et les rivières navigables appartiennent incontestablement au Roi, et font partie
" du domaine de sa Couronne."—*Boutaric Inst. de Justin. Liv.* ii. *tit.* 1. *sec.* 2.

" La propriété des *rivages*, ou *marchepied* des rivières navigables, appartiennent au Roi, à " qui nous avons dit que la propriété même des rivières appartenait."—*Boutaric, ibid sec.* 4. He is commenting on the words *Riparum quoque usus publicus est &c.*

After stating that navigable rivers belong to the Crown, De-la-Planche considers its various parts. Of the bed, which naturally includes the beach, he says: " Par rapport au canal dans le- " quel coule la rivière, il ne peut y avoir de difficulté tant qu'elle l'occupe et qu'elle le remplit, " puisque faisant alors partie de la rivière, il en suit nécessairement la destinée."—*Lefevre de la Planche M. du Dom.* i. p. 20, and at p. 21.

" La rivière n'a pas d'agitation semblable (agitation des flots de la mer) ainsi elle n'a *point de* " *rivages à proprement parler ;* car nul doubte *que les terreins que les eaux couvrent sans déborde-* " *ment extraordinaire, ne soit regardé comme faisant partie du lit de la riviere,* et comme tel, ne " soit du rang des choses publiques."—*Lefevre t.* i. *p.* 26.

" Lorsqu'il est question de définer les cours d'eau qui font partie du domaine public, et d'en " signaler l'entendue matérielle, ce n'est pas simplement le fluide qui passe et se succède sans cesse " jusqu'à ce qu'il soit enfin versé dans la mer, qu'on doit envisager, mais bien le corps du fleuve ou de " la rivière, *avec son lit et ses rivages* contenant le cours des eaux. . . . . On doit regarder comme " *rives* du fleuve, et par consequent comme limites de ce domaine, *les bords* qui servent à contenir " les eaux de la rivière quand elles sont arrivées à leur plus grande élévation sans débordement.— " *Ripa ea putatur esse que plenissimum flumen contiuet.* L. 3, sec 1, de flumimibus, tit. 48, tit. 12. " —*Proudhon, Tr. du Dom. Publique* iii. No. 678."

After saying that the principles of the Roman law govern as to such questions in France, he continues :—" Or la loi Romaine veut que le domaine publique embrasse tout le terrein dominé par " le cours des eaux, et qu'il sétende jusqu'à et compris les bords qui servent à les contenir lorsqu'elles " sont arrivées à leur plus grande élévation. sans etre accidentellement débordées."—*Proudhon. —ibid.* No. 743.

" En France, depuis l'ord. de 1566, sur l'inalienabilité de domaines de la Couronne, et notam- " ment depuis l'ord. sur la marine de 1681, les *bords et rivages* de la mer ont été soustraits à la " propriété privée et la disposition en a été reservée à la nation, à titre de souveraineté . . . . *Il* " *en est de meme* des fleuves et rivieres navigables ou flottables."—*Daviel. des Cours d'Eaux, I. No.* 9, 10, 11.

" Quomodo autem intelligatur alveus esse publici juris ? Die quod omnes gentes isto jure " utuntur, et talia loca sunt publica, et in dominio ejus, qui ibi habet imperium."—*Cœpolla de Servitutibus—Tract II. c.* 34. *No.* 2.

All above high water mark, they (the Roman Jurists) considered as *ripa*, bank ; and all below as *alveus* or bed . . . . . " In our rivers as far as the tide flows, *the Beach* is the *actual*, as well as the nominal *bed* of the river during the half of every day."—*Prest. Jefferson Tract on Levingstone's case of the Battures.—Mississippi.—Hall's Law Journal, V. p.* 49.

" Le lit d'une rivière publique, c'est à dire, de toute rivière dont le cours était perpetuel, était " nécessairement publique, *de meme que l'usage de ses rives.*"—*Compte Tr. de la propriété I. p.* 264.

" La Monarchie absolue, sortie du régime feodale, réclame, comme faisant partie du domaine " de la Couronne, les fleuves et rivières navigables et flottables, et ne reconnait aux particuliers, " que les droits qu'il lui plaira de leur concéder."—*Compte, I.* 279.

" En France, l'obligation imposée aux propriétés riveraines de fournir à la navigation un " chemin de halage, existe depuis les tems les plus reculés. Le reglement de Charles VI., du mois " de Fevrier 1415, constate qu'à cette epoque ce chemin était dû depuis un tems immémorial."— *Compte, I. p.* 347.—*Note* (1.)

Quod autem de *alveo* diximus idem et *de ripa* tenendum est, *quæ pars est extima alvei*, id est quo naturaliter flumen excurrit.—*Grotius, de jure belli et pacis Lib.* ii. c. 8, *s.* 9.

Edits et Orde.—*Arret* II. 126.

Provl. Act. 1 Will. IV. c. 38.

6 Will. IV. c. 55.

Judgment in Q. B. Quebec, June 1845.

Sampson *v.* M'Aulay.

See Appendix X. to Laporte's case before the Governor and Council.

These authorities show beyond the possibility of doubt that, although the bank, *ripa, rive*, of a navigable river, may belong to the subject possessing the adjoining land, the river, its bed (*alveus lit*), being the space between high water mark on either side, together with the *chemin de*

halage of 24 feet, are the absolute property of the Crown. And, therefore, we may, to use Lord Stanley's expression,—" assume that no legal question can arise as to the right of the Crown to " the property."

In England the prerogative right of the Crown is not so extensive, and the Riparian proprietors enjoy greater privileges. See Rex *v.* Smith Doug. 446. (Hale de jure maris pt. i.) ch. 4. p. 11, 12, 13. Chitty on Prerogative, 143, 174.

A. BUCHANAN.

MONTREAL, 10th October, 1845.

LONDON, 34 CHARLES STREET, BERKELEY SQUARE,
15th April, 1846.

SIR,—Before entering upon the questions now to be submitted to your consideration, arising out of the long litigated claims of M. Jean Bte. Laporte and the Ursuline Nuns of Quebec, I beg leave to offer my grateful acknowledgements for the opportunity you have afforded me of doing so.

The merits of the Judicial Contestation between the Crown and the Ursuline Nuns, will be found to be sufficiently developed in M. Laporte's Case and the Appendix, of which, I am informed, copies were transmitted to the Right Honorable Lord Stanley.

Although the course directed by the Governor General, that the parties should be heard by Counsel before His Excellency and the Executive Council, was unprecedented, and seemed uncalled for, after the Attorney General for *Canada East* had reported in M. Laporte's favour, —that gentleman being constitutionally the only legal adviser of His Excellency and of the Council, in respect of all questions of law *in that part of the Province*, it was deemed expedient, as it appears that Counsel should attend in support of Mr. Laporte's claim.

The only point in issue, as appeared to Mr. Laporte's Counsel, was the condition attached to the Grant ordered by Lord Stanley in favor of M. Laporte, in these words, "assuming that no legal question can arise as to the right of the Crown to the property," and the impression in that respect, it will be found, was confirmed by the remonstrance of the Nuns against Lord Stanley's decision,* wherein they obstinately and disingenously persevered in denying the title of the Crown to the Beach, while they inconsistently prayed for a grant of the property in dispute at the hands of the Crown, on the score of their being the Riparian proprietors. " Mais vos suppliantes repre- " sentent de plus, que même d'apres *le strict droit*, les rivages des fleuves, appartiennent à ceux " qui sont proprietaires des heritages voisins, sauf toutefois qu'ils sont assujettis à un droit de " *servitude naturelle*, qui consiste dans la faculté que chaque individu a de passer et repasser, " librement sur ces rivages, pour se rendre au fleuve pour les fins de commerce, et de la navi- " gation."

" *Il ne sont donc pas une veritable propriété* dans les mains du souverain, mais ce n'est qu'un " Depôt qui lui est confié, et il n'exerce sur ces rivages que les droits qui appartiennent à tous ces " sujets qu'il represente."

" Si ces principes sont corrects, il s'en suivera que le souverain, en alienant les rivages du fleuve, " ne peut ceder plus de droit qu'il n'a lui même."

It therefore must have created no little surprise, that the Counsel, in the name of the Nuns, but in fact of the Messrs. Fraser, descanted on the subject *ab initio*.

The arguments of the Nuns may be thus succinctly stated :—

That they purchased from one De Villeray in 1725, their purchase being bounded by the River St. Lawrence.

That by their title, they had the *droit de pêche*, which was emblematical of possession, and gave them a right to preference.

That the name of the place, *l'Anse des Mères*, evinced that the Beach had always been considered theirs.

That, in 1808, they took possession, and granted an emphyteutic lease to Messrs. Coltman.

That in 1816, the Messrs. Coltman assigned their lease to Mr. Laporte, who ceased in 1827 to pay rent to the Nuns.

That in 1827, an information for intrusion was exhibited by the Attorney General *pro Rege*.

That the laws and usages of the colony, established their right of ownership in the Beach, in consequence of their holding the Riparian property.

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*Appendix No. 6.

That on the 20th April, 1831, the Court of King's Bench at Quebec, awarded by its judgment that the property, as well above as below high water mark, to the Crown.

That in 1839 the Crown granted a lease of the property to Laporte for 21 years.

That on the 30th July, 1840, the Court of Appeals by its Judgment restricted the right of the Crown to the Beach, a space between high and low water mark.

That on the 11th May, 1841, it was decided by the Executive Council of the Province, whose Report was confirmed by Lord Sydenham, that the Beach should be granted on certain terms to Laporte.

That on the 13th December, 1841, the same decision was confirmed by Sir Richard Jackson.

That they thereupon submitted a memorial to Lord Stanley.

That his Lordship's decision was unfavourable to them; whereupon in 1842, they addressed the House of Assembly, for relief, which body, since that period, had not taken any definitive measures.

That they do not pretend to be the proprietors of the Beach, but that the Crown is not the owner of it, having, for the public, only a servitude on it for commerce, navigation, &c.

That the Governor and Council by their Report of the 26th September, 1843, and the subsidiary reports of 11th November and 13th December, 1843, subverted the reports of the year 1841.

That on the 16th September 1844, they remonstrated against Lord Stanley's Dispatch of June 1844.

That, as Riparian proprietors, they, in law, equity and usage, were entitled to the Beach.

That the *rives*, *rivages* of the river belong to the subject, and of the sea to the Crown.

That by usage, there was no precedent of a grant of the Beach, except to Riparian proprietors.

That Mr. Laporte's possession was merely that of a tenant, and not of an owner.

That, if the title were confirmed to Mr. Laporte, the line of division between high water mark and the Riparian property of the Nuns, would intersect many buildings belonging to persons, who had built on the Beach reclaimed from the tide waters.

These, Sir, were the grounds relied upon by the Nuns, to entitle them to the favorable consideration of the Crown; and it now becomes my duty to make such comment upon them as I may conceive necessary in the interest of Mr. Laporte. In the first place, I apprehend that all questions, as to the Title of the Crown to the Beach Lot in question between high and low water mark, and the circumstances of the case prior to the judgment of the provincial Court of Appeals, 30th July 1840 must be wholly discarded, for as that judgment had not been appealed from, but acquiesced in, by the Nuns it constituted *Res Judicata*, and the property in the Beach was irrevocably confirmed to the Crown.

Although it may be asserted that Mr. Laporte is not possessed of the Royal Letters Patent, yet I trust it will be in my power to show that he must be regarded as the absolute owner of the property, by grant from the Crown, and that the Crown is bound, *ex debito justitiæ*, to confirm the contract by an instrument of record.

To support this proposition, I beg leave sir, to claim your attentive perusal of the Reports of Council on the 11th May and 13th December 1841, which were subsequently respectively confirmed in Council by the Governors of the Province, and also to the confirmatory Dispatch of Lord Stanley of June 1844, and to the consideration of the additional facts, that Mr. Laporte was continued in the possession of his property by the Inspector General of the Royal Domaine, and other officers who acted on behalf of the Crown, who fixed the boundaries of the grant to him, and admeasured its superficial contents conformably to the said Reports and of Mr. Laporte's subsequent acceptance of the terms, and of his having, as appears by the Report of Her Majesty's Attorney General for Canada East, years since paid the price agreed upon.

Under such circumstances, but two questions can arise:—

1st. Whether the objections and arguments contained in the adverse report of the Council, of 26th September, 1843, are tenable.

2nd. Whether there be any reason to doubt the Title of the Crown to the Beach of navigable waters in Canada East.

On the first point, I would beg to remark that the argument founded on the nature of the Emphyteutic Lease, might hold good, if the land leased below high water mark belonged to the Nuns; but unfortunately for those religious ladies, or rather the Messrs. Fraser, *that* property was adjudged to the Crown, and the improvements made on it belonged to Mr. Laporte; who, accord-

ing to the law of Canada, be it understood, could not be dispossessed, even by the Crown, without being indemnified for them.

That to deny the value of the information given by Laporte was, to say the least, unjust; for, until he urged the matter on the attention of the Provincial Authorities, the interests of the Crown, as to that valuable part of the Royal Domain, had been neglected, and the question, as to the Title of the Crown to it, had been suffered to continue a matter of doubt; his conduct strikingly, and favourably to him, contrasting with the demeanour of those ladies who concealed and pertinaciously disputed, and even to this moment impeach, the Title of the Crown

That as to the existence of any invariable rule to grant the Beach to the riparian owner, nothing could be more untrue, or more destitute of any foundation. Having had the honor to hold the office of Solicitor General, and afterwards of Attorney General, for a period of 17 years, I am enabled to assure you, Sir, that such was not the fact; grants of Beach Lots adjoining the riparian land of the Nuns of the Hôtel Dieu, River St. Charles, were made to Messrs. John Anderson, John Bell, Jacob Pozer, James M'Callum, against one of whom (Anderson) those Nuns had brought an action of ejectment, founded on their supposed right, which they afterwards hopelessly abandoned; and other Beach Lots in the Port of Quebec, adjoining the land of the Seminary, were granted to Messrs. Bell and Sheppard. Besides, it appears from the highest authority on the subject, (that of the Hon. F. W. Primrose, Inspector General of the Queen's Domain, Appendix, No. 9), that the invariable rule had been, to grant the Beach to the persons who had improved and reclaimed it.

That, with respect to the position that the Nuns were on the same footing as other subjects as to preference in this matter, I beg to be permitted to say that the truth of it is very questionable; and even if such equality existed, it might be applicable to those parts of the navigable waters, where agricultural operations were carried on down to their margin, but not to the Beach, in such a port as that of Quebec; and particularly as the Riparian property of the Nuns was a cliff of 360 feet of altitude, rendering all access to the waters of the St. Lawrence impracticable. moreover, I would respectfully contend that it was the duty of the Crown to grant such property to persons in secular life, who would render it useful for the purposes of commerce and navigation, and not to a body in Mortmain, composed of members, supposed in their seclusion from civil life, to be dead to all worldly and speculative pursuits.

That, on the ground urged in the Report, that the sale to Mr. Laporte was incomplete, enough I think has been said on his part to shew, that, independently of the preference due to him as having improved and reclaimed the soil, all the elements required to form a valid Contract of Sale, were there. *Res pretium et consensus.* And that, even looking at the orders in Council of 1841, and Lord Stanley's dispatch, and the proceedings of the Government, as only *a promise of sale*, I venture to assert that no Lawyer conversant with the laws of Lower Canada would hazard his reputation by asserting that those laws do not regard a promise of sale, followed by tradition and the possession of the grantee, as equivalent to an absolute sale.

Another argument has been attempted to be sustained equally unfounded and absurd, to wit: —that the sale made by Government to Mr. Laporte was *sans garantie*, by which the Crown, as it is asserted, admitted the weakness of its title; for, it must not be lost sight of, that the title of the Crown to the Beach was solemnly confirmed by two concurring judgments, unreversed to that extent, and recognized and acquiesced in by those very Nuns. In point of fact, the object of the recommendation of the Council, was clearly to avoid incurring costs, by investing Mr. Laporte with all the rights of the Crown, leaving him, at his own expense, judicially or otherwise, to ascertain the true line of division between high water mark, and the adjoining property of the Nuns.

In respect of the Report of the 26th September, 1843, there remains but one ground upon which I must beg leave further to trouble you. It is upon the plan proposed by that Report, of exposing the property to public sale; this to my mind would not only be illegal and unjust, as depriving Mr. Laporte of his vested preference and title, but would be futile and onerous to the Government, who would necessarily be obliged to indemnify Mr. Laporte for his improvements, and could not, without oppression, withhold from him the price to be obtained, which would represent the property substantially, if not formally by Letters Patent granted to him.

I feel that it is not at all necessary for the interest of Mr. Laporte, that I should indulge in terms of severity on the conduct of the Nuns, throughout the whole transaction; but I cannot refrain from stating that this conduct exhibits gross *malafides*. They disputed, and still impugn, the

title of the Crown, while they seek, from H. M. Government, a grant of the property,—by which they would enrich themselves, out of Mr. Laporte's improvements, made at his sole expense, on the property of the Crown, and defeat his claim, preferable not only according to the invariable practice prevalent as to grants of such property, but in law and equity, and under every imaginable view of the case. Conscious of the infirmities of their pretended title to the Beach, the Nuns having sold to the Messrs. Fraser, 11th June, 1832, between the date of the Judgment in the Court of King's Bench and the Judgment of the Court of Appeals, the Beach-Lot in question, caused the Messrs. Frasers to execute a deed of the same date—and which I am informed is now before you—whereby they were absolved from any obligation of *garantie*, and the Messrs. Frasers bound themselves to prosecute the appeal in the name of the Nuns, but free of expense to them.

That these Contracts, on the part of the Nuns, constituted a sale of a disputed Title, *droits litigieux*, which was severely reprobated, by the Civil Law of Lower Canada, and penally condemned by the Statute, of 32 Henry VIII, ch. 9.

That this piece of conduct, if not of moral turpitude of the Nuns, was the consummation of their bad faith; and they forfeited all pretensions to the consideration or favour of the Queen's Government.

On the second point, I beg leave to argue on behalf of Mr. Laporte, that the perverse adherence of the Nuns to their supposed title to the Beach, notwithstanding the judicial decisions to the contrary, had its source in a total misapprehension of the terms *rive*, *rivages*, *ripa*, erroneously and inexcusably applied to signify the *Beach* or space between high and low water-mark; whereas, the *rive* or *ripa* forms no part of the *Beach* (for which word the French language did not afford any precisely corresponding term) but is the bank (*bord*) of the river.

According to the French Law, from time immemorial, the right of the Crown, founded on the Roman Law, to Rivers, Ports and Highways, had always been recognized; so much so that, by the provisions of the Ordinance of 1669—and of the Edict of 1683 (not in force in Lower Canada), such property was declared inalienable; but all the grants of the Crown, of such property, made, according to the property as it had existed, previous to the Ordinance de Moulins 1566, were ratified. So that the condition of the law of Lower Canada, or Canada East, is that of France before and at the time of the Ordinance 1566.

The property of the Crown in Rivers extended over the *alveus*, the whole bed between the banks, *ripæ*.

"*Tribus flumina constant, alveo ripis aqua.*" The *ripa*, *rive*, is the bank and margin of the river, down to high-water mark. *Ripa est quæ plenissimum flumen continet;* and it undoubtedly belongs to the proprietor of the adjoining soil, subject to a servitude or easement in favour of Her Majesty's subjects, for the purposes of navigation and land carriage.

"Riparum quoque usus publicus est jure gentium, sicut ipsius fluminis. Itaque naves ad eas "appellere, funes arboribus ibi natis religare, onus aliquod in iis reponere, cuilibet liberum est, "sicut per ipsum flumen navigare; sed proprietas earum illorum est, quorum pradiis hærent; "qua de causa, arbores quoque in eisdem natæ eorumdem sunt"—*Justinian Institutes—Lib. II. tit.* 1, § 4.

These are the relative rights of the owner of the *ripa* and of the public, and their very nature and the mode of enjoying them, wholly excludes any supposition that the land, on which they are to be exercised, is at any period covered with water.

The reservation of the road or *chemin de hallage* of twenty four feet, above high water mark, existed from time immemorial along the banks of rivers in France (see Ordinance Charles VI. in 1415), and it was a *public highway*, vested like all other highways and rivers, in the Crown. It formed a space or band of public property, between the soil of the adjoining owner, and high water mark, all below which belonged to the Crown.

That, upon the same principle, the right, of the Crown to the space of 24 feet above the highest tides, has been asserted and recognised in Canada, as necessary for the purposes of navigation and communication by land carriage—(Ordinances, 13 May, 1665,)—and the erection of any fence within that space, by the adjoining proprietor, has been declared a nuisance, abateable by any subject of the Crown.

Independently of the decisions in the Provincial Courts in the contest between the Crown and the Nuns as to the Beach, and of a recent judgment of the Queen's Bench at Quebec, in a case between other parties, Sir James Stuart, Baronet, presiding, rendered in June, 1845, (see

Appendix, No. X.), fully establishing the indubitable right of the Crown to property of that particular description ; it will be found that the Provincial Legislature of Lower Canada, by Statute of 1 Will. IV. c. 38, a temporary act made permanent by 6 Will. IV., c. 55, exercised the ownership of the public in the Beach or strand of the Saint Lawrence between high and low water mark. It is also right to notice, that the assertion by the Nuns, that the Cove, where the Beach in question is situated, was always known as *l'Ance des Mères* is untrue, for the name had always until these Religious Ladies *Les Dames* (*meres*) *Religieuses*, chose to alter it for the purposes of this present controversy, been written *l'Ance des Mers*, or the Cove of the Tides.

Having now fully, and I flatter myself satisfactorily shewn that the legal and equitable right of Mr. Laporte, to claim at the hands of Her Majesty's Government, the confirmation of the sale made to him, by the issuing of letters patent for the Lot in question, and having as clearly demonstrrted the utter worthlessness and total absence of foundation of that of the Nuns or of the Messrs. Fraser, I shall proceed to notice a point patent, as I am informed, upon the face of the proceedings transmitted by the Governor General of Canada, which presents, as I am also informed, an insuperable barrier to the exercise by Her Majesty of Her prerogative to confirm the sale in question, whith is said to be contained in an Act recently passed in Canada, entitled "An "Act for the disposal of public lands."

It is very much to be regretted, and may hereafter be the source of bitter remorse to gentlemen desirous of doing justice; that this point which appears to have originated in the Council, and that, at the outset of their supposed judicial career that, they should not have thought it fit and proper in accordance with the daily practice, which obtains, not only in the Courts of Her Majesty in England, but in the common Law Courts of Lower Canada, where the contending parties have overlooked a point, which the Court considers material, to have called upon the Counsel to speak to it, in order to assist the Court in coming to a proper decision on the point ; such a course would not only have been conformable to universal practice, but would have been in perfect accordance with the maxim of British justice, never to condemn or deprive a party of his rights until he shall have been heard. I regret this the more, as I am persuaded that the learned Counsel who represented Mr. Laporte, and who was so perfectly competent from his legal attainments and knowledge of the laws of Canada, would have had no difficulty in convincing the most scrupulous of that judicial body, had he been heard on the point, that the Act in question conferred no jurisdiction on the Governor and Council, to the exclusion of the Sovereign, in respect to land of the partioular description here contended for.

As it is, I feel myself called upon to do so.

The first objebtion which I beg leave to offer to this enactment is, that it was not passed according to law, to wit in conformity with the provisions of the Act 3 and 4, Victoria c. 35, intituled, "An Act to re-unite the Provinces of Upper and Lower Canada, and for the Government of Canada," and consequently confers no power whatever on the Governor and Council of Canada nor can it as a necessary consequence deprive Her Majesty of any power or authority which she possessed prior to its supposed enactment, that in point of fact, the Act in question is a nullity.

In the first place I beg to call your attention to the fact that on the 18th September 1841, the Governor of the Province being at the point of death, and consequently unable to close the session of Parliament in person, caused a commission to be issued under the Great Seal of the Province, by which he nominated and appointed Major-General John Clitherow to be his Dep ty, in order to express the Royal pleasure in respect of the Bill in question, and of some fifty or sixty other Bills —that Major-General Clitherow was sworn to the faithful discharge of that duty, and having ascended the Throne in the Council Chamber, the Usher of the Black Rod was commanded to proceed to the Legislative Assembly to requi-e that body to attend His Excellency in the Council, where, in the presence of the Deputy Governor and of the Legislative Council and Legislative Assembly, the proper officer presented the said Bill, among others, to His Excellency, and having read aloud the title of the Bills so passed by the two Houses, the Clerk of Parliament in respect to the Bill under consideration, declared that His Excellency reserved the said Bill for the signification of Her Majesty's pleasure thereon. And secondly to the proviso contained in the 40th section, which is as follows : "That nothing herein contained shall be construed to limit or re- "strain the exercise of Her Majesty's prerogative in authorising, and that notwithstanding this Act, "and any other Act or Acts passed in the Parliamhnt of Great Britain, or in the Parliament of the "United Kingdom of Great Britain and Ireland, or of the Legislature of the Province of Quebec, or

" of the Province of Upper or Lower Canada respectively, it shall be lawful for Her Majesty to " authorise the Lieutenant Governor of the Province of Canada to exercise and execute within such " parts of the said Province as Her Majesty shall think fit, notwithstanding the presence of the Governor " within the Province, *such of the powers, functions and authorities*, as well judicial as other, *which* " *before and* at the time of passing this Act, *were and are vested in the Governor, Lieutenant Governor,* " *or person administering the Government of the Provinces of Upper Canada and Lower Canada* " *respectively, or of either of them*, and which from and after the said re-union of the said two Pro- " vinces shall become vested in the Governor of the Province of Canada, and to authorize the " Governor of Canada to assign, depute, substitute and appoint any person or persons jointly or " severally to be his Deputy or Deputies, within *any part or parts* of the Province of Canada, and " in that capacity to exercise, perform and execute during the pleasure of the said Governor such " of the powers, functions and authorities, as well *judicial as other, as before and at the time of the* " *passing of this Act were and are vested in the Governor, Lieutenant Governor, or person admin-* " *istering the Government of the Provinces of Upper and Lower Canada respectively*, and *which*, " from and after the union of the said Provinces, shall become vested in the Governor of the Pro- " vince of Canada."

It is not necessary, I consider, to enquire into the nature of the authority given by Her Majesty to Lord Sydenham, the Governor of the Province of Canada, or whether any authority was given to him in this particular, beyond that contained in the Commission appointing him to be Governor General of Canada, because upon a careful perusal of the said proviso, it will be found that the authority of Her Majesty to be exercised under the reservation therein contained, could only extend to authorise the Governor of the Province of Canada to assign, depute, substitute and appoint, a person to be his Deputy within any *part or parts* of the Province of Canada, and in that capacity exercise, perform, and execute, such of the powers, functions and authorities, as well judicial as other as before and at the time of the *passing* of the Act, were vested in the Governor and Lieutenant Governor of Upper and Lower Canada, *respectively*, and which, after the union of the said Provinces, should become vested in the Governor of the Province of Canada.

A reference to the 44th section shews clearly the extent and nature of the powers to be delegated,—" That all *judicial and ministerial authority* which, before and at the time of the " passing of the Act, were vested in and might be exercised by the Governor, Lieutenant Gover- " nor, &c. of the said Province of Upper Canada, or the members or any number of members of " the Executive Council of the same Province, or was vested in or might be exercised by the " Governor, Lieutenant Governor, &c. &c. of the Province of Lower Canada, should be vested in " and might be exercised by the Governor, &c. &c. of the Province of Canada, and in the mem- " bers or the like number of members of the Executive Council of Canada respectively. And " it was in respect of such judicial and ministerial authorities as were in force in the two " Provinces respectively; that the Parliament intended should be delegated under the authority " of Her Majesty, by the Governor of Canada, to a Deputy or Deputies, and not as regarded any " of the new powers, functions or authorities created or conferred upon him by the Act 3 and 4 " Vict. c. 35.

It therefore follows as a necessary consequence that the Bill in question,* being subject, like all other Bills, passed by the Legislative Council and Assembly to render them capable of becoming Laws on receiving the Royal Assent, whether given through the medium of the Governor, by the Queen herself to presentation to the Governor with all the solemnities required by the Act of Union, and that having been presented for the Royal pleasure to Major General Clitherow, not being at the time, constitutionally or legally invested with legislative authority, although presented precisely and in strict conformity with the usage which obtained in the province of Upper and Lower Canada, when legislating separately under the powers and authority conferred by the Act 31, Geo. 3, c. 31, which are identical with those contained in the Act of Union, became and is null and void.

If this interpretation of the Act of Parliament be correct, the difficulty which appears to have stood in the way of the Council in Canada—the supposed legal existence of the Provincial Act, will happily have been removed; and those gentlemen will be restored to a position which, under any circumstances, could not fail to be most agreeable to their wishes and to their feelings, as it will enable them, to give immediate effect to the commands of the Sovereign, as conveyed by Lord Stanley, and hereafter to congratulate themselves, as being the medium through whom,

* See Appendix, p. 1 3.

justice although injuriously delayed, was at length done to Mr. Laporte, and the good faith and the honour of the Government maintained.

But secondly, supposing the Act to have been passed in due form of law, my next objection is, that the Legislature did not contemplate or intend that its provisions should apply to lands of the particular description now contended for, and that they do not so apply.

Having been a member of the Council where the measure originated, and of the Assembly wherein it was passed, and having a personal knowledge that the Bill was framed by Mr. Sullivan then President of the Executive Council, this gentleman having previously been Commissioner for managing the Crown Lands in Upper Canada, a Province situate about 200 miles above the highest tidal waters, I can safely assert, that so far as the intention of the Legislature was concerned they never contemplated any exclusive control over land of this particular description, nor in any wise to affect it,—that, on the contrary, their object was to extend the provisions (with some necessary alterations) of the Act passed in the province of Upper Canada in the first year of Her Majesty's Reign, bearing the same title, to wit, an Act to provide for the disposal of the public lands in this Province,—to make it applicable to all parts of the Province which had become necessary by reason of the reunion of the two Provinces.

After a careful perusal of this Act, it will be manifest that there is nothing in it to prevent Her Majesty from authorizing the Governor General of Canada to confirm the sale made to Laporte as already directed by Lord Stanley, and to issue letters patent under the Great Seal of the Province for that purpose, notwithstanding any decision to the contrary which has been made by the Governor and Council under that Act.

It has already been decided, that the preferable claim to the Lot in question, was in Mr. Laporte, and that, by the local and imperial authorities, that the sale has been made to him, and the money paid before. As far, therefore, as the faith of the Crown could be pledged, without matter of record the case has been decided, the bargain made, and the contract closed before the Act came into operation.

In vain will be sought a clause in this Act, providing, or even indicating an intention to provide, that a case already determined should be subject to reconsideration and reversal by the Court of the Governor and Council, as constituted under that Act. I apprehend the prerogative of the Crown could not be so limited without express words or necessary implication. Some of the provisions of the Act, it is true, have a retrospective effect, but the clause under which the Nuns seem to have applied as Riparian proprietors, clearly relates to sales made under the authority of that Act. But this sale was made before the Act; and I repeat that there is nothing in it to shew that such sales were to be set aside, or that grants in pursuance of such previous sales were prohibited; there is indeed a clause that all claims for land heretofore allowed shall be commuted for land scrip; but that beyond the shadow of doubt, relates only to general claims for land of indefinite locality, not to that specific claim for a particular lot arising out of a sale, which word also is used in the very same clause as something very different from claim. There are in the Act express provisions made for sales and rights accruing under them, but it is impossible not to perceive that those provisions are clearly to be confined to sales under the Act. But, even supposing those provisions could be extended to previous sales, Mr. Laporte would thereby be entitled to his grant, as having paid his purchase money. If, on the other hand, those provisions do not extend to previous sales, the inference from those provisions also is the same as from every other clause in the Act, viz. that the jurisdiction of the Governor and Council established by that Act does not extend to sales previously made, or to do any thing inconsistent with them, much less to authorize a breach of the public faith, by making it lawful to annul or set aside a sale previously made by the Executive authorities, at a time when it was perfectly competent to them to exercise unrestrictedly the Royal prerogative as to the disposal of the Lot in question. I have already stated, that from personal knowledge the Legislature by the Act in question never had in its contemplation in legislating in regard of what is termed "Public Lands," Lands of the particular description under consideration to wit, the bed of a navigable river between high and low water mark, the word Land might be considered large enough to extend so far; but lots of land of this particular description, are peculiarly situated, and the right of the Crown to them *is qualified by and subject to the rights of all Her Majesty's subjects*, which are in most cases far more important; but that, on the contrary, the object the Legislature had in view, was to extend the pre-existing provisions of law, the Act passed in the first year of Her Majesty's reign in Upper Canada to United Canada to wit, in respect of the waste demesne of the Crown, as were usually

the subject of grant or sale to settlers, militiamen and others, and consequently no clause or words properly adapted to ports and the beds of rivers is to be found in the Act,—the provision made for "public places" seems clearly to exclude land between high and low water mark, being for the site of market places, gaols, &c., and for other like public purposes.

That this is the proper interpretation to be given to the Act; I beg most respectfully to refer to the proclamation or notice published by the Governor General and Council under the authority by which the price of such public lands has been fixed to wit, in Canada West 8s. per acre—Canada East 6s.;—no mention whatever being made of lands sold by the foot in the bed of the river.

If this Act is to be held applicable to the beds of rivers and havens, this inconvenience would follow that any District Agent might sell them, and the Crown be obliged to convey them by its Letters Patent.

I would here, sir, beg leave to call your attention to a most important point in considering this subject. That the right of the Crown to the soil of the navigable rivers, lakes, and estuaries in Canada, is of *Imperial* as well as Provincial interest, and is so subservient to the rights of all Her Majesty's subjects throughout the Empire, that unless the Act contain certain express terms peculiarly applicable to the Beach between high and low water mark, it would, I humbly conceive, be most unreasonable and inconvenient to introduce by construction such an application.

A Sovereign and Imperial prerogative in which all subjects have an interest, should not, by the interpretation of such an enactment be transferred to a Colonial Council.

I have the honour to be

Sir,

Your most obedient humble Servant,

C. R. OGDEN.

APPENDIX.

I think the presentation of all Acts with the solemnities adverted to, (in the Act 3 and 4 Vict. c. 35), is requisite to render them capable of becoming laws on receiving the Royal Assent, whether given through the medium of the Governor, or by the Queen herself upon a reservation.

I do not think the Provincial Act intituled "An Act for the disposal of public lands"—applies to the lands in question. They belong to the Crown in a very different right from the waste lands, which appear to me to have been alone within the meaning of the Act. I think the payment of the money amounted to a purchase, and that it was not intended to disturb purchasers. I think, therefore, a patent would be good.

M. D. HILL,
44 *Chancery Lane.*

I am of opinion, that the Provincial Act for the disposal of public lands does not preclude the Crown from issuing in favor of Mr. Laporte, a patent to the effect and for the purpose referred to. I conceive that the land in question cannot be considered as "the public land," which the Act is intended to effect, none of its provisions appearing to me to have any reference to the particular description of land, but its provisions being addressed to lands of a different character, and to be disposed of and dealt with in a manner and for purposes altogether different, and in particular, I conceive that this land as affected by a *previous obligation*, under the contract with the Executive, and the payment of the purchase money, cannot be considered as "public land" to be brought within the operation of the Act; and further, that a patent to be issued on the special ground of the equity thus affecting the land could not be considered as "a free grant of public land" within the Act.

T. OLIVER ANDERDON,
Lincolns Inn.

13th April, 1846.

I entirely agree in the above opinion, except only that, though I think the lot in question may still be called public land, I do not, on that account, or on any other, think it at all within the operation of the Act.

H. BLISS,
11 *King's Bench, Walk Temple.*

14th April, 1846.

I am of opinion, that the Governor had no authority to delegate the Legislative power given by the 37th section of the statute (3 and 4 Vict.) to any other person, no authority to appoint a Deputy was given by his Commission, and had this been otherwise, it seems to me (considering the terms of section 40) that he would not have been authorized to appoint one to execute the Legislative functions for the whole of Canada, specified in the 37th section.

THOS. STARKIE.

Temple, 11th April, 1846.