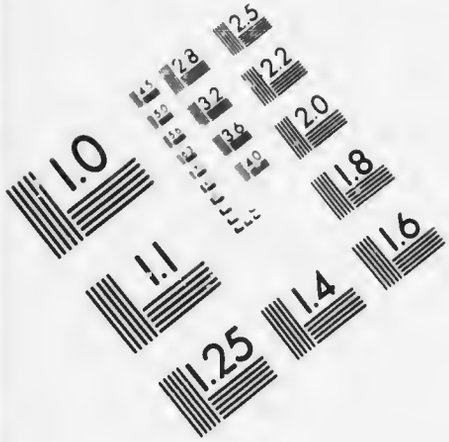


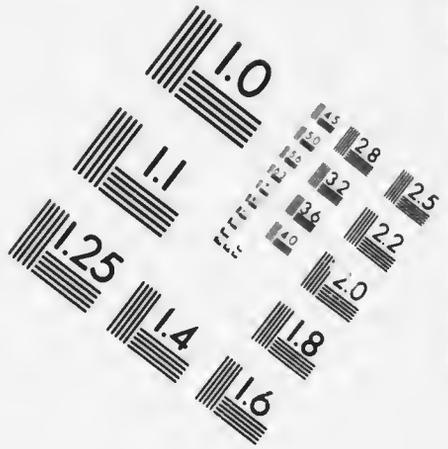


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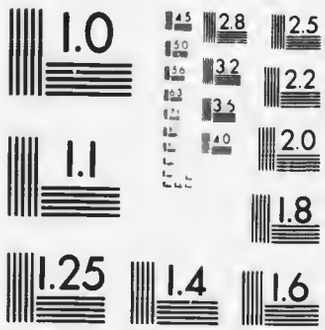


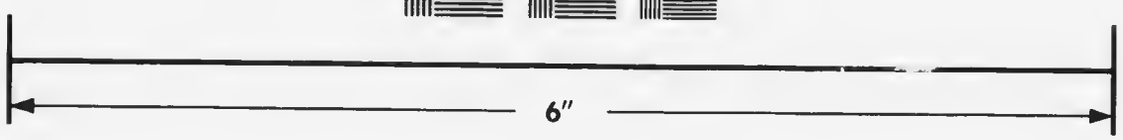


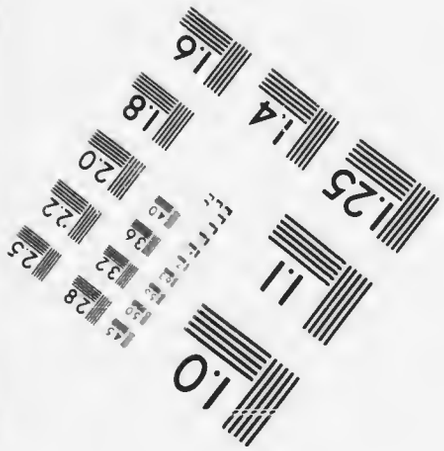


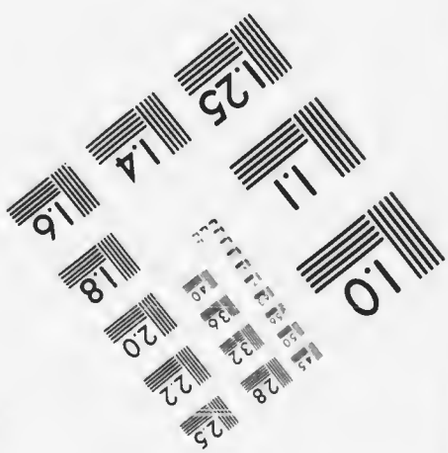


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# JUDGMENT

OF THE

# SUPREME COURT OF CANADA

On the Appeal from the Judgment of the

## SUPREME COURT OF PRINCE EDWARD ISLAND

Setting aside the Award of the Commissioners under

# THE LAND PURCHASE ACT 1875,

In the Case of

## CHARLOTTE ANTONIA SULIVAN.

CHARLOTTETOWN:
*PRINTED BY HENRY LAWSON,*
1877.

# SUPREME COURT OF CANADA.

*In the matter of the application of Francis Kelly, Commissoner of Public Lands, for the purchase of the Estate of Charlotte Antonia Sullivan and the Prince Edward Island Land Purchase Act* 1876

Appeal by the Commissioner of Public Lands of Prince Edward Island.

Present:—Their Lordships Chief Justice RICHARDS, RITCHIE, J., STRONG, J., TACHEREAU, J., and FOURNIER, J.

CHIEF JUSTICE RICHARDS: The Appeal is from the Supreme Court of Prince Edward Island, making absolute a rule to quash the award made and filed in this matter and all subsequent proceedings, wherein it was ordered that the said award be quashed and set aside, and that the said Commissioners of Public Lands pay the costs of the application and the rule. Against this Judgment and order of the Court the Commissioner appeals. On the hearing, the first objection taken on behalf of the respondent, was first discussed, viz: that no appeal lies direct from the Supreme Court of Prince Edward Island to the Supreme Court of Canada.

The latter part of sec. 11, of the Supreme Court of Canada Act, reads as follows: "And when an appeal to the Supreme Court is given from a judgment in any case, it shall always be understood to be given from the Court of last resort in the Province where the judgment was rendered in such case."

The respondent in the factum suggests that the Lieutenant Governor in Council is constituted a Court of Error and Appeal in Prince Edward Island, by various Royal Instructions, and refers to the instructions to Sir John Colborne, accompanying his commission, of 13th Dec., 1838, appointing him Captain-General and Governor-in-Chief of the Island.

The instructions which in the absence of the Captain-General and Governor-in-Chief, were intended for the Lieutenant Governor, or Officer administering the Government for the time

being, are referred to as being in the Appendix to the Journals of the House of Assembly of the Island, A. D. 1851, Appendix F. The Commission to Sir John Colborne is also to be found in the same book.

The twenty-third, and twenty-fourth sections of the instructions were specially referred to on the argument. The first part of the twenty-third section is as follows: "Our will and pleasure is that you do in all civil causes, on application being made to you for that purpose permit and allow appeals from any of the Courts of Common Law in Our said Island of Prince Edward; and you are for that purpose to issue a Writ in the manner which has been usually accustomed, returnable before yourself and the Executive of the said Island of Prince Edward who are to proceed to hear and determine such appeals." It goes on to provide that the Judges of the Court whose judgment is appealed from shall not vote on the appeal, though they may be present and give the reasons of their judgment. It also directs that the sum or value appealed from must exceed £300 sterling, and security be given, and when the sum exceeds £500 sterling and either party is not satisfied with the Judgment of the Governor in Council, an appeal may lie to the Queen in Council, the same to be made within (14) fourteen days and security given; and in certain cases when the rights of the Crown are involved, he is to *admit* an appeal to the Queen in Council, though the value be less than £500 sterling.

The twenty-fourth paragraph directs him to *admit* appeals to the Queen in her Privy Council in cases of fines to a certain amount for misdemeanors.

Clarke's Colonial Law, page 111, was cited, and referring to the position of the North American Colonies the following language is used: "From the Common Law Courts an appeal in the nature of a Writ of Error lies in the first instance to the Court of Error in the Colony, and from them to His Majesty in Council. The Colonial Court of Error is usually composed of the Governor in Council, who decide by a majority."

*In re* Cambridge, 3, Moore, P.C.C, p. 175, an application was made for leave to appeal where the amount was under £300, the Court of Appeal in the Colony only allowing appeals when the amount was over £500; Lord Brougham refers to the existence of the Court of Appeal in the Colony.

The Act 6 Vic. chap. 26, sec. 5 provides that any person dissatisfied with the decree of the Surrogate may appeal "to the Governor in Council." Under section 51, he was to give a bond for the payment of such costs as should be awarded by the Governor in Council. (Sec. 52.) If the decision of the surrogate should be reversed or altered the Governor in Council should make such order touching the subject of the appeal as to them shall seem fit; and by sec. 53, every license to sell real estate "shall be made in such form as the Surrogate (or in case of the decision of the Surrogate being altered, by the Governor in Council) may prescribe."

The Island Statute 21 Geo. 3rd chap 17, relates to the limitations of actions, Sec. 4 provides that "when judgment given for a plaintiff is reversed on a Writ of *Error*, Arrest of Judgment &c., he may commence another action within a year."

The Island Statute 5 Wm. W. Ch. 10 constitutes the Governor in Council a Court for hearing matters of Divorce with full power, authority and jurisdiction. The Court to sit on the second Monday in May in each year. The Governor may appoint the Chief Justice to preside.

*In re* Moncton, A Barrister, 1 Moore P.C.C. p. 455, the Chief Justice of the Island had made an order, in a matter wherein the applicant, a Barrister, was arrested, striking his name off the Rolls as a Barrister. On appeal to the Privy Council the order was set aside.

The sections of the Island Statute 36 Vic. chap 22. from 136 to 158 inclusive and section 230 refer to appeals to a Court of Error or appeal. Sections 136 to 157 inclusive are the same as those in the English Common Law Procedure Act 15 and 16 Vic. chap 76. From Sec. 146 to 167 inclusive they slightly varied to adapt them to the circumstances of the Island. The 136th section begins: "and with respect to proceedings in *Error* be it enacted &c." The 145th section speaks of the setting down of the case for argument in the Court of Error in the manner heretofore used, refers to the Roll being sent into the Court of Error *or appeal* "and the Court of Error or appeal shall thereupon, review the proceedings."

The Appellants on the argument contended that as a matter of fact no such tribunal as a Court of Error and Appeals was ever established in the Island.

There is no official document of any kind showing the establishing of such a Court.

There is no record of any case ever having been brought before such a Court, and the reference in the Island Statute 21 Geo. 3, chap 17, respecting the limitation of actions to a year for bringing an action when cases are reversed in error &c, cannot be considered as establishing or recognizing the establishment of a Court of Appeal as a Court of the last resort from the Supreme Court in the Island.

That the Statute 6 Vic. chap 26, so far as it relates to an appeal from decisions of the Surrogate Court to the Governor in Council does not form them into a general appellate tribunal, but in those special cases allows an appeal to the Governor in Council and directs the Probate Court to carry out the decision of that body when the appeal is made to them. That the reference to appeals in the Act 36 Vic. chap 22, arose from hasty legislation in adopting the general provisions of the Common Law Procedure Act and if no Court of Appeal actually existed would not necessarily establish one.

A copy of the instructions to Governor Patterson was produced at the argument but his Commission was not. It was suggested that application should be made to the Colonial Office for copies of the Commissions and instructions of such Governors as would be likely to throw light on the subject, and any other documents of a like nature, and these documents were to be placed before this Court. Reference was also made on the argument to Stuart's History of Prince Edward Island printed in 1805, and to Haliburton's, Nova Scotia, vol. 2, p. 330. Since the argument, copies of the Commission of Governor Patterson of Prince Edward Island, then the Island of St. John, and of two Commissions to Guy Carleton, Esq., as Governor of the Province of Quebec, and the instructions accompanying each of the Commissions have been filed with the Registrar of the Court. We must, therefore, dispose of the preliminary question with the materials before us.

Copies of the commissions of Lord Monck, Sir John Young, Lord Dufferin, and of the present Governor of the Island, Sir Robert Hodgson, were obtained in Ottawa.

Prince Edward Island, or the Island of St. John as it was then called previous to the year 1764, was under the same Government with the Province of Nova Scotia, and in giving the

boundaries of that Province in the Commission of Wm. Campbell, Esq., commonly called Lord William Campbell, dated 11th August, 1766, appointing him Captain General and Governor of Nova Scotia, the Island of St. John is included. In the Commission to Walter Patterson dated 4th August, 1769, so much of the Patent to Lord William Campbell as mentioned the Island of St. John was revoked, and Patterson was appointed Captain General and Governor in Chief of the Island and Territories adjacent thereto. Under the Commission to Governor Patterson he had power by and with the consent of the Council to erect and establish Courts of Judicature within the Island for the determining and hearing of all causes, civil and criminal, according to law and equity, and to constitute and appoint Judges and Commissioners of Oyer and Terminer for the better administration of Justice. The Commission also refers to such reasonable statutes as should thereafter be made and agreed upon by him with the advice and consent of the Council and Assembly of the Island; and as soon as the situation and circumstances of the Island would admit thereof and as soon as need should require, he was to call general assemblies of the freeholders and planters, to be called the Assembly of the Island, and by the consent of the Council and Assembly he had power to make laws for the good government of the Island. By the instructions he was to constitute a Council to assist him in the administration of the affairs of the Colony, and the Council to have all the powers and privileges and authority usually exercised in the other American Colonies. He was to give his immediate attention to the establishing of such Courts of Judicature as might be found necessary for the administration of Justice. He was to consult the Chief Justice as to the measures proper to be pursued for the purpose, governing himself as far as difference of circumstances would admit by what had been approved and found most advantageous in Nova Scotia. He was to transmit to the Secretary of State copies of all acts, orders, commissions, &c., by virtue of which any Courts, Officers, Jurisdictions, &c., were established. The consideration of calling a Lower House of Assembly could not too early be taken up.

There is no authority in his Commission or instructions directing him to establish a Court of Error or Appeal nor to permit or allow appeals to himself in Council.

The Commission of Guy Carleton, afterwards Lord Dochester, appointing him Governor of the Province of Quebec, dated 12th

April, 1768, is similar to that of Governor Patterson which was dated 4th August, 1769. It appoints him Captain General and Governor-in-Chief of the Province of Quebec. His instructions differ somewhat from those afterwards given to Governor Patterson and as to summoning a general assembly of freeholders as soon as the more pressing affairs of Government would allow, stated as it was impracticable to form such an establishment, then he was to make such rules and regulations with the advice of the Council as should appear to be necessary for the peace, order and good government of the Province. He was to establish Courts of Justice and consider what had been established in that respecting the other Colonies in America, particularly in Nova Scotia. He was to allow appeals from any of the Courts of Common Law to the Governor in Council and for that purpose was to issue a writ *in the manner which has been usually accustomed* before himself and the Council who were to proceed to hear and determine such appeals. (As already stated no such direction or authority as this is contained in the Commission to Governor Patterson.)

He was again appointed Governor of Quebec, his commission being dated 27th Dec., 1775, after the passing of the Imp. Stat. 14 Geo. 3, Ch. 83 for making more effectual provisions for the Government of the Province of Quebec. Following the provisions of the Imp. Stat. he was authorized, with the consent of the Council, to make ordinances for the peace, welfare and good government of the Province, certain exceptions as to ordinances imposing taxes. He had authority to appoint Judges, &c., as in his former Commission.

Under his instructions he was directed by and with the advice of his Council to establish Courts of Justice. Suggestions were made as to the kind and number of Courts, but he was to be guided by circumstances, and amongst other suggestions as to what should be done was the following, viz: "That the Governor and Council should be a *Court* of Civil Jurisdiction for the hearing of appeals from the Judgments of the other Courts when the matter in dispute exceeded ten pounds. The decision of the Governor in Council to be final in cases not exceeding £500 stg. in which case an appeal from the Judgment *to be admitted* to the King in Council."

An ordinance was passed by the Governor in Council on 25th July, 1777, establishing certain courts according to the

suggestions contained in the Royal Instructions, and under that ordinance the Governor in Council was constituted a Court of Appeal. On the margin of the ordinance in the copy in the Library of Parliament here, there is the following entry in manuscript: "Vide ordinance of 17 Sept., 1773 passed on C. J. Hayes going home."

It was the model of this and the next ordinance in some instances. The next ordinance was to regulate the proceedings in the Courts of Civil Judicature in the Province of Quebec. From this it appears that before the Act of 14 Geo. 3, Ch. 2, the commission and instructions under it were given, the Governor in Council had passed an ordinance to establish a *Court* of Appeals in Quebec, and this under a Commission and instructions similar to that under which Governor Patterson was acting in Prince Edward Island, except so far as the power to grant appeals was wanting in the instructions to Governor Patterson which was contained in the instructions to Governor Carleton.

In August 1769 the commission to Governor Patterson was issued and he is said to have arrived in the colony in 1770. The first meeting of the Legislature composed of the Council and Assembly with the Governor of course, was, according to Stewart's History of Prince Edward Island p. 177, in 1773; and the first statute as appears by the Acts of the General Assembly of the Island published in 1862, was passed in 1773. It is entitled "At the General Assembly of the Island of His Majesty's Island of St. John, begun and holden at Charlottetown, the seventh day of July, Anno Domini 1773, in the thirteenth year of the reign of our Sovereign Lord, George the Third, by the Grace of God, of Great Britain, France and Ireland, King, Defender of the Faith. Being the first General Assembly convened in the Island."

The first statute passed recited that it had been found absolutely necessary and expedient by His Majesty's Governor in Council of the Island to make several resolutions, ordinances and regulations for the good government of the said Island; it then repeats these ordinances and confirms what was done under them. Chap. 2 is entitled an Act to confirm and make valid in law all manner of process and proceedings in the several Courts of Judicature within this Island from the first day of May 1769 to this present session of Assembly. The recital states: "Whereas this Island has been without a complete Legislature from the commencement of the Government thereof which took place on the first day of May

1769 unto this present session of Assembly, during which time many and various proceedings have been had at the several Courts of Judicature in the Island." It then declares the writs, judgments and proceedings in the Courts from and after the said 1st May 1769 to the end of that session good and valid in law. That it should not extend to take away or rectify errors in the using of process, mis-pleadings and erroneous rendering of judgment in point of law, but in all such cases the parties aggrieved might have their writ or writs of error upon such erroneous judgment in such manner as they might have done before the making of the Act

Governor Patterson apparently remained Governor until 1786 when he was succeeded by Governor Fanning who continued in office, it is said, for nineteen years, that would be until 1805.

Governor Patterson was authorised by his Commission with the advice and consent of the Council to establish such and so many Courts of Justice within the Island as they should think fit for determining causes, as well criminal as civil, according to law and equity, and to constitute and appoint Judges, and in cases requisite, to issue commissions of Oyer and Terminer. We have nothing to show that in Governor Patterson's time any Court of Error or Appellate Court was established by any act of his. And it seems admitted that as a matter of fact no such Court ever exercised any jurisdiction in the Island, and no case was ever brought before such a Court If it had been established under any ordinance of the Council before the first sitting of the Legislature, we have not been referred to any such ordinance. It is shown by statute passed at that sitting that Courts of Judicature had before that been established and have been continued ever since. As to those courts that have been exercising their functions and powers ever since, with legislation from time to time with reference to them, they would, no doubt, be considered as established tribunals and as having been legally established. But when it is contended that so important a tribunal as a Court of last resort exists in a Province, it should be shown there was such a Court actually exercising Judicial functions, or that it was established by some act of the Legislature of the Crown.

As far as Governor Patterson is concerned it does not appear that, by any kind of Legislative enactment or order either by the Governor in Council or by the more perfect Legislation after the General Assembly was called, such a Court was established, nor

does it appear that he was, by instructions, specially authorized to establish such a Court or to *allow* appeals from any of the Courts of Common Law as Governor Carleton was in the instructions accompanying his first Commission, and as Sir John Colborne was in the instructions accompanying the Commission to him in 1838.

Under the instructions to Governor Patterson he was to send to the Secretary of State copies of all Acts, Orders, Commissions, &c., by virtue of which any Courts, &c., were established. We presume the parties have had proper enquiries made as to the existence of copies of such documents and that none can be found. It is said none exist in the Island.

Whether under any subsequent Commission or instructions an attempt was made to establish such a Court in the interval between the Commission to Governor Patterson 1769 and that to Sir John Colborne 1838, we have nothing before us to show. Under that Commission, as already stated, he was authorized to *allow appeals* and for that purpose to issue a writ in the *manner* "*which has been usually* accustomed" returnable before himself and the Executive Council who were to proceed to hear and determine the same. The instructions to most of the Colonial Governors were said to be to the same effect. In Macpherson's Practice of the Privy Council Appendix 72, he speaks of the Governor in Council as forming the Court of Error in the Colony.

The instructions accompanying the Commission to Lord Monck in 1861 do not in any way refer to the allowing of appeals and from what is said on the subject in Macpherson's practice in the Privy Council, it seems that in the Royal Instructions issued to Colonial Governors (of the Colonies that have Legislatures) for some time past no mention is made of appeals; and the same can be said as to the instructions to Lord Lisgar in 1868. Nor is anything said as to *allowing* appeals in the Commissions to Lord Monck and Lord Dufferin, nor in the instructions accompanying the same.

The reference to the matter in Haliburton's, Nova Scotia Vol. 2, p. 330, is to the effect that "the Governor in Council conjointly constitute a Court of Error from which an appeal lies on the *dernier ressort* to the King in Council." He considers the origin of this appellate jurisdiction to have been the custom of Normandy when appeals lay to the Duke in Council.

In Stewart's Nova Scotia, after stating the only Common Law Court established in the Island was the Supreme Court, pointing out how the Chief Justice was appointed and how the proceedings were conducted adds: "An appeal in the nature of a Writ of Error is allowed from the Supreme Court to the Governor or Commander in Chief in Council when the debt or value appealed for exceeds £300 stg. with an appeal from their judgment when the debt or value appealed for exceeds £500 stg.

There is a Chapter on appeals in Clarke's Summary of Colonial Law p. 106, in which he refers to the right of determining in the Court of last resort all controversies between citizens of a state as having been always considered the best evidence of the possesion of Sovereign power. At page 111 he uses the language already referred to, and at page 120, referring to the Practice in the Privy Council and to the case of a party who has been prevented by accidental causes from applying to the Governor of a Colony within the period limited in the particular Colony for leave to appeal to His Majesty in Council, the Governor having no jurisdiction after that to allow the appeal, he proceeds: "*but His Majesty in Council* from whom *the right of appeal itself in all cases emanates* may *of course at his pleasure relax* in any such particular instance, *when it appears equitable to do so*, the *restrictions* to which it is generally subject. So it may happen that a Governor improperly refuses to allow an appeal, from some doubts as to its competency or regularity, or from any other cause where justice required a contrary decision. In all such cases the party aggrieved is of course entitled to apply to His Majesty in Council."

In the report of the case, in *re* Cambridge, cited on the argument, Lord Brougham said there is no instance of allowing an appeal from the Supreme Court at once to the Queen in Council, there being by the Constitution of the Island a Court of Appeal, namely, the Governor in Council, from whose decision alone an appeal lies; and then says: "The proper course and the only course their lordships can take is to advise Her Majesty to *allow* it to be appealed to the Governor in Council, it may then be brought before us in a future stage, if the parties are not satisfied with the decision."

In the statement of the case it is said (this was in 1841) that by the Royal instructions to the Governor he was directed to allow appeals to himself in Council in cases where the value appealed from amounts to £300 stg., and to the King in Council

where the value appealed from amounts to £500 stg. That the amount being below £300 the case was not appealable either to the Governor in Council or to Her Majesty.

Now if a *Court* in the sense now contended for by the Respondent had been created by the Constitution of the Colony, or in any other way recognized by law where the jurisdiction it had was only in matters above £300 stg. would an appeal be *allowed* in that Court by order of the Queen in the manner suggested in Cambridge's case? I should think not But if it be considered as the exercise of the Prerogative right of the Crown to review the Judgments of Colonial Courts, and the Crown chooses to exercise that right through the Governor and Council, appeals may be allowed to them according to instructions which, of course may be varied from time to time or according to specific cases as to the Crown may seem just. The Governor in Council may be considered a Court as long as these instructions exist, but when they are withdrawn the Court must fall with them. At the time of the passing of the Dominion Statute establishing the Supreme Court, the Lieutenant Governor of the Island was not an Officer holding a Commission under the Great Seal of Great Britain, nor did he receive any instructions to allow appeals, nor was he authorized to issue writs for that purpose returnable before him and the Executive Council, nor were they directed or authorized to proceed to hear and determine such appeals.

In the absence then of any evidence showing the establishment of a Court of Error or that any tribunal ever exercised within the Island the powers of such a Court, I am of opinion that the unmistakable references to such a Court in the Island Statute of 1873 or in the other Acts to which we are referred, do not create such a Court, if it had not an existence previous thereto. If it had been shewn that such a Court assumed to exercise the functions of a properly organized Court and had been doing so for years, the recognition of it by the Acts of the Legislature might be considered as affirming its legal existence, but not to create a Court.

In the reference to the Court of Error or Appeal in the Statute referred to, mention is not made of the Governor in Council constituting such Court.

The Island Statute of 21 Geo. 3, chap. 17, does not necessarily imply that the revising of a Judgment in Error must be by a Court Superior to the Supreme Court or if it does, that that

Court must be necessarily one existing in the Colony. The King in Council might revise an Error.

As to the statute relating to the estates of intestates, special jurisdiction is by the Statute given to the Governor in Council who are to decide the matter on appeal and their decision, I apprehend, is to be carried out by the Judges of the Court.

The fact that in the instructions to most of the Governors in the American Colonies reference is made to their granting letters of administration and probates of will, probably suggested that it was desirable to have an appeal to the Governor and that appeal is expressly given to him and the Council by name in the Statute.

The Act constituting the Governor in Council a Divorce Court creates them for that purpose and does not make them a Court of Error or Appeal.

In the Imperial Act of 1791, 31 Geo. 3, chap. 31, the existence of the ordinance of the Governor in Council of the Province of Quebec constituting the Governor in Council a Court of Civil Jurisdiction for hearing and determining appeals in certain cases is recognized under sec. 34 which enacts: "that the Governor of each of the Provinces (of Upper and Lower Canada) with such Executive Council as shall be appointed by His Majesty for the affairs of such Province, shall be a Court of Civil Jurisdiction within each of said Provinces for hearing and determining appeals within the same, in like cases and manner, and subject to such appeal as before the passing of the Act might have been heard and determined by the Governor in Council of the Province of Quebec, but subject nevertheless to such further or other provisions as might be made by the Legislature of the Province.

The Legislature of Lower Canada passed a Statute on the subject 34 Geo. 3, chap. 6. In Upper Canada the same year, by 34 Geo. 3, chap. 2, sec. 33, the Governor, the Lieutenant Governor or person Administering the Government, or the Chief Justice of the Province together with any two or more members of the Executive Council of the Province shall compose a Court of Appeal for hearing and determining all appeals from such judgment or sentences as might lawfully be brought before them. Sec. 35 declares in what cases an appeal should lie to the Court. Appeals were also allowed under the Upper Canada Act of 1837 from the decisions of the Vice Chancellor, though the Governor was Chancellor.

In Woodcock's West Indies p. 288, the following reference is made to appeals in the Colonies: "Appeals from the decisions of Colonial Courts may be considered as existing at the Common Law as affected by the King's instructions to the Governors, by colonial law and parliamentary enactment. It has been said to be an inherent right of the subject of which he cannot be deprived to appeal to the Sovereign to redress a wrong done to him in any Court of Justice, and also an inherent right of the King inseparable from the Crown to distribute justice amongst his subjects. His Majesty by his instructions declares his Royal will and pleasure to be that his representative shall in all cases on application being made to him for that purpose permit and allow appeals from any of the *Courts* of Common Law and he and the Council, with the exception of such as may have heard the cause below (who are nevertheless allowed to give their reasons for the judgment complained of), are to proceed to hear and determine the appeal. It is provided, however, that the sum or value appealed for do exceed £300 stg. and that security be first given by the appellant to answer charges as shall be awarded in case the first sentence be affirmed, and if either party be dissatisfied with the decisions of the Governor in Council, then an appeal is *allowed* to the King in Council provided the sum or value appealed for exceed £500 stg; the appeal to be made within 14 days after sentence and good security given by the appellant that he will effectually prosecute the same and answer the condemnation and also pay such costs and charges as shall be awarded in case the sentence of the Governor in Council be affirmed."

It is also provided that in special cases the Governor is to admit the appeal.

In Macpherson's Practice of the Privy Council, Appendix 72, the instructions to Governors previous to 1854 are referred to. They are said to be substantially the same in all the American Colonies, and were generally to the effect mentioned in Mr. Woodcock's book. He adds: "In the Royal Instructions now issued to Colonial Governors no mention is made of appeals."

Special orders are made in the Privy Council as to appeals from the Supreme Court in the Colony, named in the order where the sum or or matter in issue is above a certain amount. Such orders appear to have been made in reference to the provinces of New Brunswick and Nova Scotia.

It may be that after the powers conferred by the Statute 3 and 4 William IV. chap. 41, on the Judicial Committee of the Privy Council had began to be exercised, it was found by experience that it was better not to continue to all the Governors of the Colonies the right to permit appeals to the Governor in Council, but rather that appeals should come direct to the Queen in Council, and that in consequence when it was desired to continue such powers; the Governors were not authorized to exercise them by their instructions. Whatever may be the reason, the latest instructions I have seen to the Governors of the Island, viz: those to Sir John Young (afterwards Lord Lisgar) dated 29th December, 1868, contained no authority to allow appeals to the Governor in Council from any of the Courts of the Island.

When the Provincial Statute of 1875, called the Land Purchase Act, was passed, and when the judgment now appealed from was pronounced, the Governor of the Island was appointed by a Commission issued under the Great Seal of Canada, and attested and signed by the present Governor General of Canada, Lord Dufferin, and no instructions accompanied that Commission.

During the time instructions of the kind alluded, and the power to appeal to the Governor-in-Council existed and was exercised, it might be referred to as a *Court*, in the same way as the Queen in Court or the Judicial Committee of the Privy Council is frequently called a Court; but when these instructions were withdrawn and no other authority existed, by which the appeals to the Governor-in Council could be made, then, I fail to see how the Governor-in-Council, for the time being, could be such a Court. If the Commission of any Governor had ordered and directed that he and his Executive Council, and the Governor-in-Council, for the time being, should constitute a Court, to which appeals might be made, it could then with more force be urged that a Court was thereby established. But I do not think such authority as was contained in the instructions to Sir John Colborne, by itself constituted a Court of appeals as a permanent institution: but for the time being he was to exercise the prerogative righ, of the Crown to hear appeals from the Colonial Court under such instructions; and when such instructions were withdrawn, the right of the Governor-in-Council to hear appeals, ceased.

I am not satisfied that any Court of Error or Appeal, or any Court of last resort, save the Supreme Court, within the meaning

of the Dominion Act, creating this Court, was established or existed in the Island of Prince Edward during the time that Mr. Patterson was Governor of the Province. We were not referred to any case that had ever been brought before such a Court, and it was not denied that no case had ever been taken to such a Court within the Island. It is not pretended that such a Court has ever been *established* by legislative enactment, though it was contended the existence of such a Court was recognized in Statutes passed by the Legislature. If established at all, it must have been by an instrument under the great seal, or under the instructions to the Governor, if that would establish a Court of that kind. No instrument under the great seal, either of Great Britain or of the Colony, has been referred to as establishing such a Court. Now, the Governor in Council was established *a Court* of Appeal by an Ordinance of the Province of Quebec when the instructions expressly authorized an appeal to the Governor in Council. The instructions to Governor Carleton, with his second commission, when referring to subjects for (if I may use the term) legislation, directs his attention to constituting the Governor in Council, *a Court of Civil Jurisdiction* for the hearing of Appeals. The Act of 31st Geo. 3d, ch. 31, distinctly recognises such a Court, and the subsequent legislation, both in Upper and Lower Canada, constitute the Governor, in Council, a Court. The tribunals, so established, were properly Courts, and exercised their powers under laws which continued them as long as the laws existed. There is a manifest difference between tribunals so constituted and those which exercise powers conferred by the Royal Instructions alone, and which seem only to exist whilst the instructions are continued. In the one case they exist and continue by positive enactment, and in the other by virtue of the prerogative right to revise the decisions of the Colonial Courts, and when the Governors are not authorised to exercise that right, it seems the natural and logical result that they cease to possess it.

The Commissions issued to Governors since Sir John Colborne's time, which we have seen, do not contain any authority to the Governor to allow and hear appeals, and the reference to this matter, in Macpherson's Practice, indicates that in most, if not in all of the Commissions issued lately, that authority which was formerly given, has been intentionally withdrawn.

On the whole, I come to the conclusion that the present Governor of the Island of Prince Edward had no authority to

allow an appeal in the matter now before this Court, and that it is properly brought before us. As already stated, I do not think that the references to the Court of Error or Appeal, in the Island Statute of 1873, create such a Court, if none existed at the time.

The other statutes referred to, do not necessarily imply that a Court of Appeal existed in the Colony, and none of these statutes create a general court of appeal.

I do not think that the Dominion Parliament, when they enacted that the appeal given to this Court was to be "understood as given from the Court of last resort in the Province in which judgment was rendered," meant to compel suitors before bringing their cases here, to have them heard in, if I may use the term, a *Mythical Court* that had had never been resorted to by them, or to a Court where such resort, if any, ever existed, had long been abandoned and ceased to be used.

I think, therefore, the appeal is properly before us, and we have jurisdiction to hear it.

In regard to the merits:

The case states: That the Right Honorable Hugh Culling Eardley Childers, was duly appointed a Commissioner by the Governor-General-in-Council, under the seventh section of the Land Purchase Act, 1875; John T. Jenkins, Esq., was duly appointed a Commissioner by the Lieutenant Governor, under the fifth section; and Robert Grant Haliburton was appointed by Miss Sulivan, as her Commissioner, under the ninth section.

That the Commissioners, so appointed, met at a day and place in Charlottetown, then appointed for the purpose of hearing and considering the matters referred to them, and at the same time and place, so appointed, the Commissioner of Public Lands and the Proprietress, Charlotte Antonia Sulivan, were represented by Counsel; and evidence, tendered on both sides having been heard, the said three Commissioners made an award, which was set out.

The notice of the Commissioner of Public Lands, served on Miss Sulivan's agent, is set out in the case and refers to the Act and the powers of the Commissioner under it, and states that the Island Government intends to purchase all of her township lands in the Island liable to the provisions of the Act, including all such parts or portions of Lots or Townships Numbers 9, 16, 22 and 61, in the Island as she was or claimed to be the proprietor of and as were liable to the provisions of the Act.

It appears from the Statute that the Government of the Island was entitled to receive from the Dominion Government a large sum of money for the purpose of enabling the government of the Province to purchase the township lands held by the Proprietors in the Island.

We may, without going beyond what is considered the legal province of a Judge, be supposed to know that there had been difficulties in the Island existing for many years, in relation to the collection of rents on these lands; that there had been legislation on the subject, and that further legislation was deemed necessary. The recital in the Statute that it was desirable to convert the leasehold tenures into freehold estates, indicates that it was a matter affecting the public interests. This Statute ought therefore to be viewed, not as ordinary legislation, but as the settling of an important question of great moment to the community, and in principle like the abolition of the Seigniorial tenure in Lower Canada, and the settling of the land question in Ireland. In carrying out such measures as these, there may be cases where the law works harshly, where important rights may seem to be disregarded, and private interests are made to yield to the public good, without sufficient compensation being given; yet, the legislation on the subject generally assumes to be based on the principle of compensation to individuals when their property is taken from them, and points out a mode of ascertaining what the indemnity shall be and how it shall be paid.

It is not doubted in the Court below, and we do not doubt that the Legislature of the Island had a right to pass the Statute in question. The great object of the Statute seems to have been to convert the leasehold tenures into freehold estates, a matter of very great importance, and one which, if not settled, would be likely to affect the peace, as well as the prosperity of the Province.

Their intention seems to have been as to all questions connected with the land, such as rents, and judgments obtained for the rents, and clauses arising out of the ownership of the land (as far as proprietors of the land were concerned) that they should no longer be enforceable by them, and that those incidents, such as arrears of rent, and the like rights, should be with the soil itself and all interest in it pass from the proprietor to the Government That the money value of the rights of the proprietor, taking into consideration, in estimating such value, certain circumstances such as the price at which other proprietors had sold their lands,

the annual rentals due and actually received each year, the expense of collecting, the net receipts for six years, &c., was to be fixed by three Commissioners. These Commissioners were to be selected, one by the Dominion Government, one by the Island Government, one by the party interested. It can hardly be disputed that this was a fair mode of selecting the Commissioners, who were, after hearing evidence, to make the award, and the money awarded was to be paid into the Island treasury to the credit of the suit or proceedings; the object, no doubt, being that the money should represent the land, and the different parties interested should, on application to the Court, receive what they were entitled to from that fund.

They intended the award of the Commissioners to be final, but if either party wished to have any *error*, *informality* or *omission* in the award corrected, he could apply, within *thirty* days after the publication of the award, to the Supreme Court, to have it remitted back to the Commissioners.

A trustee was to be appointed to convey the estate of the proprietor to the Commissioner of Public Lands; notice was to be given to the proprietor, and the Court, or a Judge might restrain the execution of the deed. This conveyance and the payment into the treasury was to vest the lands in the Commissioner, in fee simple.

The money awarded in each case was to be paid into the Provincial Treasury at the expiration of 60 days, and the Public Trustee after the money was so paid, was to execute a conveyance of the estate of the preprietor unless restrained after 14 days notice to the Proprietor. Why should not the intention of the Legislature be carried out in this matter?

I do not think it necessary to discuss the elaborate judgments given by the learned Judges in the Court below. The view I take of the Statute renders that unnecessary. The view I take is that the mode pointed out by the Statute is the one which should have been pursued by the proprietor in this matter if there were any *error*, *informality* or *omissions* in the award made and that the Court had no other authority to enquire into the proceedings of the Commissioners further than to see if the subject matter was properly before them and perhaps to see if they had been guilty of any fraud in their proceedings. And if they had the strict legal right to do so, in the exercise of a sound discretion according to the

best of my judgment, the application of the proprietors to set aside the award should have been refused.

I see no reason to doubt that the Commissioners properly entered on the inquiry as to the compensation to be awarded to Miss Sulivan for her rights as a proprietor in township lands in the island.

It is not denied that Miss Sulivan was a proprietor within the meaning of the Act, of township lands exceeding in the aggregate 500 acres. Her lands were therefore liable to be purchased under the Act. The appointment of the Commissioners is stated in the case and the notice to Miss Sulivan of the intention to purchase all her lands is set out. The notice complies with the Act. If only a portion could be purchased, it might be that the portion selected would be that which was most profitable to the proprietor and most desirable for her to keep.

In my opinion the Statute contemplates the purchase of all of the peculiar description of lands owned by a proprietor whose estate exceeded 500 acres, and when the value was to be ascertained, it would be for the interest of the proprietor to show what the land was, in order that compensation might be given for all and that none might be omitted. If the Statute had required the Commissioner of Public Lands to define by *metes* and *bounds* in his notice the lands he intended to be purchased under the Act, it would probably induce him to describe such lands as were well known to belong to the particular proprietor and which probably would be those that were most valuable and most for the interest of the proprietor to retain, or it would have the effect of making the Statute useless if the Commissioner would not give a minute description of each parcel of land owned by the proprietor. The Court below thought the notice sufficient and I see no reason to dissent from that view. It was suggested on the argument for the first time that it did not appear that the Commissioners were sworn or that the Commisioner appointed by the proprietor ever notified the Commissioner of Public Lands of his appointment. It was also suggested that the notice of the sitting of the Commissioners was not published a sufficient length of time before the day fixed for their sitting.

The provisions of the Statute as to these matters seem directory, and it is reasonable to presume they were followed, particularly as the objections were not taken on the argument in the

Court below, nor in the rule, nor mentioned as relied on in the respondent's factum. It is not now shown affirmatively, that as to the points suggested, the proceedings were not regular, except as to the time of giving the notice of the sitting of the Commissioners, which, as the parties appeared, could be no objection. If necessary to show in any proceeding that these things were done, it could, I apprehend, be averred in pleading, and proved by evidence.

If the proprietor's Commissioner gave the Commisssoner of Public Lands no other notice of his appointment than claiming to sit and sitting as such when the matter was proceeded with, when the said Commissioner was either personally present or was represented by Counsel, that would be some notice of his appointment, and on a bare supposition of this kind, we will not presume that the parties did not do what they ought to have done.

The papers before us show that the case was fully enquired into before the Commissioners, a large number of witnesses examined, able advocates addressed the Commissioners, and two of them made their award as follows:

"DOMINION OF CANADA.

*Province of Prince Edward Island.*

"In the matter of the application of Emanuel McEachen, the Commissioner of Public Lands, for the purchase of the estate of Charlotte Antonia Sulivan, and 'The Land Purchase Act, of 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 Eighty-one thousand five hundred dollars.

"HUGH CLLING EARDLEY CHILDERS,
*Commissioner appointed by the Governor General, in Council.*

"JOHN THEOPHILUS JENKINS,
*Commissioner appointed by the Lieutenant Governor, in Council.*

"Charlottetown, 4th September, 1875."

The award was duly published, 7th September, A. D. 1875, pursuant to the 29th section of the Act. The application was made to set it aside, on the 17th November. The Public Trustee having notified Miss Sulivan's Agent, on the 3d of November that the sum awarded had been paid into the Treasury of the Island to the credit of the suit, and that after fourteen days from

the service of the notice, he would execute a conveyance to the Commissioner of Public Lands of the estate of Miss Sulivan, the proprietor, which estate was more particularly described in the four schedules annexed.

The question is whether the Court below had any authority to make the rule absolute to quash the award, and in discussing this question it is necessary to refer to the 45th section of the Act which is as follows: "No award made by 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, informality* or *omission* made *in their award.* Provided always that 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.*" Could any more emphatic language be used to show that the Legislature intended that the award should be "binding, final and conclusive on all parties," and should not be held or deemed to be invalid or void for any reason whatsoever? On the application to the Court below certain facts were stated by the agent of Miss Sulivan in his affidavit. One, that in Schedule B. there is a farm alleged to be 34 acres purchased by Aurthur Ramsay on Lot 16, whereas Ramsay had purchased 84 acres, this being 50 acres more than Miss Sullivan claimed to own or demanded compensation for. 2. That in the 15,000 acres claimed to be conveyed to the Commissioners by the Trustee there is included 1100 acres on Lot 16 held under verbal agreement, whereas in truth under verbal agreement the lands owned by Miss Sulivan and for which she

claimed compensation amount only to 708 acres. The following matters are in dispute and evidence given concerning the same. The amount of arrears of rent due by several tenants upon the estate, the performance of the conditions of the original grants from the Crown and how far the performance has been waived. That Miss Sullivan contended the conditions of the original grants had been waived, the Commissioner of Public Lands alleged the contrary and gave in evidence despatches of Secretaries of State for the Colonies printed in the Journals of the House of Assembly in support of his claim and in denial of her contention.

That in Schedule B. four several plots of land purchased by Arthur Ramsay and Samuel Yeo upon township No. 16 and excepted out of the said township claimed to be conveyed as aforesaid, are referred to as "being numbered or colored green upon the plan of the said township in the possession of Miss Sullivan's agent and produced by him before the Commissioners under the Land Purchase Act," whereas there was more than one plan of Lot No. 16 in the agent's possession and produced by him before the Commissioners. There were two produced by him and they differ from each other, and he had no means of finding out from the notice which of the plans is referred to.

The same thing is stated in effect as to township lot No. 16.

If, in relation to these matters thus stated in the affidavit, it was necessary to protect Miss Sullivan's interest or even to prevent inconvenience in carrying out the award, that something more explicit should be stated in the award relative thereto, application might have been made under the 45th Section of the Act to the Supreme Court to remit the award to the Commissioners to correct the same. But that was not done. If an application had been made to the Court and it had been shown that the omissions or errors referred to in the affidavit would prejudice Miss Sulivan or were such as ought to be remedied by the arbitrators, the Court would have sent it back for that purpose. But the course taken on Miss Sulivan's behalf in lying by until the time for applying to the Court under the statute had passed, it can be seen has worked great injustice and inconvenience to those acting on behalf of the Public. If it had been urged that the award was faulty it could have been corrected. The Commissioner of Public Lands does not complain of it, therefore there was no reason to apply on his behalf, the proprietor does object therefore

she ought to have applied sooner. She might have applied according to the terms of the statute, she has deliberately chosen not to do so, she must therefore abide by the consequences.

As I understand the Judgment of the Court below, the matter in their view was properly before the Commissioners, it was within their jurisdiction and they were fully authorised to decide on all questions arising in relation to the inquiry and decision they were to make. The objection is that they did not decide matters which they ought to have decided and that the award is void by reason of that defect, though if the proprietor had applied within the 30 days the award might have been remitted to the Commissioners to correct the error or omission.

It is not pretended that after the 30 days the Court have the power of setting aside this award under the statute nor am I aware that they have any peculiar powers conferred on them by local statutes to interfere when the Legislature has declared that an award shall be final. I understand that the Court below proceed on the Common Law right of the Court to review the decisions of inferior tribunals and to see that they properly carry out the powers and authority vested in them. Not that they are a Court of appeal to review the conclusions at which the inferior tribunal has arrived, but that they can if that tribunal has not done all that it should have done, declare void its decisions. The more logical course to be taken under such circumstances would be to require the inferior tribunal to do what it ought to do and that was what the Legislature authorized the Court to do. But in this case I do not think any such right existed in the Court below. The Statute emphatically declares that in no case shall an 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 power of the Supreme Court to remit back the matter, their award shall be binding final and conclusive on all parties.

If a power of a Superior Court to review or set aside an award or decision of a special tribunal can be taken away by Act of Parliament it seems to me that the words in this Statute ought to be held to do it.

In Richards *vs.* South Wales Railway Co., 14 Jurist, Page 1097, Sir William Erle in his Judgment said: It was admitted

that the writ (of *certiorari*) was taken away as to all proceedings under the acts, (which he referred to), this rule therefore cannot be made absolute unless it distinctly appears that in the proceedings the Sheriff and the Jury have taken upon themselves to decide on a matter on which they had no jurisdiction. When that is made out the Statutory prohibition does not apply and the inherent jurisdiction of this Court is unrestrained. * * * * There is however a great disposition to evade clauses in Acts of Parliament which take away the *certiorari* on the alleged excess of Jurisdiction and we feel bound not to yield to attempts of this kind unless they rest on very clear and satisfactory grounds.

In the Colonial Bank of Australasia *vs.* Williams, 5 L.R.P. C. 442, the following language is used in the decision of the Judicial Committee of the Privy Council: "There are numerous cases in the books which establish that, notwithstanding the privative in a Statute, the Court of Queen's Bench will grant *a certiorari*, but some of those 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 at page 450 the following is used: "The Court of Queen's Bench, *whose exercise of this power is discretionary*, would certainly not quash an order of an inferior Court upon the ground of fraud, unless the fraud were clear and manifest."

Here there is no defect of jurisdiction, and it is not pretended that there is any fraud. But, as I understand the argument, it was urged that all the jurisdiction was not exercised, and that is a defect of jurisdiction. They were to consider and award on the matters referred to in the 28th section, and not having done so, the whole proceeding is void.

After giving the matter my best consideration, I have arrived at the conclusion that the Legislature did not intend that the Commissioners should find, as specific facts, the facts and circumstances mentioned in the 28th section, which they were to take into their consideration in estimating the amount of compensation to be paid to a proprietor for his interest or right in any land.

If it had been intended they should find specifically on each of these points, I think different language would have been used, and if the Court thought some kind of decision necessary on the

points, they could have referred the award back to the Commissioners for that purpose. In any view it does not seem so plain a question of want of exercise of jurisdiction as to justify setting aside the award under such a Statute as this.

The object of this section 28th being to allow the Commissioners to take evidence on all these subjects and having all these matters and the evidence relating to them before them and seeing that the declared object of the Legislature was to pay every proprietor a fair indemnity or equivalent for the value of his interest and no more in the land to be purchased; all this was to be taken into consideration and then they were to award under section 26 the sum due to the proprietor as "the compensation or price to which he should be entitled by reason of being divested of his land and all interest therein and thereto." The papers before us show that the matters referred to in the 28th section were brought before the Commissioners, except, perhaps, those relating to the conditions of the original grants. It is said that, as Miss Sulivan was one of the parties referred to in the Act of 27 Vic., chap. 2, she was not a party affected by any decision of that question. After hearing the evidence, the Commissioners made their award. They say, in express terms, the sum awarded under the 26th section of the Act, is $81,500. Is there any reason why we should presume they did not take the matter into consideration, which the law directed them to do before they made their award? They were to make the award after hearing the evidence. This of course implies they were to consider it, or it would be useless to offer evidence. On the contrary, ought we not to assume that as they could not properly make an award under the 26th section unless they considered these matters, that they have done so?

In Brittain *vs.* Kinneard, 1 Brod. and B., p. 430, Dallas, C.J., said formerly the rule was to intend everything against a stinted jurisdiction. That is not the rule now, and nothing is to be intended but what is fair and reasonable; and it is fair and reasonable to intend magistrates will do what is right.

It is fair and reasonable to presume that the Commissioners did what was right. It is a fair and reasonable intendment that they did what the law required of them, unless it appears on the face of the award that they did not. The proceedings before the Arbitrators show that these matters were discussed before them; and the only reasonable conclusion is that they must have taken them into consideration.

In the view that I take, then, the award ought not to have been set aside. The Commissioners were not required to find specifically on the matters they were to take into consideration under the 28th section, and the presumption is they did take them into consideration.

Then, as to the necessity of describing the specific lands as to which they made the award, suppose they had, in the award, described lands that Miss Sullivan did not own, or lands that were not liable to be purchased under the Act, would their finding bind any one not a party to the award? It is not pretended it would. The Commissioner notified Miss Sullivan he intended to purchase *all* her township lands, that being the kind of land referred to in the Statute which he was authorized to purchase, and it was concerning all these lands the award was made. The money has been paid into the Provincial Treasury, and represents all these lands. When those claiming the money are brought before the Court, they will decide to whom and in what proportion the money is to be paid. *Prima facie* it is Miss Sullivan, and those who contest her right must show how their claim originates. The finding of the Commissioners could not in any way deprive the parties of rights which arose out of matters in which they and Miss Sullivan were alone concerned. The Court might say, if the Commissioners took a certain view, it would be only fair as between individuals that the other parties should have a certain sum, but the Court would not necessarily be bound to take that or any particular view. The whole matter is open to them, and when the parties are before them they will dispose of their rights as they show them to be. Mere speculative difficulties ought not to be very seriously considered when the party suggesting them had an opportunity of having them all settled, but did not chose to avail herself of it.

I do not consider the describing of the property in the deeds by the Public Trustee a transfer of their authority by the Commissioners. There were certain lands, the value to be paid for which was the subject of their enquiry. What those lands were seems to me easily ascertainable, and if the particular maps in the descriptions cannot be identified and the conveyance is held void for uncertainty, I fail to see how Miss Sullivan is injured by that, or why she should concern herself with it. It seems to me all her township lands, and her interest in them, and in the rents were properly before the Commissioners, and

they have awarded her all the compensation she is entitled to for them. The amount so awarded has been paid into the treasury, and I see no reason why she should not get what she is entitled to out of it. Why she should concern herself about the conveyance, unless as it may affect her interest, is not so apparent. If this conveyance included any of her land not liable to be purchased under the Act, she might then say she was interested as to that and insist upon its being put right. She might apply to the Court to restrain the conveyance under the 32 section until it was corrected. I fail to see that the omission to describe the land in the award is a ground for setting it aside. The Trustee is to execute a conveyance of the estate of the proprietor. If he executes a deed of property, not a part of her estate, that cannot prejudice her nor any one else as far as I can see. It has, indeed, been suggested that if it was her estate the conveyance gives a *prima facie* title, and if a squatter on the estate were sued the Land Commissioner, or purchaser under him, would only be obliged to show that title under the conveyance by the trustee, instead of tracing the title from the Crown. I would hardly think a Court would set aside an award like this on that ground alone.

The money was awarded under the section for the lands of which Miss Sulivan was divested, and they were all the lands of a certain description, of which she was proprietor in the Island. As it was not necessary to describe them in the notice I fail to see why it is necessary for the Commissioners to describe them in their award. If she had devised all her township lands in the Island and died, it is not doubted that such a description would carry to her devisee all the lands of that description in the colony It is urged that the form of deed appended to the Statute makes it necessary the lands should be described by *metes* and *bounds*. The section 32 says the deed *may* be in the form and if a clear and intelligible description were given without *metes* and *bounds* I do not think the deed would be imperative.

It seems to me that the words of the 20th sec. of the Act authorizing the Commissioners to summon and examine witnesses upon matters submitted to their consideration, "and the facts which they may require to ascertain in order to carry this Act into effect," taken in connection with the 28th sec. mean the facts and circumstances they are to take into consideration in order to make their award, and they could not do this unless

they had power to examine witnesses as to these facts. That cannot mean all the facts necessary to carry the Act into effect as far as the action of others is concerned. Much must be left to the Court to ascertain when they are called upon to distribute the money, and as the Commissioners were not called upon in any view to find specially on those matters referred to in the 28th sec. I do not think the words referred to in the 20th sec. compelled them to do so.

Take the converse of the case before us, supposing after the time for moving to refer the case back to the Commissioners had passed and after the money had been paid into the treasury, and an application had been made on Miss Sullivan's behalf to the Court for an order to pay over the same, then, for the first time, the Commissioner of Public Lands had applied to set aside the award, because he would be embarrassed in discharging his duties under the Act inasmuch as the Commissioners had not found specially on the matters referred to in the 28th section, would not the answer have been : " You had the knowledge of the award and its contents long ago, you have deliberately chosen to let the opportunity pass of having the alleged errors corrected, and you must now work out your rights under the award as you best can ; Miss Sullivan has had a certain sum awarded to her, by your notice you claimed to purchase *all* her township lands, she has been awarded a sum for her interest in those lands and she ought to have it." If this would be the proper answer to such an application a similar answer to Miss Sulivan's seems to me equally just and proper.

I have not met with any case where special provision was made for the correction of errors or omissions of the tribunal created by the Statute, and where the privative enactment was so strong and emphatic, as it is in this Statute, when the Court has felt justified in setting aside the award of the inferior tribunal.

Under such circumstances, on an application like this, I think that the declared intention of the Legislature ought to be respected and the parties should be left to assert their rights in some other way than by asking the Court, on an application such as this is, to declare the award invalid and void when the legislature has said it shall be binding, final and conclusive on all parties, unless inquired into in the manner prescribed by the Act, and shall not be inquired into by any Court on *certiorari*.

If either of the parties to the award find a difficulty in obtaining all the benefits under it to which they claim to be entitled, that is a matter which may be said to have arisen either from their own deliberate act or want of reasonable care and attention.

The appellant in this matter does not anticipate difficulties of a serious character as far as his part of the case is concerned. If the respondent finds a difficulty she ought to have taken the steps that were open to her to have it remedied.

The case may be briefly summed up as follows:—After considering what has been brought before us relating to the subject we are not satisfied there is a Court of last resort in the Province of Prince Edward Island other than the Supreme Court from whose judgment this appeal is brought, and therefore the appeal is properly brought directly to this Court;

Secondly: That by the Statute passed by the Island Legislature, and which they had a right to pass, the award of the Commissioners could not be quashed and set aside, or declared invalid and void on an application made to the Supreme Court, but it could have been remitted back to the Commissioners in the manner prescribed by the 45th section of the Act. The application for the Rule in the Court below not having been within the proper time nor according to the provisions of that section, the decision of that Court is against the express words of the Statute and cannot be allowed to stand.

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### Judge Ritchie's Decision.

Mr. Justice Ritchie: I think this appeal is properly before us. It was admitted on both sides on the argument that no evidence could be discovered of the establishment of a Court of Appeal either by Charter or Patent under the Great Seal or by any statutary enactment, nor could it be discovered that any such Court has ever sat in the Island. The observation of Lord Brougham in the Cambridge case must therefore, I think, refer to the clause at that time usually inserted in the Royal instructions to Colonial Governors authorizing the Governor in Council to permit and allow appeals.

I think this was not the establishment of a Court, because there is clear authority for saying that the power to establish Courts cannot be granted by the Crown by instructions or

otherwise than under the Great Seal, but it is rather, I think, an exercise of the Royal prerogative in furtherance of the right of the Queen to receive and hear appeals from Colonial Courts, by which the Queen directs that before coming to her direct, the appellant shall first go to her representative in Council in the Colony. A Governor without instructions to that effect has, it appears to me, no authority to entertain such appeals, and no such instructions exist at present. If the Queen's representative without instructions would have no such power, much less would the officer of the Dominion Government. I do not think it can be said that there is either *de jure* or *de facto* any Court of appeal on the Island, and therefore I think the matter was appealable to this Court from the Supreme Court as being the highest court of final resort in the Island.

It was, I think, clearly the object of the Legisleture to provide for a speedy final and conclusive decision by the Commissioners of all questions referred to them, and to make their award "final, binding and conclusive on all parties." At the same time it was obviously the desire of the Legislature to secure to the public through the Commissioner of Public Lands and to the proprietors the means of having the doings of the Commissioners reviewed and any errors they may have committed corrected, any omissions supplied and any informalities or defects cured. for accomplishing which the Commissioners were placed, as it were under the immediate supervision of the Supreme Court of the Island, and ready access to that Court was afforded by the simple application either of the Commissioner of Public Lands, or the Proprietors, and to enable the Court when its aid was invoked to see that right was done, ample power is given to remit the awards to the Commissioners to correct any error or informality or omission, provided the application was made within the time limited, and on such award being remitted to the Commissioners full power is given them to revise and execute the same.

The statute first declares that "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;" and then provides a suitable tribunal for the correction of any "error, informality or omission," and declares that 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 Commis-

sioners be removed or taken into or inquired into by any Court by *Certiorari* or any other process, and as if to prevent the possibility of the intention of the Legislature being misapprehended the section of the Act, after being thus minute, thus concludes: "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." It cannot be denied that the Legislature had the power to deal with this subject and if it chose make the award of the Commissioners final, and most certainly it had the right to establish a Court of review final in the Island, so far as the Courts of the Island were concerned. Could they have selected a more suitable tribunal than the Supreme Court, the Court to which, under ordinary circumstances, belongs especially the duty of supervising the proceedings of the inferior tribunals of the Island? The practical effect really was merely to give the Supreme Court a more summary and ample jurisdiction to enable it more speedily and effectually to deal with the matter free from the technicalities and delays, and possibly costs incident to the ordinary mode of proceeding. If this was the intention of the Legislature as from the Statute I gather it to have been, I am at a loss to conceive what language could have been used to achive that object if the language of the 45th sec. of the Land Purchase Act of 1875 does not do it.

In the case of Nawab of Surat, 9 Moore, P. C. C., p. 88, an Act of the Legislature of India empowered the Governor in Council of Bombay to administer the private estate of the Nawab of Surat and it was by Sec. 2 enacted "that no act of the said Governor of Bombay in Council, in respect to the administration to and distribution of such property, from the date of the death of the said late *Nawab* should be liable to be questioned in any Court of Law or Equity." No provision was made for an appeal from the Governor's decision. On an application by a claimant dissatisfied with the award made distributing the estate for leave to appeal to the judicial committee, Knight Bruce, Lord Justice said:

"Their Lordships are of opinion that the intention of the Act was not to create a Court; that the intention of the Act was to delegate either arbitrarily, or subject to certain limitations of discretion, the administration and distribution of the Nawab's property, but in such a way that the administration and distribu-

tion should not be judicially questioned. * * * *
It seems, he says, an anomalous and extraordinary proceeding to vest powers of this description, not liable to be checked by any ordinary course of powers of law in any individual or in any body; but the Indian Legislature had power over the property; they might, in the exercise of that power, which is inherent in Legislation, have given the whole property at once to any stranger, or devoted to any purpose, and whether with moral justice or not, is not the question. Instead of doing that, they do what, to their Lordships, appears substantially the same thing: they vest the power of dealing with it in a particular individual or a particular body, and declare that its acts shall not be liable to be questioned in any Court of Law or Equity."

How different is this case, in view of the exigencies and necessities of the Country, the Legislature compels proprietors to sell, no doubt in many cases against their will, and makes provision for compensation to be established by disinterested parties, and not by parties whose acts cannot be judicially questioned. It only provides that if such acts are questioned it must be before a particular Court, within a specified time and in a specified manner.

I have been unable to discover, after most careful investigation, that the Commissioners have in any way dealt with any matter over which their jurisdiction did not extend, or, that in dealing in matters over which they had jurisdiction, they exceeded in any way that jurisdiction. The only question the Commissioners had finally to determine and award was in the words of the statute "the sum due to the proprietor as the compensation of price to which he shall be entitled by reason of his being divested of his land and all interest therein or thereto."

The provisions of the Act as to how they were to proceed and what they were to take into their consideration to enable them to arrive at a just and proper conclusion were directory though not the less obligatory on them and which if they ffailed to regard, ample remedy as we have seen was provided. It is not shewn that they did not do every thing that they were required to do, and did not follow the directions of the statute in every particular; but the complaint seems to be that this does not appear on the face of the award. But if they did not do as they were required, or if they did and it should have appeared on the face of the award, which I by no means

affirm, is not the answer to the complaining party very obvious? If you were aggrieved thereby, or in any other way, why did you not avail yourself of the remedy provided for you, and apply to the Supreme Court within the time and in the manner prescribed and have the error or omission, irregularity or defect rectified?

The Commissioners have referred and incorporate.. in their award the application of the Commissioner of Public Lands and the Land Purchase Act, 1875, and in the matter of such application, for the purchase of the estate of C. A. Sulivan, have awarded under sec. 26 of said Act a certain sum This, it seems to me is just what they were authorized and required to do. If, in their proceedings, the Commissioners were guilty of any error, informality, or ommission, a remedy was at hand. The course to be pursued by a dissatisfied party was plain and simple in the extreme. But it was a course they could adopt or not; if they did not choose to take it, and so get the error corrected or omission supplied, and award revised and re-executed in the mode prescribed, but have allowed the time given them by the Legislature to elapse, they have only themselves to blame. The law in clear, strong and unambiguous language, not to be misunderstood, says is effect: "if the Commissioners err, or for any reason you are dissatisfied with the award, go to the Supreme Court within a certain time and in a certain way, and get the error corrected; but you shall go to no other Court, and with the exception of the power given to the Supreme Court to remit the matter to the Commissioners, their award shall be binding, final and conclusive on all parties: and neither the Supreme Court of the Island, nor this Court have, in my opinion, to say to the contrary.

Therefore, I think the adjudication of the Supreme Court was not warranted, and their judgment must be reversed.

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### Judge Strong's Decision.

Mr. Justice Strong: Although entirely concurring in the conclusion arrived at, I am unable to assent to all that has been propounded in the preceding judgments as to the law on the question of jurisdiction of a Colonial Governor and Council as a Court of Appeal. I consider it sufficient to say that the preliminary objection raised in this case to the jurisdiction on the ground that the Supreme Court of Prince Edward Island was not a

Court of last resort, has not been sustained, for the following reasons: If any appellate Court exists in the Island, it must owe its origin either to an Imperial Act of Parliament, a Statute of the Island Legislature, or to Letters Patent under the Great Seal of the United Kingdom, or of the Island, if indeed, a Court exercising a jurisdiction by way of appeal, which was unknown to the common law, could be created otherwise than by Statute. No such Statute can be shown to have been in existence, and no Letters Patent conferring such a jurisdiction are now extant; for this reason, and this reason only, I think the objection fails. As regards the merits, I agree on all points with the judgments of his Lordship the Chief Justice and my brother Ritchie.

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JUDGE TASCHEREAU'S DICISION.

Mr. JUSTICE TASCHEREAU: The facts of the case have already been stated by my learned brother Judges who have just expressed their opinion, and I will therefore abstain from reflecting them. I shall neither mention the objections made on the part of Miss Sulivan to the right of appeal *de plano*, in this case, from the judgment of the Supreme Court of Prince Edward Island, on the ground that the same appeal should have been, in the first instance to the Governor in Council, as a Court of Error and Appeal, and thence to our own Court, viz., the Supreme Court of Canada. As it has been clearly shewn, no such Court of Error and Appeal exists in the Island, and, therefore, the appeal was rightly brought before this Court, the judgment complained of being rendered by the Court of last resort in P. E. Island. But, coming to the merits of the case, I say that the respondent had no right, such as she claimed in the Court below, and such as the same Court entertained, that is to say: to set aside the award made by the Commissioners appointed under the Land Purchase Act, 1875, stating the amount of money to be paid to respondent, Miss Sulivan, as proprietor of certain township lands. The grounds on which the respondent based her motion to set aside the award, were on account of pretended irregularities and insufficiency in the wording of the award. Looking at the text of the Act in question, we find, at section 4, that the amount of money to be paid as an indemnity to any such proprietor, shall be found and ascertained by three Commissioners, or any two of them duly appointed; no form of procedure is indicated, and it seems that the duty of the Commissioners is purely and simply

limited to the award of an amount as an indemnity, and in fact they were authorsed to proceed in a summary way, without even reducing the evidence to writing. It is also to be observed that by section 45 of the Land Act in question, it is provided that "in no case shall any appeal lie from 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," mark this, "the Supreme Court shall have power, on 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 ommission made in their award, provided always that any such application to the Supreme Court to remit such award to the Commissioners shall be within thirty days after the publication thereof; and provided, further, that the said Commissioners shall have power to revise and re-execute the same."

I think the above enactment of the "Land Purchase Act" clearly indicates the intention of the Legislature as to celerity of action and proceedings, as to denial of any revision or appeal as to avoiding a multiplicity of proceedings in the law courts, and as to the correction and revision by the Commissioners themselves alone of any defect or informality duly pointed out to them by any of the parties within thirty days from the promulgation of the award. Now the thirty days had elapsed before any of the parties in the terms of the Statute lodged any complaint. I infer that the respondent is now estopped from lodging her complaint before a Court of Justice unless section 45 above referred to means nothing and should be looked upon as a dead letter. The language of the section seems so clear and so energetic that I can see no way of eluding it. It is true that the Judges of the Court appealed from have quoted a number of decisions having some bearing on the case, but others of equal strength can be found to show we could not interfere and set aside such an award supported by a section so formal as the 45 section of the Land Act in question. I for one would not be disposed to set aside the law, (which is clear and positive in its terms) on the strength of decisions whose authority is destroyed by contrary rulings.

Now referring to the 46th sections of the same act, we will see that the Supreme Court of P. E. Island has power to make rules and regulations not inconsistent with the provisions of the Act, for the purpose of more effectually carrying out the requirements of the Act, and I say that it is not shown that any such regulations have been made authorizing all the forms of proceeding claimed in respondent's brief.

But what did the Commissioners omit to do? To declare in their award on the matters mentioned in the 28th section of the Land Purchase Act of 1875 and therein vindicated as to be taken into consideration by them in estimating compensation to proprietors? An attentive perusal of that section has convinced me that the suggestions therein contained are merely directory for their investigation, and, as it was very well said in appellant's factum were intended merely *as beacons to light the Commissioners on their way to a final conclusion*, and that the mention of details was not a necessary ingredient in their award.

In arriving at their award the Commissioners must be presumed to have taken into their consideration all the suggestions contained in the Land Purchase Act, and this under the very common rule of law, *omnia presumm inter rite et solemnter acta*.

The Commissioners, by the Act in question, are put in the position of juries. It is not, either, evident that all the details required by the respondent can easily be reached, and in fact of what great use would it have been for the respondent, if the Commissioners had categorically alluded to each of the matters of fact mentioned in the 28th section? None whatever, for the report was final to all intents and purposes, it could not be questioned in any way nor reversed. The respondent, if desirous of knowing her true position, can easily ascertain it; the important facts being very few in number, her number of acres guaranteed and her rights to arrears of rent not affected.

All the presumptions are against the respondent and so is the law of the case. She did not comply with the law, she did not complain in due time (and she had ample time to do so) but allowed her adversary to rest in peace; she does not avail herself of the only efficient proceeding pointed out by the statute; but an after thought lead her to adopt in the Court below the proceedings alluded to. I consider the respondent is not rightly before this Court, and, as one of its members, I am not disposed to disturb the award of the Commissioners, for the reasons mentioned in

the *rule nisi* granted by the Supreme Court of Prince Edward Island. I would, therefore, maintain the appeal.

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## Judge Fournier's Decision.

(Translated from the French.)

Mr. Justice Fournier : The first question is—has this Court jurisdiction to hear this appeal ?

The Respondent contends that it has not. In Prince Edward Island there was a tribunal after the Supreme Court, and superior to it, consisting of the Governor-in-Council, to which application should have been made before bringing the present appeal. She bases her contention on the provision of our Act, which declares that no apeal shall lie to this Court, except from the decision of the Court of last resort in the Province whence the appeal comes.

The numerous documents cited by his Honor the Chief Justice, and the historical researches made, for the purpose of ascertaining the existence of that Court, have only had the result of demonstrating, in a very positive manner, that such a tribunal, consisting of the Governor-in-Council, as a Court of Appeal for Prince Edward Island, does not exist and never did exist.

Therefore the appeal is well laid. That point being decided, the question remains to be determined, whether the respondent, on bringing the matter before the Supreme Court of Prince Edward Island by *Certiorari*, should have had the award of the arbitrators, of which she complains, set aside. In the proceedings of the Supreme Court, the respondent gained her application and the award was set aside.

But the Act concerning the purchase of lands on Prince Edward Island, "The Land Purchase Act, 1875," contains an express provision taking away the remedy of *Certiorari*, in order to contest the validity of the proceedings of the arbitrators, and substituting a special course of procedure. Ought not the respondent to have had recourse to the special remedy pointed out by the statute in order to guard herself against mistakes and omissions, which might slip into the proceedings of the arbitrators.

Not having seen fit within the prescribed time to resort to the only remedy pointed out to her by the law, she ought not now to complain of the law, if she does not succeed in having the decree of the arbitrators amended.

Moreover, I am satisfied, like my honorable colleagues, that the formalities prescribed by the Law have been complied with, and that the respondent has no real grievance.