NOE CHEVRIER .....APPELLANT; 1879

AND *Feb'y.18,22.

HER MAJESTY THE QUEEN.....RESPONDENT. 1880

March 1.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Petition of Right—Demurrer—9 Vic., c. 37—Right of the Crown to plead prescription—10 years prescription—Good faith—Translatory title—Judgment of confirmation—Inscription en faux—Improvements, claim for by incidental demand—Arts. 2211, 2251, 2206, *C. C. (L. C.)*; *Art.* 473, *C. P. C. (L. C.)*

N. C., the suppliant, by his petition of right, claimed, as representing the heirs of *P. W. Jr.*, certain parcels of land originally granted by Letters Patent from the Crown, dated 5th January, 1806, to *P. W. Senr.*, together with a sum of $200,000 for the rents, issues and profits derived therefrom by the Government since the illegal detention thereof.

The Crown pleaded to this petition of right—1st, by demurrer, *defense au fonds en droit*, alleging that the description of the limits and position of the property claimed was insufficient in law; 2nd, that the conclusions of the petition were insufficient and vague; 3rd, that in so far as respects the rents, issues, and profits, there had been no signification to the Government of the gifts or transfers made by the heirs to the suppliants.

These demurrers were dismissed by *Strong*, J., and it was *Held*, That the objection taken should have been pleaded by *exception à la forme*, pursuant to art. 116 C. C. P., and as the demurrer was to all the rents, issues and profits as well those before as those since the transfer, it was too large and should be dismissed, even supposing notification of the transfer necessary with respect to rents, issues and profits accrued previous to the sale to him by the heirs of *P. W. Jr.*

This judgment was not appealed against.

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* PRESENT.—Ritchie, C. J., and Fournier, Henry, Taschereau and Gwynne, J. J.

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As to the merits the defendant pleaded—1st. By pre-emptory exception, setting up title and possession in Her Majesty under divers deeds of sale and documents; 2nd. Prescription by 30, 20 and 10 years. An exception was also fyled, setting up that these transfers to petitioner by the heirs of *P. W. Jr.* were made without valid consideration, and that the rights alleged to have been acquired were disputable, *droits litigieux*. The general issue and a supplementary plea claiming value of improvements were also fyled.

To first of these exceptions the petitioner answered that the parties to the deeds of sale relied upon had no right of property in the land sold, and denied the legality and validity of the other documents relied upon, and inscribed *en faux* against a judgment of ratification of title to a part of the property rendered by the Superior Court for the district of *Aylmer, P. Q.* To the exception of prescription the petitioner answered, denying the allegations thereof, and more particularly the good faith of the defendant. To the supplementary plea, the petitioner alleged bad faith on the part of defendant. There were also general answers to all the pleas.

On the issues thus raised, the parties went to proof by an *enquête* had before a Commissioner under authority of the Court, granted on motion, in accordance with the law of the Province of *Quebec.*

The case was argued in the Exchequer Court before *J. T. Taschereau*, J., and he dismissed the suppliant's petition of right with costs. Whereupon the suppliant appealed to the Supreme Court of *Canada.*

Held, (*Fournier* and *Henry*, J. J., dissenting.) 1. That before the Code, and also under the Code (art. 2211), the Crown had, under the laws in force in the Province of *Quebec,* the right to invoke prescription against a subject, which the latter could have interrupted by petition of right.

2. That in this case the Crown had purchased in *good faith* with translatory titles, and had, by ten years peaceable, open and uninterrupted possession, acquired an unimpeachable title.

3. That in relation to the *Inscription en faux,* the Art. 473 of the Code of Procedure is not so imperative as to render the judgment attacked an absolute nullity, it being registered in the Register of the Court.

4. That the petitioner was bound to have produced the *minute,* or draft of judgment attacked, but having only produced a certified

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copy of the judgment, the inscription against the judgment falls to the ground.

5. That even if *S. O's* title was *un titre précaire*, the heirs by their own acts ceded and abandoned to *L.* all their rights and pretensions to the land in dispute, and that the petitioner *C.* was bound by their acts.

Held, also, That the *impenses* claimed by the incidental *demande* of the Crown were payable by the petitioner, even if he had succeeded in his action.

Per *H. E. Taschereau* and *Gwynne*, J.J., That a deed, taken under 9 *Vic.*, c. 37, sec. 17, before a notary (though not under the seal of the Commissioners) from a person *in possession*, which was subsequently confirmed by a judgment of ratification of a Superior Court, was a valid deed, that all rights of property were purged, and that if any of the *auteurs* of the petitioner failed to urge their rights on the monies deposited by reason of the customary dower, the ratification of the title was none the less valid.

APPEAL from a judgment rendered by Mr. Justice *J. T. Taschereau* in the Exchequer Court of *Canada*, dismissing appellant's petition of right with costs.

The suppliant, as representing the heirs of one *Philemon Wright Jr.*, by his petition of right, claimed from Her Majesty certain parcels of lands forming part of lots Nos. 2 and 3 in the 5th range of *Hull*, held by the Government of the Dominion of *Canada*, and including portion of the works, booms and canals, known as the *Gatineau* works, and demanded $200,000 for rents, issues and profits derived therefrom by the Government since their illegal detention thereof. The petition set up Letters Patent from the Crown to *Philemon Wright Senr.*, a transfer from *Philemon Wright Senr.* to *Philemon Wright Jr.*; the marriage of *Philemon Wright Jr.* to *Sally Olmstead* without marriage contract; the death of *Philemon Wright Jr.*, in Dec., 1821, leaving 8 children, issue of his marriage with *Sally Olmstead*; the right of dower in the widow, called customary dower, consisting in the usufruct for the wife and ownership

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for the children, after death of the husband, of the real estate held by *Philemon Wright Jr.*, at the time of his marriage with *Sally Olmstead*; and the donations and transfers by the children of *Philemon Wright Jr.* to the suppliant, executed in favor of the suppliant after the death in 1871 of their mother, who, subsequent to the death of *Philemon Wright Jr.*, had married one *Nicholas Sparks*.

The crown pleaded to this petition of right: 1st, by demurrer, *defense en droit*, because the petition failed to describe by a clear and intelligible description the limits and position of the lots in question, as in the possession of Her Majesty; and, also, because the petition was insufficient in law in so far as the petitioner had failed to allege any signification to Her Majesty of the deeds of gift or transfer in virtue of which he claimed the said property and said rents, issues and profits, which he estimated to amount to $200,000.

These demurrers were argued before *Strong*, J., and the following judgment was rendered, and was not appealed from:—

"The Court having heard the parties on the demurrers by the said defendant firstly, secondly and thirdly pleaded. Considering that as to the said demurrer in the cause *firstly* pleaded the objection thereby taken to the petition, should, pursuant to article 116 of the Code of Civil Procedure of the Province of *Quebec*, have been taken and set forth by way of exception to the form of the petition, and not by way of demurrer. And considering further, that the position, boundaries and extent of the land of which the petitioner prays to be declared proprietor are set forth with sufficient certainty and particularity in the petition, doth dismiss the said demurrer first pleaded with costs, *distraits* to the Attorney for the said petitioner.

"And considering, with respect to the demurrer in

this case by the said defendant *secondly* pleaded, that the said second demurrer is addressed to the whole of the petitioner's claim to the rents, issues and profits of the lands in the petition mentioned, and that by virtue of article 1,498 of the Civil Code of the Province of *Quebec*, the petitioner is entitled to recover so much of the said rents, issues and profits as have accrued since the sale and transfer to him the petitioner as alleged, without shewing any notice or signification to have been made of the said deeds of sale, and transfer to the Crown or its officers, whereby it appears that, assuming the pretention of the defendant to be right as regards the rents, issues and profits, accrued prior to the date of the said deeds of sale and transfer, the conclusion of the said second demurrer is too large, and covers a portion of the petitioner's conclusions in respect of which he is entitled to recover, *doth dismiss* the said demurrer secondly pleaded with costs, *distraits* to the Attorney for the petitioner.

"And as to the demurrer in this cause *thirdly* pleaded, considering that the grounds of the said demurrer are the same as those severally comprised in the first and second demurrers, for the reasons already given as to the first and second demurrers *doth dismiss* the said demurrer so thirdly pleaded with costs, *distraits* to the Attorney for the said petitioner."

As to the merits the defendant pleaded—1st. Prescription by 30 and 20 years; 2nd. Prescription by 10 years; 3rd. By exception, setting up title and possession in Her Majesty under divers deeds of sale and documents to the Crown, the deeds relied upon being a notarial deed from *Sally Olmstead*, 12th Sept., 1849, to Her Majesty, of 21 acres, 1 rood and 25 perches of the property claimed by suppliant; two notarial deeds by one *Andrew Leamy et ux.*, dated respectively 27th March, 1854, and 7th May, 1855, of 65 acres and 2 perches of

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the property, and a deed of sale and quit claim, dated 3rd Feb., 1853, and registered after the *fiat* was granted, alleged to have been executed by some of the heirs in favor of *Leamy*; 4th. By exception, alleging that by 9 *Vic.*, c. 37, the Commissioners of Public Works were authorized to take possession of the lands and water-courses necessary, in their judgment, for the construction of Public Works, and to contract and agree with all persons, guardians, tutors, &c., and all such contracts and agreements, and all conveyances and other instruments made in pursuance thereof, were declared to be valid and effectual to all intents and purposes whatever, and provision was thereby made for the payment of the compensation to be paid for such land and waters, to the owner and owners, occupier or occupiers thereof; that in conformity with said statute, and the law in force in that behalf, the said Commissioners of Public Works caused the said titles or conveyances to Her Majesty the Queen to be deposited with the Prothonotary of the Superior Court, in the District of *Ottawa*, said Court representing the Court of Queen's Bench, and fully complied with all and every the requirements of said statute and of law, in order to obtain the confirmation of said several deeds or conveyances; and that by judgments in due form of law, rendered in said Court, and now in full force and effect, the said titles and conveyance were confirmed and the claims of the persons under whom petitioner set up title were thereby barred.

An exception was also fyled, setting up that the donations to petitioner were made without legal and valid consideration, and by concert and collusion with the donors and with knowledge of the titles and possessions of the Crown, and that the rights alleged to have been acquired by the donations were uncertain, disputed, and disputable, *droits litigieux.*

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A *défense en fait*, or general issue, was also fyled.

The answers to the pleas of prescription denied that Her Majesty the Queen and her *auteurs* had been in possession, use and occupation of the land in said petition mentioned, peaceably, openly, uninterruptedly, and in good faith, and with good and sufficient title, and alleged specially that *Sally Olmstead* had no right to convey the property referred to, having only a usufruct; that the judgments of ratification could not affect the rights of the real owners; that the judgment of confirmation had been entered in the Register from a pretended draft of judgment illegally made, and signed by the Prothonotary, and was null and void; and that *Leamy* had only an usufructuary possession derived from *Sally Olmstead*.

A motion for an *Inscription en faux* was made by petitioner against the judgment of ratification of title and against the draft of the judgment, and also against the register in which the judgment was registered.

An incidental *demande* was put in on behalf of the Crown, setting up that improvements had been made on the property since the occupation by defendants, and that the value of these improvements should be set off *pro tanto* against any rents or revenues.

Issue was joined on this incidental *demande*, and an admission given as to certain improvements having been made. And the incidental *demande* came up for hearing with the merits of the case.

The other allegations of fact in the pleadings and the oral and documentary evidence given at the trial, sufficiently appear in the judgments hereinafter given.

The case was argued on the merits in the Exchequer Court before *J. T. Taschereau*, J., who delivered the following judgment:

"Le pétitionnaire réclame en cette cause contre Sa Majesté la Reine:

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"1o. La propriété d'une étendue de terre que Sa Majesté possède comme formant partie des Lots. 2 et 3, du 5e rang du township de *Hull*, en la Province de *Québec* ;

"2o. Une somme de $200,000 comme fruits et revenus de cette étendue de terre qu'il allègue être illégalement détenue par le gouvernement de Sa Majesté.

"Le pétitionnaire fonde sa réclamation sur un grand nombre de tîtres, et notamment sur plusieurs actes de donation produits en cette cause comme émanant des héritiers de feu *Philémon Wright*, concessionnaire originaire de ces lots de terre en vertu de lettres patentes en date du 3 janvier 1806.

"Sa Majesté en réponse à cette pétition a plaidé :

"1o. Insuffisance dans la description de l'étendue et du site actuel des parties de lots de terre en question et comme possédés par Sa Majesté.

"2o. Insuffisance dans la pétition, en autant qu'elle n'allègue pas que le pétitionnaire ait signifié au gouvernement de Sa Majesté les divers actes de donation, cessions ou transports en vertu desquels il (le pétitionnaire) réclame la propriété des lots et les fruits et revenus qu'il estime à la somme de $200,000 et la propriété des dits lots de terre.

"3o. Par exception péremptoire en droit, Sa Majesté a plaidé prescription de 10 et 20 ans, et de plus celle de trente ans (30 ans).

"4o. Sa Majesté a invoqué au soutien de sa défense divers documents, entre autres :

"1o. Un acte de vente fait et passé pardevant Mtre. *R. A. Young* et confrère, notaires, le 7 mai, 1855, consenti par *Andrew Leamy* et *Erexina Wright*, son épouse, au gouvernement du *Canada*, contractant par la ministère de *W. F. Coffin* et *Thomas McCord*, Ecr., pour et au nom du Commissaire des Travaux Publics.

"2o. Un acte de ratification (dudit acte de vente), passé

à *Québec*, devant Mtre. *Petitclerc* et confrère, notaires publics, le 19 mai, 1855, des deux lots de terre vendus à Sa Majesté par l'acte ci-dessus mentionné comme portant date 7 mai, 1855.

" 3o. Que cet acte de vente du 7 mai, 1855, fut déposé au bureau du Protonotaire de la Cour Supérieure pour le District d'*Ottawa*, conformément à un statut de la Législature du *Canada*, 9 Vic. ch. 37, établissant les Travaux Publics et que cet acte a été confirmé par jugement de cette dite cour, prononcé le 3 juillet, 1856, et qu'en conséquence, en vertu des diverses sections du dit statut et du dit jugement, tout droit de propriété, hypothèque, droit de mineurs, et même *douaire non ouvert*, si aucuns existèrent, ont été purgés et entièrement éteints, quant aux immeubles acquis par le gouvernement de Sa Majesté.

" 4o. Sa Majesté a également invoqué un titre de donation fait et passé à *Hull*, le 6 février, 1865, devant *Larue* et confrère, notaires, par lequel acte, *Andrew Leamy* et la dite *Erexina Wright*, vendirent au gouvernement de Sa Majesté, représenté par l'Honorable *Charles Chapais*, en sa qualité de Commissaire des Travaux Publics, un certain lot de terre y désigné et en a obtenu un jugement de confirmation aux mêmes effets que celui ci dessus énoncé.

" 5o. Sa Majesté a également invoqué en sa plaidoirie divers autres actes pour appuyer sa défense et elle en allègue l'enregistrement, conformément à la loi.

" La pétitionnaire *Chevrier* a répliqué, spécialement, que le jugement de confirmation du 3 juillet, 1856, par la Cour Supérieure du District d'*Ottawa*, était faux, et il s'est inscrit en faux contre cet acte et a plaidé mauvaise foi à l'encontre des différentes prescriptions invoquées par Sa Majesté, et a prétendu que les divers titres d'acquisition ci-dessus énumérés, n'étaient pas dans la forme pre-

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scrite par le 9 Vic. ch. 37, et qu'en conséquence Sa Majesté n'en pouvait tenir aucun avantage.

"Comme l'on voit, cette cause est très compliquée et soulève nombre de questions importantes. Et j'avoue que la plaidoirie orale des habiles avocats des parties m'a beaucoup aidé dans le *délibéré*. Je suivrai dans le cours de mes observations, autant que possible, l'ordre dans lequel les différents points de la demande et de la défense, m'ont été présentés.

"Insuffisance des allégations de la déclaration ou pétition.

"Le pétitionnaire dit que le gouvernement de Sa Majesté est actuellement en possession de 159 acres de terre, situés dans les Nos. 2 et 3, du 5e rang du Township de *Hull*, y compris un étang (*a pond*) ; il ne donne pas les tenants et aboutissants de ces 159 acres, ni l'étendue ou superficie de l'étang ; cette irrégularité, si elle eût été plaidée par exception à la forme serait fatale et aurait indubitablement entraîné le renvoi de la pétition quant à présent et sauf à se pourvoir; mais Sa Majesté n'a pas plaidé par exception à la forme, mais bien par une défense ordinaire en droit. Tout l'effet de cette dernière défense a été de mettre le Requérant sur ses gardes, et s'il eût demandé à amender cette partie de sa pétition *ab initio*, ou même pendant l'instance, je lui aurais accordé ce droit d'après la règle 57, Cour d'Echiquier, page 231 du Manuel de Mr. *Cassels*, mais le pétitionnaire n'en a rien fait, pas même lors de la plaidoirie devant moi. Aujourd'hui, si j'avais à prononcer en faveur du pétitionnaire, je ne pourrais savoir ni indiquer où se trouvent les 159 acres de terre en question, y compris le *pond* (étang), dans le 2 ete 3e rang, je ne sais où arrêter au nord comme au sud, à l'est comme à l'ouest. Je serais dans l'impossibilité de prononcer d'une manière certaine avec une base si incertaine. Pourrais-je même aujourd'hui renvoyer les parties à rectifier cette

irrégularité ? C'est possible, mais cet amendement n'obligerait-il pas le pétitionnaire à recommencer l'enquête *ab initio* après une plaidoirie nouvelle de la part de Sa Majesté, car je ne puis d'avance prévoir les conséquences d'un tel amendement sur la plaidoirie. Mais je crois qu'à cet étage de la cause le pétitionnaire n'a pas droit de demander à faire cet amendement : je considère que le droit d'amendement qu'accorde la règle 57, (page 231, Manuel *Cassels*), ne s'applique qu'au temps de l'instruction de la cause et non au temps de la plaidoirie (argument) de la cause, après que les parties l'ont terminé. D'ailleurs le requérant n'a fait aucune demande de permission, ce qui met fin à la question.

"Ainsi, en supposant pour un instant que sur tous les autres points, je serais convaincu de la légalité des pétitions du pétitionnaire, je suis d'opinion qu'il devait faillir relativement à cette irrégularité à laquelle il n'a pas voulu y remédier et qui a pour effet de rendre impossible un jugement en sa faveur.

"Sa Majesté a plaidé que le pétitionnaire n'est pas saisi d'un droit d'action contre elle, tant pour la propriété réclamée que pour les fruits et revenus au montant de $200,000, parce qu'il n'a pas signifié à Sa Majesté avant de produire sa pétition de droit, ni en aucun temps depuis, les actes de donation sur lesquels il fonde cette pétition. C'est un principe incontestable d'après le Code Civil, que le cessionnaire de droits de créances et de droits d'actions n'a pas de possession utile à l'encontre des tiers tant que l'acte de vente n'a pas été signifié et qu'il n'en a pas été délivré copie au débiteur. De fait il n'est pas saisi du droit d'action, il ne peut poursuivre sans avoir au préalable effectué cette signification, son droit n'est pas né et n'existera que lors de cette signification des transports, ou donations, qu'il tient des prétendus héritiers, ou représentants, de feu *Philémon Wright*.

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"Les décisions de nos plus hauts tribunaux sont en ce sens, surtout depuis les articles 1570, 1571 du Code Civil Canadien.

"Les articles 1689 et 1690 du Code *Napoléon* dont la rédaction est en termes équivalents à ceux de notre Code Civil Canadien, et M. *Troplong* en son traité de la vente, No. 909, démontre que les actions, même de droits immobiliers, ne peuvent être cédées qu'à la charge d'une signification du tître de cession.

"Mr. *Toullier*, Vol. 17, continuation de *Duvergier*, page 215, No. 18, énonce cette même doctrine, même quant aux cessions de droits d'actions immobiliers. Telle est la loi, surtout en la Province de *Québec*, depuis le Code Civil Canadien.

"Il n'y a aucun doute que les actes de donation, ou cession, que lui ont faits les représentants *Wright* ne contiennent ;—

1o. Qu'un transport de fruits et revenus ;

2o. Qu'une cession de droits d'action pour recouvrer ces fruits et de droit d'action contre Sa Majesté pour recouvrer certains immeubles. Or, tout cela est transport de droits d'action, exigeant signification au débiteur pour que le cessionnaire en soit légalement saisi et puisse les exercer en justice.

"Le pétitionnaire prétend que le tître principal que Sa Majesté invoque, et cité en sa défense comme vente par *Andrew Leamy* et *Erexina Wright*, son épouse, exécuté le 7 mai, 1855, par-devant *Young* et collègue, est nul et ne peut produire les effets que Sa Majesté prétend en résulter.

"Cet acte d'acquisition est évidemment basé sur la 9 *Vic.* ch. 37, et le pétitionnaire invoque la section 17 de cet acte comme contraire à la validité de ce contrat, sur le principe que cet acte n'a pas été exécuté sous le seing du commissaire. Cet acte n'est pas un écrit sous seing privé ; il a été exécuté en première instance par-devant

notaires, entre Messieurs *W. F. Coffin* et *T. McCord*, comme se portant fort du commissaire-en-chef, et promettant de le faire ratifier par acte de mai, 1855, passé à *Québec* par-devant Mtre. *Jos. Petitclerc* et collègue, notaires, et aussi contresigné par *Thomas Begley*, Secrétaire du Bureau des Travaux Publics. Le pétitionnaire prétend que cet acte est nul parce qu'il n'a pas été scellé du sceau du Commissaire, mais il me semble que le seul objet de cette section 17 de la 9 Vic. ch 37, exigeant le sceau du Commissaire, était pour éviter toute erreur sur l'interprétation à donner à aucun écrit sous seing privé du Commissaire, comme une lettre que l'on pouvait, ou voudrait, interpréter comme un contrat liant le gouvernement.

"Indubitablement la législature ne pouvait avoir en vue de prohiber comme contrat l'acte le plus solennel en la Province de *Québec*, savoir celui reçu et exécuté par des officiers publics aussi bien connus que les notaires publics. Il me semble que le fait seul d'exécuter de tels actes par-devant des notaires publics, leur donne un caractère d'authenticité beaucoup plus prononcé que s'ils étaient passés sous seing privé, quoique revêtus du sceau du commissaire. Je considère cette section 17 comme suggestion d'un mode de contrat, mais non exclusive de toute autre manière de contracter suivant les lois de la Province de *Québec*. De plus, on voit à la section 8 de cet acte 9 *Vic.*, ch. 37, que l'emploi des actes passés par-devant des notaires est admis comme valable. Cette section 8 dèclare que ces contrats notariés seront exemptés de la formalité de l'enregistrement, admettant évidemment, la forme du contrat notarié. Cet acte de vente et ceux de méme nature que Sa Majesté a invoqué dans sa défense ont dû être soumis au procureur général et être approuvés par lui, puisque les applications pour leur confirmation ont été faites en son nom pour Sa Majesté la Reine, et j'avoue

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que je trouve en ces circonstances une haute autorité à l'appui de la légalité des titres en question en cette cause, et notamment de celui du 7 mai, 1855.

"De plus, ces tîtres ont été approuvés par le tribunal de la Cour Supérieure, qui les a confirmés, et personne ne s'en est plaint, que plus de vingt ans après, et cette plainte vient de la part d'un acquéreur de droits litigieux. Ces actes me paraissent parfaitement légaux, et il ne me reste sur cette branche de la cause qu'à considérer l'effet qu'ils pourraient légalement produire vis-à-vis des auteurs du pétitionnaire.

La Législature par son statut, 9 *Vic.*, ch. 37, a décrété emphatiquement que de tels actes suivis d'un jugement de confirmation par la Cour Supérieure écarterait à toujours en faveur de Sa Majesté toute réclamation hypothécaire, tout droit de propriété quelconque, même le douaire non-ouvert, laissant aux créanciers, ou propriétaires du fonds, à faire valoir et exercer leurs droits sur le prix de vente déposé entre les mains du Protonotaire de la Cour Supérieure. Tout ceci a eu lieu. Cette législation peut paraître exorbitante de prime abord, mais elle est sage et conforme aux exigences du service public qui ne doit pas souffrir des délais. Si les auteurs du pétitionnaire n'ont pas jugé à propos de se présenter pour recevoir leur créances comme représentant le douaire coutumier, ils n'ont qu'eux-mêmes à blâmer. Mais à ce propos je vois que Mr. *Andrew Leamy* et son épouse, *Erexina Wright*, les vendeurs, ont reçu sur la distribution des deniers du prix de vente une somme de £933 2s. 4d., et je remarque dans le dossier de la cause qu'il se trouve nombre de documents sous forme de transports, ou cessions, (*quit-claims*) par les héritiers *Philémon Wright*, à Mr. *A. Leamy*, constatant que *Leamy* et son épouse étaient aux droits de ces héritiers, ou représentants, *Philémon Wright*, ce qui expliquerait probablement l'esprit de libéralité avec le-

quel ils ont fait donation sans garantie au pétitionnaire de ces prétendus droits ou réclamations qui, pour une cause ou une autre étaient sortis de leurs mains. Je remarque aussi qu'un autre créancier, *John O'Meara*, a reçu £430 14s. 2d. et que plusieurs des héritiers, ou représentants légaux de feu *Philémon Wright*, qui étaient parties opposantes à la confirmation du titre de Sa Majesté, du 7 mai, 1855, ont retiré leur opposition. Si les autres intéressés ne se sont pas présentés pour recevoir leur part du douaire, ils n'ont qu'eux seuls à blâmer et leurs droits sont à jamais perdus, si le jugement de confirmation du titre de Sa Majesté et de la distribution des deniers n'est pas déclaré faux, tel que le pétitionnaire le demande en cette cause.

" En abordant cette branche de la cause qui se rapporte à l'inscription de faux que le pétitionnaire a formulée contre le jugement du 3 juillet, 1856, disons de suite, que le moyen principal du pétitionnaire, et en réalité le seul qu'il puisse invoquer est celui tiré du fait que le projet (*draft*) ou minute de ce jugement n'est pas paraphé par le ou les deux juges qui l'ont prononcé, car du reste le dossier de la cause est complet, le jugement incriminé est entré au dossier, il a été régulièrement enregistré au bureau d'enregistrement du comté d'*Ottawa* 14 jours après sa reddition, et ce dans le livre B, Vol. 6, p. 554, sous No. 416, sous le certificat du régistrateur, lequel certificat n'est pas attaqué, et ce n'est que vingt ans après tout cela, que l'on se réveille pour contester l'authenticité de ce jugement. J'ai dit que le régistre de la Cour Supérieure constate toute la procédure de la cause et même l'entrée du jugement, mais il semblerait que cette entrée n'aurait été faite que longtemps après. Je dirai même que le régistre a été tenu avec une négligence bien regrettable, quoique toute la procédure y soit complétement entrée depuis le dépôt de l'acte de vente jusqu'au jugement final. Il ne manque donc que la

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paraphe du juge sur la minute, et ici s'élève la question de savoir si l'article 473 du Code de Procédure du *Bas-Canada* est tellement impératif que la cour y doive trouver une cause de nullité insurmontable, s'il n'est pas observe à la lettre ? Je ne le crois pas, à moins que l'article le prononce en termes formels. Cet article est, suivant moi, suggestif plutôt qu'impératif. Le juge ou le greffier par suite de cette négligence peuvent être blâmés, et même condamnés à des dommages sérieux, à défaut par l'un d'avoir paraphé la minute, et par l'autre d'avoir entré au régistre un jugement dont le juge n'a pas paraphé la minute. Dire que le plaideur souffrira de la négligence d'un officier public au point d'en être ruiné, et ce soit par l'oubli ou négligence, c'est ce que je ne puis admettre, surtout dans un cas comme celui-ci, où il ne manque que cette paraphe et que le dossier est régulier et constaté par son enregistrement au bureau du régistrateur du district d'*Ottawa*. M. *Poncet*, 1er vol. Traité des Jugements, pages 228, 229, 230 et suivantes, traite cette question en maître, et je suis heureux de le trouver de mon opinion. Sans doute la loi est stricte et elle doit l'être, mais son caractère principal est celui de l'équité et de la justice, et je le demanderai à tout esprit impartial, dans un cas comme celui qui nous occupe, pourrait-on légalement ruiner un simple individu par suite d'une telle omission. Je dis non avec toute confiance.

" Le pétitionnaire *Chevrier* a beaucoup insisté sur le fait que la minute du jugement (*draft of judgment*) n'a pas été signée ou paraphée par le ou les juges qui l'ont prononcé le 3 juillet, 1856, mais la preuve de cette omission me paraît insuffisante.

" En effet ce document (la minute), produit sous le No. 26 des exhibits de Sa Majesté, n'est pas paraphé par le juge, mais le pétitionnaire aurait dû noter que ce document No. 26 n'est qu'une copie du projet (*draft*

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of judgment) puisqu'elle est ainsi produite et certifiée comme telle copie. Le pétitionnaire aurait dû faire produire la minute elle-même; ce n'est que contre une copie qu'ils s'est inscrit en faux; et pour réussir dans la preuve de son faux il aurait dû demander à la cour d'ordonner aux avocats de Sa Majesté de produire la minute même. C'est une mesure de toute nécessité qu'il aurait dû prendre, et à défaut son inscription de faux dirigée contre la minute doit être renvoyée. Il aurait pu à cet égard examiner le greffier de la Cour Supérieure du District d'*Ottawa*, lequel vit encore, et qui aurait pu produire la minute ou jetter sur la matière quelques nouvelles lumières. Sa Majesté, ni ceux qui la défendent aujourd'hui, se trouvant sur la défensive, n'avaient rien à produire, leur position était celle de la défensive. Je considére cette objection comme insurmontable et comme mettant fin à l'inscription de faux, quant à ce qui concerne la minute, car cette minute n'a pas vu le jour sous cette inscription. La minute n'étant pas produite, l'inscription contre elle tombe, et par contre-coup celle contre la copie du jugement entrée au registre doit éprouver le même sort, puisqu'en réalité la seule chose que l'on pût reprocher au jugement consistait en l'absence de la paraphe du juge sur la minute et qui n'est pas nécessaire sur la copie du jugement tirée du régistre. Cette objection peut paraître futile; je la considère pour le moins aussi importante que celle de l'omission de la paraphe du juge sur la minute d'un jugement entré au régistre, accompagné de toutes les autres formalités de la reddition d'un jugement, suivi de l'enregistrement de ce jugement et de plus de vingt ans de possession sans trouble, si ce n'est celui que lui cause le pétitionaire qui ne se présente ici que comme acquéreur de droits litigieux, qualité que les tribunaux ont mission de ne pas accueillir aveuglément.

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"Suivant les prétentions du pétitionnaire, le jugement qu'il attaque n'aurait jamais été prononcé, il serait un faux, mais il ne peut nier que la cause dans laquelle ce jugement est allégué avoir été prononcé a existé et il existe encore; le greffier actuel le dit, et l'a prouvé clairement, or je me demande, quelle serait la conséquence d'un jugement que je rendrais aujourd'hui, ou que tout tribunal, en appel par exemple, et que maintiendrait l'inscription de faux contre le jugement de confirmation? Serait-ce de donner gain de cause au pétitionnaire sur tous les points et de faire condamner Sa Majesté à l'indemniser? Non, indubitablement, si ce n'est quant aux frais de l'inscription et à la déclaration du faux du jugement. Je ne pourrais condamner Sa Majesté à remettre les terres réclamées au pétitionnaire. La seule conséquence serait que la cause serait reportée à l'état où elle était avant le jugement du 3 juillet, 1856. Le dossier de cette cause, dans la quelle la demande de ratification a eu lieu au nom de Sa Majesté, est encore en existence, et son instance n'a pas été affectée par la péremption, et si aujourd'hui le jugement était déclaré faux la cause pourrait être continuée jusqu'à jugement final sur nouvelle demande, ou application, que Sa Majesté ferait d'un plaidoyer depuis *darien-continuance*, et alors Sa Majesté pourrait faire suivre ce plaidoyer d'un jugement dont on aurait soin de ne plus oublier la paraphe sur la minute.

"Je crois que je pourrais me dispenser de tout commentaire ultérieur, vu que les divers tîtres de propriété en cette cause suivis de leur ratification en justice, comme je l'ai déjà fait remarquer, assurent à Sa Majesté un droit incontestable à la propriété de ses divers terrains, mais comme les parties en cette cause ont traité la question de prescription, je dois en dire quelques mots.

"Je dirai d'abord que la couronne comme tout indi-

vidu peut prescrire. L'article 2211 du Code Civil Canadien le déclare en termes formels, et de plus consacre ce droit comme ancien, en ces termes :

" Le Souverain peut user de la prescription. Le moyen qu'à le sujet pour l'interrompre est la pétition de droit outre les cas où la loi donne un autre remède.

" La Législature, en adoptant cet article comme droit ancien, a tranché une question qui a pu être douteuse, mais qui se trouve définitivement réglée aujourd'hui.

" D'abord, quant à la prescription de dix ans, il est incontestable que Sa Majesté ayant été de bonne foi dès le moment de ses diverses acquisitions dont elle ignorait les vices, si toutefois ces vices existèrent, a par l'espace de dix ans à compter des diverses dates de ses tîtres d'acquisition, à l'encontre du prétendu douaire coutumier de *Sally Olmstead*, dont le mari est mort le 28 novembre, 1812, époque à laquelle le douaire s'est ouvert quant à la mère et aux enfants, avec cette différence que la prescription contre la mère a couru à compter du décès de son mari, et contre les enfants à compter de leur majorité, même du vivant de leur mère, suivant l'article 1449 du Code Civil Canadien. Or tous ces enfants étaient majeurs depuis plus de dix ans à l'époque des acquisitions de Sa Majesté des terrains en question en cette cause.

" S'il existait un vice dans la possession de Sa Majesté il ne lui a pas été dénoncé par interpellation judiciaire (ou pétition de droits) conformément à l'article 412 du Code Civil Canadien qui règle cette question comme ancien droit : ' Le possesseur est de bonne foi lorsqu'il possède en vertu d'un tître dont il ignore les vices ou l'avènement de la cause résolutoire qui y met fin. Cette bonne foi ne cesse néanmoins que du moment où ces vices ou cette cause lui sont dénoncés par interpellation judiciaire.' L'Honorable Juge *Loranger* a admis ce

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principe dans la cause de *Lepage* vs. *Chartier* (1), savoir, que pour prescrire par dix ans contre un douaire et faire les fruits siens il suffit que le tiers acquéreur ait été de bonne foi au moment de son acquisition, et que la connaissance subséquente du vice de son tître ou de celui de son prédécesseur ne peut lui préjudicier. Je ne vois rien au dossier de cette cause pour me faire croire un instant à la mauvaise foi du Gouvernement de Sa Majesté, au moins à l'époque de la passation des divers actes d'acquisition que Sa Majesté invoque en cette cause. Inutile de remarquer ici que la plaidorie en cette cause de la part de Sa Majesté n'énonce pas que cette possession de dix ans avec tîtres ait été entre présents et non-absents, car c'était matière d'exception chez le pétitionnaire, le principe étant que dans ces cas la preuve de l'absence incombe à l'excipient. Je crois également que Sa Majesté a prouvé son plaidoyer de prescription de trente ans. En effet elle possède les terrains en litige en vertu d'acquisition à tîtres singuliers, elle peut invoquer sa possession en vertu de ses tîtres, ce qui lui donne vingt-six ans de possession, et elle peut y joindre celle d'*Andrew Leamy* et *Erexina Wright*, qui a été d'environ trois ans, et celle de Madame *Sparks* elle-même. On a prétendu que le tître de Madame *Sparks* était précaire et sa possession infectée de ce vice et ne pouvait servir à Sa Majesté pour compléter, environ deux ans manquant pour accomplir les 30 ans de prescription.

"Je suis porté à croire que le titre de Madame *Sparks* en est un non-attaché de précarité, je l'interprète comme un arrangement de famile entre elle et ses enfants, par lequel cette femme, *Sally Olmstead*, a renoncé à son droit à un douaire sur une étendue de plus de 591 acres sur lesquels elle pourrait réclamer 295 acres en usufruit pour s'en tenir à la propriété pleine et

(1) 11 L. C. Jur. 29.

entière de 159 acres, plus l'étang (*pond*) dont il est ci-devant question, et qu'elle vend le 29 septembre, 1853, comme à elle appartenant, suivant l'acte exécuté par-devant *R. A. Young* et confrère, notaires, à *Aylmer*. Le fait que cette vente ait été faite sans autre garantie que celle de ses faits et promesses, ne milite pas contre les droits de la couronne : elle a usé de ces 159 acres de terre comme à elle appartenant, et elle pourrait les vendre ainsi après les avoir possédés depuis le partage ou arrangement de famille du 5 mars, 1838, ce qui donnerait à Sa Majesté le bénéfice d'une prescription trentenaire plus six ans.

" En supposant pour un instant que le tître de Madame *Sparks* fût précaire, ce que je ne crois pas, les héritiers de *Philémon Wright* et de Madame *Sparks* ont effectué en faveur de M. *Leamy* dès 1836 et 1838, des cessions et abandons de tous leurs droits et prétentions aux terrains réclamés en cette cause, et en ce moment leur cessionnaire en ayant cause, M. *Chevrier*, est lié par les actes de ses auteurs et prédécesseurs et surtout par les déclarations et désistements (*quit-claims*) des prétendus douariers représentés par M. *Chevrier ;* ces actes de désistement (*quit-claims*) constituent une rénonciation au douaire de leur mère.

" La rédaction de ces actes de désistement, rénonciations et *quit-claims*, peut laisser quelque chose à désirer, mais ce qu'il y a de bien certain en ces actes c'est l'intention d'abandonner à M. *Leamy* et à ses successeurs tous les droits et prétentions qu'ils pouvaient avoir à aucun tître sur les terrains en question en cette cause,

" Maintenant, le grand nombre de ces enfants, petits-enfants, ou représentants de *Philémon Wright* ont-ils prouvé leur généalogie, ou même droits successifs ? C'est une question tres-problématique et dans la discussion de laquelle il vaut mieux ne pas entrer, et ce dans l'intérêt de ces enfants.

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"Je passe par-dessus nombre de questions d'assez faible intérêt, croyant en avoir déjà dit assez pour motiver le renvoi de la pétition ; cependant je signalerai une autre seule difficulté que le pétitionnaire aurait à surmonter : elle n'a pas été signalée par la défense, mais que je me considère tenu d'indiquer ici, vu qu'elle est très-sérieuse et que si le jugement que je vais prononcer était porté en appel, comme j'ai tout lieu de croire qu'il le sera, l'objection pourrait y être soulevée et le requérant pris par suprise. Cette difficulté vient de ce que le pétitionnaire n'a pas prouvé ou même essayé de prouver l'enregistrement des droits de succession des descendants dans les immeubles en question. Cette formalité est essentielle et formellement requise par l'article 2098 du Code Civil Canadien qui énonce : 'Que la transmission par succession doit être enregistrée au moyen d'une déclaration énoncant le nom de l'héritier, son degré de parenté avec le défunt, le nom de ce dernier et la date de son décès, et enfin la désignation de l'immeuble, et que jusqu'à ce que l'enregistrement du droit de l'acquéreur ait lieu, l'enregistrement de toute cession, transport, hypothèque en droit par lui consenti affectant l'immeuble est sans effet.'

"Ainsi les cédants ou donateurs de M. *Chevrier*, n'ayant jamais fait enregistrer leurs droits successifs tel que requis par cette article, ils n'en étaient pas légalement saisis de manière à céder à M. *Chevrier* ces mêmes droits ; M. *Chevrier* n'a donc qu'un vain titre à ces propriétés, il ne pouvait les réclamer sans montrer que les donateurs s'étaient soumis à cette forme de transmission par succession impérativement exigée par cet article 2098 du Code Civil Canadien. M. *Chevrier* n'a donc qu'un titre sans effet, il ne peut donc pas espérer un jugement favorable.

"Disons de suite à propos des fruits et revenus de ces terrains au montant de $200,000 que M. *Chevrier*

réclame, que supposant pour un instant que Sa Majesté dût être condamnée à remettre à M. *Chevrier* ces terrains, Sa Majesté ne pouvait être condamnée à les payer, vu que Sa Majesté a possédé en vertu de bons tîtres, justes tîtres et de bonne foi depuis le moment de ses acquisitions de ces terrains, car suivant l'article 412, ayant un tître valable, en ignorant les vices, surtout au moment de ses acquisitions, elle a fait les fruits siens et ne peut être condamnée à les remettre.

" Et quant aux impenses que Sa Majesté a réclamées à un montant trés-élevé, elle devrait dans tous les cas lui être payées par le pétitionnaire, dans le cas ou il aurait réussi à établir ses droits aux terrains en question. Le renvoi pur et simple de la pétition me semble être une conséquence inévitable des objections que j'ai indiquées dans les pages précédentes, et en conséquence je renvoie la pétition de droit de M. *Chevrier* et je le condamne à payer les dépenses encourues par Sa Majesté sur la défense en cette cause."

From this judgment the suppliant appealed to the Supreme Court of *Canada.*

Mr. *Fleming* for appellants :

The defendant demurred to the petition on the ground of insufficiency of the description of the property, and want of notification to the Government of the transfer of the rights of the heirs to the suppliant. These demurrers were all dismissed by *Strong*, J. This judgment is sound in law. See arts. 116, 119 and 52 C. P. C. L. C., *Pothier* Procédure Civile (1), *Pigeon* Procédure Civile (2); *Cameron* v. *O'Neill* (3); C. C. L. C. art. 1570 and 1571; Code Nap. art. 1689, 1690; *Laurent* Code Civil (4).

Moreover, Mr. Justice *Strong's* judgment has not been

(1) 3 Vol. p. 123.
(2) 1 Vol. p. 140.
(3) 1 L. C. R. 160.
(4) Vol. 24 p. 141, No. 496.

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appealed against by way of a cross appeal, and it therefore remains in force.

The first plea relied on by respondent is that of thirty years' prescription. To complete the time of this prescription, the defendant has to join the possession of *Leamy* and Mrs. *Sparks*. Now, the possession of Mrs. *Sparks* was that of a dowager, *douairiere*, only, and she could not prescribe against her title, and *Leamy* having only acquired the usufruct could not prescribe either, and consequently there was no prescription during their occupation of which the Crown might avail itself, and its own possession was too short.

The quit claims produced show nothing contradictory of the property being held by *Sally Olmstead*, as dower. With respect to her share the expression is "allotted to her use." Now, this exactly coincides with the rights of a dowager—which is the use or enjoyment of the property subject to dower.

Had the quit claims simply said "allotted to *Olmstead*," there would be nothing contradictary to the right of dower, it would be merely an omission of the mention of the title by which that portion was to be held, and consequently the character of the title must be held to be in accordance with the rights of the person to whom it was allotted; if an heir, then she would hold as heir; if it had been community property, then as *commune*; if left to her by will, then as legatee; but as no other title than that of dowager is shewn, then the allottment must be considered to have been made to her, according to her only apparent rights, viz.: that of dowager.

That it was given to her in any other way is moreover contradicted by her own statement in the deed of the 7th December, 1852, by which she sells to *Leamy* her right of dower on the property.

The next point I will take up has reference to the

title which Her Majesty got through the Commissioners of Public Works under 9 *Vic.*, ch. 37.

The defendant, by exception, sets up the sale by *Leamy* and wife to Her Majesty, represented by the Commissioner of Public Works, before *Young* & Colleague, notaries public, on the 7th of April, 1855, purporting to convey the land in question in this case, along with other pieces, and also a deed of donation of the 6th February, 1865, by which *A. Leamy* and wife made a donation to the Crown of a certain piece of land forming part of lots Nos. 2 and 3 in the 5th concession of *Hull*, and two judgments of confirmation of these deeds, one rendered on the 3rd July, 1856, and duly registered in the registry office for the county of *Ottawa*, and the other on the 14th February, 1866, and also duly registered, and that these judgments, rendered under the provisions of the 9th *Vic.*, ch. 37, sec. 9, forever barred all rights of property in the land mentioned in the deed thereby confirmed.

First the suppliant submits that the title in itself is not in the form required by the statute 9th *Vic.*, ch. 37, sec. 17; to render it valid the deed must be signed by the *Commissioner, countersigned by the Secretary, under the seal of the Commissioners*, "and no other deed shall be held to be the act of the Commissioners."

Then also *Leamy* does not come within the category of persons mentioned in the Act, and thereby authorized to convey property not their own—viz.; tutors, curators, administrators, and others holding a representative character: the Act shows the confirmation could only be applied for with respect to contracts made either with the persons above mentioned, or persons holding as proprietors; whereas *Leamy* was not one of the class enumerated in the Act, and held only as usufructuary, not as proprietor, and the property was not dealt with as belonging to an unknown proprietor.

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Moreover, the judgment of confirmation was only authorized by the Act with respect to lands which could have been expropriated, to wit, to such portions of the lands which were included in plans submitted by the Commissioners to the Legislature, and approved of, as the Commissioners might deem necessary for the construction of public works.

Until the Legislature had thus authorized the construction of a public work and designated the site of it, the Commissioners were destitute of authority to expropriate, and consequently could not ask for or obtain a valid judgment of confirmation, and there was no evidence, nor even any allegation, that such plan had ever been submitted to, or approved of by the Legislature.

Upon this point the appellant cited the following authorities:—*Abbott* on Corporations (1); *Green's Brice ultra vires* (2); *Pothier Vente* (3); *Guyot*, Repertoire de Jur. (4); *Potter's Dwarris* on Stats. (5.)

Supposing, however, that the deed was not so absolutely null as to be unsusceptible of ratification, still it is not a title of which Her Majesty can be presumed to have any knowledge.

Her Majesty is presumed to be cognizant of all acts *legally* performed by her agents acting within the scope of their authority, and of no others.

But in this case, as it has been clearly shown, the deed itself was illegal and a contract *ultra vires*, and consequently Her Majesty cannot be reputed cognizant of it. See *Pothier*, Prescription (6).

Her Majesty's commissioners must therefore be considered as holding possession by virtue of the law which allowed them to take possession without a title, rather than under a title which is null. This proposi-

(1) P. 214, No. 60.
(2) P. 867, sec. 1.
(3) No. 31.
(4) *Vo.* Ratification Vol. 14, p. 455.
(5) P. 381.
(6) No. 30.

tion is almost self-evident, and hardly needs authorities to support it. See *Dunod*, Prescription (1).

The next proposition which the appellant will submit is that until the Civil Code was passed there was no petition of right in the Province of *Quebec* by which a subject could interrupt prescription.

[TASCHEREAU, J.: The Privy Council have declared that the Code has the effect of a declaratory law as to what was the old law.]

I think I will be able to show that the Court has the right to say what was the law previous to the Code; that is only a matter of opinion. I will admit that theoretically the petition of right has always existed, but there was no machinery in existence; and even up to this day in the Province of *Quebec*, bills providing for such machinery have always been rejected by the Legislature. Then when you cannot bring an action *contra non valentem agere nulla currit prescriptio.*

As to the prescription of ten years the appellant contends that the Crown, in order to avail itself of this prescription, should have held the property under a just title, in good faith, openly and publicly as proprietor. The good faith required is a belief that the party from whom the property was acquired was the real proprietor of it; the just title is a title which would be a valid transfer, if the person making it was the legal proprietor. In this case, the title set up from the Crown, not being under seal as was required by the Act 37 *Vic.*, chap. 37, sec. 17, which provides that these deeds shall be so executed, and that no others shall be held to be the act of the Commissioners, was null, and consequently could not be the base of prescription. Moreover, the agents of the Crown were aware of the defect in *Leamy's* title, as is proved in the first place by the letter of Mr. *Merrill*, Superintendent of Public Works, *Ottawa*, to *Thomas Begley*,

(1) Part 1 chap. 4 p. 22.

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Secretary of Board of Works, under date of the 16th April, 1853, in which he states *Leamy* has only a right of dower on part of the property, and gives the names of the heirs of *Philemon Wright* as proprietors; 2nd, by the deed of 4th April, 1855, from *Leamy* to Commissioners, in which it is stated that difficulties may arise respecting his title, and security is exacted from him; Thirdly, by the correspondence between the officers of the Department of Public Works here and at *Quebec*, in which it is repeatedly stated that with respect to that part part of the property which *Leamy* obtained from *Sally Olmstead*, he had only a life interest.

The third plea of prescription, viz., twenty years, is merely that of ten years applied to absentees—it is open to the same objection as those urged against that of ten years, and it is therefore unnecessary to discuss it.

The Crown is not accused of being a trespasser, it is merely contended that the Crown took possession with the consent of *Leamy*, who had a right to hold or transfer possession during the lifetime of Mrs. *Sparks*.

The Crown subsequently got from *Leamy* and wife what its agents supposed to be a valid title, during Mrs. *Sparks'* lifetime. In reality, the Crown holds without a title.

As the agents of the Crown were aware that *Leamy's* title would expire at Mrs. *Sparks'* death, they knew they could not legally hold the property after that date; the Crown is consequently bound to account for the rents, issues and profits from that date.

The fifth exception sets up the deed of 1849 from *Nicholas Sparks* and wife to the Crown; deeds of 1855 from *Leamy* and wife to the Crown; alleges that Her Majesty was in possession under these deeds, and that donations to petitioners were made collusively with intent to defraud Her Majesty, of whose titles the parties thereto were well aware.

With respect to this plea, I cannot see how the donations could injure Her Majesty, as the petitioner claimed no greater rights than the parties from whom they held, and, consequently, it made no difference to Her Majesty whether these rights were urged by the petitioner or by the heirs.

The petitioner expressly denies the execution of the alleged sale by the four heirs of *Philemon Wright Jr.*, in February, 1853, impugning it as a forgery.

The document in question was never produced, nor registered when *Leamy's* title was questioned by the agent of the Crown, and if it had been genuine *Leamy* would surely have then produced it.

One of the subscribing witnesses was dead, and the other, being examined, said he did not know whether he was present at the execution of it or not, or whether it ever was executed by the alleged parties to it. Moreover, two of these parties, *Philemon Wright* and *Sally Wright* swore positively that they never signed it; of the other two, one was dead, and the fourth, Mrs. *Leamy*, could not be affected by it, as she could not contract with *Leamy*, her husband.

By the seventh exception the defendant alleged that the rights transferred to petitioner were litigious, and prayed that the petition should be dismissed.

The petitioner contends that the rights are not litigious, that, even supposing they were, the defendant could only ask to be subrogated in the right of the petitioner, paying all cost and charges, and, consequently, the conclusion of this exception was wrong, and moreover, this plea should have been urged *in limine litis*, and could not be pleaded as a subsidiary plea.

I will now take up the *inscription en faux:*

The petitioner inscribed *en faux* against the copy of the alleged judgment of confirmation of title of the 3rd July, 1856, and against the register from which the

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said judgment was copied, and the pretended draft of judgment, all of which he said were false, no such judgment having ever been rendered.

On this issue the parties went to proof, and it was established: that according to the entries in the minute book the case had been inscribed for hearing in law on the 1st July, 1856; that it never was inscribed for hearing on the merits; that no judgment had ever been rendered; that according to the judge's diary, the last proceeding in the Court was the hearing on law, on which the case was taken *en delibéré*. With respect to the book called a register, it was shown that it was never seen by the prothonotary until four years after his appointment; it was delivered to him by the former prothonotary, who, in the interval, had been entering up judgments.

The only draft of judgment to be found in the record was produced by the present prothonotary; and was not paraphed by the judge by whom it purported to be rendered.

The initials or paraph of the judge on draft is the only legal evidence of the rendering of the judgment.

Now, even supposing other evidence could have been adduced to show that a judgment had been rendered in this case, no evidence has been brought by the other side, for the sham register, being a book, made up out of the office of the Prothonotary, by a person having no authority to keep a register, can have no more probative effect than if they had fyled a copy of *Scott's Waverly Novels*.

On the necessity of the signature of the Judge, and its necessity to establish the rendering of a judgment, the following authorities were cited:—Code of Civil Procedure, art. 473 and art. 474; Ordinance 1667, Titre 26, art. 5; Code de Procédure Napoléon, art. 138; *Denizart* Vo. Minute (1); *Bonnier* Procédure Civile (2).

(1) Vol. 3, p. 350, No. 12. (2) Vol. 1, Nos. 778 and 779.

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The ordinance of 1667, title 26, art. 6, abolished the formality of the pronunciation of judgment, but maintained the *dictum* which was also called the *arrêté*.

But in *Canada* the Courts have not observed the rule with respect to the *dictum*, and the only record recognized by law and the jurisprudence of the Courts has been for many years the minute or draft paraphed by the Judge and the transcript or copy of that minute entered in the register.

It is the duty of a Judge, when a judgment has been rendered, to sign or paraph the draft. The presumption of the law is that the Judge performs his duty; consequently, if the draft is not paraphed, that no judgment has been rendered. To controvert this presumption the strongest evidence would be required. But so far from this being the case, the other original registers of the Court, namely, the "Rôle de Droit," minute-book and diary, all show that not only was no judgment rendered, but that the case was not even inscribed for final hearing.

Now all these books are recognized registers of the Court (vide Rules of Practice, S. C. No. 50), and, as such, authentic, and entitled to more credit than the register of judgments, as they are originals, whereas the latter is only a transcript. Where, then, is the proof of the rendering of the judgment?

Mr. *Laflamme*, Q. C., followed on behalf of the appellant:—

As to the want of signification, the various French authors show that the objection could only be urged by a person prejudiced by not having been notified, and that in this case the defendant did not even pretend to have suffered, or to be liable to suffer any prejudice thereby.

Moreover, the formal notice or signification required by the law of the Province of *Quebec* could not be car-

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ried out in this Province; substantially, notice has been given by the submission of the petition, and the documents on which it was based, by Her Majesty's Attorney General, and the sufficiency of that notice has been admitted by the fiat of the Administrator of the Government thereon.

The learned counsel referred on this point to *Troplong* De la Vente (1); *Marcadé* (2); *Duvergier* (3).

Then as to prescription:

The title deed relied upon principally by the Crown is that of the 7th May, 1855. We contend that this deed was not at the time of its execution a perfect deed, and therefore cannot be relied on for prescription. By the Act creating this corporation the commissioners are obliged to affix their seals to all documents, writings, &c. We do not say they could not execute a deed before a notary, but that they should comply with the requirements of the 17th sec. of 9th Vic., c. 37, in notarial deeds as well as in other writings. Analogous provisions exist in the law of the Province of *Quebec*, viz.: Donations, if not executed before notaries, were an absolute nullity and produced no effect whatever. Then, could the Crown prescribe until this petition of right Act was passed. If subjects had the right of interrupting prescription by petition of right, it certainly was an *error communis* that such a right did not exist in the Colony, and the anthorities quoted show that where there is a reasonable obstruction, prescription does not run. Then has the Crown purchased in *good faith*.

Bona fides, says *Pothier*, *nihil aliud est quam justa opinio quæsiti domini*. *Voët* expresses the same idea. *Bona fides est illæsa conscientia putantis rem suam esse*. We find that there is in these ideas a view comprehending more than the third party whose property is pre-

(1) P. 390, on art. 1690. (2) Vol. 6, p. 339.
(3) Vol. 2, No. 206, p. 239.

scribed. The possessor must be conscious of the validity of his title, as to the right and capacity of the one with whom he treats. For without this how could he believe himself proprietor of the thing.

These therefore are the conditions which the possessor must combine to enable him to have that undoubted belief which is called good faith. He must first have no knowledge that any one but the person who transfers the thing is proprietor. Secondly.—Be convinced that the one who conveys had the right and capacity to alienate. Thirdly.—Receive it by a contract free of fraud and of any other vice. See *Troplong* on Prescription (1).

There can be no doubt that at the time the Government purchased from *Leamy*, in 1854, they had doubts as to the validity of his title, and before the deed of the 7th May, 1855, they were officially informed of the rights of the heirs of *Philemon Wright Jr.*

The question therefore is, can the Crown prescribe against a subject on more favourable conditions than a subject can prescribe against a subject? If a subject could not take the property with such knowledge, how can it be said that the officer of the Crown or a Board of Works could do so?

Mr. *Robertson*, Q. C., for respondent:—

It is undoubted, that a Judge, at the hearing on the merits, may revise the decision of a Judge of the same Court, previously given on a *défense en droit*, and also that on an appeal from a final judgment, the merits of the judgment on such *défenses* come up for adjudication. The Supreme Court therefore can legally decide on the three *défenses* fyled generally to the portion of the petition claiming to have plaintiff declared proprietor of all the land now held by Government, on lots 2 and 3; and as to the necessity of signification upon the

(1) 2 Vol., Nos. 915, 927, 930, and 931.

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Government of the deeds of donation and transfer, so far as respects the rents, issues, and profits.

Reference was then made to *Pigeau* (1); *Merlin* Repertoire (2); C. C. L. C. art. 1571; *Charlebois* v. *Forsyth* (3).

It is submitted that the Crown can invoke prescription under article 2211 of the Civil Code.

Before the Code, it was decided in appeal in *Lower Canada* that the Crown could invoke the thirty years' prescription against a petitory action brought to recover portion of the lands covered by the fortifications of the city of *Quebec: Laporte* and *The Principal Officers of Her Majesty's Ordnance* (4).

As to the ten years' prescription it is clearly made out.

What the English form of art. 2251, Civil Code, calls a translatory title and the French "*un titre translatif de propriété*," and the Contume *juste titre*, is a title capable and fit on its face to convey title.

See Grande Coutume by *Ferriere*, on art. 113, p. 359, where he says: One of the conditions is that the possession be founded on a *juste titre*, *i. e.*, that possessor has a *cause légitime*, capable of transferring the *domaine*, such as purchase, donation, will, judgment, &c, not a lease, or loan, or precarious title.

The titles to the Crown in this case are manifestly translatory, they are *deeds of sale*, deeds in the usual form, and authentic, and perfect.

The possession of the Crown has been for more than ten years, and if its good faith is impugned, the bad faith must be clearly established by the petitioner.

As to the plea of confirmation or ratification of title, the statute 9th *Vic.*, c. 37, was in force when the ratifications in question in this cause were obtained.

In ordinary cases of ratification, hypotheques alone are purged; but in cases where the Crown obtains or

(1) 1 Vol., p. 10.
(2) *Verbo* "aboutissans."
(3) 14 L. C. Jur. 135.
(4) 7 L. C. R. 486.

expropriates land for public purposes under the statutes referred to, it is submitted, that rights of mortgage and hypotheques, and rights of property also, are equally purged, and the claim of the owners converted into a claim on the monies deposited in Court.

Under this statute the commissioners had the right to deposit the monies in the Court; the compensation-money was to represent the land; and parties claiming rights of property were bound to fyle their oppositions; and it will be seen that oppositions were actually fyled in this cause by some of the parties, donors to the plaintiff, namely, by *Pamelia Wright* (Mrs. *McGoey*), *Serina Wright* (Mrs. *Pierce*), and *Hull Wright*.

The judgments of the Court at *Aylmer*, ratifying the titles, evidently went on the ground that not only were hypotheques purged, but claims of property were also purged. The judgment in No. 136, *ex parte* Her Majesty, for ratification, recites that the parties above named, also *Ruggles Wright*, were opposants; that the application of Her Majesty was made under the 9 *Vic.*, c. 37; that all the formalities required had been shewn to have been complied with, and the oppositions of *Pamelia Wright* and others had been discontinued with costs.

As to the *Inscription en faux*, it is submitted that it does not lie against the Register, as stated in the demurrer to certain of the *moyens de faux;* next, that it is very doubtful, under our jurisprudence, whether a judgment can in any case be attacked by an *Inscription en faux;* that no *faux* are proved, the evidence of the witnesses being wholly worthless, and insufficient to set aside either the judgment or Register.

The ordinance of 1667, tit. 26, art. 5, in force in *Lower Canada*, says: The presiding judge shall see that at the close of the sitting, and on the same day, the

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clerk has written, he shall sign "*le plumitif*," and paraph each *sentence*, judgment, or *arrêt*.

The plumitif is defined as being the original and primitive paper on which a summary of the judgments is written, which are rendered in open Court. *Répertoire de Jurisprudence*, *vo.* "*Plumitif.*"

The plumitif is never signed in our practice. The draft of judgment, when drawn by the Prothonotary, and approved, is initialed, or signed by the Judge.

In *France*, the *feuilles d'audience*, or original drafts of judgments, are kept till the end of the year.

The learned counsel referred to *Healy* v. *Corporation of Montreal* (1); art. 1207 and 1220 C. C. L. C.

In *Carter* v. *Molson* and *Mechanics' Bank* v. *Molson*, recently decided in the Superior Court, *Montreal*, by *Dorion*, J. (not reported), it was held no inscription *en faux* lay against a judgment.

The learned counsel then argued on the facts of record that it appeared that the division agreed to on the 5 March, 1838, ought to be held as a family arrangement, under which *Sally Olmstead* obtained a title to the 159 acres, reserved for her dower, and that the evidence adduced did not establish bad faith on the part of the Crown.

Mr. *Lacoste*, Q. C., followed on behalf of the respondent.

It is contended that Her Majesty cannot invoke prescription, because it was practically impossible to exercise the right of petition of right, and that there was common error as to the existence of this right. The case of *Laporte* v. *The Principal Officers of Her Majesty Ordnance* (2), clearly shows that the right existed. Then also ignorance of the law is no excuse.

The first plea of prescription is that of thirty years.

(1) 17 L. C. R. 409. See also Starkie, Ev., 212, 213.

(2) 7 L. C. R. 486.

To succeed on that plea I admit Her Majesty is bound to join her possession to that of her *auteurs*. Now, if the Court hold that Mrs. *Sparks* had a precarious title, her possession cannot be joined to that of the Crown, but it seems to me that the estate was divided in 1838, among the heirs, not as a *partage provisoire*, but forever. See art. 2094.

However, the Crown relies also on the plea of 10 years' prescription in good faith with translatory title. As to the deed of 1849, there can be no question of bad faith. The learned counsel then argued that on the evidence adduced the appellant had failed, as the burden was on him to prove that the crown was in bad faith, if *bad faith* can ever be imputed to the Crown.

Then, as to the plea under the Statute 9 *Vic.* c. 37 ; it is said the deed is not valid, because it was not passed in accordance with the provisions of the act, viz. : *Signed and sealed.* If that construction is to be put upon the act, how can you explain sec. 5 of the act which expressly recognizes transfers made before notaries and declares such deeds to be valid. Then, that the Crown could purchase from other persons than those specially mentioned in sec. 8, sufficiently appears by the following section, which declares that the money will stand in lieu of the land, and one of the effects of the judgment of ratification is to bar all claims.

We find also, that by the deeds of transfer to the petitioner, some of the parties thereto assumed the quality of heirs of *Sally Olmstead* ; if so, as warrantor of her acts, the suppliant could not call in question titles derived from her. More than this, one of these heirs, Mrs. *Leamy*, was the co-vendor with *Leamy* to the Government, and she, in any case, had no rights to transfer to the suppliant.

The following additional authorities were then referred to by the learned counsel on the question of the

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inscription en faux. French Code of Proc., art. 214 to 251; *Sirey* (1865), Code, *vo. Faux. Bioche*, Dict. de Proc. 1850, *vo. Faux*, No. 44—56, No. 197. *Palsgrave* v. *Ross* (1). The omission to sign a judgment in a Register will not authorize a Court to treat it as *non-existant* when an authentic copy is produced. 9 *Dalloz*, Juris du Royaume, p. 616, Note 3.

Mr. *Laflamme*, Q. C. in reply.

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The property claimed by the petitioner was granted to *Philemon Wright*, 3rd May, 1806. On the 25th April, 1808, *Philemon Wright* conveyed this property to his son *Philemon Wright Jr.* On the 4th May, 1808, *Philemon Wright Jr.* married *Sarah, alias Sally Olmstead*, without any marriage contract.

Philemon Wright Jr. died 5th Dec., 1821, intestate, leaving his widow and eight children issue of the said marriage.

The real estate in question, having been acquired previous to the marriage, continued, notwithstanding the marriage, the sole and absolute property of *Philemon Wright Jr.*, subject to the customary dower (*douaire coutumier*) of the wife, which consisted of the usufruct or life enjoyment of one-half of the real estate owned and possessed by the husband at the date of the marriage, the absolute property of which would revert to the children, issue of the marriage, or their representatives, after the death of the widow.

On 20th November, 1826, the widow married *Nicholas Sparks*, and died on the 9th October, 1871.

After the death of *P. Wright Jr.*, his heirs made a division or *partage* of their father's estate between themselves and the said *Sally Olmstead*, and caused a plan to be made by one *Anthony Swalwell*, a surveyor,

(1) 2 L. C. Jur. 95.

of the several portions, and on the fifth day of March, 1838, by certain agreements entitled quit claims or transfers, seven in number, all bearing date on the day and year last aforesaid, under their hands and seals, duly made before witnesses, and all duly registered in the Registry Office of the said County of *Ottawa*, the said several heirs, with the exception of *Wellington Wright*, ratified the said survey and partage or division made; and the possession of the several lots so previously occupied and enjoyed and the rights of *Sally Olmstead*, their mother, to certain portions of said lots 2 and 3, in said 5th range of *Hull* aforesaid, hereinafter mentioned, were also thereby ratified and acknowledged.

In and by each and every of said quit claims and transfers, it was declared:

That the said *Philemon Wright*, junior, *Hull Wright*, *Pamelia Wright*, *Horatio Wright*, *Erexina Wright*, *Sally Wright*, as surviving heirs of their late father, having mutually agreed *to divide the inheritance of their late father*, have caused the same to be surveyed by *Anthony Swalwell*, Deputy Surveyor, who having ascertained the quantity of land in lots nos. 2, 3 and 4 in the 5th Concession of the Township of *Hull* to be 591 acres, 1 rood 24 perches, including a certain pond of water, the said portions of said land, having been sub-divided, the following portions have been allotted to each, that is to say:—

To *Philemon Wright*.....	43	acres	2 roods.
" *Hull Wright*.....	43	"	2 "
" *Pamelia Wright*.....	49	"	
" *Horatio Wright*.....	53	"	1 rood 24 p.
" *Wellington Wright*.....	48	"	
" *Serina Wright*.....	60	"	
" *Erexina Wright*.....	65	"	
" *Sally Wright*.....	70	"	
" *Sally Olmstead*, their mother, the pond of water inclusive.....	159	"	

With all of which the said heirs declared themselves satisfied, and that in order the better to secure to each other a legal title to the said portions of land aforesaid,

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the said heirs did grant remise and release, and forever quit claim by each of said deeds to each heir severally the lot hereinabove referred too, and shown on said plan of said *Swalwell*, and describing each portion by metes and bounds, to have and to hold to each heir the said portion so allotted to his or her use and behoof forever, so that the said heirs so conveying said several lots should not, nor should any person claiming from them, have claim or demand any right or title to the said several premises whatever.

The plaintiff now claims a certain undivided interest in the 159 acres so set apart for the use of the said *Sarah Olmstead*, under deeds from the heirs of *Philemon Wright Jr.*, on the ground that the same was set apart to the said *Sally Olmstead* as and for her dower in her husband's estate, and that the same on her death reverted to the heirs of the said *Philemon Wright Jr.*

Of the nine deeds set up in the petition, the *first* and *eighth* are set up as being from *Philemon Wright* as one of the children of *Philemon Wright Jr.* The *third* and *fourth* from *Sally* or *Sarah Wright* (Mrs. *Boucher*). The *second* and *sixth* from *Erexina Wright*, otherwise called *Elizabeth Wright*, (Mrs. *Leamy*). The *seventh* from *Pamelia Wright*, (Mrs. *McGoey*). The *ninth* and last from *Philemon Wright*, *Mary Jane Wright*, (Mrs. *Allan*), *Serina Wright*, (widow *Olmstead*), *Ellen Wright*, (widow *Whitney*), as the children of *Hull Wright*. The consideration of some of these deeds is as follows:

> The present gift *inter vivos* and conveyance is thus made for and in consideration, firstly, of the friendship which the said donors entertain towards and for the said donee; secondly, of the gratitude they, the said donors, feel for him, said donee, for services rendered and being rendered by the latter to the former.

It is claimed on behalf of the Crown, in the first place, that this *partage* was a family arrangement, that the quantity of land set off to the widow was much less in

quantity than half her husband's land, and that it was the intention of the parties that the widow, in taking so much less than she was entitled to, was to have the absolute right and title to the part so allotted to her, and that the same was given to and accepted by her in lieu of her dower, or life interest in the half of the estate; and that the Crown, by deeds from the widow and her husband, and from *Leamy* and wife, who likewise claim a portion under deeds from the widow and late husband, became vested with the absolute ownership of the land. Failing in this contention, it is claimed that the property was acquired and taken possession of by the Crown, for the use, maintenance and construction of certain public works, under powers conferred by the 9 *Vic.*, c. 37 of the statutes of *Canada*, and that the same was conveyed to the Crown, and that the title of the crown (as to part if not the whole) was afterwards duly confirmed by a judgment of confirmation, whereby all claims to the lands, to which such confirmation extended, were forever barred; and lastly, that if the conveyances and confirmation were not of themselves sufficient to vest the legal title in the Crown, then that the Crown had acquired a legal title to the property by prescription.

If the first proposition could be established there would be an end of the case, but I can find no sufficient evidence to sustain this contention. On the contrary, I think the evidence leads to a conclusion the reverse, though certainly the conduct of the parties would tend to a strong suspicion that such may have been the case. No necessary inference can, I think, be drawn from the quantity of the land set apart to the widow, as being less than half the property which the law gives her, because it would, I think, be unreasonable to suppose that in a block of 590 acres, on rivers such as the *Gatineau* or *Ottawa*, every acre would be

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exactly of the same value, or that it would be possible to divide the lot into nine portions of relatively equal value by giving an exact half in quantity to the widow and eight other portions, each containing exactly the same quantity, to the eight heirs. Thus, we see, in the *partage* among the heirs of the balance, after deducting the portion set apart to the widow, there is quite as great a discrepancy in the quantities awarded to them respectively. Two get only 43 acres each, while all the rest get many more, ranging in excess from 6 up to 17 acres; therefore, I think the inference may fairly be, that the *partage* was based on and governed by the value of the respective lots, and not on the quantity of land each share contained, and so, though the widow may not have had allotted to her the use of half her husband's property in extent, she may have had it in value. Then again, we find that while, as among and for the security of the heirs, quit-claims and transfers were made, securing to each heir, by legal documentary title, the absolute interest in the lot appropriated to him or her respectively, no such quit claim or transfer is made to the widow, nor do we find her a party to any such quit claim. If it was deemed necessary that the title of the heirs should be so secured to them, *a fortiori* the right of the widow, who, as widow, had only an usufructuary interest, still more required, if it was intended that she should be the absolute owner, a solemn relinquishment and conveyance of the rights of the heirs to her in the portion allotted to her.

It is true the deed made by the widow and her husband on the 12th September, 1849, whereby they sold, as their sole and absolute property, a portion of this land so allotted to Her Majesty the Queen, which deed I shall have occasion more particularly to refer to on another branch of this case, certainly shows that she, at

that time, claimed to be absolute owner of the property and dealt with it as such, but this can in no way be used directly or indirectly to establish the fact that she was such owner, and if it could, it must, on the other hand, be observed that on the 7th December, 1852, dealing with another part of the 159 acres and her interest in it, she deals with it as if she had a right of dower only. It is a somewhat singular circumstance, that in this deed is expressly excepted the portion sold and conveyed to Her Majesty, which portion was most certainly sold and conveyed as the absolute property of the vendors, and this would rather lead to the supposition that, as they had sold to the Crown, so they were selling to *Leamy* as the absolute proprietors; the language of the deed to *Leamy* can only be reconciled with this idea, on the supposition that in transferring what had been allotted to her, if absolutely, for and in lieu of dower, she in common parlance continued to call it her dower, and whoever drew the deed did the same, possibly considering that the words of the deed "the said dower and *all other rights whatsoever belonging to the said Sarah Olmstead*, and which the latter claims as her right of dower" would cover all her rights, whether as dower or absolute owner. However this may be, I cannot bring my mind to the conclusion that there is sufficient legal evidence to justify me in saying that there was a binding agreement between the heirs and the widow, whereby the portion allotted to the latter was not simply as and for her dower, but was set apart as her absolute property in lieu of her dower, however much I may suspect such to have been the intention, in view of what has been said and of the fact that the parties have so long slumbered on their rights, if they had any. If this is so, then it follows that the deeds from *Sparks* and wife to the

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Crown, and from *Sparks* and wife to *Leamy*, could not convey the legal estate in this property.

A deed of quit claim or transfer to *Leamy* has also been produced purporting to be signed by *Horatio*, *Elizabeth*, *Sarah* and *Philemon*, children and heirs of *Philemon Wright Jr.*, dated the 3rd February, 1853, whereby they sold and quit-claimed all their rights, claims and pretensions to the 159 acres allotted to their mother. This instrument is alleged not to be genuine, in fact to be a forgery. On behalf of its authenticity *Jas. Goodwin*, a witness to this paper, proves his own handwriting, but has no recollection of the transaction. He says; "Without my own signature being there, I should not have recollected any thing about it." He knew *Doyle*, the other witness, who was a bar keeper to *Leamy*, who he understood died in the year 1853, or 1854. *Jas. Leamy* was killed, he says, in the year 1860, or thereabouts. He says: "I have seen *Jas. Doyle* write very often, I have not seen him sign his name very often, but he kept *Leamy's* books when I stopped there, and to the best of my judgment that is his signature." And being asked as to his recollection of being asked to be a witness, or to his supposing from his signature being there that he was called as a witness, he says: "All I can swear to is, that is my signature, but I have no recollection seeing the party sign the document."

Robert Farley cannot swear positively to signature of *Doyle* after a lapse of 20 years, but gives his opinion and belief as strongly as could be done after so long a lapse of time. He also says the words "third," "February" and "three," and the signature "*John Doyle*," appear to be written by the same party, and also the signature "*H. G. Wright.*"

James Clarke produces four receipts, which were written by him and signed in his presence by *Philemon Wright*,

H. G. Wright, and *Sarah Wright*. He looks at paper *U. U.*, and says: "I believe the signatures *H. G. Wright*, *P. Wright* and *Sarah Wright* are written by the same persons as those who signed said receipts in my presence."

Here, then, we have one of the subscribing witnesses proved to be dead, but his handwriting very clearly proved by the other subscribing witness produced, who proves his own signature, though he does not recollect the transaction, which, after a lapse of 20 years, is not to be wondered at. This evidence, under the English jurisprudence would prove this document without any evidence of the handwriting of the parties to it, but, in addition to this, we have the fact very clearly established, that the paper must have been in existence at or about the time it bears date, because it is proved that *Doyle*, the witness, died in 1853 or 1854. In addition to which we have very strong evidence of the handwriting of *Horatio*, *Elizabeth*, *Sarah* and *Philemon Wright*, not only by a person who had seen them write, but also by the production of and comparison with a genuine document, the signatures to which are unquestionably proved to have been written by these parties respectively.

It is true *Philemon Wright* denies his signature, and produces entries in a memo. to show he was not in *Hull* at the date of the paper. *Sarah Boucher* denies her signature, and alleges in support of that statement that she was not on speaking terms with Mr. and Mrs. *Leamy*, and not until 8th October, 1853.

On cross-examination she is asked: "Can you give any other reason in respect to said signature not being yours, than not speaking to or being on speaking terms with Mr. and Mrs. *Leamy*?" She answers "I do not know, I never seen or spoke to any of the parties." This witness also says: "The signature, '*Sally Wright*,'

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set and subscribed to the exhibits of the defendant at *enquêté* numbered *R. R. S. S.*, now shewn, are my signatures. Q. Do you not think there is a resemblance between the signatures *Sally Wright* and *Sarah Wright* in these exhibits? A. Yes, there is. Q. Would you sometimes sign *Sarah Wright* and sometimes *Sally Wright?* A. Yes."

I think very little of the fact that *P. Wright Jr.* was in the woods on the date of this paper, or that *Sarah Wright* was not then on speaking terms, if we are bound to take this evidence as conclusive, because it by no means follows that the paper must, to be genuine, have been signed on the day it bears date. I think it would be a most dangerous thing to allow interested parties by such evidence as this, after a lapse of 20 years, and the death of the other party to an instrument and of one of the witnesses, to destroy a document and reap the benefit of the property purporting to be conveyed away by him by such instrument.

Unsatisfactory as this evidence is, I think the evidence of the only other two witnesses called is, if possible, more unsatisfactory. *Alex. Heney* and *Chas. Desjardins* are called as experts or *quasi* experts. The evidence of experts under the most favorable circumstances is to be received and acted on with very great caution. It is only necessary to read this evidence, I think, to show that it ought not to have any weight whatever.

Alexander Heney:

Q. Look at the exhibit marked "U.U." now shown to you in this cause, and produced by the plaintiff, and say whether or not the words "third," "February" and "three" at the end of the said document are in the same hand-writing as the signature *John Doyle* in your opinion. A. I think the words "third," "February" and "three" and *John Doyle*, were by the same pen and the same hand.

Q. Will you look at the signatures *H. G. Wright*, on receipts exhibits X and XX, and on exhibit U.U., fyled by defendant, and say whether you think the signatures on the said exhibits X and XX

are in the same hand-writing as on the exhibit U.U.? A. I do not think the signature *H. G. Wright* on the exhibit U.U. is in the same hand-writing as the signatures *H. G. Wright* on the exhibits X and XX.

Q. Have you been in the habit of seeing different signatures for a length of time, and state how long? A. I have more particularly for about twenty-four years.

Cross-Examined—My reason for thinking that the words referred to in my examination-in-chief, are in the hand writing of *John Doyle*, is that the stress of the pen and ink appears to be the same.

Q. Please state what is your reason upon which you stated in your examination-in-chief that the signature *H. G. Wright* on the said receipts are not in the same hand-writing as the signature *H. G. Wright* on the exhibit U.U.? A. The reason is because the signature on the receipt X is not so well written and not so closely connected as the one on the exhibit U.U.

Q. Did you ever see the said *Horatio G. Wright* sign his name? A. Never.

Q. Are you prepared to give an opinion whether or not the signature *P. Wright* on the exhibit XXX, now shown to you, is or is not in the same hand-writing as the signature *P. Wright* on the exhibit U.U.? A. No I am not. I never seen any of the parties mentioned in the exhibit U.U. sign their names.

In my examination-in-chief, I stated I had been in the habit for about twenty-four years of seeing different signatures, I mean that I saw them in the course of my business as landing waiter and otherwise. I do not mean that I was ever examined as a witness in a dispute regarding signatures.

Charles Desjardins:

Q. Are you in the habit of comparing or examining signatures, and for how long had you occasion to do so? A. Yes as insurance agent and telegraph operator for about eight years.

Q. Will you take communication of defendant's exhibit U.U., and say whether you think the words "third," "February," "three," at the end of the said document are or are not in the same hand-writing as the signature *John Doyle* subscribed thereto as a witness. A. I believe they are.

Q. What do you think of the signature *H. G. Wright* on the said exhibit U.U.? A. I think it is in the same hand-writing as the words "third," "February," "three," and the signature *John Doyle.*

Q. Will you compare the signature *H. G. Wright* on defendant's exhibits X and XX with the signature *H. G. Wright* on said exhibit

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U.U., and say whether you think they are or are not in the same hand-writing? A. I don't think they are.

Q. What difference do you see between the signatures on exhibits X and XX and signature on exhibit U.U. A. I don't think it is in the same hand-writing at all.

Cross-Examined—I am not acquainted with any of the signatures on the exhibits to which I have referred, that is the receipts and the exhibits U.U. I have not been examined as an expert in cases of disputed signatures.

Q. Can you state the differences between the signature of said receipts X and XX, and the said exhibit U.U.? A. The letter "H" in the exhibit X and XX differs from the letter "H" in the exhibit U.U. and the first limb being longer in the two receipts than in the exhibit U.U. and the strokes in both limbs of the letter "H" in exhibit U.U. are heavier and farther apart than in the two receipts, and the turn in the last limb of the letter "H" in exhibit U.U. is different. The letter "G" in exhibit U.U. differs from the same letter in the two receipts, and the upper loop being heavier and more open in exhibit U.U. than the same letter in the receipts. And the tail of the "G" on exhibit U.U. differs from the other on the exhibits XX, being turned down in exhibits U.U., and not turned down in exhibits X and XX. The letter "W" in exhibit U.U., is not started the same way, and is more open or straggling, and the finishing limb is turned down, and heavier than the same letter in exhibits X and XX. The rest of the letters in the exhibit U.U. differ materially from the same letters in the said receipts.

When we know how little reliance is to be placed on the testimony of even professional experts, to allow evidence of this kind with reference to the signatures of persons such as these, who, from the signatures, are but rough writers, and who, it is very evident, were not in positions called on to sign their names so often as to give their signatures a set established character, to overthrow solemn sealed instruments in reference to the title to real estate, where the possession of the property has, for upwards of 26 or 27 years, gone in entire consistency with the instrument assailed, and when the parties have remained perfectly quiet, and where their quiescence appears now only to have been disturbed by

the plaintiff's procuring deeds of gift and starting this controversy; I say, to overthrow instruments on such evidence and under such circumstances, and where, as we shall see hereafter in another branch of the case, some of these very parties had been parties to and assented to the judgment of confirmation of the Crown's title, would be, in my opinion, to jeopardize and shake to the very foundations the security of property. Therefore, I am not prepared to say this is a forged instrument.

There can be no doubt that the proper officers entered upon and took possession of the property for the use of the Public Works of the Province of *Canada*, as by law they were authorized to do, and it cannot be doubted that the property was purchased from parties in possession, who, in dealing with the Crown, claimed to be the absolute and lawful owners thereof, and it is not disputed that the Crown paid the full value therefor, and has continued in peaceable, continuous, uninterrupted, public and unequivocal possession as proprietors of the property in dispute, a portion from the 12th Sept., 1849, the remainder from 7th May 1855; and that the Crown has exclusively dealt with it as public property and has placed on the premises extensive improvements of a public character, involving a very large expenditure of the public money, and of a character and for a purpose wholly inconsistent with any use to which the same premises would or could have been applied had they continued private property.

The notarial deed from *Sally Olmstead*, or *Sparks*, and her husband to the Crown, before referred to, is dated 12th September, 1849, whereby *Sarah Olmstead* and *Nicholas Sparks* her husband granted, bargained, sold, assigned, transferred, and made over from thenceforth and for ever, with promise of warranty against all gifts, dowers, mortgages, substitution, alienations and other

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hindrances whatsoever, to Her Majesty, Queen *Victoria*, Her heirs and successors, represented by the Honorable *Etienne Taché*, Chief Commissioner of Public Works of the Province of *Canada*, a certain tract of land required for the use of the *Gatineau* works, and in said deed particularly described, containing 21 acres, 1 rood and 25 perches (of the land now claimed by appellants), *which said vendors are lawfully seized thereof by virtue of a good and sufficient title*, the aforesaid thereby bargained and sold tract of land being holden by the tenure of free and common socage, free and clear of every charge, burden and incumbrance as the said vendors now thereby declared, excepting such burthens, &c., as might be charged and imposed thereon by the Letters Patent from the Crown, in consideration of £107 7s. 0d., being the value of the said 21 acres 1 rood and 25 perches, at the rate of £5 cur. per acre, agreed upon by the said vendors and the said commissioners, which said £107 7s. 0d. was paid previous to the passing of said deed, whereof the said vendors did thereby acknowledge payment and grant discharge, *dont quittance générale et finale.*

On the 24th April, 1854, by deed between *Leamy* and wife of the one part, and the Honorable *J. Chabot* and Honorable *H. Killaly*, Commissioners of Public Works, *Bartholomew Conrad Augustus Gugy*, acting on behalf of the Commissioners of Public Works, binding himself to cause these presents to be duly ratified by the Commissioners within 15 days after execution, pending which time the Government, who were in possession of the thereinafter mentioned and described property, should not be disturbed or molested by the said *Andrew Leamy* or his said wife of the other part; after reciting that the Commissioners of Public Works deemed it necessary "to acquire, for the use, benefit and advantage of the public, possession of certain

pieces or parcels of land situated in the Township of *Hull*, &c., which *Leamy* and wife *claimed* to be theirs," the deed witnessed that *Leamy* and wife sold, &c., unto Her Majesty The Queen, her heirs and successors, the land described, being parcel of the property now claimed. The said deed then recited that a tender and notification had been made by the Commissioners of Public Works to *Leamy* for two of said pieces of land by the notices on the 21st April, then inst., which, not having been accepted, it was necessary to estimate the value thereof, together with the other pieces above described, by experts to be nominated under the provisions of the Acts regulating that subject in force in the Province of *Canada*. It then proceeds to nominate experts on the part of Her Majesty and on the part of *Leamy* to assess the value of the land, together with the value of the use and occupation thereof, or of such part thereof as may have been used or occupied by the Government or its agents for the time so occupied, &c.

It then recites :

And whereas difficulties or doubts may arise *as to the validity of title* of the said *Andrew Leamy* and his said wife with regard to the aforesaid four pieces or parcels of land, and it is necessary that security, *caution*, shall be given to Her said Majesty the Queen in that respect by him, therefore, to these presents personally came, intervened and was present, *James Leamy*, also residing in *Bytown* aforesaid, inn-keeper, who, after having had reading and taken communication of the foregoing premises, did and doth hereby voluntarily become the security, *caution*, for and on behalf of the said *Andrew Leamy* and his said wife, and doth hereby bind himself conjointly with the said *Andrew Leamy* and his said wife to the due performance of all the obligations which the said *Andrew Leamy* and his said wife have entered into aforesaid, and this in the same manner as if he were the principal or principal obligé to these presents, provided always that should this deed not be ratified, no right of action whatever shall ever be exercised by the said *Andrew Leamy* and wife, or either of them, against the said *Bartholomew Conrad Augustus Gugy*, or for the due execution of these presents.

By deed, made on the 7th May, 1855, by *Andrew*

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Leamy and wife, and *Wm. Foster Coffin* and *Thomas McCord*, for and on behalf of the Honorable The Commissioner of Public Works for the said Province of *Canada, se portant forts pour eux*, and thereby obliging themselves to cause those presents within fifteen days after the execution thereof to be ratified in due form of law by the said commissioners, of the other part; the parties covenant, that whereas the said commissioners have deemed it necessary to acquire for public purposes certain pieces of land situate in the Township of *Hull*, &c., which the said *Andrew Leamy* and wife claim to be theirs, the deed witnessed that said *Leamy* and wife sold and assigned unto Her Majesty, her heirs and successors, accepting thereof by and through the aforesaid Commissioners of Public Works, all the following pieces, *inter alia*: Secondly, a strip of land (describing it), save and except, however, out of the said strip two portions of these, represented and colored, one red and the other yellow on the plan No. 2, also annexed to those presents, the said two exempted portions being one of them so much of the said strip as is comprised in that share of the estate of the late *P. Wright Jr.* alloted by a *partage* or division thereof, made between his heirs and *Czarina Wright*, wife of one *James Pierce*, and the other of them, so much of the said strip as is comprised in that part alloted in the said *partage* to *Sally Olmstead*, widow of the late *P. Wright Jr.*; and the said partage or division being represented and shewn by a sketch or plan thereof made for the said heirs by one *Anthony Swalwell*, D. P. S.

By another deed between the same parties of the same date, under the number 1032, the said *Andrew Leamy* and his wife sold, transferred and assigned, with promise of warranty against all gifts, debts, dowers, claims, mortgages and other incumbrances whatsoever, to Her Majesty the Queen, accepting thereof by the Commis-

sioners of Public Works, duly represented and acting by the said *William Foster Coffin* and *Thomas McCord*, those certain other lots or pieces of land, *inter alia* : Secondly, a piece or parcel of land, for the most part covered with water, the water covering the same being portions of the south and south-east parts of lots numbers two and three in the fifth concession of the Township of *Hull*, colored yellow on the plan number one, annexed to the said deed of sale entered into by the said parties, bearing even date with these presents, describing it and forming part of the 159 acres claimed by petitioner. Thirdly, a portion of the west bank of the *Gatineau* River (describing it) : "Until intersected by the boundary line between the share allotted to *Wellington Wright* in the *partage* amongst the heirs of the said *Philemon Wright Jr.*, according to the sketch or plan of the said *partage* made by *Anthony Swalwell*, D. P. S, and the share allotted by the said *partage* and according to the said plan to *Sally Olmstead*, widow of the late *Philemon Wright Jr.*, as will appear by the first mentioned plan, No. 2, upon which plan the said portion is represented and colored yellow." The deed contains a provision that the price agreed on shall be paid into the hands of the prothonotary of the Superior Court, district of *Ottawa*.

In the view I take of the case, it is not necessary to stop to enquire whether the proceedings to expropriate this property were strictly in accordance with the statute or not.

The property having been taken possession of by the Crown, and the Crown having obtained these deeds, we find from the records of the Superior Court, district of *Ottawa*, that the following took place :

"In the Superior Court, *exparte* :

"On the application of the Hon. Her Majesty's Attorney General for *Lower Canada*, for and on behalf of Her

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Majesty, The Queen, for a judgment of confirmation and *Ruggles Wright* the elder opposant, and *Pamelia Wright, et al.*, opposants, and *John O'Meara* opposant *en sous ordre* (subordinately)."

The Prothonotary certifies he cannot after diligent search find any of the oppositions in the above case.

Then we have an appearance by attorney :

SUPERIOR COURT.

Exparte.

The Attorney General for *Lower Canada* on application for ratification, and *Andrew Leamy et al.* vendors.

I appear for the vendors mentioned in the deed of sale, ratification of which is sought by the said petitioner in this cause, for the purpose of contesting or otherwise defending the interests of the said vendors against any parties opposants claiming the purchase money filed in this cause.

Alymer, 1st July, 1856.

(Signed,) PETER AYLEN,
Attorney for A. Leamy, et al.

I consent for the Attorney General }
T. MCCORD, *Attorney.* }

The next document is the notice as follows :

IN THE SUPERIOR COURT.

Exparte.

The Honorable the Attorney General for *Lower Canada* on behalf of our Lady, the Queen. Application for confirmation of title ; and *Pamelia Wright et al*, opposants.

To T. G. FENWICK, Esq.,
Attorney for Opposants.

SIR,—Take notice that the following are the grounds of the *defense au fonds en droit*, herewith filed to the opposition of the said opposants. Because the alleged fact that the said opposants, at the time of the passing of the title, a judgment of confirmation of which is sought to be obtained in this cause, were the proprietors of any portion of the property conveyed by the said title and the said *Andrew Leamy* and *Erexina Wright* were not, and had no right to convey the said property, does not, in law, justify the conclusions of the said opposition, in so far as by the same it is prayed that the said opposants be declared the proprietors of any property described in the said title, to the exclusion of Her Majesty ; and that no confirmation of the said title be granted, unless upon payment to the

said opposants of a portion of the compensation money deposited in Court. Because any claim of proprietorship which the opposants may have had, or pretend to have, to any portion of the property described in the said title, and the consideration money for which has been deposited into Court, was and is converted by law into a claim upon the money so deposited, and cannot affect the right of Her Majesty to obtain the confirmation of title sought for in this cause.

Aylmer, 26th June, 1856.

Received copy.
T. G. FENWICK,
Attorney for Opposants.

For the Attorney General,
T. MCCORD,
Attorney.

Replication of opposants filed 27th June, 1856. Oppositions well founded in law, and allegations true.

Cause inscribed for hearing 30th June, 1856, of which attorney admits notice same day. On 3rd July, opposant, *Ruggles Wright* moves by his attorney to be permitted to withdraw and discontinue his opposition filed by him in this cause upon payment of costs. On 3rd July,

IN THE SUPERIOR COURT.

Exparte.

The Honorable the Attorney General for *Lower Canada* on behalf of our Lady the Queen, applicant for confirmation of title, and Divers, opposants.

Motion on behalf of Her Majesty that sentence or judgment of this Honorable Court be now granted, confirming the title of Her Majesty in this cause deposited with the Prothonotary of this Court.

Aylmer, 3rd July, 1856.

For the Attorney General,
T. MCCORD, Attorney.

to which is appended

We consent.

JOHN DELISLE, Attorney for *Ruggles Wright*, Opposant.

T. G. FENWICK, Attorney for *Pamelia Wright* and others, Opposants.

Then we have the copy of the judgment rendered as follows:

Province of Canada,
District of Ottawa.

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No. 136. IN THE SUPERIOR COURT.

The third day of July, one thousand eight hundred and fifty-six.

PRESENT: The Honorable Mr. Justice Smith; William K. McCord, Esquire, Circuit Judge.

Exparte on the application of the Honorable Her Majesty's Attorney General for *Lower Canada* for and in behalf of Her Majesty the Queen, for a sentence or judgment of confirmation;

and

Ruggles Wright, the Elder, of the Township of *Hull*, in the said District of *Ottawa*, Esquire opposant;

and

Pamelia Wright, of the Township of *Hull* aforesaid, wife of *Thomas McGoey* of the same, lumberer, and by him duly authorized in this behalf, and the said *Thomas McGoey* as the husband of the said *Pamelia Wright*. *Serina Wright*, of *Hamilton*, in *Upper Canada*, wife of *James P. Pierce*, of the same place, yeoman, by him duly authorized in this behalf, and the said *James P. Pierce*, as the husband of the said *Serina Wright*, and *Hull Wright*, of the said Township of *Hull*, yeoman opposants;

and

John O'Meara, of *Ottawa* city, formerly called *Bytown*, in *Upper Canada*, merchant,

opposant *en sous ordre*.

The Court taking into consideration that the said Honorable Her Majesty's Attorney General for *Lower Canada*, for and in behalf of Her Majesty the Queen, did under an Act of the Legislature of the Province of *Canada*, passed in the ninth year of Her Majesty's reign and intituled: "An Act to amend the Law constituting the Board of Works," on the twenty-third day of June, one thousand eight hundred and fifty-five, lodge in the office of the Prothonotary of the said Court in the said District of *Ottawa*, deed of sale made and executed before Messrs. *R. A. Young* and colleague, Notaries Public, on the seventh day of May, one thousand eight hundred and seventy-five, between *Andrew Leamy*, of the Township of *Hull*, in the District of *Ottawa*, trader, and *Erexina Wright*, wife of the said *Andrew Leamy*, and by him duly authorized for the due effect thereof, of the one part and *William Foster Coffin*, Esquire, of the city of *Montreal*, and *Thomas McCord*, Esquire, of the Village of *Aylmer*, both acting for the effect thereof, for and on behalf of the Honorable the Commissioners of Public Works for the Province of *Canada*, *se portant forts pour eux*, of the other part, together with the Ratification thereof, made and executed before Messrs. *Petitclerc* and colleague, Notaries Public, on the nineteenth day of May, in the year of Our Lord one thousand eight hundred and fifty-five;

Being a sale by the said *Andrew Leamy* and his said wife, to Her Majesty Queen *Victoria*, Her heirs and successors of the following pieces and parcels of land and water, that is to say :—(Here follows the description).

And further, that the said Attorney General of Her Majesty has caused to be given and published three several times in the course of four months in the *Canada Gazette*, the public notices in that behalf required by law, of his intention to make application to this Court on the first day of February, one thousand eight hundred and fifty-six, for a sentence or judgment of confirmation of the said title deed.

And further, that the said public notices have been publicly and audibly read at the church door of the Parish Church, in the Village of *Aylmer*, in the said District of *Ottawa*, and in the said Township of *Hull*, wherein the said pieces and parcels of land and water are situated, at the issue of and immediately after Divine service in the forenoon, on the four Sundays next before the said first day of February, one thousand eight hundred and fifty-six, and the said notices were posted at the door of the said church on the first Sunday on which they were read as aforesaid, as appears by the certificate of *William K. Hodges*, one of the sworn bailiffs of this Court.

And the Court further considering the summary petition of the Attorney General of Her Majesty, made and filed in that behalf on the said first day of February, one thousand eight hundred and fifty-six, and that due proof hath been adduced of the observance of all and every the formalities required by law; also that the opposition of the said *Ruggles Wright*, the Elder, by him filed with the Prothonotary of the said Court, to and against the confirmation of the said Title Deed has been discontinued with costs, and that the opposition filed with the Prothonotary of the said Court to and against the confirmation of the said Title Deed, by the said *Pamelia Wright* and others, has also been discontinued with costs, doth adjudge, order and decree that the purchase or acquisition made by Her said Majesty Queen *Victoria*, of the said pieces and parcels of land and water, and of all and singular the rights, members and appurtenances whatsoever thereto belonging or in any wise appertaining under and by virtue of the said Title Deed, be and the same is hereby confirmed; and thereupon that all claims in, to or upon the said pieces and parcels of land and water or some portion thereof be and the same are hereby barred, and that Her said Majesty Queen *Victoria*, Her heirs and successors, be and remain the incommutable proprietors of the said pieces and parcels of land and water, to have and to hold the same unto Her said Majesty Queen *Victoria*, Her heirs and successors for ever,

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discharged of and from all privileges and hypotheques with which the said pieces and parcels of land and water may have been encumbered previous to or at the time of the aforesaid purchase or acquisition made by Her said Majesty Queen *Victoria*.

And the Court doth further order and adjudge that the Prothonotary of the said Court do deliver to the said Attorney General of Her Majesty the said Title Deed of sale filed in his said office.

And the said Court proceeding to make the distribution of the amount of purchase money deposited with the deed of sale, being the sum of one thousand and one hundred and four pounds, sixteen shillings and two pence currency,

£1404 16s. 2d.
£7 10s. 4d.
£1397 5s. 10d.

Less however the sum of seven pounds ten shillings and four pence deducted for poundage to the Prothonotary of the said Court, doth adjudge and order by and with the consent in writing of the said vendors and of record in this case, that the sum of one thousand three hundred and ninety seven pounds five shillings and ten pence be paid and distributed as follows:

1st. That the said opposant *John O'Meara* be paid the amount of his debt, interest and costs as claimed in and by his said opposition to wit; for his said debt the sum of four hundred and thirty pounds fourteen shillings and two pence..... £430 14s. 2d.
for the interest accrued thereon up to this day, the sum of twenty eight pounds eight shillings and six pence..... £28 8s. 6d
and for his costs of opposition the sum of five pounds and ten pence..... £5 0s. 10d.

£464 3s 6d.

2nd. That the remaining balance of nine hundred and thirty-three pounds two shillings and four pence be paid to the said vendors *Andrew Leamy* and *Erexina Wright*..... £933 2s. 4d.

£1397 5s. 10d.

which sum being duly paid the Prothonotary shall be discharged.

Ten words erased are null and void.

(Draft,) Certified a true copy.
(Signed,) AIMÉ LAFONTAINE,
Prothonotary Sup. Co.
Dis. and Co. Ottawa.

This was certainly on its face a good and perfect con-

firmation by a Court of competent jurisdiction of the Crown's title, and, I think, put the Crown, from the moment it was adjudged for the Crown, in good faith, with a title on its face good and authentic.

Then, what does the Code declare in reference to prescription. Art. 2,206 of the Civil Code declares:

Subsequent purchasers in good faith, under a translatory title, derived either from a precarious or subordinate possessor, or from any other person, may prescribe by ten years against the proprietor during such subordinate or precarious holding.

Art. 1,449:

The purchaser of an immovable, which is subject to or hypothecated for dower, cannot prescribe against either the wife or children so long as such dower is not open. Prescription runs against children of full age during the lifetime of their mother from the period when the dower opens.

Art. 2,251:

He who acquires a corporeal immovable in good faith, under a translatory title, prescribes the ownership thereof, and liberates himself from the servitudes, charges and hypothecs upon it by an effective possession in virtue of such title during ten years.

Art. 2,253:

It is sufficient that the good faith of subsequent purchasers existed at the time of the purchase, even when their effective possession only commenced later. Knowledge acquired since will not vitiate the title (1).

Art. 2,193:

For the purposes of prescription, the possession of a person must be continuous and uninterrupted, peaceable, public, unequivocal, and as proprietor.

Art. 2,194:

A person is always presumed to possess for himself and as proprietor, if it be not proved that his possession was begun for another.

Art. 2,202:

Good faith is always presumed; he who alleges bad faith, must prove it.

(1) See *Lepage* v. *Chartier*, L. C. Jur. 29.

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Then as to what will amount to interruption :

Art. 2,224, after providing that a judicial demand in proper form served, &c., creates civil interruption, provides that:

> No extra judicial demand, even when made by a notary or bailiff, and accompanied with the titles, or even signed by the parties notified, is an interruption, if there be not an acknowledgment of the right.

Now with reference to prescription, I cannot assent to the proposition contended for by the appellant, that the Crown could not acquire by prescription before the Code, and that before the establishment of the Exchequer Court of *Canada* the Crown could not prescribe against the subject.

Art. 2,211, which declares, as old law, that the Crown may avail itself of prescription, and says the subject may interrupt such prescription by means of a petition of right apart from the cases in which the law gives another remedy, in express terms negatives the proposition thus put forward, and which I am bound to accept as an authoritative exposition of the law.

What, then, is the position of the Crown in reference to this property? It must be admitted the Crown entered lawfully and has held possession continuously and peaceably for 26 or 27 years. Now, assuming that a documentary title has not been shewn, and that the expropriation has not been regular, and that the judgment of confirmation did not do what it professes to do, viz., bar all claims and make the Crown "the incommutable proprietor" of the property, is not the Crown in a position to invoke a 10 years' prescription as claimed on its behalf with respect to that portion of the property conveyed by Mrs. *Sparks* and her husband to the Crown? Wholly apart from the 9 *Vic.*, c. 37, I think the deed from *Sally Olmstead* and *Sparks* to Her Majesty, having been duly passed as a deed of sale in

authentic form, was a conveyance which, if the grantors had been the owners of the property, would have conveyed the title to Her Majesty, and, therefore, was a translatory title sufficient in law to base a prescription; and without discussing whether bad faith can be attributed to the Crown, it is, to my mind, abundantly clear that as to this deed there is no pretence for saying that there is the slightest evidence of bad faith at the time the deed was executed in September, 1849. There is not a particle of evidence to show that the Crown or any of its officers had any knowledge or intimation that the interest of Mrs. *Sparks* was precarious or subordinate, or that she and her husband were not what they professed to be, and that they sold as the absolute owners of the property; and it cannot be disputed that, from the date of that deed till the present time—a period of upwards of 30 years—the Crown has been and still is in the continuous and uninterrupted, peaceable, public, unequivocal possession as proprietor. Under such circumstances I am at a loss to understand how it can be successfully contended that the exception claiming a 10 years' prescription has not been made out.

As to the deeds from *Leamy*, they stand in a somewhat different position, because it is claimed to be shewn that by divers letters and documents from the Public Works Department, dated respectively 11th April, 1853, 16th April, 1853, 27th April, 1853, 18th May, 1855, and also a direct intimation from two of the parties interested in the property in these words:—

Hull, April 26, 1855.

To the Honorable the Commissioner of Public Works:

SIR,—

We desire to state for your information and for the information of the Government, that the proposed sale of land in the township of *Hull*, by Mr. *A. Leamy* to the Government, is made without the sanction of the individuals who are mainly interested as pro-

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prietors of that land; that we are personally interested in the land, and have an incidental interest towards another portion included in the proposed sale. You will use this information as you deem mete, and should it prove of any benefit to the public service, it will be most gratifying to

Your most obedient, humble servants,

(Signed,) THOMAS McGOEY.
HULL WRIGHT.

that the Department and the officers engaged in buying this property for the Crown had knowledge of the defects in *Leamy's* title, and so subsequently taking a deed from him and his wife as absolute owners placed the Crown in bad faith. It must be borne in mind, that though Mrs. *Sparks* and husband's deed to *Leamy*, on its face dealt with and conveyed her interest in the property as simply a right of dower, *Leamy's* deed to the Crown distinctly stated on its face that he and his wife were the absolute owners, and it must be likewise remembered that he had a quit claim dated 3rd February, 1853, from the heirs of *Philemon Wright* of all their interest in the lot assigned to the widow, and this may possibly account for the deed from the widow to him dealing only with the question of dower. If this quit claim must be treated as I have already pointed out, I think it must be as a genuine document.

When the deeds were made by *Leamy* and wife to the Crown, he was actually in the position of absolute owner by force of the widow's deed and the quit claim of the heirs; and if so, the Crown purchasing from him as owner, and receiving a deed of sale in authentic form to convey the interest, without reference to the Public Works Act, surely the Crown cannot now be said by the person claiming under these very heirs to have purchased in bad faith? But it is said the Crown on the face of one of the deeds took security or *caution*. I think this should have no prejudicial effect; as difficulties had been started, the officers of the Government no doubt felt it their duty to take every precaution, even if it

might be considered excessive caution, to secure the public against any possible difficulty arising. I do not think it is a reasonable presumption that the Crown, or the officers of the Crown, should desire to take a bad title, still less to buy from a person whom they knew to be falsely putting himself forward as owner, and take a deed from him as owner, when they knew, or had reason to believe, the property belonged to others, and this too when they had an Act of Parliament under which the property and an undeniable title could be acquired in defiance of the real owner.

But the good faith of the Crown does not rest on this alone. Application is made to the Superior Court for a confirmation of this title from *Leamy*, and there we find the very parties who signed the so called protest opposing the confirmation, and though the oppositions could not be found, from the *defense au fonds en droit* filed to the oppositions, we can readily discover what had been alleged by them against the confirmation, viz., "That they, the opposants, were the proprietors of the property conveyed, and that *Leamy* and wife were not and had no right to convey the property, and that confirmation of title should not be granted unless upon payment to the said opposants of a portion of the money deposited in Court." Instead of making good the oppositions, what do we next find? One of the opposants moving to be permitted to withdraw and discontinue his opposition; and on the 3rd July, 1856, when motion is made on behalf of Her Majesty that a sentence or judgment of the honorable Court be now granted confirming the title of Her Majesty in the cause deposited with the Prothonotary, all the opposants, including *McGoey* and *Hull Wright*, consenting by their respective attornies to such judgment.

But as the petitioner has attempted to fasten bad faith on the Crown, through the communications which passed

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between the different officers in respect to the property, there would seem to be no impropriety on a question of this kind in looking at all that passed, and reading all the communications, rather than selecting some and rejecting others. If we do this, the letter written on the 24th July, 1856, after the judgment obtained by the attorney of Record to the Commissioners of Public Works, which is as follows :—

AYLMER, 24th July, 1856.

To the Honorable the Commissioners of Public Works, Toronto:

GENTLEMEN,—

I beg to enclose herewith the deed of sale of the 7th May, 1855, from *Andrew Leamy* and his wife to Her Majesty, the ratification thereof by the Honorable *Frs. Lemieux* under date 19th May, 1855, and an enregistered copy of the judgment of confirmation, which I obtained at the last term of the Superior Court, in this district, and which fully completes for the Government exclusive title to the lands purchased under the above deed, at the same time that it frees them from all incumbrances. I have also effected a purchase from Dr. *Church* of that portion of his property, which had been assumed by you for the *Gatineau* works. * * * *

I have the honor to be,

Gentlemen,

Your obedient servant,

(Signed,) T. MCCORD.

would show very conclusively that from that time those representing the Crown believed, and acted on the belief, that by that judgment the exclusive title of the Crown, free from all incumbrances, was fully completed; and from that time the Crown should be held to be in good faith.

But, wholly apart from this, after this judgment, thus passed and unappealed from, has remained in the records of the Court unchallenged in any way by any party for any cause whatever for upwards of 23 years, is it not asking too much of this Court to say, that in favor of a party claiming under deeds of gift from these very people, and actually from the widow of *Leamy* who made the deeds,

that the Crown has not acted in good faith, and has not been for ten years, in the words of the article of the Civil Code, in good faith "in the continuous and uninterrupted, peaceable and public, unequivocal possession" of the land now claimed as proprietor thereof.

After giving this case much more than ordinary consideration, I have arrived at the conclusion, that under the deed of September, 1849, the Crown purchased by a good translatory title 21 acres, 1 rood and 25 perches of this property, and has since possessed the same as absolute owners, and nothing has since taken place to disturb or interrupt this possession, and that the Crown has a legal title by ten years' prescription.

As to the 65 acres acquired under *Leamy's* deeds, though there may be some doubt as to the right of Mrs. *Sparks* to sell the legal estate, yet as it was shown *Leamy* got deeds from the very heirs through whom the petitioner claims, and as the title was confirmed by a judgment of a Court of competent jurisdiction, at any rate from the date of the judgment of confirmation, if not from the date of the deeds, the Crown has been in good faith, and therefore acquired a legal title by prescription of 10 years.

FOURNIER, J.:—

The property claimed by the suppliant, the present appellant, is part of lots 2 and 3, containing two hundred acres each, in the 5th range of the township of *Hull*, originally granted to *Philemon Wright*, by Letters Patent from the Crown, on the 5th January, 1806.

On 25th April, 1808, the said *Philemon Wright*, by indenture, transferred and ceded the said lots of land, together with some other property, to *Philemon Wright Jr.*, his son.

Philemon Wright Jr. married *Sarah, alias Sally, Olmstead* on the 4th May, 1808, without having previously

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made a contract of marriage, and the above property, by the sole operation of the law, became subject to the customary dower of *Sally Olmstead* and the children issue of her marriage with said *Philemon Wright*. He died about the 4th December, 1821, leaving as his sole heirs and representatives, *Philemon Wright*, now *Philemon Wright*, senior; *Hull Wright*, now deceased; *Pamelia Wright*, now wife of *Thomas McGoey*, of the said Township of *Hull*, yeoman; *Horatio Wright*, now deceased; *Wellington Wright*, also deceased; *Serina Wright*, also deceased; *Erexina Wright*, now widow of the late *Andrew Leamy*; and *Sarah Wright*, now widow of the late *Andrew Boucher*; to wit, eight children, all issue of his marriage with the said *Sarah Olmstead*, his wife, who became seized and possessed of his estate, according to the laws of the said Province of *Quebec*, *equally for one undivided eighth each*.

Wellington Wright, one of the said heirs, died at *Ottawa*, about the year 1856, leaving no issue and without having made a will; leaving his surviving sisters and brothers his heirs-at-law.

Hull Wright, also one of the said heirs, died without having made a will, about the 22nd April, 1857, leaving eleven heirs-at-law, nine of whom were the lawful issue of his marriage with *Suzan Morehead*, to wit: *Philemon Wright*, *Isabella Wright*, *Samuel Wright*, *Pamelia Wright*, *Sarah Wright*, *Suzanna Wright*, *Serina Wright*, *Mary Jane Wright*, *Helen Wright*, and two children issue of his marriage with *Mary Sully*.

Horatio Wright, another of *Philemon Wright's* heirs, died intestate, without issue, and leaving as his heirs-at-law his brothers and sisters.

Erexina Wright also died without issue or will, thus leaving the surviving brothers and sisters the

heirs-at-law of *Philemon Wright*, each for one-fifth jointly with her nieces and nephews for one-fifth as representing *Hull Wright* their father deceased.

In 1862 *Suzan Wright*, daughter of *Hull Wright*, died in *Ottawa* leaving as issue of her marriage with *Melvin Whiting*, *Emma Whiting*, the sole heir of her mother's rights in the succession of *Philemon Wright Jr.*

So the only representatives of the said *Philemon Wright Jr.*, above-mentioned and of his three children, deceased, *Horatio Wright*, *Wellington Wright*, and *Serina Wright*, are :—

1st. *Philemon Wright*, of the said City of *Hull*, carpenter.

2nd. *Pamelia Wright*, of the said Township of *Hull*, wife of *Thomas McGoey*, of the same place, yeoman.

3rd. *Erexina Wright*, of the Township of *Hull* aforesaid, widow of the late *Andrew Leamy*, in his lifetime of the same place, lumberer.

4th. *Sarah*, *alias Sally*, *Wright*, of the Township of *Nepean*, in the County of *Carleton*, in the Province of *Ontario*, widow of the late *John Boucher*.

5th. The said children of the said *Hull Wright*, to wit :—1. *Philemon Wright*, of the said City of *Ottawa*, saddler; 2. *Mary Jane Wright*, of the said City of *Ottawa*, wife of *David Allen* of the same place, carpenter; 3. *Serina Wright*, of the said City of *Ottawa*, widow of the late *George Holsted*, in his lifetime of the said Township of *Hull*, trader; 4. *Helen Wright* of the said City of *Ottawa*, widow of *Melvin Whiting*, in his lifetime of the same place, laborer; 5. *Samuel Wright*, now absent from the Dominion of *Canada*; 6. *Pamelia Wright*, now of *Burlington*, in the State of *Iowa*, wife of *John Sharp*; 7. *Isabella Wright*, now absent from the Dominion of *Canada*; 8. *Emma Wright*, of the City of *Chicago*, in the State of *Illinois*,

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wife of *James D. Fanning*, of the same place; 9. *Alfred Wright*, of *Cleveland*, State of *Ohio*; 10. *Sarah, alias Sally, Wright*, represented by her said children, issue of her marriage with the said *Richard Olmstead*, viz:—1st. *Alexander Olmstead*; 2nd. *Edith Olmstead*. 3rd. *Howard Olmstead*; 4th, *Charles Olmstead*; and 11. *Suzanna Wright*, represented by her daughter, issue of her marriage with *Melvin Whiting*, viz:—*Emma Whiting*.

The appellant, in virtue of several deeds of donation mentioned in the petition, which were duly executed and registered, became the sole owner of the rights of the said heirs of *Philemon Wright* in a property, being part of Lots Nos. 2 and 3, in the 5th Range of the Township of *Hull*, containing 159 acres of land and water, the metes and bounds being given as follows in the said deeds of donation, to wit:—

"Commencing at a post planted in the fifth range line on the boundary between lots number one and two, thence in a westerly direction following the said fifth range line a distance of forty chains and six and one half links to a post planted at the intersection of said fifth range line with the centre line dividing lot number three; thence in a northerly direction at nearly right angles to the said fifth range line, following the said centre dividing line of lot number three, a distance of forty chains to a post planted; thence in an easterly direction parallel to the said fifth range line, a distance of thirty-five chains, more or less, to the water edge of the River *Gatineau*; thence following down stream the water edge of the River *Gatineau* a distance of five chains, more or less, to a post planted; thence in a southerly direction, parallel to the aforesaid centre dividing line of lot number three, a distance of thirty-five chains, more or less, to the place of beginning."

This property, by a certain deed of partition and division, (*partage*), to which reference will be made here-

after, between the heirs of *Philemon Wright Jr.*, on the one part, and *Sally Olmstead* his widow, of the other part, was set apart for her use and benefit by virtue of her customary dower.

Sally Olmstead was married subsequently to *Nicholas Sparks* the 20th November, 1826, and died in *Ottawa* on the 9th October, 1871.

It is from this *Sally Olmstead*, who had but the *usufruct* of this property, that the government derive their title to that part of the property, which they alleged to have purchased by certain deeds mentioned in their defence.

The suppliant claims this property, together with a sum of $200,000 for the rents, issues and profits derived therefrom by the government, since their illegal detention thereof.

The crown pleaded to this petition of right: 1st. by demurrer, *defense en droit*, because the petition fails to describe by a clear and intelligible description the limits and position of the lots in question, as in the possession of Her Majesty; and, also, because the petition is insufficient in law in so far as the petitioner has failed to allege any signification to Her Majesty of the deeds of gift or transfer in virtue of which he claims the said property and said rents, issues and profits, which he estimates to amount to $200,000.

2nd. By peremptory exception averring that Her Majesty became and was seized and possessed of said premises by various deeds of sale and alleged *inter alia:*

That by deed of sale duly made and passed before *Larue*, notary public, and witnesses, at *Hull*, aforesaid, on the 12th day of September, 1849, *Sarah Clmstead*, or *Sally Olmstead*, of *Bytown*, in *Upper Canada*, wife of *Nicholas Sparks*, of *Bytown*, aforesaid, and by her said husband duly authorized, together with her said husband, for divers good and valid considerations in deed mentioned, sold, transferred, conveyed and made over to Her Majesty the tract or parcel of land in said deed described as follows, to wit:

A certain tract, piece and parcel of land required for the use of

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the *Gatineau* Works, and described as follows, to wit: A certain tract, piece or parcel of land commencing at the edge of the *Gatineau River*, on the south side, on the boundary line between lots number one and two, in the fifth concession of the said township of *Hull*; thence on the boundary line between lots one and two aforesaid, south, two degrees and fifteen minutes, magnetically, thirty-two chains to the edge of the outlet of the *Gatineau Pond;* thence westerly along the edge of the outlet of the Pond, and northerly along the edge of the Pond, to a point north, fifty-six and three-quarters degrees west, magnetically, nine chains and seventy links from where the said distance on the said boundary line terminated at the edge of the *Gatineau Pond;* thence north, thirteen and three-quarters degrees east magnetically, twenty-eight chains to the edge of the *Gatineau River;* thence along the river edge with the stream to the place of beginning, being south twenty-two degrees magnetically, three chains and fifty-six links, more or less, containing by admeasurement twenty-one acres, one rood, and twenty-five perches.

That by a certain other deed, duly made and passed before *Young* and his colleague, notaries, at *Aylmer*, aforesaid, on the said 7th day of May, 1855, under the number 1032, the said *Andrew Leamy* and the said *Erexina Wright*, his wife, by her husband thereto duly authorized, for divers good and valid considerations in said deed mentioned, sold, transferred and assigned, with promise of warranty against all gifts, debts, dowers, claims, mortgages and other incumbrances whatsoever, to Her Majesty the Queen, accepting thereof by the Commissioners of Public Works, duly represented and acting by the said *William Foster Coffin* and *Thomas McCord*, those certain other lots or pieces of land in said last mentioned deed described as follows, to wit:—

Secondly.—A piece or parcel of land, for the most part covered with water, the water covering the same being portions of the south and south-east parts of lots numbers two and three in the fifth concession of the township of *Hull*, colored yellow on the plan number one, annexed to the said deed of sale entered into by the said parties, bearing even date with these presents, and executed before us, the said notaries above referred to, described as follows:

Commencing at the point C of the said plan, on the side line between numbers one and two in the concession aforesaid, about two rods south of the high water line of the creek represented on the said last mentioned plan; thence south westerly to point B, on the line between the fourth and fifth ranges of the said township of *Hull;* thence westerly along the concession line aforesaid to the point A on the said plan; thence north-westerly and south-

easterly, being also about two rods west of the *Gatineau Pond* to point K on said plan; thence south-westerly to point L at the water edge of *Gatineau Pond*; thence south-westerly along the margin of the pond to point M on said plan; thence south-easterly through the water of the said pond to point J on the eastern margin of the said pond; thence southerly, south-easterly and north-easterly, following the windings of the said pond to point O on the said line between the lots numbers one and two in the fifth range of the township of *Hull* aforesaid; thence following the course of the said line, in a southerly direction to point C, the place of beginning, containing by admeasurement sixty-five acres and ten perches, be the same more or less.

3rd. By peremptory exception, the Crown also relied on a deed of ratification passed before Mr. *Petitclerc* and colleague, notaries public, the 19th May, 1855, of these two lots of land sold to Her Majesty by the deed above mentioned and bearing date the 7th May, 1855. The Crown also averred that this deed of sale, in conformity with the statute, 9 *Vic.*, c. 37, was deposited with the prothonotary of the Superior Court, in the district of *Ottawa*, and that it was duly confirmed by judgment of said Court rendered on the 3rd July, 1866, and that by reason thereof, and in virtue of the provisions contained in the statute, all claims to the lands (including dower not yet open) as well as all hypothecs and incumbrances thereon were barred.

4th. Prescription of 30, 20 and 10 years. There was also the general issue and a supplementary plea claiming value of improvements.

To the exception of prescription the petitioner answered, denying the allegations thereof, and more particularly the good faith of the defendant.

To the 4th and 5th exceptions the petitioner answered, denying that the parties to these sales had any right of property on the land they sold, and denying the legality of the sales and of the judgment of confirmation.

To the 6th exception, the petitioner answered that the

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pretended renunciation by the heirs in favor of *Leamy* is a forgery.

To the 7th the petitioner replied generally.

To the supplementary plea, the petitioner alleged bad faith on the part of defendant. There were also general answers to all the pleas.

The two points raised by the demurrer, to wit: the insufficiency of the description of the property claimed and the want of the signification of the transfer of the issues and profits, after argument on the demurrer, were decided by Mr. Justice *Strong* in favor of the appellant. There has been no appeal from this judgment.

Mr. Justice *J. T. Taschereau*, who rendered the final judgment in the case, from which the present appeal is brought, having stated, that admitting the suppliant ought to succeed on the merits, he would yet be unable to obtain judgment in consequence of the insufficiency of the description of the property claimed, it becomes necessary for me to deal with this part of the case.

It was not by demurrer, but by an exception to the form, *exception à la forme*, that the Attorney General for Her Majesty should have objected to this alleged irregularity or insufficiency of the description of the property in question. The judgment delivered by Mr. Justice *Strong* is in accordance with Art. 116 C. C. P. Even Mr. Justice *Taschereau* admits that this irregularity should have been objected to by an exception to the form (*exception à la forme*), but adds, if he had to give a judgment in favor of the suppliant, he could not state nor indicate where the 159 acres of land and water were situated. Mr. Justice *Strong*, on the contrary, was of opinion that the situation, the boundaries and the extent of the land claimed, were sufficiently described in order to enable the Court to adjudicate upon the petition. By reading the description given

in the petition, it is easily ascertained what property is claimed. If the appellant had proved that the Government were in possession of the whole 159 acres, a better description by metes and bounds could not be given. The difficulty, if any, arises, that having a right to claim but one part of the property, it must be ascertained. This, at first sight, may seem difficult, but is easily done by establishing the number and the proportion of shares of the heirs represented by the appellant in the property in question.

As will be hereafter demonstrated, by digesting the titles, the proportion the appellant represents is 47 undivided 55ths, in 88 acres, 1 rood and 29 perches of these 159 acres.

For these reasons, I am of opinion that this ground was insufficient, and that the judgment dismissing this part of the defence should be affirmed, and that the final judgment ought to have maintained the same principle.

The second ground of demurrer, which relates to the want of signification of the transfer, not having been decided on the merits by Mr. Justice *Strong*, as he dismissed it because it had been improperly pleaded, had to be decided upon by the final judgment. This has been done by Mr. Justice *Taschereau*, who decided that the appellant should have signified to Her Majesty the transfer of the rents and profits of the property before filing their petition of right. It is now a well settled rule of law that a transferee of a debt cannot claim it from the debtor until the deed of transfer has been delivered to him. The appellant in this case not having caused this signification to be made, cannot now claim, as representing the heirs of *Philemon Wright Jr.*, the rents and profits due and accrued before he became the owner.

This long debated question has been definitely settled

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since the publication of the Code, and the decisions of the Courts are now in accordance with the law, although it is well known they were not in the province of *Quebec* when the Custom of *Paris* was in force.

For these reasons, the petition, in so far as it prays for the rents and profits due and accrued before the date of the execution of the deeds of grant to the appellant, must be dismissed. It should be dismssed also because the rents and profits transferred by the heirs *Wright* did not belong to them, but were, on the contrary, as we shall see hereafter, the property, in her capacity of dowager, of their mother, who died on the 9th October, 1871.

The principal question, and, no doubt, the one upon which depends the determination of this appeal, is that which has reference to the validity of the deed by which Her Majesty purchased this property notwithstanding the rights and pretensions of the appellant. I refer to the deed of sale (exhibit of the respondent), dated 17th May, 1855, to the Crown, represented by *William F. Coffin* and *Thomas McCord*, Esquires, as attorneys for the Commissioners of Public Works, from *Andrew Leamy* and *Erexina Wright*, his wife.

Before examining this point it is necessary, I believe, to ascertain if, in the absence of any adverse title, the titles relied upon by the appellant are sufficient in law to enable him to recover the property claimed.

This property, as I have before stated, was originally sold by letters patent dated 3rd January, 1806, to *Philemon Wright*. He was, no doubt, the only true and lawful owner of it when on the 25th April, 1808, by deed in due and valid form, he transferred it together with other lots to *Philemon Wright Jr.*, his son. The latter being possessed of this property at the time of his marriage, as before stated, having died intestate, the property fell to his heirs-at-law, who became

proprietors immediately after his death, subject to the customary dower of their mother. The pleadings tried to raise some doubts on this part of the case, and the crown relied on the absence and irregularities of some of the registers according to law in the place where the marriages, births and deaths of the family of *Philemon Wright Jr.* and of his issue took place. Mr. Justice *Taschereau*, in his judgment, uses the following language :—

> Now, there are a great number of *Philemon Wright's* children, grandchildren and representatives, have they established their filiation or successive rights? It is very doubtful, and, in the interest of the children, it is better not to discuss it.

This objection has not before this Court the importance which was given to it before the Court below. The appellant, knowing of the impossibility of getting those necessary certificates, and of the irregularities in the keeping of the registers, specially alleges the fact in his petition, and claimed the benefit of producing secondary evidence to prove the legal filiation of his *auteurs*. This proof has been given, and it is so complete that the Crown before this Court on the argument did not rely on any such irregularity. For this reason I will not review the parol and written evidence adduced on this part of the case. I cannot say more than to my mind, it completely establishes the filiation of the heirs of *Philemon Wright Jr.* These heirs, therefore, had a good and valid title to the property in question, and could validly dispose of it, as they did, to the appellant, unless it can be shewn that at the time they executed the divers deeds of donation in favor of the appellant, mentioned in the petition, they had previously alienated their rights in the said property. The defence has tried to supply this proof, and, in support, have fyled a large number of deeds, the greater part of which have no reference whatever to

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the property in question. In order to dispel the confusion that exists, it will be necessary to examine the details of certain transactions which took place between the heirs in relation to this property, and also between some of these heirs and strangers to the family.

The most important transaction is that which took place by an agreement in writing, dated 5th March, 1838.

By this agreement, the heirs of *Philemon Wright Jr.*, after having ascertained by survey made by *Anthony Swalwell*, Deputy Surveyor, that the quantity of land in lots No. 2, 3 and 4, in the 5th concession of the township of *Hull*, was 591 acres, 1 rood and 120 perches, including a certain pond of water, the said portions of said land having been sub-divided, allotted the following portions to each, that is to say:

To *Philemon Wright*,	43	acres,	2	roods.	
" *Hull Wright*,	43	"	2	"	
" *Pamelia Wright*,	49	"			
" *Horatio Wright*,	53	"	1	"	24 p.
" *Wellington Wright*,	48	"			
" *Serina Wright*,	60	"			
" *Erexina Wright*,	65	"			
" *Sally Wright*,	70	"			

This division is followed by the following declaration: "and to *Sally Olmstead*, our mother, one hundred and fifty-nine acres."

This portion was reserved to her in lieu of her dower, as it is amply established by the deed of sale she executed in favor of *A. Leamy* in 1852, and which will be spoken of hereafter. The heirs then and there signed, in favor of each other, certain quit claims or transfers to validate the division and allotment of the land in question. It cannot be said that this agreement or partition gave any right of proprietorship to *Sally Olmstead*, who did not even sign one single one of these quit claims or

transfers. The effect was to limit her dower to the *usufruct* of these 159 acres, but it gave her no right of proprietorship over the same, which remained the undivided property of the heirs. It is, however, contended that this division, in so far as it affects her, gave her proprietary rights over this portion. Such an interpretation is in direct opposition to the terms made use of in the agreement and cannot be entertained. Moreover, this partition, being signed and executed by the tutors, was an absolute nullity in law.

Now, having shown the heirs to be proprietors of the portions of land allotted to them, I find that several of them sold, not their share in the 159 acres, but their allotted portions. The first was *Wellington Wright*, who on the 11th January, 1837, sold to *Nicholas Sparks* (one of the vendors to Her Majesty,) all his rights, title and interest in the 48 acres which were allotted to him in the said lots 2, 3 and 4. This sale was confirmed by his co-heirs on the 5th March, 1838. On the same day, 11th January, 1837, *Horatio Wright*, another of the heirs, sold to the same *Nicholas Sparks* the 53 acres, 1 rood and 24 perches, which were allotted to him by the above partition.

The 30th April, 1839, *Sally Wright* and *William Colter*, her husband, gave a lease to *Andrew Leamy* of the 70 acres allotted by the said division to *Sally Wright*, and on the 1st of May, 1859, executed a release with all rights of property to the same *Andrew Leamy*.

The defence also alleges another deed of sale, dated 23rd May, 1859, before *Young*, N. P., from *P. Church* to Her Majesty, of a strip of land forming part of the 60 acres allotted to *Serina Wright* by the deed of partition and quit claim to her.

By referring to all these deeds of sale and quit claims by the said heirs, to wit: *Wellington Wright*, *Horatio Wright*, *Sally Wright*, wife of *W. Colter*, and *Serina*

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Wright, it is clearly established that they only sold the portion of land which had been allotted to each of them by the deed of partition and quit claim of the 5th March, 1838. There is no mention of their rights in the 159 acres, the *usufruct* of which was enjoyed by their mother, *Sally Olmstead*, for her dower, and there is not a single expression to be found in these deeds which might be interpreted as evidencing the intention of alienating their rights in the dower.

The only document which refers to the dower for the time is Exhibit 14, produced by the Crown, and registered on the 17th April, 1876.

With reference to this document, I will here remark that the statement contained in the respondent's factum, which reads as follows: "And the *seven* heirs had, by Exhibit 14, transferred their rights to *Andrew Leamy* in respect to the 159 acres in question," is entirely inaccurate. There are only four instead of *seven* of the heirs, which are named in that document, to wit: *H. G. Wright*, *Elizabeth Wright* (Mrs. *Leamy*), *Sarah Wright*, and *Philemon Wright*.

By this document, dated the 3rd February, 1853, these four heirs would appear to have transferred, for good and valuable consideration, previously received, all their rights in the above property subjected to the dower as follows: "All right, title, interest, claim of whatever nature, either as heirs or otherwise, which we or any of us now have, or may hereafter have, to or, upon the following lot of land and premises, to wit: that piece or parcel of land and pond of water heretofore belonging to *Philemon Wright Jr.*, in his lifetime, of *Hull* aforesaid, and which, at a division or partition of his property between his heirs and his widow, *Sarah Olmstead*, was set apart *to and for the use of* the said *Sarah Olmstead*, as will appear by reference to a diagram drawn by *Anthony Swalwell*, surveyor, annexed

to a transfer made by the said *Sarah Olmstead* to the said *Andrew Leamy*."

At the foot of this document, we find subscribed the names of *H. G. Wright*, *Elizabeth Wright*, *Sarah Wright* and *P. Wright*, which, the defence alleges, are the true signatures of the parties, and witnessed by *James Goodwin* and *John Doyle*.

The appellant contends that the document is a forged one.

One of the witnesses to the document, *James Goodwin*, admits his signature, but says: "I have not the slightest recollection of the names being set to said document, nor the place where it was signed. Without my own signature being there, I should not have recollected anything about it." To the following question: "Have you any recollection of being asked to be a witness to said document by any one, or is it by your signature being there that you supposed you were called a witness?" He answers: "All I can swear to is, that is my signature, but I have no recollection *seeing the party sign the said* document."

Further on he says: "I have no recollection of the signing in my presence, I could not swear whether I was present or not when they signed."

It is proved that the other witness, *John Doyle*, is dead. Being examined as to the genuineness of his signature, *Goodwin* says that, to the best of his judgment, it is his signature. *M. Farley*, who was examined on this point, says: "From the long lapse of time that has taken place, I would not undertake to swear that the signature, *John Doyle*, is his signature, that is to say, to swear positively to it, but my impression is that it is his signature."

The defence also endeavored to prove by witnesses that there was a resemblance between the signatures of *P. Wright*, *Horatio G. Wright* and *Sarah Wright*, com-

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pared with their present writings. Altho' such proof is generally of little value, in this case the evidence in support of their contention is very weak.

The witness *Clark*, who produced some receipts in order to compare the signatures, says that he believes the signatures at the foot of this document, U. U. No. 14, *H. Wright*, *P. Wright* and *Sarah Wright* were written by the parties who signed the receipts he produced; but at the same time declares that once only he saw *P. Wright* sign in his presence, but never saw him write. He points out a difference between the signature of *H. G. Wright* on the exhibit U. U. and the receipts signed by him.

This evidence, in absence of any proof in rebuttal, would certainly not be sufficient to declare these signatures genuine. Yet, in this case, there are the declarations of two of the parties, who swear that they never signed such a document. Both are interested in the suit, and their evidence, therefore, would not be of much weight were it not corroborated by certain statements of facts which could have been rebutted. The first declares that at the time this document is purported to have been executed and signed, to wit: 3rd February, 1853, he was passing the winter of 1853 at the *Upper Gatineau*, where he was making lumber in the shanties. He produced his memorandum book containing the following entry: "February 3, 1853, *J. McCondy*, 32." This fact, which was not contradicted, proves positively that the document does not contain his genuine signature. As to *Sarah Wright*, it is proved that for seven years she had not been on speaking terms with *Mr.* and *Mrs. Leamy*, and that the first time she spoke to them it was on the occasion of her second marriage. This fact tends to corroborate her denial of her signature. The other alleged parties to this document were not examined, but we find *H. E. Wright* one year later

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informing, by an official letter, the Government that he is one of the proprietors of the property *Leamy* intended to sell. He was dead several years when the evidence on this petition was taken. If he had signed the document U. U. in favor of *Leamy*, it is not probable that he would have sent this protest. *Elizabeth* or *Erexina Wright* is Mrs. *Leamy*. Admitting even that this is her true signature, there can be no doubt that, as regards her, it is an absolute nullity. She was at the time under the control of her husband, *sous puissance de mari*, and no contract or deed affecting her immovable property could be executed by her in favor of her husband. The law forbids it. She could, however, authorized by her husband, have sold *these* rights to a third party, but this she has not done, as can be ascertained by referring to the deeds in which she appears with her husband.

There is, however, another ground which is sufficient to render the document in question of no value, supposing it to be genuine, and this covers all the alleged signatures. It is that a document or deed such as that one, purporting to convey real estate, not having been registered, cannot affect the petitioner who has purchased these rights, and has had his divers deeds of donation, &c., registered previously, as I have shown above.

Then, also, in order that the Crown may set up successfully these quit claims, they must come within the 4th section of ch. 35, Cons. Stats., *L. C.*, "an Act respecting land held in Free and Common Socage, and the transmission and conveyance thereof." Now, according to the laws of *England*, these quit claims are invalid, because no consideration is mentioned.

To summarize, this document is of no value: 1st. because the signatures have not been legally proven; 2nd. inasmuch as it affect Mrs. *Leamy's* share, it is an absolute nullity; 3rd. if it was really signed by the

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parties, the purchaser (*Leamy*) has lost all the rights he acquired in virtue of that document, because he did not have it registered. In the deed dated 7th May, 1855, as well as in the other deeds, it is evident Mrs. *Leamy* did not sell any property of her own, but simply joined her husband in the sale of certain rights he had purchased from Mrs. *Sparks*, in order to give the purchaser a release of her dower or other matrimonial rights she might have upon the property sold thereby.

The different deeds themselves, which I have separately reviewed, prove conclusively that the heirs of *Philemon Wright Jr.* have never alienated any share of their proprietary rights in the said 159 acres *set apart* for the dower of *Sarah Olmstead*, their mother, and a good reason for their not doing so before, no doubt, was because their mother, who had the *usufruct* of the property, only died on the 9th October, 1871.

Although it has been established that the heirs of *Philemon Wright* have not alienated their rights in this property, (with the exception, perhaps, of *Erexina Wright*, Mrs. *Leamy*, as to two acres,) Her Majesty has, nevertheless, obtained conveyances of a certain portion of this property.

The examination of the title deeds of the *auteurs* of the Crown, which will be made hereafter, in respect to the plea of prescription relied on by the Crown, will show that these conveyances were made by persons who were not proprietors. But first, it is necessary to refer to the all important question raised on this appeal, viz: whether the conveyances of the property in question were made in conformity with the provisions of 9 *Vic.*, c. 37, and whether the confirmation of this second title, which was granted of one of the conveyances on the 3rd July, 1856, by the Superior Court sitting at *Aylmer*, has the effect of divesting the lawful proprietor of his rights in the property.

This statute, passed in amendment of 4 and 5 *Vic.*, c. 38, establishing the Board of Works, makes special provisions in reference to the powers of the commissioners in entering into agreements for the purchase of property for the public works of the province. The principal sections of the Act, which it is necessary to refer to in the present case, are the following:

By sec. 5 it is enacted:

That the said commissioners shall have power, by writing under their hands and seals, on behalf of the province, to make and enter into all necessary contracts, agreements, stipulations, bargains and arrangements with all and every person or persons whomsoever, upon, for, or respecting any act, matter or thing whatsoever, relative to the public works of this province * * *.

Sec. 8 says:

That it shall be lawful for the said commissioners to authorize their engineers * * * to enter into and upon any and all grounds to whomsoever belonging, and to survey and take levels * * * as they may deem necessary for any, or all, of the purposes and objects under the management and control of the said commissioners, as aforesaid; and the said commissioners, in and for the said purposes, shall, at all times, have power to acquire and take possession of all such lands or real estate, and to take possession of all such streams, waters and water courses, the appropriation of which, for the use, construction and maintenance of such public works as aforesaid, shall, in their judgment be necessary; and that the said commissioners may, for that purpose, contract and agree with all persons, seigniors, bodies corporate, guardians, tutors, curators and trustees whatsoever, not only for and on behalf of themselves, their heirs, successors and assigns, but also for and on behalf of those whom they represent, whether infants (minor children), absentees, lunatics, idiots, femes-covert, or other persons otherwise incapable of contracting, who are, or shall be possessed of or interested in such lands, real property, &c.

After providing for the mode of compensation for such lands, &c., and tenders, in case of parties refusing to agree on compensation, the section goes on to say:

If the owner or owners of such land * * * do not reside in the vicinity of such property so required, then notice shall be given in

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the *Official Gazette* and in two distinct newspapers, published in, or adjoining, the district in which such property is situate, of the intention of the commissioners to cause possession to be taken of such lands * * * and after thirty days from the publication of the last notice, possession may be taken accordingly; and all land * * * contracted for, purchased, or otherwise acquired by the said commissioners in manner aforesaid, shall be vested in, and become, and be, the property of Her Majesty * * * and the respective conveyances thereof, not being notarial deeds, shall be brought to and recorded and enrolled in the office of the Registrar of this province, but being so enrolled, or being notarial deeds, need not otherwise be made by matter of record, and such conveyances may be accepted by the said commissioners on behalf of the Crown.

Sec. 9 enacts:

That in *Lower Canada* the compensation awarded as aforesaid, or agreed upon by the said commissioners, and any party who might, under this Act, *validly convey the lands, or lawfully in possession thereof as proprietor*, for any lands which might be lawfully taken under this Act without the consent of such proprietor, shall stand in the stead of such land; and any claim to, or hypothec, or encumbrance upon the said land, or any portion thereof, shall be converted into a claim to or upon the said compensation.

After providing for payment of such compensation, and deposit of an authentic copy of the conveyance or award in the hands of the prothonotary of the then Queen's Bench (now Superior Court), in case the Commissioners shall have reason to think that hypothecs or claims exist, in order to purge the same, the clause further enacts:

And proceedings shall be thereupon had upon application on behalf of the Crown for the confirmation of such title in like manner as in other cases of confirmation of title, except, that in addition to the usual contents of the notice, the prothonotary shall state that such title (that is the conveyance or award), is under this Act, and shall call upon such persons entitled to, or to any part of the land, or representing or being the husband of any parties so entitled, to file their oppositions for their claims to the compensation, or any part thereof, and all such oppositions shall be received and adjudged upon by the Court, and the judgment of confirmation shall forever bar all claims to the lands or any part thereof (including dower not yet open), as well as all hypothecs or encumbrances upon the same;

and the Court shall make such order for the distribution, payment or investment of the compensation, and for the securing of the rights of all parties interested as to right and justice, according to the provisions of this Act and to law shall appertain.

Sec. 17 enacts:

That the chief commissioner, for the time being, shall be the legal organ of the commissioners, and all writings or documents signed by him and countersigned by the secretary, and sealed with the seal of the chief commissioner, *and no others*, shall be held to be acts of the said commissioners.

Though there have been several amendments to this statute, these provisions have not been changed,—they are even now to be found in the statute of the Dominion, 31 *Vic.*, ch. 12, respecting the Public Works.

Such were the formalities and provisions by which the commissioners were bound, in order to make a *valid* contract for the purchase of the property in question. Have these provisions been complied with, in order that Her Majesty may avail herself of the extraordinary and exceptional advantages which are attached to the confirmation of a title obtained under this act?

The first instrument invoked by Her Majesty, and set up in the 4th plea or exception, is one passed in authentic form before *Larue*, notary, and witnesses, at *Hull*, on the 12th September, 1849. By this deed *Sarah Olmstead*, authorized by her husband, *Nicholas Sparks*, sells to Her Majesty, represented, as therein stated, by Hon. *Etienne Taché*, Commissioner of Public Works, the property which is therein described, and which forms part of the land claimed by the appellant, and of which *Sarah Olmstead* had only the *usufruct*, as we have before ascertained.

The Commissioner of Public Works mentioned as representing Her Majesty, Hon. *E. Taché*, was not a party to this instrument; he did not sign or seal it. It does not state that the contract is entered into in re-

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ference to Public Works, pursuant to the Statute 9 *Vic.*, ch. 37. The consideration is declared to have been paid by *Horace Merrill*, Superintendent of the Slides, "representing Her Majesty on the part of the Commissioner of Public Works," but it is not stated in virtue of what authorization he thus acted, nor did he sign the deed. Moreover, it does not appear by the record that this conveyance has ever been accepted by the commissioner, as provided in the 8th section, "and such conveyance may be accepted by the commissioner on behalf of the Crown." No deed of ratification or confirmation of this title deed was ever obtained by the Crown. Under these circumstances it is apparent that the acquisition of this property was not made in accordance with the provisions of the 9th *Vic.*, ch. 37. 1st. Because it was not purchased from a person who had power, under the statute, to convey; 2nd. Because the commissioner had no authority to delegate his powers under the act for the purpose of acquiring property, the statute only authorizing him to contract; 3rd. Because he was authorized to enter into contracts on behalf of the province only by writing under his hand and seal; 4th. Because he did not subsequently *accept* the conveyance under his hand and seal, the 17th section enacting that no writing or document shall be held to be the act of the commissioner unless signed and sealed by him, and countersigned by the secretary. Now, this instrument not being executed in conformity with the provisions required by law, is necessarily void and of no value. The commissioner could not purchase property otherwise than as provided by the statute which created the Board of Works and defined the powers of the commissioners. A similar interpretation has been given to the same clause by Sir *William Richards*, in the case of *Wood* vs. *The Queen*.

It will also be seen, that many of these defects above

stated are to be found in the second title deed relied on by Her Majesty, as to the acquisition of another portion of this property, to wit: in the conveyance by *Andrew Leamy* and *Erexina Wright*, his wife, dated the 7th May, 1855, and bearing the notary's number 1032. The Commissioners of Public Works do not appear as present at the time of the execution of this conveyance. In their stead Messrs. *Coffin* and *McCord*, not specifying their authorization, enter into an agreement obliging themselves *se portant forts pour eux* to have the deed of sale ratified within fifteen days thereof. On the 15th May, 1855, this conveyance was ratified by notarial deed passed at *Quebec*, before Mtre. *Petitclerc* and colleague, notaries, by Hon. *Francois Lemieux*, then Commissioner of Public Works, *Thomas Begley*, Secretary, but it was not *sealed with his seal*, as required by the 17th section of the Act.

By examining the abstract of titles of *Leamy* and his wife, the vendors, it is shown that they had acquired from *Sarah Olmstead* (who had only the dower, *douairiére*,) their rights in the property sold, and that they had, as she had, only a precarious title, and that the statute did not authorize them to sell such property to the Commisioners of Public Works.

Let us see who really were the parties authorized by the statute to sell to the commissioners? They are enumerated in section 8:

> Seigniors, bodies corporate, guardians, tutors, curators, and trustees whatsoever, not only for and on behalf of themselves, their heirs, successors and assigns, but also for and on behalf of those whom they represent, whether infants (minor children), absentees, lunatics, idiots, femes couvert, or other persons otherwise incapable of contracting, who are or shall be possessed of or interested in such lands, real property, streams, waters and water courses, as aforesaid.

We find here a large number of persons whose quality of legal representatives of the proprietors would not have been sufficient in law to enter into a contract

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of sale, had not the law, in the public interest, authorized them to do so.

The question then arises, are there other persons, besides those just enumerated, who can legally convey a property pursuant to the statute? The proprietor and the proprietor only, and the law says so in the most positive and unequivocal terms. In the following section it is there stated: "any party who might, under this Act, *validly* convey the lands or is *lawfully in possession thereof as proprietor*." The first part of this sentence refers evidently to those who are named in section 8, and the latter part to the proprietors designated by the following words: "those who are *lawfully* in possession as *proprietors*." Only these two classes of persons are authorized *to give a title* to the commissioners. Thus, a person who has only, say the usufruct, the right of dower, who is a tenant, or a squatter, could not give a valid conveyance, and all contracts entered into with them by the commissioners, affecting the property, would be absolutely null and void, and consequently do not come within the class of *such* titles as can be *validly* confirmed under the 9th section.

It must be borne in mind that this statute has introduced exceptional legislation, and must therefore, as all laws relating to the expropriation of the property of the subject, be rigorously and strictly construed. We cannot extend its provisions, even if it were in the public interest.

In this instance, if it is reasonable to suppose that the commissioners were authorized to purchase from the lawful proprietor, or from those who, (altho' they could not otherwise legally convey,) were authorized in their legal representative quality of proprietor to sell, surely it is impossible to go so far as to contend that this statute has authorized the purchase of *A's*

property from a third party, which would be the case if the Crown had the right to acquire the property from the *usufruitiere*.

The commissioners, in order to avail themselves of the benefit of that statute, must have purchased from some person who was *lawfully* in possession as *proprietor*, or who had the representative character of the proprietor such as *curator*, *tutor*, &c. *Leamy* had not any such representative character, and he was not the proprietor.

Nor can the acquisition made from *Leamy* be justified or validated on the ground that the real owners, proprietors, could not be found, for the statute has made provision for such a case in the 8th section. It provides that it shall be the duty of the commissioners to give notice in the official *Gazette*, and in two distinct newspapers, of their intention to cause possession to be taken of the necessary land, and after thirty days from the publication of the last notice, the law authorizes them to take possession.

The commissioners did not think proper to adopt this mode of acquiring this property, but they purchased from *Leamy*, whom they knew was not the proprietor, as is clearly established by the writings (which will be hereafter mentioned) of Messrs. *Begley*, Secretary of the Board of Works; *Coffin*, *Merrill*, *&c.*, writings which informed them that the heirs of *Philemon Wright Jr.*, whose names were given, were the lawful proprietors of the land they required. Was it not their duty to purchase from these heirs; and if they did not wish to make a contract with them because *Sally Olmstead*, in virtue of her dower, or *A. Leamy*, as her assignee or representative, was still in possession of the property, could they not at least have proceeded against them, as they might and were bound to do against an unknown or absent proprietor, in conformity with the provision

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contained in section 8, to which I have just referred? But, no, instead of doing so, they thought it proper to enter into a contract with a person whom the statute did not authorize to sell.

In my opinion, therefore, the two conveyances above cited, in so far as they are said to convey more than usufructuary rights, must be considered void, as being executed contrary to the provisions of the statute and conferring no right on Her Majesty.

These two conveyances are also void in consequence of of the non-compliance with an essential formality imposed by the statute, the affixing of the seal of the commissioner. This objection, at first sight, may seem but a technical objection, which should not entail such a grave consequences as the avoidance of a conveyance which would otherwise be valid. The statute provides, it is true, for the acquisition of property by deeds in authentic form, but it does not relieve the commissioner from the obligation of affixing his seal to such deeds; on the contrary, it declares that no other writing or document, than those bearing such seal, shall be held to be the act of the said Commissioner. The provision being "*no other*," it cannot be denied that non-compliance with such a formality, when it is enacted by statute, will invalidate any document. The authorities cited hereafter establish this point beyond doubt, though the text of the law ought to be sufficient. The Commissioners of Public Works were, by virtue of the 9 *Vic.*, c. 37, constituted a corporation, which could only make a contract or enter into an agreement in the manner prescribed by the Act, to wit: by a writing under section 8, and by affixing the seal of the chief commissioner, as provided in sec. 17, the latter section enacting, as I have before stated, that all writings and documents shall be signed and sealed by the chief commissioner and countersigned by the secretary, and *no others* (*writings* or documents)

shall be held to be the acts of the commissioners. This formality of affixing the seal of the chief commissioner not having been complied with in either of these two conveyances, they cannot, for this reason also, be held to be the acts of the commissioners, and therefore cannot have any validity or effect under that statute.

In *Marshall Wood vs. The Queen*, a case to which I have before referred, decided by the late Chief Justice *Richards* in the Exchequer Court, the Crown, by demurrer to a petition of right claiming value of work done for and accepted by the Department of Public Works, averred: that by the express terms of the 7 sec. 31 *Vic.*, c. 12, (*D.*) any such contract or agreement must have been signed and sealed by the Minister of Public Works, and charged that no such contract was in fact signed and sealed; and it was held that the words in the 7 sect. of the Public Works Act, (which is a re-enactment of sec. 17 of 9 *Vic.*, c. 37, relating to Public Works,) "no contract shall be *binding* on the Department unless signed and sealed by the Minister or his Deputy," must be considered imperative.

We now come to the fifth plea or exception, in which the Crown invokes the judgment of confirmation, dated 3rd July, 1856, pronounced by the Superior Court at *Aylmer*, confirming the deed of sale by *Leamy* and his wife above cited, 7th May, 1855, No. 1032. The statute provides the mode to obtain the ratification of deeds of acquisition made by the commissioners pursuant to the statute, and says proceedings shall be had for confirmation "of *such* title in like manner as in other cases of confirmation of title." The prothonotary is bound in the notice to be given to the interested parties to state that the demand for confirmation is made in virtue of the statute 9 *Vic.*, c. 37. It also enacts that "the judgment of confirmation shall for ever *bar* all claims to the lands or any part thereof (including dower not yet open,)

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as well as all hypothecs and incumbrances upon the same."

This disposition of the law is exceptional, and is a derogation to the laws in force, which would only have purged the hypothecs and incumbrances on the real estate, but would not have barred any rights of the lawful proprietor, who would still, notwithstanding the ratification, have been at liberty to claim them. But it can be easily understood that the Government, being desirous of purchasing real estate for the public interest, and in order to build public works, would wish to become the absolute owner, so that they might not be exposed to be ejected. This is what appears to me to have been done by the statute, but at the same time the proprietary rights of the subject have been respected. It was no doubt for the purpose of vesting in the commissioners an absolute title that the statute provided that they should contract with the person *lawfully in possession as proprietor*, imposing on them the duty of finding the true owner. If they do not purchase from him, it must be from the tutor, curator or other person having the legal quality of representing him, or they must adopt the special mode of proceeding provided for when the proprietor is not known or a non-resident.

The declaration that the judgment *shall bar all claims to the lands* cannot affect the proprietor; it does not say he shall forfeit his rights, if he does not pray to have them recognized by opposition, as the law supposes that these rights have been acquired, and that the proprietor sold all his interest before a judgment for confirmation can be asked for on behalf of the Crown. Therefore, if it is not the proprietor who has made the conveyance as provided for in the statute, then the confirmation cannot bar his rights without contravening the provision which imposes on the commissioners the duty of purchasing from him. The statute itself protects

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him from such an effect of a judgment of confirmation. In such a case the confirmation does not affect his proprietary rights any more than if the property had not been purchased by the Crown. The forfeiture of all rights of property here mentioned has only reference to the proprietary rights of those persons who did not convey themselves, but who sold by their representatives authorized by the statute, viz.: tutors, curators, &c., or to an unknown proprietor, when the statutory provisions in his favor have been complied with.

Since the statute imposed on the commissioners the duty of taking a deed from the *person lawfully in possession as proprietor*, the law cannot have intended to confirm a title deed taken from the proprietor's neighbour. It would be a spoliation which was never intended, and which was not enacted. The confirmation of a title deed under the civil law does not bar the claims of the proprietor (1).

Then is the title of the Crown, not having been taken in conformity with the statute, *a valid* title, in virtue of the right of the Crown to purchase independently of the statute? In my opinion, it would have been necessary for the person acting for the Crown to show he has been specially authorized, but then the title of the Crown would not be a title taken under the authority of ch. 37, 9 *Vic.*, and therefore could not *bar* the claims of proprietors, nor would the ratification of *such* a title *bar* the proprietors' claims (2). It is unnecessary to say more on this point, as the Crown has entirely relied on the statutory title.

The title deed being null and void,—first, because it was not obtained from the person *lawfully in possession as proprietor;* secondly, because it is not in the form required by the statute, viz.: not having

(1) C. C. Art. 2081, sub. 7. (2) See C.C. Art 2081.

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years. In order to complete this prescription it would be necessary for it to join Mrs. *Sparks'* possession, provided the latter, under her title and possession, could prescribe.

I have before stated that Mrs. *Sparks* had only the title which her dower gave to the possession of these 159 acres, part of which she sold by deed of the 12th September, 1849. She could not claim that property under any other title. Her possession must be in accordance with her title, which was in virtue of her dower, and this necessarily is a precarious title. The deed of sale to *Leamy*, dated 7th May, 1852, contains a formal declaration by Mrs. *Sally Olmstead*, that she had possession of this property in virtue of her dower, and she then only sold such rights as she had in virtue of her dower. The other deed of the 29th Sept., 1853, does not contain this admission. In this deed she sells all her rights in the property. In any event the admission in the first deed is evidence against her, and she could not, unless by proving it was an error, retract a declaration so made in conformity with her title. We must here apply the principle of law thus stated by *Dunod:* "Celui qui a un titre est presumé posséder en vertu de ce titre—*ad primordium tituli posterior refertur eventus* (1.)" It is this fundamental principle which prohibits the *usufruct* and the *tenant* to secure a title by prescription of the property he holds as such, and that even by lengthy possession. See also *Merlin* (2):

> Comme chacun est présumé posséder en vertu d'un titre, on doit dans le doute, expliquer la possession par le titre qui existe et la reduire à ces termes; conséquemment, si ce titre est infecté d'un vice capable d'empêcher la prescription, c'est-à-dire s'il est inhabile à transférer la propriété, c'est indubitable que la possession même la plus longue sera sans effet.

The possession of Mrs. *Sparks*, being derived from a precarious title, in virtue of her dower, was want-

(2) Rep. de Juris. *Verbo* "Prescription."

ing one of the essential conditions, viz.: "a possession unequivocal, and as proprietor." In order that the Government might avail themselves of this possession, they would have had to prove that there has been interversion of her title, that instead of possessing under precarious title, she held, as proprietor, or produce a deed by which Mrs. *Sparks* acquired the absolute ownership of the immovable property of which she could only claim the *usufruct.* There is no evidence that she ever possessed this property otherwise than in conformity with her title of *douairière*, and there has been no deed produced which shows that she acquired the property subjected to the dower.

From the above statement of facts, it is clear that the Crown has not possessed, either in its own name, or by joining with Mrs. Sparks' possession, *as proprietor* during thirty years, that portion of the 159 acres of land which was acquired by the deed of the 12th September, 1849, and consequently that plea of 30 years prescription cannot be maintained.

Then can the Crown be said to have acquired a title by 10 years prescription?

The plea is as follows:—

"That for more than ten years before the fyling of said petition, Her Majesty the Queen and her *auteurs*, had been in the possession, use and occupation of the land in said petition mentioned, of which the said petitioner prays to be declared proprietor, peaceably, openly, uninterruptedly, in good faith and with *good* and *sufficient* title, and Her Majesty thereby became, and was, and is owner and proprietor, and in possesion of said land, and was and is entitled to be maintained in possession thereof; and the said petition of the said Petitioner, by reason of the premises, ought to be dismissed with costs."

At the date of the execution of these conveyances the 10 years prescription was then governed by art. 13 of

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the *Custom of Paris*, which differs from the article in the Civil Code only in as much as the latter has made the term of 10 years applicable to absentees as well as to persons present. The Art. first relied on by respondent is Art. 2206 which enacts :

> Subsequent purchasers in good faith, under a translatory title in good faith, derived either from a precarious or subordinate possessor or from any other person, may prescribe by ten years against the proprietor during such subordinate or precarious holding.

By giving the term of ten years as new law, the Code virtually asserts that the prescription of ten years did not in the case in question exist under the old law, which, as we have already seen, required thirty years.

Merlin, when discussing the question of the interversion of titles, refers to only two decisions, the one of the 16th March, 1692, and the other of the 5th April, 1746, which maintained the plea of prescription of *thirty years* of a person who had purchased from a precarious possessor. The prescription invoked here, having commenced to run before the promulgation of the Civil Code, must be governed by the former laws, and, therefore, in my opinion, the only available prescription was that of 30 years, and not that of ten years.

But then art. 2251 is also relied on and it enacts:

> He who acquires a corporal immovable in good faith, under a translatory title, prescribes the ownership thereof and liberates himself from the servitudes, charges and impositions upon it by an effective possession in virtue of such title during ten years.

It is clear that under either of these articles, if a subject desires to avail himself of this prescription, he must have acquired under a translatory title, and in *good faith*. The expression *juste titre*, which is to be found in the *Custom of Paris*, has the same meaning as *translatory title* which is made use of in the Code. Another condition, says *Pothier* (1): "*Il*

(1) Prescription No. 84.

faut que ce titre soit valable" Thus we find, as some of the necessary conditions to prescribe, the three following: *translatory title, valid title, good faith.* Do we find these conditions in the present case? I have above shown by what mode the commissioners had the right of acquiring property.

Now, can it be said that the conveyance dated 7th May, 1855, by which the Government claim to have acquired another and the larger portion of this property, is on its face a translatory title of property? Is it not rather a sale by *Leamy* and his wife of whatever rights or claims they had on the real estate of which the Government were in possession for several years without a title. In order to correctly ascertain the true character of this conveyance, it is necessary to give the following important extracts:

Whereas the said Commissioners of Public Works have deemed it necessary to acquire for public purposes certain pieces or parcels of lands, situate in the aforesaid township of *Hull* which the said *Andrew Leamy*, and his said wife *claim* to be theirs.

Now, therefore, these presents and we the said notaries witness that the said *Andrew Leamy* and his said wife, have sold, assigned, transferred, conveyed and made over, and by these presents do sell, assign, transfer, convey and make over, with promise of warranty, against all debts, dowers. mortgages, claims, and demands generally whatsoever, unto Her Majesty, &c., &c., accepting hereof by and through the said Commissioners of Public Works, all and every the pieces and parcels of land and water, hereinafter described as follows: (Follows the description.)

To have and to hold the aforesaid sold pieces or parcels of land and water, first, secondly and thirdly described, unto Her said Majesty, &c., &c., from henceforth and forever. (Consideration, $1,404.16.)

And in consideration of the foregoing promises, the said *Andrew Leamy* and his said wife, have and by these presents do transfer and set over to Her said Majesty &c., all and every right, title, interest, claims or demand which they or either of them now have or ever had in or to the said above described and sold premises hereby fully divesting themselves thereof in favour of Her said Majesty.

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These extracts clearly prove that the sale was not executed by *Leamy* and his wife as *proprietors*. This deed cannot be said to contain one single expression from which it could be inferred that they were proprietors. They seem to have purposely omitted to assume that quality, and also to have prudently abstained from giving any information of their title to the properties they purported to sell or even to refer to it. They only sell their "claim," and "and all and every right, titles, interests, claims or demands." This naturally brings up the question of what consist these "claims and rights" conveyed and sold to the Government. In order to get a proper answer to this question it is necessary to refer to *Leamy* and his wife's title deed. We find, that by deed of 7th December, 1852, which I have before cited, *Leamy* and his wife acquired the usufructuary interest of *Sally Olmstead* over this property.

But, independently of this, it will be seen that the Government, in their own deed of the 7th May, 1855, (numbered 1032 by the notary), and the references therein to another deed, executed between the same parties, and numbered 1031 by the notary, were duly notified and informed of what rights and interests *Leamy* and his author Mrs. *Sparks* possessed, or at least placed in the position of obtaining exact information on the subject.

In describing the first lot sold, reference is made in the following words to a plan annexed to the deed No. 1031,—in order to give a more complete description of the lot:

> On the plan number two, annexed to a certain deed of sale entered into between the said parties bearing even date with these presents and executed before the said notaries, as upon reference to which will more fully and largely appear.

In the description of lot No. 3, in the same deed, the rights of the heirs of *P. Wright* and of their mother, Mrs. *Sparks*, are thus referred to:

Until intersected by the boundary line, between the share allotted to *Wellington Wright*, in the partage amongst the heirs of the late *Philemon Wright Junior*, according to the sketch or plan of the said partage, made by *Anthony Swalwell*, Deputy Provincial Surveyor, and the share allotted by the said partage and according to the said plan to *Sally Olmstead*, widow of the late *Philemon Wright Junior*, as will appear by the first mentioned plan, number two.

This plan is also annexed to the deed of sale, altho' a reference is specially made to the plan annexed to the deed of sale No. 1031, the only reason no doubt being that this last deed contained complete and full information respecting the division which took place between the heirs of *P. Wright.*

Then in the deed No. 1031, we find the following statement, which, as being referred to in the deed No. 1032, must be read as embodied in it. It is to be found in the description of the second lot:

So much of the said strip as is comprised in that share of the estate of the late *Philemon Wright Junior*, allotted by a partage or division thereof, made between his heirs and *Rosanna Wright*, wife of one *James Parie*, and the other options, so much of the said strips as is comprised in that part allotted in the partage to *Sally Olmstead*, widow of the said late *Philemon Wright Junior, and the said partage or divisions being represented and shown by a sketch or plan thereof, made for the said heirs by one Anthony Swalwell, Deputy Provincial Surveyor.*

In this deed it is stated that the arbitrators, to whom certain matters in dispute had been referred by the deed of the 24th April, 1854, to which I will refer later on, having delivered their award, the payment of a sum of £518. 0. 6 has been made to *Leamy* for the *use and occupation* for several years by the Crown of the property in question. This deed as well as the arbitrator's award was to be considered as annulled, "so far as they may be by these presents in part fulfilled."

A copy of *Swalwell's* plan, by which the division of the *Wright* estate was made, is annexed to this deed, as well as to the deed No. 1032.

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The Crown thus had *ample notice*, at the time of the purchase, of the precarious rights of the vendor, and at the same time was duly notified of the proprietary rights of the heirs of *P. Wright*.

Thus we find, in the expressions used in the title deed of the Crown and by the references therein to *Leamy's* rights, that the Crown evidently purchased nothing more than a precarious title, and, knowing that the sale was of an usufructuary right over certain property, no doubt paid a price estimated at the value of such *usufruct*.

Now, in my opinion, the Crown has not a *translatory* title of this property, because the Crown has only purchased, as I have just stated, *Leamy's* "*claims*" and nothing more, which consisted in the *usufruct* purchased from Mrs. *Sparks*. We may also infer that the reason why *Leamy* would only sell his "*claims*" was because he knew perfectly what they were. He was but a precarious owner.

It has also been said, that before executing a deed to the Government *Leamy* took from Mrs. *Sparks* another deed, in which she transfers to him all her rights and interest and omits to say they consisted in nothing more than the usufruct in lieu of her dower. But this conveyance, made without any guarantee, clearly puts *Leamy* in *bad faith*, and cannot give him more rights over the property than he had under the previous deed. The interversion of his title, from that of a precarious owner into one of an absolute owner from the same vendor, can only give him the right of prescribing by 30 years, in order to purge the defect in his title. Not being *proprietor*, he could only give to the Crown a title sufficient to prescribe by 10 years, by declaring in the deed that he was proprietor, and under such circumstances as would have justified the Crown in believing him. The following authority is in point:

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L'on entend par détenteurs précaires ceux qui possédent en vertu d'une convention, ou d'un titre *par lequel ils reconnaissent* le *droit d'autrui* (1).

* * * * *

Mais pour qu'un *acte de vente* fait par un *détenteur précaire*, puisse servir de base à une possession utile au profit de l'acquéreur il faut que la vente ait été faite a *titre de propriétaire*, et qu'elle ne soit entachée *ni de dol ni de fraude* (2).

The plea put forward by the Crown is that the Crown got a *just title, juste titre*, by the deed of the 7 May, 1855, but how can it be said the Crown purchased the fee simple, when by the deed itself it appears *Leamy* sold only his "claims," which were those of an usufructuary and precarious owner, as was shown by the reference in the deed to the division made by *Swalwell* of the property belonging to the estate of *P. Wright.* To these "claims" are reduced the rights of the Crown in this property, viz,: to the usufruct which *Leamy* had purchased from Mrs. *Sparks* and which he sold to the Government. It is also in evidence that the Crown has had the *use* and *occupation* of this property for a period of seventeen years since the 24 April, 1854, to the death of Mrs. *Sparks*, 9 Oct., 1871, which put an end to the usufruct. On this last date was opened the right of the heirs to claim possession of the property subjected to the dower. The *use* and *occupation* for such a long period was likely a fair value for the price paid, and in fact was *all* that the Government bought.

Another objection to this prescription is that the deed of 5 May, 1855, is not the real *title* deed of the Crown to this property. When the Crown obtained the conveyance of the 7 May, 1855, they had already been in possession of the property they were buying over one year. By deed, of sale dated 24 April, 1854, (Exhibit 39) *Leamy et ux.* had already bargained and sold these

(1) Rep. Gen. du Jour, du Pal. *Vo.* Prescription No. 313.

(2) Ibid. au No. 349.

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same lots to the Commissioners of Public Works, *Chabot* and *Killaly*, represented by the late Col. *Gugy*, as well as another lot which was not included in the sale of 1855. By comparing these two deeds carefully, it will be seen that the sale was not only of the same lots, but it is made in exactly the same language. In both deeds *Leamy et ux.* only sell "certain pieces or parcels of land which they *claim* to be theirs" as well as "all and every right, title and interest, claim or demand." And even in this deed the Government make the following important declaration, "*that they were at that time in possession of the property.*"

A remarkable feature to be noticed, and one which is important when the Crown relies on the prescription of ten years, is that by this deed the Crown thought proper to take security in order to guard itself against the invalidity of *Leamy's* title. The provision is thus worded:

> And whereas difficulties or doubts may arise as to the validity of title of the said *Andrew Leamy*, and his said wife with regard to the aforesaid *four* pieces or parcels of land, and it is necessary that security (*caution*) shall be given to Her said Majesty the Queen, therefore to these presents, personally came, intervened and was present *James Leamy*, also residing in Bytown, aforesaid, hotel-keeper, who after having had reading and taken communication of the foregoing premises did, and doth hereby voluntarily become the security (*caution*) for and on behalf of the said *Andrew Leamy* and his said wife, and doth hereby bind himself conjointly with the said *Andrew Leamy* and said wife, to the due performance of all the obligations which the said *Andrew Leamy* and his said wife have entered into aforesaid, and this in same manner as if he was the principal or *principal obligé* to these presents.

The doubt as to the validity of the vendor's title could not be more forcibly or more precisely stated. Then, can a title taken under such circumstances be a title such as meet the requirements contained in Art. 2251 of our Civil Code in order to prescribe?

Another objection is, that the title which the Crown

got is not translatory, because there has not been a strict compliance with the provisions of the statute. I have indicated that a contract in order to be valid, *valable*, must be signed by the commissioner, countersigned by the Secretary of the Public Works, and that the seal of the chief commissioner must be affixed. The statute declares that any writing or document made otherwise shall not be deemed to be the act of the commissioners. Nor can I see anything in the statute which dispenses the Crown from conforming itself to the provisions of the 17th sec., because the *writing* would be passed before a notary. Other *notarial* deeds fyled in the case were signed and *sealed* by the commissioner. The seal is evidence, no doubt, that the party signs in his official capacity, and the fact that the deed is passed before notaries instead of in the presence of witnesses does not authorize me to put two constructions on the 17th sec., viz.: when the writing is made before witnesses, the seal is necessary, but when before notaries, the seal is not necessary. Corporations, when parties to a notarial deed, are obliged to affix their corporate seal, as well as when they sign documents passed simply before witnesses. And as a matter of fact the corporations of *Quebec* and *Montreal* have always affixed their seal to notarial deeds. Now the conveyances in question do not contain the seal of the chief commissioner, and for this reason are void. There is no need of citing further authorities on this point. The following are sufficient:—

When the statute under which a corporation acts restricts the action to a particular mode, none of the agents through whom the corporation acts can bind it in any other than the mode prescribed (1).

When a legislative power, from which a corporation derives its authority to act, prescribes a particular mode in which the act shall be performed, the corporation cannot lawfully perform the act in

(1) Abbott's Dig. Law of Corporations, p. 214, No. 60.

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any other manner. If not done in the manner prescribed, the act is a mere nullity and utterly void (1).

It is now, however, fully established that as the corporation will not, so neither will the other side, be bound by any agreement not sealed, if that agreement does not fall within one of the excepted cases (2).

This nullity being established, it follows that the Government have not such a valid (*valable*) title as will allow them to acquire by prescription. This proposition of law seems to me to be incontrovertible, but it may be as well to refer to some authorities on this point.

Pothier says:

> Pourqu'un possesseur puisse acquérir par prescription la chose qu'il possède, il faut que le titre d'où la possession procède, soit un titre *valable*. Si son titre est nul, un titre nul n'étant pas un titre, la possession qui en procède est une possession sans titre, qui ne peut opérer la prescription (3).

Merlin :—

> Quand le titre est frappé d'une nulité absolue, point de prescription. La loi résiste continuellement à l'éxécution qu'il pourrait avoir, elle le réduit à un pur fait qui ne peut être ni *confirmé*, ni autorisé, et qui ne produit aucun droit, aucune action, aucune exception (4).

The same doctrine is embodied in our Civil Code which has not altered the law on this point. Article 2254 is thus worded: "A title which is null by reason of informality cannot serve as a ground for prescription by ten years."

If we apply the law as laid down in these authorities to the informalities which exist in the two conveyances relied on by the respondent, the irresistible conclusion to be drawn is, in the words of *Pothier*, that the possession of the Crown is a possession without title, "*possession sans titre qui ne peut opérer la prescrip-*

(1) Ibid. p. 869, sec. 1.
(2) Green's Brice, *Ultra Vires*, p. 382.
(3) De la Prescription No. 85.
(4) *Verbo* Prescription.

tion." The condition of a valid (*valable*) title is not there. The absence of these two conditions is sufficient to dismiss the pleas of prescription.

It may be argued that the judgment of confirmation of the deed of 1855, admitting for the sake of this argument, that the suppliants *improbation* against this judgment should be dismissed, although not the confirmation of *such* a title as was authorized by the statute, was at least equal to a *translatory* title sufficient to serve as a ground for prescription by ten years. First, if the judgment of confirmation is of *such a title* as was not authorized by the statute, then the parties who applied for it, had no authority to do so, and therefore, it is a nullity. Second, a judgment of confirmation cannot give validity to a deed which is null and void. Third, a judgment *per se* is not a *translatory title.*

Or un jugement n'est rien de tout cela. La chose jugée n'est classée nulle part parmi les moyens d'acquérir la propriété ; elle n'est que la preuve d'un droit, elle n'est pas la source ; elle ne concède pas la propriété ; elle la déclare, elle sanctionne un titre pré-existant ; elle lui assure une force obligatoire ; mais ce n'est pas elle qui le crée. Quand on excipe de la prescription avec juste titre et bonne foi, on est obligé de nommer son auteur. Eh bien où trouver cet auteur, quand le possesseur n'invoque que la chose jugée (1).

It only remains for me now to consider the condition, of good faith. *Good faith*, according to *Pothier*, consists :

Dans la juste opinion que le possesseur a que la propriété de la chose qu'il possède, lui a été acquise.

And *Troplong* says :

C'est la croyance ferme et intacte qu'on est propriétaire. Elle n'a lieu qu'avec la conviction que nul autre n'a droit à la chose, qu'on en est le maître exclusif, qu'on à sur elle une puissance absolue.

Can the Government, who ordered a preliminary examination of *Leamy's* titles, be considered, after receiving the information they got through their agent's reports, as having, at the time of the purchase on the

(1) Troplong *Vo.* Prescription, p. 404.

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7th May, 1855, that just opinion and firm and intact conviction, *cette juste opinion, cette croyance ferme et intacte*, that they had become absolute proprietors? Certainly not. On the contrary the Government were informed of all the defects in *Leamy's* titles, and at the same time of the rights of the heirs of *Philemon Wright Jr.*

In *Troplong* we find that:

Il ne suffit pas d'avoir un juste titre soutenu d'une possession de dix et vingt ans. Sans la bonne foi la prescription décennale ne peut être invoquée. C'est elle qui purifie le titre de ses vices, et le réhabilite aux yeux de la conscience; c'est elle qui appelle sur le possesseur cette faveur et cet intérêt qui le font préférer au véritable propriétaire coupable d'avoir négligé l'exercise de son droit. C'est elle enfin qui fait de la prescription décennale un moyen d'acquérir tout aussi pur et tout aussi légitime dans le for intérieur, que les contrats et les titres successifs.

Sans la bonne foi exigée par l'art. 113 de la Coutume et l'art. 2251 C. C., un titre n'est pas un juste titre suivant la Coutume, ni translatif de propriété suivant le code. Le titre translatif n'existe pas sans cela, la bonne foi en est la première condition. Suivant *Laurent*, au No. 397 de la prescription pour qu'un titre de propriété soit véritablement translatif il faut qu'il ait les qualités suivantes:

Dans l'usucapion de dix à vingt ans, la loi ne se contente pas de la croyance du possesseur et de sa prétention, elle veut que cette *croyance* et cette prétention aient leur fondement dans un titre qui aurait transféré la propriété au possesseur, si son auteur avait été propriétaire, *de sorte que* le possesseur doit se croire *propriétaire en vertu de son titre.* C'est à raison *du titre* et de la *bonne foi* que la loi *abrége* la durée de la prescription (1).

Laurent says:

L'art du code déroge sous ce rapport au droit ancien, les coutumes exigeaient un *juste titre*, mais on interprétait cette condition en ce sens que le *titre* n'était considéré que comme un élément *de bonne foi* (2).

It is evident that the Crown has not complied with any of the essential requirements necessary to prescribe, when it is stated in the deed of sale that doubts exist

(1) *Vo.* Prescription 914. (2) De la Bonne Foi p. 430.

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as to the validity of the vendor's title, and that it is necessary to take security in order to secure the Crown against the insufficiency or defect in the vendor's title.

As to the third condition, it has been shown that *Leamy's* title was clothed with a defect which prevented him from selling the fee simple, viz: precarious ownership.

Troplong cites *Voet* in support of his opinion (1):

Celui-là ne doit pas être considéré en état de bonne foi qui doute si son auteur était ou non maître de la chose, et avait ou non le droit de l'aliéner, car autre chose est croire autre chose est douter, et le doute n'est qu'un milieu entre la bonne et la mauvaise foi, entre la science et l'ignorance; de même que la silence de celui qu'on interroge, n'est, si on l'envisage en lui-même, ni une négation, ni une affirmation.

La preuve manifeste que celui qui doute ne prescrit pas, ressort de la loi *pro emptore.*

The same principle is enumerated in Rep Jour. du. P. (2):

Celui qui *doute* si son auteur était on non maître de la chose et avait le droit de l'aliéner ne doit pas être considéré comme étant de bonne foi, car le doute n'est qu'un milieu entre la bonne et mauvaise foi. Or la bonne foi (nécessaire pour prescrire) exige une croyance *ferme* et positive, une confiance entière dans le droit que l'on possède.

These authorities clearly prove that a deed positively stating that doubts exist as to the validity of the vendor's title, such as the present, cannot serve as a ground of prescription. But in this case we find the vendors, not only admitting that there may be some doubts as to the validity of their title, but they do not even declare that they are proprietors, nor do they claim to sell as such. I cannot see how, with such a title, prescription by ten years can be invoked.

But it may be contended that it is not on this deed

(1) *Vo.* Prescription No. 927. (2) No. 918, *Vo.* Prescription.

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that the Crown has relied to prescribe, but solely on the deed of the 7th May, 1855.

It is true the defense, which has set up many titles which have nothing whatever to do with the case, did not specially aver this deed of the 24th April, 1854. But in the general plea of prescription of ten years, the Crown alleges to have been in possession for ten years *in good faith and with good and sufficient title.* Then the Crown not only has the right to rely on this deed, but was bound to do so. *Pothier* says (1):

Car c'est au possesseur à justifier du contrat ou autre acte qu'il prétend être le juste titre d'où procède sa possession.

Then, how can it be said that the deed of the 7th May, 1855 is the title deed of the Crown to these lots of land? We have already seen that it is a sale of the same lots of lands as those already sold by the deed of the 24 April, 1854. Under which of these two deeds did the Crown become *proprietor*? Could the Crown thus purchase property which had been bought by another deed of sale and of which it had been in possession for several years? It is a canon of law, you cannot purchase what belongs to you, and for this reason the second deed is a nullity as a title to the property already sold; in any case, the second title cannot have added to the Crown's rights over this property. The following authority clearly demonstrates this proposition.

On ne peut vendre à quelqu'un la chose dont il est déjà propriétaire. "*Suæ rei emptio non valet sive sciens, sive ignorans emi.*" L. 16, H d. tet. La raison est que le contrat de vente consiste, suivant la définition que nous en avons donnée, dans l'obligation que contracte le vendeur de faire avoir la chose à l'acheteur; et par conséquent il consiste à rendre l'acheteur créancier de la chose qui lui est vendue; or il est évident que cela ne peut avoir lieu par rapport à une chose qui appartiendrait déjà à l'acheteur, car personne ne peut être créancier de sa propre chose; l'acheteur ne peut pas demander qu'on lui fasse avoir une chose qui est déjà à lui (2).

(1) Prescription No. 98. (2) Pothier vente No. 8.

This last deed cannot have any legal effect, in so far as it is relied on for the prescription of ten years.

This deed might, perhaps, have been available had *Leamy* in the meantime secured other rights than those he possessed over the properties sold, or if it had been executed to dispel any doubts as to the rights of the vendors as expressed in the first deed. But we find there is nothing of the kind. This second deed is couched in the very same language as the first; by it the vendors only sell their "claims," &c.

Under these circumstances, it would have been reasonable to suppose that the Crown, after declaring in the deed of 1854 that there were doubts as to the validity of *Leamy's* title, and exacting a security, would not have taken a second deed from the same vendors without previously having ascertained that all reasonable doubts no longer existed. But we find on the contrary, that the Crown in the interval, by means of its specially authorized agents, obtained direct and certain information that *Leamy's* title was in reality defective, as will be shown by the following documents:

1st. By the conveyance dated 7th December, 1872, Mrs. *Sparks* only sells to *Leamy* her right of dower, as follows:

She the said *Sarah Olmstead*, declared to have assigned, transferred and made over, and by these presents, doth sell, assign, transfer and make over from henceforth and forever, with warranty of her own acts only to Mr. *Andrew Leamy*, of the said Township of *Hull*, in the said County of *Ottawa*, in the said District of *Ottawa*, Lumberer, here present and accepting, all and all manner of dower and right or title of dower whatsoever, either customary or conventional, prefix, which the said *Sarah Olmstead*, might, or of right ought to have, or claim, in, to and out of that messuage, tenement, parcel or piece of land heretofore belonging to *Philemon Wright*, junior, her late husband, and which, at the division or partition thereof between her the said *Sarah Olmstead* and the heirs of the said *Philemon Wright*, was set apart to and for the use of her the said *Sarah Olmstead*, for the same reference to a diagram, drawn by *Anthony Swalwell*, Deputy Provincial Land Surveyor, and hereto annexed, after having been signed by the parties hereto and us Notaries, (excepting however,

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that certain piece and parcel of land heretofore sold by the said *Sarah Olmstead* to Her Majesty, *Queen Victoria*, for the use of the *Gatineau* Works, by virtue of a Deed of Bargain and Sale, bearing date and passed before *A. Larue*, one of the undersigned Notaries, in presence of witnesses, under the number two thousand two hundred and thirty-two, on the twelfth day of September, one thousand eight hundred and forty-nine, of which the said *Andrew Leamy*, hereby declares to have had and taken communication, and is therewith satisfied.

This title deed was taken communication of by the Crown's agent, as shown by the report of Mr. *Coffin*, exhibit 48, and it was in consequence of this report that they thought it necessary to take security in order to be indemnified for any risk which they had in consequence of their doubt on the validity of their title.

Then we have an extract from report of Mr. Snow, to the Superintendent of Public Works, dated 11th April, 1853, fyled as petitioner's exhibit No. 38 :

(No. 19,527.) HULL, April 11th, 1853.

SIR : I have the honor to acknowledge the receipt of your communication, with one from the Honorable the Commissioner of Public Works, in which it appears that my report of the survey of land at the *Gatineau* is not considered satisfactory or sufficiently explicit, particularly as relates to *Wm. Leamy's* property.

To make the matter as plain as possible, I may add that Mr. *Leamy's* property is held under only two kinds of tenure, viz. : One part to which he holds a good and sufficient deed, situated on the south side of the line between lots one and two in the 5th Range, east of which it includes both sides of the Range line. The other part to which his title is good merely during the lifetime of Mrs. Nicholas Sparks, it being a transfer of her right of dower. I here subjoin a description of each part to be acquired from Mr. *Leamy*, and also one of the land to be acquired from Mr. *Wright*, with a schedule.

HORACE MERRILL, Esq.,
Supt. of Ottawa Works, Bytown.

Then Mr. *Coffin* is instructed to consult with Mr *McCord*, in order to get over the difficulties :

27th APRIL, 1855.

SIR: I am directed to inform you that His Exc llency the Governor General has been pleased to appoint *W. H. Coffin*, Esq., to

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proceed to the *Ottawa*, for the purpose of taking such steps as he may deem necessary for the preservation of the peace and protection of property. Mr. *Coffin* has been instructed to consult and co-operate with you, so as, if possible, to have arrangements made and bonds entered into, of such a nature as may justify the commissioners in paying the whole of the award to the real proprietors, without any risk or further claim on them. * * * * *

In order to facilitate a settlement with Mr. *Leamy*, all the papers were sent to Mr. *McCord Jr.*, advocate, at *Aylmer*, and that gentleman yesterday reported fully on them; which reports and other documents are transmitted to you herewith. By it you will perceive that the hesitation on the part of the commissioners, to pay the award to Mr. *Leamy*, until title was shown by him, is fully justified; as, of the four separate portions of property required, it turns out that to the *first*, namely, a small piece of land on the east side of the River *Gatineau*, Mr. *Leamy* has no title whatever. To the *second*, being a strip along the west side of the river, he has title to only about half. To the *third*, and for the most important portion, his title exists only during the life of a woman between 65 and 70 years of age. To the *fourth*, namely, a strip along the south-west bank of the Creek, and extending to the centre of its waters, as shown on the map, his title is reported good.

The result of Mr. *Coffin's* operations are then given in the following extract from a report he sent to the Provincial Secretary:

During the pendency of these negotiations, however, in the interval between the signing of the first deed of sale and the final award of Mr. *Russell*, doubts had arisen as to the validity of the titles of Mr. *Leamy*, to a considerable portion of the property proposed to be conveyed to the Board of Works, and a formal protest was served on the Government on behalf of parties claiming residuary rights in the said property, denying *Leamy's* right to receive the same, and making the Government responsible in the event that *Leamy's* titles should ultimately prove to be insufficient.

The Board of Works most properly demanded and obtained communication by Mr. *Leamy's* titles to the lands in question, and submitted the same for examination and opinion to their counsel, *Thomas McCord*, Esq., of *Aylmer*, who, after careful and minute enquiry, pronounced that Mr. *Leamy* could give a valid title to certain portions of the said lands, but that with respect to the remainder, his title to one part was imperfect, and that to the rest he could give no title at all.

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Not only were the Government informed of the defects in *Leamy's* title by official communications, but, as the following clearly establishes the fact, they were informed of the names as well as of the rights of the heirs of *Philemon Wright Jr.*

BYTOWN, April 16th, 1853.

SIR: I have the honor to acknowledge receipt of your letter, dated March 24th, respecting Mr. *Snow's* report on the land about to be required round the *Gatineau* Pond and Creek, requesting me to call on Mr. *Snow* to report more fully on the subject.

I have obtained his report as requested, and herewith transmit the same to the department.

Mr. *Snow's* report does not mention the names of the heirs to that portion of the property purchased by Mr. *Leamy*, of which he only holds a temporary title, the description of this land is marked B in the schedule; if the names of these heirs are required, seven in number, they are as follows: *Philemon Wright, Hull Wright, Horatio Wright, Pamelia McGoey, Erexina Leamy, Cyrinne Pierre* and *Sally Cotter.*

I have the honor to be,

Your obedient servant,

THOMAS A. BIGBY, *Secretary Public Works, Quebec.*

HORACE MERRILL, *Supt. Ottawa Works.*

Amongst the documents produced, we find also that there was a protest sent by some of the heirs, protesting against the Government's intention to purchase this property from *Leamy.* The date of the protest is the 26th April, 1855, a few days prior to the sale made by *Leamy*, on the 7th May, 1855.

This document reads as follows:—

(Copy of No. 25765.)

Hull. April 26th, 1855.

To the Honorable the Commissioner of Public Works.

SIR,—

We desire to state for your information and for the information of the Government, that the proposed sale of land in the Township of *Hull*, by Mr. *A. Leamy* to the Government, is made without the sanction of the individuals who are mainly interested as proprietors of that land. That we are personally interested in the land, and have an incidental interest towards another portion

included in the proposed sale. You will use this information as you deem mete, and should it prove of any benefit to the public service, it will be most gratifying to

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Your most obedient humble servants,

(Signed,) THOMAS McGOEY.
HULL WRIGHT.

These documents are so important that I have deemed it necessary to give at length, all the extracts which have any bearing on this cause. The inevitable result of this enquiry shows that the Government on 7th May, 1855, when they purchased from *Leamy*, knew for some length of time of the defects in the titles of *Leamy*, their vendor, and they also knew what rights the heirs of *Philemon Wright Jr.* claimed in the property they were purchasing. With such evidence, is it possible to believe that the Government had a just opinion and firm and intact belief, *une juste opinion ou la croyance ferme et intacte*, that they were proprietors and that no others had any rights to the property purchased ?

But independently of the question whether the Crown has acquired this property in good faith under a translatory title, these documents, in my opinion, conclusively bar the Crown from availing itself of the prescription of ten years,—on the ground that they constitute an acknowledgment by the Crown, whilst in possession of the property claimed, of the rights of the heirs of *P. Wright*, sufficient to interrupt civilly the prescription if it could have commenced—1st against the property purchased by the deed of 1849, if that deed was not defective for the reasons I have before given; and 2nd, against the property acquired by the deed of 24th April, 1854, and bought a second time by the deed of 7th May, 1855.

Art. 2227 C. C. enacts :

Prescription is interrupted civilly by renouncing the benefit of a period elapsed, and by any acknowledgment which the possessor or

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the debtor makes of the right of the person against whom the prescription runs.

Art. 2255 says:

After prescription by ten years has been renounced or *interrupted*, prescription by thirty years alone can be commenced.

Bearing in mind, that at the time of the execution of these reports and other documents the Government *were in possession* of the property claimed more than a year, it will be seen that the acknowledgment made in this case is sufficient in law to interrupt this prescription. First, what should be considered an acknowledgment? and, then, by whom need it be made? *Troplong*, whose opinion on this point is concurred in by all commentators on the Code *Napoléon*, thus lays down, the rule commenting on Art. 2248 C. N., which concords with our Art. 2227 C. C.

Et d'abord la reconnaissance peut-être expresse. C'est ce qui a lieu lorsqu'elle résulte des actes mentionnés aux arts. 1337, 1338 C.N.

Elle peut également résulter d'une lettre missive. * * * La reconnaissance n'a pas besoin d'être acceptée par le créancier. Il suffit qu'elle ne soit pas repudiée par lui pour qu'elle lui profite, nul n'étant censé vouloir perdre et s'appauvrir.

Now, in these documents we find that the Crown admits that Mrs. *Sparks* never possessed this property otherwise than in her capacity of usufructuary as dowage (*douairière*). This was certainly the act of the Crown, for it was made with its consent and knowledge, and by its specially authorized agents.

I do not think it can be shown that the Crown ever has notice of official acts done in its name otherwise than by reports addressed to the Government, as was done in this case through the Provincial Secretary.

Moreover, in this case we find that the officer charged with this duty had been authorized to act by Order in Council. To support the proposition that an acknowledgment made by such an officer is in law sufficient to

interrupt civilly prescription, authorities are not wanting:

La reconnaissance est suffisante lorsqu'elle émane d'un mandataire spécial (1).

It is conclusive, therefore, to my mind, that the Crown cannot avail itself of the prescription of ten years, and that if prescription commenced to run at all, it was civilly interrupted; consequently the Crown could only prescribe by thirty years from the date of the first purchase of this property.

Before concluding it may be well to refer also to the argument founded on the fact that some of the opposants (two, I believe,) after having opposed the confirmation of the title of the Crown, subsequently discontinued their oppositions with costs.

It is true that the judgment of confirmation mentions the fact that these oppositions were "discontinued with costs." But first if no answer could be given, it would be necessary to decide the important questions raised by the appellants by the improbation of this judgment, before any advantage could be gained. But how can we presume they have admitted they had no proprietary rights over the property for which a judgment of confirmation was asked? If in such cases it were permitted to surmise, we could as easily presume that the opposants, after having taken communication of the Crown's title and ascertained that the Crown had purchased, as it is evident by the title itself, only the usufruct of an immovable, withdrew their oppositions, because the title asked to be confirmed was not *such* a title as could affect their rights, not being taken from a person *in possession as proprietor*, and because the title deed itself acknowledged their rights.

Moreover, the argument of the Crown is based on a

(1) See Sirey—Codes Annotés, art. 2248, No. 10; Dalloz—Code Civil Annoté, art. 2248, No. 5, 14, 33, 34, 77.

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mere supposition, for the *oppositions* have not been produced, and it is impossible to say on what grounds they were made. The maxim of law "*de non apparentibus et non existentibus eadem est lex*" is here very applicable to the non-production of these oppositions.

After carefully examining the titles and weighing the evidence in the cause, I have come to the conclusion that the appellant has established: 1st. That the heirs of *Philemon Wright Jr.* have never alienated their rights in the 159 acres of land and water, which were set apart for the use and enjoyment of *Sarah Olmstead*, their mother, as dowager.

2nd. That the Government, by the title of the 12th September, 1849, obtained possession of 21 acres, 1 rood, and 25 perches; that by the conveyance of the 7th May, 1855, the Government, being a purchaser with notice, obtained a precarious title to 65 acres and 2 perches, of which they were in possession without a title for several years, making a total of 86 acres, 1 rood, and 27 perches out of the 159 acres of land and water belonging to the heirs of *Philemon Wright Jr.*, and that the balance of these 159 acres is in the hands of certain persons who are not parties to this suit.

3rd. That the appellant represents the following heirs of *Philemon Wright Jr*, and that the respective share of the heirs he represents in the said 86 acres 1 rood, and 27 perches, is as follows:

Philemon Wright..... $\frac{1}{5}=\frac{55}{275}$

Erexina Wright, wife of *T. Leamy*..... $\frac{1}{5}=\frac{55}{275}$

Sally Wright, wife of *Boucher*..... $\frac{1}{5}=\frac{55}{275}$

Pamelia Wright, wife of *A. McGoey*..... $\frac{1}{5}=\frac{55}{275}$

P. Wright, *Serina Wright* and *Helen Wright*, children of *Hull Wright*..... $\frac{3}{11}$ of $\frac{1}{5}=\frac{15}{275}$

making his proprietary interest amount to 235 undivided 275ths, or $\frac{47}{55}$ undivided, in the said 86 acres

1 rood and 27 perches, now in the possession of the Government.

4th. That both conveyances to the Government are null and void, because they were not made in conformity with the provisions of 9 *Vic.*, ch. 37.

5th. That the judgment of confirmation which is alleged to have been granted of the conveyance of the 7th May, 1855, (the appellants having fyled against this judgment an improbation, which in my view of the case it is unnecessary to determine) not being the confirmation of *such* a title as was authorized by the statute, cannot affect the rights of the proprietor of the land thereby conveyed.

6th. That the quit claims alleged to have been signed by some of the heirs are null, and that the discontinuance of oppositions which have not been produced to the confirmation of a *title* cannot affect the proprietary rights of such opposants.

7th. That the titles of the Crown, being null by reason of informality, cannot serve as a ground for prescription.

8th. That the acknowledgment in writing by a special mandatory of the Crown, (while the Government were in possession of the property claimed), of the existence of the heirs of *P. Wright*, and of their rights, was sufficient to interrupt civilly the prescription of 10 years.

9th. That the Crown has not in law a title to the property claimed sufficient to prescribe the ownership thereof by 10 year's possession under Arts. 2206 and 2251.

I am, therefore, of opinion, that the petition, in so far as it prays for the rents and profits due and accrued before the date of the execution of the deeds of grant to the appellant, must be dismissed, and that the appellant should be declared proprietor of the following

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undivided *indivis* share in the said 86 acres, 1 rood and 29 perches now in the possession of the Crown, being a portion of the 159 acres belonging to the estate of *P. Wright Jr.* and which was subject to the customary dower of *Sally Olmstead*, to wit: $\frac{4}{5}\frac{7}{5}$ths., and that he is also entitled to an account of the rents, issues and profits of the said property from the date of his acquisition of the same.

HENRY, J.:—

The legal questions involved in the consideration of this case are so numerous, and, at the same time, so intricate and important, that no little application, research and consideration were required to arrive at proper conclusions in regard to them.

For some time after the argument I was, in regard to one or two of the controlling points, inclined to sustain the judgment of my late learned brother *Taschereau*. I have since bestowed much thought and research upon all the questions involved, and I shall now proceed to state the result at which I have arrived.

The property in question in this suit was formerly owned by one *Philemon Wright Junior*. On his death, intestate, it became the property of his children, subject to the dower, or usufruct, of his widow *Sarah*, formerly *Sarah Olmstead*, subsequently Mrs. *N. Sparks*. Sometime after the death of *Philemon Wright* his real estate, with the exception of a part set out for his widow, was divided amongst his children, and deeds confirming the division passed between them. The widow did not release her dower to any of the lots, and therefore held it until her death. She might have disregarded this division and made a claim to dower in the whole of the lands, for all that appears in the case, unless her deed to *Leamy* in 1852 would have estopped her; nor did she release her right of dower to any of them. The part so

set out for the widow includes that now in dispute. There is no conveyance from any of the heirs to her, and, she having died in 1871, several of the heirs conveyed their interest in that part of the property so held by her to the appellant.

It is contended that she derived a full title to the property she held, but I can see nothing in the case to justify that conclusion. She could acquire no such right as the widow of *Wright*, and whether she occupied during her life more or less than her legal share of the property could, in my view, make no difference. If more, she occupied any overplus by sufferance; if less, it was by her own act, and the fact could not turn her right to the usufruct into a superior title. Besides, she and those claiming under her are, in my opinion, estopped by her conveyance, which expressly limits her right to that of a life estate.

It is by a title derived from her that this action is defended, and if, for some of the reasons assigned, that title is sufficient to bar the legal right of the heirs, our judgment must be for the appellant. There was an attempt made at the trial to prove title out of some of the heirs, but there was not proof, in my opinion, of the execution of the deeds produced for that purpose.

I am of opinion for the reasons given by my brother *Fournier*, that the description of the property in the petition was sufficient; and also, that the appellant cannot claim for rents and profits accrued previous to the transfer to him of the property.

Several conveyances were given in evidence on the part of the Crown from heirs of *Philemon Wright* to *Leamy*; but, as they were only of the lands divided between the heirs and not of any part of that set apart for the widow and, therefore, no part of the land in dispute, I cannot see how they can, in any way, affect the issues before us. What the heirs, or *Leamy*, did with those

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other lots, cannot in any way affect the title of land not in any way referred to in the deeds in question. As the Crown did not purchase from the owners of the property, has it acquired a title independent of them and in opposition to their legal rights?

The question is not as to the abstract right of the Crown to purchase and obtain title from the legal owner, but whether, having purchased from other than the legal owners, and, by retaining possession for ten years, the latter are ousted of their title. If such a result has been reached in this case, it must be by virtue of the Civil Code and by statute. The statute by which the claim is principally supported is 9 *Vic.*, ch. 37.

Referring to Commissioners of Public Works, the 5th section provides that they shall have power, by instrument under their hands and seals, on behalf of the province, to make and enter into all necessary contracts, &c., relative to the public works of the province.

Section 8 provides that

> Said Commissioners, in and for the said purposes, shall, at all times, have power to acquire and take possession of all such lands or real estate, and to take possession of all such streams, waters, and water-courses, the appropriation of which for the use, construction and maintenance of such public works aforesaid as shall, in their judgment, be necessary.

Power is also given to the Commissioners to contract for the purchase from all persons, seigniors, bodies corporate, guardians, tutors, curators or trustees, lands and real estate. This provision only extends to a purchase from owners, or their representatives. It does not authorize the purchase from A of B's land. After this provision there is another necessary one for such objects, as follows:

> If the owner or owners of such lands, &c., do not reside in the vicinity of such property so required, then notice shall be given in the Official *Gazette* and in two distinct newspapers published in or adjoining the district in which such property is situate, of the inten-

tion of the Commissioners to cause possession to be taken of such lands, &c.

After thirty days from such notice possession was authorized to be taken, and the land to become vested in Her Majesty. Provision is also made for paying the amount of a valuation under the Act into Court.

Sec. 9 provides that in *Lower Canada* the compensation awarded as aforesaid, or agreed upon by the Commissioners, and any party who might, *under that Act*, validly convey the lands, or lawfully in possession thereof as proprietor for any lands taken under the Act, without the consent of such proprietor, shall stand in stead of such land, and any claim to a hypothec or incumbrance shall be converted into a claim to or upon the compensation. Provision is then made for proceedings of confirmation in either of the two cases mentioned—that is, where the purchase and conveyance is from the owner or his representatives, as stated in the clause ; and second, in the case of expropriation, without any such purchase. It is, in my opinion, only in one or other of those cases that there is provided any power of confirmation. The lands in question were not taken under the provisions for expropriation ; and if the widow of *Philemon Wright* could not give a title, then the provision by which the power of confirmation is given is inapplicable. The terms of the provision are plain as I read them. 1st. Where the conveyance is from the owner the confirmation is intended and provided to purge the lands from all hypothecs or other legal or equitable liens ; and, 2nd, where the title cannot be procured from one capable of making it according to the terms of the Act, the amount of the award is paid into Court for the parties entitled to it, to receive it in payment of the land which, in either case, becomes, by the confirmation, vested in the Crown. To apply the provision for confirmation to the

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case of a purchase from A of B's land, would, in my matured opinion, be doing what the Legislature did not mean and statute has not provided. There are other strong grounds mentioned by my learned brother *Fournier* which, in my opinion, are legitimate against the validity and efficacy of the confirmation in question. When private rights are invaded by a statute the mode and means provided by the statute must be strictly pursued, and the statute itself strictly construed; and, unless the provision be clearly and plainly applicable, no title can be acquired under it. I am fully of the opinion that the provisions for acquiring a title under the statute in question are inapplicable to the circumstances of this case, and, therefore, that the judgment of confirmation therein was *ultra vires* and void.

The only other defence that I think necessary to consider, concurring as I do generally in the judgment of my learned brother *Fournier*, is that of prescription by thirty or ten years, as claimed by the defence.

The claim of prescription of thirty years is not shown to rest on a proper foundation.

The possession of Mrs. *Sparks* must be characterized by her title, and as her possession was only of the usufruct during her life, and her title therefore precarious, and not as a proprietor, one essential element of the right of prescription was wanting. The possession of the Crown was under thirty years, and it therefore cannot defend by prescribing for any period before the conveyances.

The defence under a prescription of ten years is still open for consideration.

By article 2211 of the Civil Code, "the Crown may avail itself of prescription."

Availing itself of that right, and setting up a defence under it, subjects, in my opinion, the Crown to the same rules and principles as a subject would be.

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Article 2206 of the Code provides that:

Subsequent purchasers *in good faith*, under a translatory title derived either from a precarious or subordinate possessor, or from any other person, may prescribe by ten years against the proprietor during such subordinate or precarious holding.

It is contended that the question of *bad faith* cannot be raised against the Crown, and should not therefore be considered, no matter the extent of bad faith shown on the part of the commissioners, or others acting for the Crown in the purchase of the land. That the King can do no wrong is a maxim well understood, and universally applied, and therefore bad faith cannot be imputed to the Sovereign. The ordinary maxim *respondeat superior* has no application to the Crown; for the Sovereign cannot, in contemplation of law, command a wrongful act to be done; and it is equally well established, that the Crown cannot be prejudiced by any laches or acts of omission of any of its officers. The doctrine is applicable this far, but here it ends. Where, however, a wrongful act is done, although directly by the Sovereign, as in the improper issue of patents, redress is given, on the principle or theory that the Crown was misinformed in the premises. No bad faith or wrongful act is imputed. When a patent is issued interfering with the rights of a previous patentee, the Crown is not, theoretically, charged with a breach of faith towards the first patentee, although a wrong was done to him for which he has a remedy. Independently of the principles upon which the maxim is founded, it would be *bad faith* in the Sovereign, and contrary to its own previous grant to both parties, to grant to one what it had no right to, and, by doing so, interfere with the previously acquired rights of the other. Still, those principles do not prevent justice being done to one or both of the parties. In every suit brought in the Exchequer Court against the Crown, the claim is founded

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on a wrong; but not on one imputed to the Sovereign; and redress is given, if the suppliant is entitled to it. He is not answered by the maxim that the Sovereign can do no wrong. Neither can I think that maxim furnishes an answer in this case. At page 60 of *Broom's* Legal Maxims, under the heading of the maxim just referred to, we find doctrines and principles applicable to the point under consideration. He says:

> With respect to injuries to the rights of property, these can scarcely be committed by the Crown, except through the medium of its agents and by misinformation or inadvertency, and the law has furnished the subject with a decent and respectful mode of terminating the invasion of his rights by informing the King of the true state of the matter in dispute, being by petition of right; and as it presumes that to know of any injury and redress it are inseparable in the Royal breast, then issues as of course, in the King's own name, his order to his judges to do justice to the party aggrieved.

The record teems with evidence that the Government, through its departmental and other officers, were, all along, aware of the precarious title they were getting from *Leamy* and Mrs. *Sparks*, as shown in the judgment of my learned brother, before alluded to; and of the attempts, from time to time made, to remedy the defects in it. As before asserted, if the Crown seeks the remedy of a statute or code, the whole, and not part of it, is invoked, and the Crown cannot ask to have any part of it eliminated. If the Crown adopts the acts of its subordinates, such as the purchase in this case, it must do so under the circumstances as they exist, and there is no principle that I am aware of that would give the Crown in this respect a higher or different position, than could be claimed by a subject. The ingredient of *bad faith*, although not necessarily communicated, is transmitted to the Crown with the conveyances; and independently of other important considerations is sufficient, in my opinion, to prevent the application of the prescription by ten years.

It is, however, desirable to consider the ingredient of

bad faith in connection with the principles involved in the maxim that the King can do no wrong. If the law, as laid down in the extract from *Broom*, "presumes that to know of any injury and to redress it are inseparable in the Royal breast," and that the order from the Sovereign is "to do justice to the party aggrieved," it is important to consider whether it would comport with that order that any defence should be pleaded in direct violation of it. When the Sovereign orders that justice be done, it must, I think, mean the same justice that would be done between subjects, and by the same legal and equitable principles. I do not contend that the plea of prescription, if applied in its integrity, would necessarily amount to such a violation; but to apply the prescription, without one of its essential constituents and conditions, would I think do so. It would be in direct opposition, not only to the principle involved in the Code, but, in my humble opinion, to the principles which are involved in the maxim that the King can do no wrong, and, at the same time, derogatory to the assumed high moral and dignified position of the Sovereign. The servants of the Crown by *bad faith* acquire for the Crown a translatory title from one man of the property of another. The fact is brought to the notice of the Sovereign, who orders that justice be done; but the counsel of the Crown would desire to frustrate the equitable desire of the Sovereign by invoking part of an article of the Code and excluding the qualifying provision of it, by which that very question of bad faith would be withdrawn from consideration. This, in my opinion, would be giving to the counsel the right to oppose the Sovereign will, and prevent that justice being done which the Sovereign intended and ordered. I will not speculate as to the propriety of the Sovereign, in view of the high toned and elevated position he is assumed to occupy in regard to the redressing

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of wrongs done to an individual, pleading prescription, as it is not necessary in this case to do so; but, that the Crown should retain the title and possession of land belonging to others, obtained in bad faith by its servants in the way contended for here, would, I think, be contrary to every well founded principle of law, equity or honor. The Legislature, by the provision requiring *good* faith, has decreed that, without such, prescription of ten years between subjects shall be insufficient. No subject could therefore hold land, the title to which had been acquired contrary to such *good* faith. The title of every one is held good unless some one can prescribe for thirty years, or as a recipient of a translatory title in *good faith* for ten years. In this case there is no evidence of either the thirty years or of the good faith. The defence rests upon shewing good faith. It is a condition of the article and upon which the prescription by ten years depends. It is not for the suppliant to show *bad* faith. It is not necessary to impute it, but for the defence to establish *good faith*, which, I think, has not been done. One of three things, I think, must be assumed: first, that the Sovereign was not informed of the purchase before the presentation of the petition; second, that if informed the bad faith was not communicated; or third, that the bad faith was communicated. There is no evidence as to the first, nor is there anything to show any adoption by the Sovereign of the purchase. If the bad faith was not communicated, the Sovereign was deceived as to a fraud perpetrated, which, being subsequently informed of, the Sovereign wishes corrected. If it was communicated the prescription should not run. As to the true position of the Sovereign in this respect we have no evidence; but, taking the second alternative, which is the important one, and that a fraud was practiced on the Sovereign by suppressing the fact of the bad faith, the only honorable, consistent

and justifiable course for the Sovereign to take, on discovering it, would be, as has been done here, to require the fact to be inquired into and ascertained, and justice done. The Sovereign is the fountain of honor and dignity, and the law assumes, as before stated, that "to know of any injury and to redress it are inseparable." The order that justice be done cannot surely be alleged to be honestly or honorably carried out by taking a course to prevent it. The Sovereign must be presumed to intend what she orders; and what would be justice between subjects must be equally between her and one of her subjects; and what is meant by the order. If a man of high honor and principle ascertains that, by means of the bad faith of his servant, he is placed in a position to claim another man's property, I need not suggest what would be reasonably expected to be done by him. The Sovereign would not only be assumed on personal considerations to decline holding the property of one of its subjects, but, on the principles before referred to, must be held bound to have justice done; and not by eliminating one part of an article of the Code seek to prevent it. I am not dealing with any assumed merely sentimental question of high honorable principle in the breast of the Sovereign, but with constitutional doctrines underlying rights and liberties necessary for the government of the empire and the administration of justice, and requiring to be strictly maintained. The honorable and dignified position of the Sovereign in dealing with her subjects is too important to be frittered away; and it is as much the duty of Courts to uphold it as to administer the law in any other respect. I think, therefore, to give effect to the position as contended for would be placing the Sovereign in a position antagonistic to the important constitutional principles to which I have thought it necessary to refer.

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There is still another objection to the applicability of the alleged prescription of ten years independently of the question of bad faith.

The Civil Code by article 2227 provides that:

Prescription is interrupted civilly by any acknowledgment which the possessor or debtor makes of the right of the person against whom the prescription runs.

Article 2225 provides that:

After prescription by ten years has been renounced or *interrupted*, prescription by thirty years *alone* can be commenced.

The evidence in this case shews that the Government, by its active agents and officers, prior to 1855, purchased the property, a part of which is claimed by this petition, and received a deed of sale made by *A. Leamy* and wife to Her Majesty, dated the 24th of April, 1854. That deed contains the statement that the Government was then *in possession of the land* thus: "And the Government who are now in possession of the hereinafter mentioned property." Letters and reports dated in April and May, 1855—a year after the Government acknowledges to have been in possession—show that the Crown agents and officers had not only notice of the precarious title under the previous deed, but clearly, expressly and unequivocally acknowledged the proprietary rights of the parties against whom is invoked the prescription of ten years.

It seems to me that under such circumstances the prescription, if any, under previous titles would cease to run and be interrupted.

Article 2227 of the Code provides that:

Prescription is interrupted civilly by renouncing the benefit of a period elapsed, and by *any acknowledgment* which the possessor or the debtor makes of the right of the person against whom the prescription runs.

Troplong commenting on article 2248 of the Code Napoleon—which corresponds with the article last cited—says:

And first of all the acknowledgment can be made in express terms. The acknowledgment need not be accepted by the creditor. It can also be made by letter. It is sufficient for the creditor not to repudiate it in order that he may avail himself of it, nobody being supposed to give up any right, &c.

This Court is asked to say, under the circumstances in this case, that the prescription has not been interrupted and gives a right to defend this action.

The Sovereign, by her agents or officers, was *in possession* for a year before the acknowledgments were made; and the knowledge and dealings of an agent whose act in respect to other parties is adopted by his principal must be considered the knowledge and dealings of the principal.

In the words of Article 2227 the prescription was civilly interrupted by the acknowledgment *while in possession* of the proprietary rights of the persons against whom the prescription is invoked. Having once acknowledged this right—with the full knowledge of the title—the prescription was interrupted and therefore according to Article 2255:

After prescription by ten years has been interrupted, prescription by thirty years alone can be commenced.

It cannot be contended that by taking another deed from the same vendors subsequent to the acknowledgment the defect was cured, and the peculiar provisions of Article 2255 are to be rendered inoperative. On the contrary, in my opinion, it strengthens the opposite contention. After the acknowledgments of title in the authors of the suppliant, no further conveyances from the same vendors could remedy the defect in the title, as, *nemo sibi causam possessionis mutare posse*, or, as put by a French writer,—"toute qualité imprimée à un titre doit subsister indéfiniment."

It may be claimed that after the ratification by the Superior Court, supposing that to have been *intra vires*

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as relating to the title of the heirs, the holding was in good faith, and that it was a holding *animo domini* from that time. I don't think it should be so concluded. The knowledge of the title of the heirs existed before, at, and after the alleged ratification; but if the ratification divested that title we need not consider the question of prescription. If it did not from any cause do so, it cannot be taken as anything more than a further attempt unsuccessfully made, a void proceeding against the title of the heirs, and being inoperative cannot cure the bad faith previously existing. It must I think, be regarded only as another ineffectual struggle to deprive them of their rights in the property without removing the element of bad faith.

I am of opinion that the appeal should be allowed and judgment given for the appellant, to the extent stated in the judgment of my learned brother *Fournier*, with costs.

TASCHEREAU, J., concurred in affirming the judgment of the Exchequer Court.

GWYNNE, J. :—

The petition alleges, and it may be admitted to be true, that *Philemon Wright*, the younger, on or about the 4th day of May, 1808, being then seised in fee of Lots Nos. 2 and 3 in the 5th range of the Township of *Hull*, was married to *Sarah Olmstead* without any marriage contract, and that, being still seised of the same estate and other lands, he died intestate, leaving issue of that marriage, and his widow *Sarah*, him surviving.

The petitioner has produced in evidence a deed dated the 20th of November, 1822, appointing the said *Sarah Olmstead* tutrix of the children of the marriage, whose names and ages are therein respectively stated to be as follows:—1st. *Philemon Wright*, stated to be aged 14

years; 2nd. *Hull Wright*, aged 12 years; 3rd. *Pamelia Wright*, aged 10 years; 4th. *Horatio Gates Wright*, aged 8 years; 5th. *Wellington Wright*, aged 6 years; 6th. *Erexina Wright*, aged 4 years; 7th. *Serina Wright*, aged 2 years; and 8th, *Sally Wright*, aged 10 months.

Now, it is apparent that at some time before the year 1838, and during the minority of several of the children, an arrangement (which may well be believed to have been a family arrangement for the partition of the whole heritable estate whereof *Philemon Wright Jr.* died seised in the above lands among his eight children and his widow, the latter to take in fee a smaller portion of the estate than she would have been entitled to for her estate in dower), was verbally agreed upon, and that notwithstanding the minority of several of the children it was acted upon as if it had been perfect and effectual in law, for we find that on the 11th of January, 1837, *Wellington Wright*, who was then most probably himself a minor, and while his three younger sisters certainly were, conveyed the share allotted to him upon the partition to *Nicholas Sparks*, to whom *Sarah Olmstead* had been married in 1826, and on the same 11th January, 1837, *Horatio Gates Wright*, by a like deed, conveyed also to Mr. *Sparks* the share allotted to *Horatio*, by the same agreement for partition.

In these deeds *Wellington Wright* and *Horatio G. Wright* respectively describe the piece of land by each conveyed to *Sparks* as: "That part of the farm belonging to my late father, apportioned to me, as will appear on the diagram drawn by *Anthony Swallwell*, Deputy Provincial Surveyor, which piece of land is butted and bounded as follows"—&c., &c.; and the deeds contained covenants executed by each grantor respectively for further assurances to be executed by all and every other person or persons whomsoever having any

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claim, estate, right, title or interest in or to the piece of land thereby granted, &c., or any part thereof.

Then we find that by several deeds executed upon the 5th day of March, 1838, all in like form, the heirs of *Philemon Wright*, deceased, reciting the partition which had been agreed upon, purported to secure to each other the allotment assigned to each. The deed to *Erexina*, then the wife of *Andrew Leamy*, is as follows:

Know all men by these presents that we *Philemon Wright Jr.*, *Hull Wright*, *Pamelia Wright*, wife of *Thomas McGoey*, Esq.; *Horatio Wright*, *Serina Wright*, wife of *James Pearce*; *Erexina Wright*, wife of *Andrew Leamy*; *Sally Wright*, surviving heirs of the late *Philemon Wright Jr.*, of the Township of *Hull*, in the District of *Montreal*, in the Province of *Lower Canada*, *having mutually agreed to divide the inheritance left us by our late father*, we have caused the same to be surveyed by *Anthony Swallwell*, Deputy Surveyor for the Province of *Lower Canada*, who having ascertained the quantity of land in Lots numbers 2, 3 and 4, in the 5th concession of the said Township of *Hull*, *being the property* of our late father, hath computed the same to be 591 acres 1 rood and 24 perches, including a certain pond of water, *the said portion of land having been sub-divided, the following portions have been allotted to each*, that is to say:

To *Philemon Wright*,	43 acres	2 roods.		
To *Hull Wright*,	43 "	2 "		
To *Pamelia Wright*,	49 "			
To *Horatio Wright*,	53 "	1 "	24 perches.	
To *Wellington Wright*,	48 "			
To *Serina Wright*,	60 "			
To *Erexina Wright*,	65 "			
To *Sally Wright*,	70 "			
To *Sally Olmstead*, our mother,	159 "	the said pond of water inclusive, *with all which we are content.*		

And in order the better to secure to each other a legal title to the said portions of land aforesaid, we the said *Philemon Wright*, *Hull Wright*, *Pamelia Wright*, *Horatio Wright*, *Serina Wright*, and *Sally Wright* by these presents do grant, remise, release, and forever quit claim unto the said *Erexina Wright*, her heirs and assigns all our right, title, interest and estate to the 65 acres of land, (described by metes and bounds), to have and to hold the above released premises to her, the said *Erexina Wright*, her heirs and assigns to her and their use and behoof forever, so that neither we the said *Philemon*

Wright, Hull Wright, Pamelia Wright, Horatio Wright, Serina Wright and *Sally Wright*, nor our heirs, nor any other person or persons claiming by, from or under us or them, or in the name, right or stead of us or them, shall or will by any ways or means have, claim or demand any right or title to the above released premises or to any part or parcel thereof.

This instrument is signed by all the parties named therein except *Wellington Wright*, who was then dead, and *Serina Wright* and her husband *James Pearce*, who, though living, were not parties executing it; although not executing this deed, *Serina* appears to have executed all the other deeds. Now, with reference to the recital in these deeds of the allotments which had previously been made, and which must have been made in the lifetime of *Wellington Wright* and during the minority of three at least of the children, if not also during the minority of *Wellington*, it is to be observed that the allotment stated to have been made to *Sally Olmstead*, the mother, is stated in precisely the same language as the allotments to all the others. The whole of the estate whereof the father died seised is stated to have been divided into nine parcels, and a parcel is allotted to each of nine persons, one of whom is *Sally Olmstead*, the mother. That one of the nine persons to whom the respective allotments are made is to take a different estate from the others is not stated; the contrary seems to be implied, for the agreement recited is not an agreement to divide presently among the heirs the residue of the estate whereof the father died seised, after deducting the one-half to which the mother was entitled as customary dower, and the reversion in such half (abiding the event of her death to come into possession of the latter half), nor is it an agreement to divide presently among the heirs the one-half, and to leave the other half to be divided at the death of the mother; the agreement is to divide presently the whole inheritance left by the

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father, and for that purpose to divide it into nine parcels and to allot a parcel to each of nine persons alike, one of such being the mother. It is not suggested, on the deed, nor yet by any evidence given in the cause, that the 159 acres allotted to the mother were so allotted as having a peculiar value equal to the value of half of the whole estate, nor that she had consented to take the 159 acres in life use as her customary dower, nor that the part of the 159 acres, which consisted of a pond of 71 acres, had any value. Nor is it likely that at that early period before the improvements subsequently made that it had. However, there is no suggestion that the 159 acres were to be enjoyed by the mother for her life only, or that they were a fair and reasonable equivalent for her customary dower in the 295 acres, the half of the estate, nor that the allotment was made upon that foundation, or with that view, or that the mother had agreed to any such arrangement, and in the absence of any suggestions or evidence of the above nature the recital in the deeds is more consistent with an agreement for partition having been made, as it might have been, if the parties were willing to concur in it, that the whole property should be divided into nine allotments, one to be given to each of the nine persons named, of whom the mother was one, to be enjoyed presently, in severalty in fee; and that this was the intention obtains confirmation, as appears to me, from the frame of a deed of the same date executed in favor of *Nicholas Sparks*, confirming to him *Wellington Wright's* portion conveyed to him by this deed of January, 1837. This deed is as follows:

Know all men by these presents that we *Philemon Wright, Hull Wright, Pamelia Wright,* wife of *Thomas McGoey,* Esq., *Horatio Wright, Serina Wright,* wife of *James Pierce, Erexina Wright,* wife of *Andrew Leamy,* and *Sally Wright,* surviving heirs of the late *Philemon Wright Jr.,* of the Township of *Hull,* &c., have mutually released and quitted claim to each other the several portions of our

late father's estate *allotted to us* by deed bearing even date with these presents; and, whereas, our late brother *Wellington Wright* did by deed, bearing date the eleventh day of January, in the year of Our Lord one thousand eight hundred and thirty-seven, for a certain consideration therein mentioned, relinquish his claim *to the certain* portion *of our father's property allotted to him*, in favor of *Nicholas Sparks*, Esq., of *Bytown*, and whereas it appears to us to be just and reasonable that the said *Nicholas Sparks* should be confirmed in his title to the said portion of our late brother. Therefore, &c., &c., &c.

This deed appears to have been executed only by *Hull Wright*, *Serina Wright*, *Pamelia Wright*, and *Sally Wright*, although prepared for execution by all parties. It speaks however, as it appears to me, of the allotments made to each as the *certain* portion of each in their father's property, an expression precisely applicable, assuming the whole estate to have been divided and *Sarah Olmstead* to have taken one allotment equally with the others. Then, by deeds of lease and release, bearing date respectively the 30th of April and 1st May, 1839, *Sally Wright* and her husband, *William Colter*, bargained, sold and released to *Andrew Leamy*, his heirs and assigns forever, the piece of land, describing it by metes and bounds, which by the deeds of March, 1838, is said to have been allotted to *Sally Wright*.

We find next, that by a deed bearing date the 12th September, 1849, *Sarah Olmstead*, claiming this property as her own absolute property, by notarial deed executed by her and her husband, *Nicholas Sparks*, granted, bargained, sold, assigned, transferred and made over, with promise of warranty against all gifts, dowers, debts, mortgages, substitutions, alienations and other hindrances whatsoever, to Her Majesty Queen *Victoria*, Her heirs and successors, represented herein by the Honorable *Etinne Pascal Taché*, Chief Commissioner of Public Works of the Province of *Canada*, a certain piece of land, &c., &c., describing it—" The aforesaid hereby bargained and sold piece of land and premises being

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holden by the tenure of free and common socage, free and clear of every charge, burden and incumbrance," &c., &c.

Now, the piece of land hereby conveyed was part of the above allotment made to *Sarah Olmstead*, and this deed is only consistent with the fact that up to the time of its execution, in September, 1849, she was under the impression and belief that she was seised in fee simple of the portion allotted to her.

In the year 1852, *Andrew Leamy* plainly entertained the design of increasing his estate in these and the adjoining lots, for he purchased from one *Nancy Louisa Wright*, by a notarial deed, dated the 6th December, 1852, a part of lot No. 2, in the 4th concession, and of lot No. 1, in the 5th concession, and a part of lot No. 28 in the long range of the Township of *Templeton*, on the east side of the *Gatineau* River, adjoining those lots whereof *Philemon Wright Jr.*, had died seised, and by another notarial deed, dated the 7th December, 1852, he purchased from Mr. *Sparks*, who, jointly with his wife, *Sarah Olmstead*, conveyed to *Leamy* the respective pieces purchased by *Sparks* from *Wellington* and *Horatio G. Wright*, free and clear of every charge, burden, &c., excepting such as are imposed by the Letters Patent from the Crown, comprehending the said pieces of land.

It would seem, that about this time the Commissioners of Public Works were making surveys, and contemplating acquiring more land in the locality for improvements about to be made in the *Gatineau* works, and it is not unlikely that those contemplated improvements may have operated in some measure in inducing *Leamy* to extend his estate by purchase. The knowledge that the Commissioners of Public Works would investigate the title of any lands they might be about to purchase, may have induced him to have been more particular in having the title of *Sparks* to the land he was about to

purchase from him looked into, than he would otherwise have been. Up to this time there does not appear to have been any doubt whatever raised, by any of the parties interested in the *Philemon Wright* estate, as to the right of *Sarah Olmstead*, then Mrs. *Sparks*, selling as absolute proprietor, the piece of land which, claiming to be such, she had sold to the Commissioners of Public Works in 1849. It seems that when *Leamy* was contemplating purchasing the lands in which *Sparks* was interested by purchase from *Horatio* and *Wellington Wright*, he also contemplated purchasing from Mrs. *Sparks* the residue of the 159 acres, including the pond allotted to her, after deducting the 21 acres 1 rood and 25 perches sold by her to the Commissioners of Public Works in 1849, and it is not improbable that *Leamy's* better knowledge, arising perhaps from his residing in the neighborhood, of the quantity and situation of the lands which the Commissioners were having inspected, and surveyed, and would require, induced him to make those purchases, and it is altogether likely that upon the negotiation of the purchase from *Sparks*, he had his title investigated and also that of Mrs. *Sparks* to the residue of the 159 acres allotted to her, which he contemplated purchasing also. It was probably at this time discovered that, however much the parties may have intended, and Mrs. *Sparks*, formerly *Sarah Olmstead*, may have believed that she held the 159 acres allotted to her in fee, as the children held their shares, and in lieu of her claims to dower in the half of her deceased husband's estate, yet that no deed may have been executed to her, as had been to the children in March, 1838, or if executed, that it was defective by reason of some of the children having been infants, and she may have then for the first time been awakened to the discovery that a title, which she may have considered to be, and which all her children may have considered and intended to be, perfect, was in

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truth imperfect, for the want of a deed executed by parties competent in law to bind themselves and their heirs, evidencing what may have been well known in the family to have been the intention of the whole family.

The petitioner relies upon a notarial deed executed upon this same 7th December, 1852, by Mrs. *Sparks* to *Leamy*, for the purpose of showing that, as he contends, the fact is *Leamy* knew that Mrs. *Sparks* had only a usufructuary interest for life as her dower, in the 159 acres. By this deed she, describing herself as *Sarah Olmsteal*, declared that she sold, assigned, transferred and made over from thenceforth and forever, with warranty of her own acts only, to Mr. *Andrew Leamy*, all and all manner of dower and right or title of dower whatever, either customary or conventional, prefix, which she might, or of right, ought to have a claim into and out of that messuage tenement parcel or piece of land heretofore belonging to *Philemon Wright Jr.*, her late husband, and which, at the division or partition thereof between her the said *Sarah Olmstead* and the heirs of the said *Philemon Wright*, was set apart to and for the use of her the said *Sarah Olmstead*, excepting, however, that piece sold by the said *Sarah Olmstead* to Her Majesty for the use of the *Gatineau* Works by deed (1032), dated 12th September, 1849, to have and to hold unto the said *Andrew Leamy*, his heirs, executors, administrators or assigns, the said dowers and all other rights whatsoever belonging to the said *Sarah Olmstead*, and which the latter claims as her right of dower of, into and upon the said messuages, tenements, parcel or piece of land referred to in said diagram, and called *Sally Olmstead*, with the exception of the piece sold to Her Majesty, and the said *Sarah Olmstead* thereby substituted and subrogated the said *Andrew Leamy*, his heirs &c., &c., in and to all and singular her rights of actions for and

in respect of said dowers, to be claimed in the said messuage tenement, parcel or piece of land referred to in said diagram and marked *Sally Olmstead*, excepting, however, what is before excepted.

It is quite consistent with this deed, notwithstanding its frame, that both *Sarah Olmstead* and *Leamy* may have well known that the intention of the family was that the former should enjoy the 159 acres in fee in lieu of her dower in her husband's estate, and that *Leamy* may have been advised that, whatever might be their belief or knowledge upon that point, if the fee had not been in law secured to her by a deed executed for that purpose by persons competent to bind themselves, it would be of no use to him, if he comtemplated selling to the Government, to take a deed in fee from *Sarah Olmstead* as from an absolute proprietor, if he could produce no deed showing such a title in her, and that under the circumstances his best plan would be to take a deed describing the title as it would be in the absence of a deed conveying the land to her in fee, and that, as he knew what the intention of the family had been, of which family he was a member by marriage at the time of the execution of the deeds of 1838, having been married to *Erexina Wright*, in 1835, he might run the risk of having the title made perfect by the family, so as to enable him to give a good title to the Commissioners of Public Works. It may be said that all this is mere suggestion; but after the death of the parties to this transaction, and 27 years after it took place, a suggestion of motives explanatory of conduct, which, from matters which do sufficiently appear, would seem to be very natural and highly probable, may well be put forward and relied upon in answer to suggestions of bad faith, for which purpose this deed is relied upon by the petitioner, and for the purpose also of adding weight and support to the *bona fides* of other instruments subsequently execut-

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ed which the Crown relies upon, and which are assailed by the petitioner as false.

It seems that at this time the Commissioners of Public Works, through their counsel, were taking the ordinary precautions usual in such cases of enquiring into the title to the lands they contemplated acquiring, and it seems reasonable to conclude from the letters and reports which passed between the Superintendent of Works and the Secretary of the Commissioners that, in so far as affected the title to so much of the land then contemplated being acquired, which formed part of the 159 acres alloted to *Sarah Olmstead*, the only title shown up to and in the month of April, 1853, was the title, whatsoever that might be, which appeared upon the transfers of *Horatio G. Wright* and of *Wellington Wright's* interests, sold and conveyed to *Sparks* by the deeds of January 7th, 1837; upon the releases of the 5th March, 1838; upon the deed of lease and release of 1839, executed by *Sally Wright* and her husband to *Leamy*; upon the deed executed by *Sparks* in December, 1852, conveying to *Leamy* the shares of *Horatio G.* and *Wellington Wright*; and upon the deed of the same month of December executed by Mrs. *Sparks*, formerly *Sarah Olmstead*, and her husband to *Leamy*. It may be admitted that the deed of release of 3rd February, 1853, had not as yet been communicated to any person acting in the investigation of the title upon the part of the Commissioners. That deed purports to bear date the 3rd of February, 1853, and to have been executed by *Horatio G. Wright*, *Elizabeth Wright*, *Sarah Wright* and *Philemon Wright* in the presence of *James Goodwin* and *John Doyle*—and to sell, transfer and make over unto *Andrew Leamy*, his heirs and assigns all right, title, interest and claim of whatever nature either as heirs or otherwise, which they or any of them then had or might thereafter have in, to or upon that piece of land and pond of water

heretofore belonging to *Philemon Wright Jr.*, in his lifetime, of *Hull, and which at a division of his property between his heirs and his widow, Sarah Olmstead, was set apart to and for the use of the said Sarah Olmstead*, as will appear by reference to a diagram drawn by *Anthony Swallwell*, surveyor, annexed to a transfer made by the said *Sarah Olmstead* to the said *Andrew Leamy*, executed before *A. Larue* on the 7th December, 1852, and part of which is now used for the purposes of the *Gatineau* boom.

Now, this deed is so framed as to be consistent with the fact that the 159 acres were intended by all parties to have been enjoyed in fee by *Sarah Olmstead* as her share on the partition, although that intention may not have been effectually executed in law. Nothing turns upon the fact of the signature of *Elizabeth Wright* (Mrs. *Leamy*) to this deed being void, for the title of the Crown, in so far as Mrs. *Leamy's* interest is concerned, requires not this deed to support it; for she is a party to the conveyances under the statute under which the Crown claims.

But the petitioner asserts that this deed is a forgery in so far as the signatures of *Sarah* and *Philemon Wright* are concerned. These two persons were called by the petitioner and severally denied the signatures of their respective names to be in their hand writing. *Sally Wright*, however, having been shown the deeds of lease and release of 1839, admitted that she had signed them, and upon being asked to compare those signatures with the signature of the name of *Sarah Wright* to the deed of February, 1853, she admitted that they resembled each other, and that she sometimes signed her name as *Sarah* and sometimes as *Sally*. *Philemon Wright*, upon being asked whether he had any reason for saying that the signature of "*P. Wright*" to the deed was not in his hand writing, said

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that he had—namely, that he was not in *Hull*, but was a long way off in the bush upon the 3rd February, 1853, the day of the date of the instrument, and much evidence was entered into in support of this his allegation, but, as it seems to me, very little weight is to be attributed to this evidence, for it may be quite true that upon the 3rd February, 1853, he was absent, as he says, in the bush, and yet the deed may be a perfectly good and honest deed; indeed, it may be so even though it should not have been executed by *Philemon Wright* until after the expiration of some months after the time at which it bears date. Where a deed is prepared for execution by different persons who may be living at places remote from each other, and for that reason is executed by the several parties at different times, it is usual to date the deed of the day that it is executed by the one who first signs it, and those who sign subsequently adopt the deed as of the date so given to it. A cautious and precise witness would in such cases insert above his signature as a witness, for refreshment of his own memory, the time and place where each party executed the instrument, but an omission to do so would not avoid the deed, Now, it may be that this deed was signed by all but *Philemon* (whose name is set last to it) upon the 3rd of February, 1853, and that *Philemon's* signature was subsequently obtained upon his return from the bush. In that case the deed would be perfectly good and valid, although what he said as to his absence in the bush on the day the deed bears date may be true. *Doyle*, who was one of the subscribing witnesses to the deed, died early in 1854, and his signature is proved. Another subscribing witness, who swore to its execution for registry in August, 1876, was called and proves his own signature. He says that he made the affidavit for registry upon the faith of seeing his signature as a subscribing witness, but that he has

no recollection at this distance of time of the fact of being present at the execution of it. This is precisely the evidence which might be expected from him after the lapse of 23 years. He gave evidence that the name of the other subscribing witness, *John Doyle*, was in the handwriting of a person of that name whom he knew at that time living in *Ottawa*, as bar-keeper to one *James Leamy*. He had no recollection of the fact of seeing any party sign the deed, and he said that without his own signature he would not have recollected anything about it. Being asked on cross examination by the petitioner's counsel, whether it was not possible that the names of the parties to the document were not signed in his presence, he replied that he could not say it was not possible. He was then asked if he meant to say that he was positive that he was present and saw the parties to the document sign their names thereto, to which he replied "certainly not, I have no recollection at all." The following question was then put—"Then you cannot say that you were present when the document was signed?—to which he replied—"I cannot say that I was present when they signed." Upon re-examination, the following question was put to him:—"With reference to your last answer, do you mean to say that you recollect you were not present as a witness?"—to which he replied—"I say I have no recollection of the signing in my presence, I could not swear whether I was present or not when they signed." To my mind, what this witness intended to convey by all this was just what he had stated in his examination in chief, namely, that he had no actual recollection at all of the matter; that he could not swear to anything about it from recollection, but that there was his signature, upon the faith of which he made the affidavit for registration; and that there was, to witness's knowledge and belief, *Doyle's* name in *Doyle's* handwriting as a subscribing

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witness also. Unless the deed was executed by some persons representing themselves to be the parties respectively signing it, both this witness and *Doyle* must have been parties to a forgery. Now, it is impossible to read the witness's evidence as intending to convey that he could falsely have set his name as subscribing witness to the execution of a deed which he had never seen executed, and, if this be not what he intended, then his evidence is just what might have been expected from an honest witness after 23 years, who had no recollection of the fact of execution, but who saw his own signature and that of another person whom he knew set as subscribing witnesses to the execution, and who, upon the faith of such subscription, had, in 1876, made oath to the execution for registration.

There are many reasons which may be urged, and there is also other evidence which may be relied upon, in my judgment, in support of the genuine character of the deed. Firstly, The recitals in the deeds of March, 1838, afford evidence to my mind, that the intention of all the parties to the partition of *Philemon Wright's* estate recited in those deeds was that the whole of his estate should be divided into nine parts, of which his widow should take one part in satisfaction of and in lieu of her dower, and that it was with this intent that the 159 acres, of which 71 acres were pond, were allotted to her. Secondly, Then as to *Horatio* and *Wellington Wright*, the deeds executed by them respectively to *Sparks* are fairly, as it seems to me, open to the construction that they were selling the whole of their respective interests in their father's estate. Thirdly, When *Sarah Olmstead*, in 1849, sold the 21 acres 1 rood and 25 perches to the Government, there can be no doubt that she regarded herself as being, and claimed to be, the owner in fee of the 159 acres allotted to her. Fourthly, That she had so sold this piece, claiming to be seised in

fee, must have been known, we may fairly assume, to her children, and yet none of them, so far as appears, made any objection to her having so done, or disputed her right to do so. Fifthly, *Leamy* may have been advised to take the deed of December, 1852, in the frame in which it was, because of *Sarah Olmstead* being unable to produce a deed transferring the fee of the 159 acres to her, although as one of the family he may have known that the intention of all parties was that she should take the fee, and he may have relied upon getting the family to confirm his title in pursuance of, and with a view to giving effect to, such original intention, so as to enable him to deal with the Commissioners. In this view the frame of that deed cannot be appealed to, to his prejudice. Sixthly, Under these circumstances and in this view, the execution of the deed of the 3rd of February, 1853, would have been a proper act to be performed by the respective parties to that deed, and would have been but the fulfilment and discharge of a moral obligation resting upon those parties to give legal effect, so far as they could, to what had been agreed between the parties to the partition, and acted upon as if it had been legally effectuated. Seventhly, Under these circumstances, it would be reasonable that the deed should be executed without any consideration therefor being paid by *Leamy*. None appears or is pretended to have been paid by him; it merely states that it is executed for good and valid considerations previously paid. Eighthly, The withdrawal of all opposition by *Hull Wright*, *Pamelia Wright* and *Serina Wright* to the confirmation of the deed of May, 1855, subsequently executed by *Leamy* to the Government, also affords strong evidence in confirmation of the position that *Sarah Olmstead* was intended to have an estate in fee in the 159 acres, and that it was for this reason that the opposition

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was withdrawn; and Ninthly, The execution of the several deeds under which the petitioner claims, for the consideration of which evidence has been given, is quite consistent with the parties who executed those deeds believing that they had no beneficial interest to transfer, and is, to my mind, wholly inconsistent with their believing themselves to have any beneficial interest.

But, besides all these considerations, there is the evidence of one *Clark*, who having taken receipts from *Horatio, Serina* and *Philemon Wright*, which he produced, testified to his belief that the instrument dated the 3rd February, 1853, was signed by those persons; an opportunity of the comparison of the signatures of those persons with undoubted documents signed by them respectively has been also afforded us, which, I confess, instead of creating a doubt in my mind, confirms me in the belief that the signatures to the deed of February, 1853, are genuine.

It was argued, that if the deed was genuine it would have been brought forward by *Leamy* at once upon its execution. But who is to say? Certainly no one does say that it was not exhibited to Mr. *McCord*, the counsel taking the title upon behalf of the Commissioners. Its having been produced to Mr. *McCord*, we may conclude with certainty, would have had no effect whatever upon him, so as to have diverted his mind for an instant from taking the steps which he seems to have resolved to take, namely, to take a deed, under the Act of Parliament, executed by *Leamy*, as the best and most perfect title which in his judgment could be obtained, and the only one that he would recommend; and to procure a confirmation of it. Upon the whole, therefore, the evidence in favor of the genuineness of the deed appears to me to be immeasurably stronger than that offered against it.

The fact of this deed not having been registered until after the registration of the deeds under which the petitioner claims, is, in my judgment, of no importance, for the title by the conveyance under which the Crown claims from *Leamy* and wife, which is made a good title by statute, and which deed was registered at the time of its execution, intervened (1). Moreover, at the time of the Code coming into force, the Crown was in open and public possession of the land as owner, and so within the exception enacted by article 2088 of the Code.

Then, by notarial deed dated the 27th September, 1853, *Sarah Olmstead* sold, ceded, transferred and made over, with warranty of her own acts and deeds, to *Andrew Leamy*, all the right, claim, title and interest, demand and property of the said *Sarah Olmstead*, of, in, to and upon that piece or parcel of land situate, &c., &c., and described on the plan drawn by *Anthony Swallwell*, surveyor, and which is of record in the office of *A. Larue*, one of the undersigned notaries, together with the pond of water included in the said piece or parcel of land, excepting, and the said *Sarah Olmstead* doth except and reserve out of said piece or parcel of land and pond of water, all that certain piece containing 21 acres 1 rood and 25 perches, sold to the Government by deed bearing date the 12th September, 1849. This deed is expressed to be made in consideration of £100 acknowledged to have been paid to her by *Leamy* previous to the 7th December, 1852, upon which day the said *Sarah Olmstead* declares that she delivered unto the said *Andrew Leamy* seisin and possession of the said piece or parcel of land so transferred and described as aforesaid.

With respect to this deed it may be observed that, if it was never intended that *Sarah Olmstead* should be the owner in fee of the piece allotted to her, in lieu of

(1) See article 2089, Civil Code.

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her dower in her deceased husband's estate, and if it was only allotted to her to enjoy the usufruct for life as her dower, there would have been no sense whatever in her executing this deed after having, in December, 1852, sold all her interest in the land, if her usufruct by way of dower was all the interest she was supposed to have; but if the deed of December, 1852, was executed under the circunstances and for the purpose which I have above suggested when dealing with that deed as the probable motive for its being executed in the frame in which it was prepared, then, if *Leamy* had afterwards procured the release of February, 1853, to be executed by the parties thereto, which, if executed by them, is fairly open to the construction that it was so executed in recognition and confirmation of the previous intention entertained at the time of the partition, that *Sarah Olmstead* should hold her allotment in fee, it was not unnatural or improbable that *Leamy* should have been advised to take a deed from *Sarah Olmstead*, conveying to him her estate in the land, whatever it might be, not describing it as dower, in support of *Leamy's* title to the whole lot in fee as against *McGoey* and *Hull Wright* and *Serina Wright*, in case they should persist in withholding their recognition of *Sarah Olmstead's* claim to the fee in accordance with the intention entertained at the partition. The execution of this deed affords to my mind strong evidence of the *bona fides* of the contention that such was the intention entertained by the parties to the partition at the time it was made.

I pass over the deed of March, 1854, executed by *Leamy* and wife, because by deeds subsequently executed by them, in May, 1855, that deed was vacated. It appears that subsequently to March, 1854, the Commissioners contemplated acquiring more land than was mentioned in that deed, and not being able to agree with *Leamy* as to the price, it was by mutual agreement referred to

Mr. *A. J. Russell* to set a price upon the several parcels. This *Russell* did, and the prices so set by him were adopted by *Leamy*, who thereupon agreed to accept those prices for the lands. Accordingly, two deeds were prepared, bearing date the 7th of May, 1855, and executed by *Leamy* and wife: by one of those deeds they conveyed to the Crown the 18 acres and 26 perches acquired by *Leamy* by the deed of December, 1852, from *Nancy Louisa Wright*; a strip of land, parcel of the allotment of *Wellington Wright*, conveyed by him to *Sparks* in January, 1837, and sold by *Sparks* to *Leamy* by deed of December, 1852, and a small strip forming part of the allotment of *Erexina Wright*, *Leamy's* wife. By the other deed *Leamy* and wife conveyed the following parcels of the said lots 2 and 3, in the 5th concession of *Hull*, namely: 1st, a strip of land on the east side of the *Gatineau* River; 2nd, 65 acres and 10 perches, parcel of the 159 acres allotted to *Sarah Olmstead*; and 3rd, a part of lot No. 2, particularly described in the deed. Of the lands comprised in this deed it is only with the 65 acres and 10 perches, as I understand it, that we have to deal. The price, however, representing all the lands comprised in this deed, as agreed upon between *Leamy* and the Commissioners in pursuance of the award of *Russell*, was paid into the hands of the Prothonotary of the Court of Queen's Bench for the district in which the lands lay, in pursuance of the provisions of 9th *Vic.*, ch. 37, sec. 9, for the advisers of the Commissioners seemed to have determined to rest upon a title acquired under that Act.

Now the 8th sec. of the Act had enabled the Commissioners to contract and agree as to the price of the lands they might require, with all persons possessed of or interested in such lands. And by the 9th section it was enacted that—In *Lower Canada* the compensation agreed upon by the Commissioners and any party law-

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fully in possession as proprietor of any lands which might be lawfully taken under the Act, without the consent of the proprietor, should stand in the stead of such land, and that *any claim to*, as well as any hypothec, or incumbrance upon the said land, or any portion thereof, *should be converted into a claim to or upon the compensation*, and that if the Commissioners should have reason to believe that any such claims, &c., &c., exist upon the land, &c., &c., &c., *or if for any other reason* the Commissioners should deem it to be advisable, it should be lawful for them to pay the money into the Court, together with an authentic copy of the conveyance, and that proceedings should be thereupon had for confirmation of such title, in like manner as in other cases of confirmation of title, *except that in addition to* the usual contents of the notice, the Prothonotary should state that such conveyance was under the Act, and should call *upon all persons entitled to, or to any part of the land*, or representing or *being the husband of any parties so entitled, to file their opposition for their claims to the compensation, or any part thereof*, and all such oppositions should be received and adjudged upon by the Court, and the adjudgment of confirmation should forever bar *all claims* to the land, or any part thereof, including dower not yet open, &c., &c., &c., and the Court should make such order for the distribution, payment or investment of the compensation, and for securing the rights of all parties interested, as to right and justice, according to the provisions of this Act and to law should appertain, &c.

From this Act it appears that the Legislature contemplated the Commissioners agreeing with a person in possession *animo domini* as to the price to be paid for the fee simple title to the land of which he was in possession, although he might turn out not to be seised of the whole of such estate. The Act, as it appears

to me, authorizes the Commissioners to agree as to the amount of compensation which is to stand instead of the land with a person in possession *animo domini*, that is, as a proprietor, although it might turn out that the title under which he claimed was imperfect, or that he was not sole proprietor, but that others were entitled to undivided interests in the land with him.

The provisions of the 9th section and of the last clause of the 8th section seem to me to have been framed for the precise purpose of meeting such a case and of vesting in Her Majesty, her heirs and successors, all land *contracted* for in manner aforesaid, and the object appears to have been to protect the Crown, when contracting with a person in possession as a proprietor, against the claims of all other persons to the land, or to anything but the compensation so agreed upon, in case any others should prove to be entitled to the land, or to some part thereof.

The Legislature has, by these two sections taken together, in effect declared, that a contract made with the commissioners by a person in possession as proprietor shall convert the claims of all persons interested in the land from claims to the land into claims for the compensation agreed to be paid for the land.

Now, that *Leamy*, when this deed of the 7th of May, 1855, was executed, was in possession as a proprietor, and that he believed himself to be, and that he claimed to be, absolute proprietor of the 159 acres allotted to Mrs. *Olmstead*, I do not think we can reasonably doubt; from the view which I take, as already expressed, it will be seen that, in my opinion, he had just and sufficient grounds for entertaining such belief, but, however this may be, there can be no doubt, I think, that he was in possession as proprietor, *animo domini*, and that he was a person competent, within the provisions of the Act, to agree with the Commissioners upon the price to

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be paid for the whole land, and so to convert the claims of all persons, if any others should prove to be interested in the land with him, into claims upon the compensation so agreed upon.

The deed having been executed under the 8th section, we find that proceedings were taken under the 9th sec. to obtain confirmation of that deed. These proceedings, as it appears to me, were not enacted so much for the purpose of making the title of the Crown *to the land* contracted for with *Leamy* by the Commissioners more perfect than it always was in virtue of the contract with *Leamy*, and the conveyance executed by him, which by force and effect of the 8th section in connection with the 9th had, as I think, in the existing circumstances converted the claims of all persons "*to the land or any portion thereof*" into a claim upon the said compensation, as they were inserted for the protection of the Crown against claims to the compensation.

But assuming the proceeding to confirmation to be a step necessary to complete the bar of all *claims to the land*, this step was taken, and upon being taken, *Hull Wright* and *Pamelia Wright*, the wife of *Thomas McGoey*, which *Hull Wright* and *Thomas McGoey* had, by letter of April 26, 1855, notified the Commissioners of Public Works that they were personally interested in the land, and *Serina Wright*, filed oppositions in the proper court in that behalf. The Act declares that such oppositions being made shall be received and adjudged upon by the Court, and such proceedings were thereupon had that these oppositions were withdrawn upon application of the opposants to the Court, which therefore adjudicated upon the oppositions by dismissing them. Now, when these parties, in conformity with a notice informing them that the deed sought to be confirmed was a conveyance executed by *Leamy* and wife for the purpose of

giving a title under the Act, and calling upon all persons entitled to any part of the land *to file their oppositions for their claims to the compensation* or to any part thereof, do file such oppositions and afterwards withdraw them, they must be considered as abandoning all claims. And after so withdrawing their claims such opposants cannot, in my opinion, be permitted, nor can any person claming through or under them be permitted, afterwards to impugn the title obtained by the Crown by reason of any imperfection, irregularity or defect, if any such should occur in the proceedings taken towards confirmation of the title *subsequently* to the withdrawal of such oppositions, and therefore it is not, in my opinion, competent for these parties, or for the petitioner as claiming through them, to attack the judgment of confirmation as he has done by the inscription *en faux* for an alleged omission to paraph the judgment. What injury could it work to the parties who had withdrawn their claims, if *subsequently* some irregularity or defect should occur? Plainly they would not be prejudiced by any such defect, and therefore, as it seems to me, upon no principle should they be allowed to make such an objection. I am of opinion, however, that the evidence which they offered in support of the inscription *en faux* was defective and insufficient, for the reasons given by the learned Judge of the Court of Exchequer in his judgment in that Court.

It is said, moreover, that the oppositions which were filed in Court were improperly withdrawn by the attornies of the opposants without their consent. In reply to this, it may be observed that this is an assertion of which no proof was offered, and if it were true, as asserted, that could not affect the title of the Crown to the land, for if the attornies of the opposants improperly withdrew the oppositions filed, without the consent of their clients, the utmost relief in such a

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state of things which the clients could obtain would be, to be reinstated in their oppositions, and that they should be permitted to reassert their claims *against the compensation*, which by the statute was made to stand in the place of the land. The improper and unauthorized withdrawal of the oppositions filed by the attornies, if such a thing did take place, would not revest the interest, if any, which the clients may have formerly had in the lands in them so as to enable them to convey such interests to the petitioner. It seems, therefore, to me, to be unnecessary to enter upon the point as to the transfers under which the petitioner claims being transfers of *droits litigieux*.

A point was urged to the effect that the deed executed by *Leamy* and wife, purporting to convey the land in question, was imperfect, by reason of its not having been executed under the hand and seal of the Commissioner of Public Works, as well as by *Leamy* and his wife, and that by reason of such imperfection the deed was not such a one as could have been confirmed under the Act. I do not understand this objection to be rested upon any provision of the Civil Code applicable equally to all cases of deeds of sale of lands, but that the objection is relied upon as applicable only to the cases of deeds of sale under the Act 9th *Vic.*, ch. 37, and that it is wholly founded upon the 17th section of that Act, which enacts :

> That the Chief Commissioner for the time being shall be the legal organ of the Commissioners, and all writings and documents signed by him and countersigned by the Secretary, and sealed with the seal of the Chief Commissioner, and no others, shall be held to be the acts of the Commissioners.

The observations I have already made, as to an objection taken in respect of any irregularity in the proceedings to obtain confirmation occuring *subsequently* to the withdrawal by the opposants of their oppositions

filed, would apply equally to this objection, if there were anything in it.

After notice given upon behalf of Her Majesty that she claims under the deed as a deed accepted by her under the Act, and after the purchase money agreed upon by the Commissioners had been paid into Court for the benefit of all having any claims to any part of the land, and after the opposants had come in and filed their oppositions in answer to a notice calling upon them to file their oppositions for *claims upon the compensation so paid into Court*, neither the opposants themselves, nor any person claiming under them, can, as it appears to me, be heard to say that the deed is defective for want of execution by the Chief Commissioner. The 17th section, however, has no reference to the case of a deed conveying lands to Her Majesty. The 8th and 9th sections relate to such deeds, and these sections declare that the lands purchased *or acquired* by the Commissioners shall be vested in Her Majesty, and that the conveyances may be *accepted* by the Commissioners upon behalf of the Crown, but this acceptance may be signified as it might be by any other purchaser, viz.: by payment of purchase money, the manual acceptance of the instrument and entry under it upon the lands. No better signification of the acceptance of the conveyance could be given than the lodging a copy of it together with the purchase money in Court, as the Act directs, for the purpose of obtaining confirmation of it, and the entry upon and continuous possession of the land under the conveyance.

The 17th section relates to those executory contracts which, to be *binding upon the Crown*, must be executed as directed in that section, and has no reference to a deed transferring title to Her Majesty. A deed executed by persons having authority to agree with the Commissioners upon the price to be paid for the whole fee, as

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provided in the Act, vests the whole estate in the Crown, barring forever the claims of all persons whomsoever upon the land, whether such deed should be signed by the Chief Commissioner or not, and converts their claims into claims for the compensation.

Upon the whole, I am of opinion, that the title of the Crown to the lands in question is unimpeachable; in my opinion, the intention of the parties to the partition of *Philemon Wright* the younger's estate appears to have been that *Sarah Olmstead* should enjoy in fee the 88 acres of land with the 71 acres of pond in satisfaction of her claim for dower, and she entered upon the land and exercised acts of ownership upon it upon the faith of such being the intention, and although legal effect may not have been given to that intention by a deed properly executed by the parties interested and competent to give a valid title, or, if executed, may have been lost, still, when she conveyed to the Crown the lands comprised in the deed of 1849, she was in possession *as proprietor*, claiming to be entitled as such, as I think we must reasonably infer, in virtue of a family arrangement, which she *then* in good faith believed to be acknowledged and regarded as good by all parties interested; and if the Commissioner of Public Works in good faith contracted with her, believing her to be in possession as proprietor, and agreed with her in good faith as to the price to be paid for the land, and in pursuance of such agreement took a conveyance from her and entered upon the land under such conveyance, and applied it to the public purpose for which it was acquired, the claims of all persons, if any others should prove to be entitled to the land, would, in my opinion, be converted under the provisions of the statute from claims to the land into claims to the compensation so agreed upon.

But, assuming confirmation of that deed to have been

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a step necessary to make the title of the Crown to the land perfect under the statute (a step which does not appear to have been taken with reference to this deed), still the possession acquired by the Crown under that deed, executed and accepted in good faith and in the belief that it conveyed a good title, would make a basis for prescription to operate upon; and there is not a particle of evidence warranting the slightest imputation of bad faith to the parties acting for the Crown in taking title under that deed. Her Majesty's title, therefore, to the land coveyed by the deed of 1849 cannot, after twenty-seven years undisputed, uninterrupted possession under that title, be called in question.

It was contended that until the Code Her Majesty could not acquire title by prescription, but the article 2211 which declares that the Crown may avail itself of prescription is given as old law, and whatever may in truth have been the law of *France* upon that subject, we are concluded by the above article, which we must construe as declaring what was the law in *Lower Canada* before the adoption of the Civil Code, and this article must be read as declaring the right of the Crown by prescription to have accrued in the like cases and under the like circumstances as title by prescription would have accrued to the subject, that is to say, as appears by the 1st vol. of the Commissioners' Report upon prescription (1), by prescription during ten years against a proprietor present, and twenty years against an absentee.

The article 2251, which makes new law, providing for the future only, cannot alter or abridge in any respect the effect of the declaratory article 2211 as to what was the old law. Under article 2251, for prescriptions begun since the Code, ten years will be sufficient against absentees, where formerly twenty years would

(1) P. 539, sec. 92.

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have been required, but the old law prevails (unaffected by this or any provision in the Code pointing to the future) where the prescription began to run before the Code. This is specially provided by article 2270. It is clear, therefore, that prescription in favor of the Crown could begin before the Code, and could mature into a perfect title, where, in like circumstances, it would have done so in favor of a subject.

As to the residue of the land comprised in the deed of the 7th May, 1855, I have already expressed my opinion to be that, for the reasons already given by me, the title of the Crown is perfect under the provisions of the statute, but Her Majesty's title to this portion also is good by prescription. It is apparent, from the whole evidence, as it strikes my mind, taken even in connection with those notices of claim given in 1853, and in April, 1855, which the petitioner's counsel so much relied upon for the purpose of establishing bad faith, that the persons acting as advisers of the Commissioners were particular in taking care that there should exist no just ground for imputing to them any want of the most perfect good faith in the taking the title which should be accepted. It appears that an experienced counsel was employed to secure a good title, and he seems to have resolved to take title only under the provisions of the statute. Under his advice, a deed was taken from a party in possession of the land claiming to be absolute proprietor, but undoubtedly interested therein to a large amount, if not to the extent of the whole estate. Having taken what I can see no reason to doubt counsel believed to be a good deed under the statute, he must have communicated to the Commissioners of Public Works, the proper officers representing the Crown, the facts of the execution of the deed, and of its having been taken under the statute, for we find that upon the 23rd of June, 1855, the Commis-

sioners caused to be deposited the purchase-money, £1,404 16s. 2d., together with the deed of the 7th May, 1855, in the proper Court in that behalf, under the provisions of the statute. Now, from this date, at least, we must hold that the Commissioners of Public Works, representing the Crown, had notice from their counsel that the deed of the 7th May was perfected, and that it was taken under the statute. This, then, is the period at which the test is to be applied to determine whether the Commissioners had any reason to doubt the goodness of the title which they accepted by thus paying the purchase-money into Court, to be dealt with in accordance with the provisions of this statute in that behalf. The petitioner's counsel relied upon a passage in *Pothier* (1).

La bonne foi requise pour la prescription, étant la juste opinion que la possesseur a, que la propriété de la chose qu'il possède lui a été acquise, c'est une conséquence que lorsque mon procureur a acquis pour moi un héritage avant que j'ai été informé de l'acquisition, je ne puis néanmoins commencer le temps pour la prescription jusqu'à ce que j'ai été informé de l'acquisition ; car se ne puis avoir l'opinion que je suis propriétaire d'un héritage avant que de savoir qu'on en a fait pour moi l'acquisition.

And they asked: Is there anything, then, to establish that Her Majesty has since the execution of the deed become cognizant of it?

If by this question is meant whether there is any evidence that Her Majesty has personally become cognizant of the deed, I answer, no. Nor, in my opinion, is it necessary that there should be. If the law required that Her Majesty should personally be made cognizant of the execution of a deed so procured to be executed, vesting land in her, so likewise to establish the want of that *juste titre*, whereon to base prescription, it would be necessary to show that Her Majesty *personally* did not entertain that firm and undoubted belief that she

(1) Prescription No. 30.

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ha become proprietor, which alone, as was so strongly urged by the petitioner's counsel, constitutes *bonne foi*, and as Her Majesty, as we know, personally knows nothing whatever about these transactions, the effect would be that the Crown could never stand for title upon prescription by ten years undisputed possession under a *juste titre*. But under this Act the Commissioners for Public Works must be held to represent Her Majesty. They are the persons who are authorized to contract for, purchase and acquire the lands, which, when so purchased and acquired, the Act declares, shall be vested in Her Majesty, and to put a rational construction upon the Act we must hold that the knowledge acquired by the Commissioners of the fact of the execution of the deed (of which fact we must conclude they were informed, when, upon the 23rd of June, 1855, in acceptance of the title so acquired, they paid the consideration-money into Court to be dealt with under the statute), is sufficient, within the meaning of the passage extracted from *Pothier*, to base prescription upon, and as there does not appear to me to be a tittle of evidence to cast a doubt upon the *bonne foi* of the Commissioners at that time, construing *bonne foi* as the petitioner's counsel contend it should be construed, namely, the entertaining a "firm and undoubted belief" in the goodness of the title so acquired, prescription by ten years possession under this title would make the title of the crown good, if there was no other to rest upon. It appears to be rather inconsistent for the petitioner's counsel to contend that this knowledge of the Commissioners as to the execution of the deed which led to the payment of the consideration money into Court under the provisions of the statute could not be relied upon as a base of prescription from that date, when they insisted so strongly upon the knowledge acquired by the Commissioners by notice to them in

1853, and in April, 1855 for the purpose of establishing the absence of good faith in May, 1855. But it is said that ten year's prescription is insufficient, by reason of the absence, as is alleged, of *Serina* and *Sally Wright* and of the children of *Hull Wright*.

In answer to this objection, it is to be observed: 1st. That there is no replication in answer to the plea asserting title in the Crown by ten years' prescription, which asserts the absence of any of the parties to be affected by such prescription; the only answer to that plea is one denying it, and according to every principle of pleading prevailing under every system of jurisprudence, if there be no pleading raising an issue upon the subject, evidence of the absence of any of the parties which would be affected by prescription is inadmissible. But 2nd. As to *Hull Wright*, the evidence shows that he was not absent, for he was present when he entered his claim under the statute upon the proceedings being taken in Court for confirmation of the deed, and he continued to be present until his death, in April, 1857, and there was no interruption of the prescription so begun during the currency of the ten years upon behalf of any one claiming through or under him. So also as to *Serina*; she was also present when she entered her claim in Court upon the proceedings taken for confirmation of the deed, nor is there any evidence of her having been absent at any time until after the expiration of the ten years from the opening of the prescription in 1855, and as to *Sally Wright*, there is no evidence of her having been absent when the ten years' prescription began to run in 1855, nor of any interruption of such prescription upon her part. But 3rd. The absence of *Sally Wright*, if established, is, in my judgment, immaterial, for the reason, that in my opinion, it sufficiently appears that she executed the quit claim deed of February, 1853, and, moreover, twenty years had elapsed before the

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institution of proceedings by the petition of right in this case, so that upon the whole, as it appears to me, the title of the Crown to all the land in litigation is unimpeachable and the appeal should be dismissed with costs.