

Copy of the Memorial

OF THE

MCCORMICK FAMILY OF POINT-AU-PELÉE ISLAND,

TO

HIS EXCELLENCY THE GOVERNOR GENERAL

IN COUNCIL:

Praying, 1stly.—For the Waiver of the Judgment obtained against them, under peculiar circumstances, on an Information for Intrusion, filed against them at their own instance, in respect of their possession of that Island ;

AND

2ndly.—For the issuing of Patents for the Confirmation of their Title to their respective portions of the Island under the Will of the late William McCormick, Esquire, who held the Island under an Indian Lease, of 1st May, 1788, made to the late Thomas McKee, Esquire a Chief and a half-breed, for 999 years, (renewable) ;

TOGETHER WITH

A Synopsis of the several Affidavits and other documents referred to in and accompanying, the Memorial.

Presented on 22nd August, 1865.

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Memorial

To His Excellency the Right Honorable Charles Stanley
Viscount Monck, Baron Monck of Ballytrammion, in the
County of Wexford, Governor General, &c., &c., &c.,
IN COUNCIL.

The Memorial of MARY McCORMICK, widow and relict of William McCormick, late of the Island of Point-au-Pelée, in Lake Erie, Esquire, deceased; of David, William, Thomas, Lucinda E., Peregrine, Arthur and Sarah Ann, the surviving sons and daughters of the said late William McCormick, all being devisees in his last Will and Testament; and of Francis Burwell, Charlotte Louisa, Walter Herbert, William Charles and Malcolm Talbot, the sons and daughters of John McCormick, late of the said Island, Esquire, deceased, who died intestate, and who was also one of the sons and devisees in the said Will of the said late William McCormick;—

Humbly sheweth—

1. That on the first day of May, 1788, the Chiefs and Sachems of the Bands of the Chippewa and Ottawa Nations of Indians, then owning and inhabiting the said Island, executed, with all due solemnity, and delivered to Thomas McKee, who was a half-breed, and a Chief, and then of the Parish of L'Assomption, in the then Province of Quebec, a Lease of the said Island, for a term of nine hundred and ninety-nine years, which Lease was duly attested by, as subscribing witnesses, James Allen, then of Detroit, in the then Indian Territories, and François Baby, then of L'Assomption aforesaid, and afterwards of the Town of Windsor, in the County of Essex, Esquire, deceased, and who represented, in Parliament, the said County for many years; a true copy of which said Lease, marked (A,) accompanies this Memorial.

2. That the said Thomas McKee, immediately after the execution and delivery of the said Lease, entered into possession of the said Island, thereunder, and continued in such possession, by himself and his tenants, up to the time of his death, which occurred in the month of March of the year 1815, when his only child, Alexander McKee, of L'Assomption, in the then District of Hesse, Esquire, deceased, inherited his interest therein, the said Thomas McKee having died intestate.

3. That the said Lease was taken from the said Thomas McKee, with his baggage, by the enemy, on the occasion of the retreat of the British forces after the battle of the Thames, (in which he had participated) during the last war with the United States, the said Lease having, however, been first duly enrolled according to the French law, prevailing in the then Province of Quebec, by William Monforton, Esquire, as a Notary Public, in a registry book, kept by him, as such Notary, on pages 293 and 294 thereof; the said book being one of a series of three old registry books which are more particularly referred to and described in the affidavit of John Stuart, accompanying this Memorial, and marked (B). That the said Notarial Registry Book of the said William Monforton, with the affidavits of one William Monforton, the grandson of the said Notary, and of one Charles Labadie, and others, accompanying and further identifying the same, is herewith exhibited.

That Your Excellency's Memorialists respectfully submit that the said Registry Book bears, on its face, ample evidence of its own authenticity.

4. That it was not until the 19th May, 1790, upwards of two years after the execution of the said McKee Lease, that the territory, extending from Catfish Creek, in what is now the County of Elgin, to the Chenail Ecarté, in what is now the County of Kent—opposite a portion of which territory the said island is situate—was ceded to the Crown by the Indians, and that the Deed of such cession (the treaty for which appears, by the terms of such Deed, to have been negotiated by Alexander McKee, Esquire, who was the father of the said Thomas McKee), is enrolled in one of the others of the said three old registry books; that two of the said registry books, of which that last mentioned is one, appear to have been deposited in the Registry Office of the then Western District of Upper Canada, upon its establishment, where they still remain; whereas, that of the said

William Monforton appears to have remained in his hands up to the time of his death, and to have been subsequently in the keeping of his descendants until a very few years since, when it was acquired by the said Charles Labadie, and by him handed over to the said John Stuart, as mentioned in the said affidavits, annexed thereto.

That a true copy of the said Deed of Cession, as extracted from one of the said other two registry books, is annexed to, and forms a part of the said affidavit of the said John Stuart.

5. That none of the islands, lying off the coast so ceded, and of which the island in question is one, are included in the said Deed of Cession; neither have the Indians, either before, or since the date of the said Deed, ever pretended either to cede the said last mentioned island to the Crown, to demand possession thereof, or to claim any right thereto.

6. That the bands of Indians, who so owned and occupied the said island, and whose Chiefs and Sachems executed the said Lease thereof, to the said Thomas McKee, have become extinct.

7. That the said William McCormick, so early as the year 1815, removed to the said island, as will appear by reference to the affidavit of Michael Fox, (accompanying this Memorial, and marked (C,)) occupying the same, as the tenant of the said Alexander McKee, the younger, up to the year 1823, when he, the said Alexander McKee, by Deed of Bargain and Sale, duly registered in the Registry Office of the County of Essex, conveyed to him, the said William McCormick, the whole of the said island, for a valuable consideration, (a certified copy of the Memorial, of which said Deed as registered, accompanies this Memorial, and is marked "D,") and, from which latter period, he, the said William McCormick, occupied the same as his own property, improving and building upon it, by himself and his tenants, up to the time of his death, the 18th day of February, 1840, bringing up and establishing thereon a numerous family of eight sons and three daughters, to whom he devised the same equally by his Will, and all of whom, with the exception of those since deceased, have continued to reside upon and improve the same up to this time. Read

8. That the said William McCormick, by his last Will and Testament, bearing date the 20th July, 1839, also duly registered in the Registry Office of the said County of Essex—after leaving to his wife a Life Estate in the "Home Farm," and two hundred acres of woodland adjoining it for her own support; charging three other farms, specified, with the support and education of the younger branches of his family, during their minority; and leaving his sister Elizabeth a life interest in the "Butler Farm,"—devised to each of his eleven sons and daughters, a certain farm, (particularly designated) providing that each and every of ~~the ten,~~ of the said eleven, farms thus specifically devised, should be made up to the complement of three hundred acres of tillable land.

And the said William McCormick further—after providing that one hundred acres of land, on the island, not otherwise disposed of, should be reserved for the support of a school on the said island, and that a certain place should be marked out for a village plot, a church and a school-house—devised the residue of the island, the saw-mill, with two acres around it, with all stone, cedar, timber, village plot, church and school lot, and hunting and fishing privileges, equally among his said eleven children.

That the said William McCormick, by his said last Will and Testament, appointed, as executrix and executors thereof, his said wife and his said sons, Alexander, John, David and William, of whom only the said Mary McCormick and the said David and William are now surviving; a certified copy of the Memorial of the said Will, as duly registered, accompanies this Memorial, and is marked "E."

9. That after the death of the said William McCormick, the devisees, under his said Will, considering it advisable that the said island should be surveyed, and the farms, so specifically devised to them respectively, measured out and defined, consented to the employment of a Provincial Surveyor for that purpose; that the late Philobeth D. Salter was, accordingly, employed therefor, and who, in the year 1847, made a survey of the island, and whose original field notes and copy of map of such survey, accompany this Memorial, and are marked respectively "F" and "G."

10. That the said Alexander McCormick, who, as the eldest, had been allowed by the other devisees to act as their agent, for the management of their interests in the undivided portion of the said island, induced the said surveyor to set off the farms, so specifically devised by the said Will, in such a manner as to suit his own individual interests, and not in accordance with the terms of the said Will, and to which survey none of the other devisees ever assented, excepting as to that of that portion of the said

Island known as "Middle Island," the division thereof being in strict accordance with the terms of the said Will, and also, as truly determining the area of the said island and its marshes respectively.

11. That the said Island of "Point-au-Pelée," though found, by the said survey, to cover an area of eleven thousand six hundred and forty-nine acres, one rood and four poles, contains upwards of five thousand four hundred acres of marsh, which is unavailable at all times and, in consequence of its low level, utterly irreclaimable; that upwards of two thousand acres of that portion, which is not such irreclaimable marsh, can never be made available as tillable land, it being always overflowed at anything like a high stage of water; and further, there are at least five hundred acres of the remaining four thousand three hundred acres on bed-rock—slightly covered with soil—which is also unfit for purposes of tillage; there, thus, being less than four thousand acres of the whole area of the Island, available, at all times, as arable land.

12. That, in the year 1859, some of Your Excellency's Memorialists, being anxious to raise money, some by way of mortgage on, and others by sale of portions of, their respective interests in the said island, and having failed in such attempts in consequence of the indisposition, on the part of the parties with whom they had negotiated for the purpose, to purchase or make advances on real estate, for which no Patent had issued, consulted their then legal adviser, John Prince, Esquire, as to the best mode of procuring the confirmation of their titles by the Government; that the said John Prince thereupon suggested that the Government should be requested to bring an amicable suit against one or more of them, in respect of their possession of the said island, he, the said John Prince, advising them, that upon judgment being rendered in their favor, (as he was confident it must be,) the Government would at once issue the necessary Patents to them, confirming their titles; that Your Excellency's Memorialists, reposing full confidence in the legal knowledge and ability of the said John Prince, were induced to assent to such his suggestion.

That, accordingly, at the express instance and request of the legal adviser of the said devisees, the Toronto agent of Her Majesty's Attorney General for Upper Canada, filed, in the Court of Queen's Bench, an Information for Intrusion, on the said island, against Mary McCormick and William McCormick, two of Your Excellency's Memorialists; which action resulted in a judgment, rendered in Easter Term of 1859, in favor of the Crown, and on which said judgment no further action has been taken, by or on behalf of the Crown, than the collection of its costs therein, from the defendants, under a Writ of Execution; that the said information, having been so filed, a special case was agreed upon, by the Counsel on both sides, for submission for the judgment of the Court; that in the statement of such special case, not only were some material facts erroneously stated, but a particular one, which, as Your Memorialists are advised, was most material and important to the defendants' case—as in fact, constituting the basis and ground-work of the McKee-McCormick title to the said island—was wholly omitted and ignored, namely: the existence of the Registry of the said Lease from the Indians, and that the holding, as well by the said devisees, as by those under whom they claimed, was under the said Lease, and, which fact, had it been made to form a part of the said special case, could not, as Your Memorialists are advised, have failed to satisfy the Court on the very important point, as to which the learned Chief Justice, the late Sir John Beverley Robinson, Baronet, in giving his judgment, admits, in the following words, the Court to have been left wholly in the dark, viz: "Some proof, I think, should be given that the possession had not been a mere continued one taken, in the first instance, by a mere intruder, not asserting title."

Your Excellency's Memorialists beg leave to append, for Your Excellency's information, the concluding paragraph of the judgment in question: "I do not doubt, when I consider the position of this Island, on the southern frontier of Canada, that it must have been known to the Government, in fact, that McKee and McCormick, and his family, had held the long possession which is admitted; if the Government acquiesced in it from a knowledge that the Indians had, all along, intended the land to be theirs, and, for that, or any other reason, have forborne, for sixty years, to assert a claim, either on account of the Indians or for the Crown, that may be felt, perhaps, by the Government, to give a strong claim to the present occupants to be confirmed in their title or, at least, to be left unmolested, as they have hitherto been; but that is a consideration to be disposed of by the Government, and, *it is evident*, I think, *from what is before us*, that the defendants are not likely to be unjustly or harshly dealt with. As a Court of Justice we must be careful not to distort legal principles on account of their operation in particular cases, for what we hold to be law in the present case, we should be bound to apply in others, unless there should be a difference in the facts, such as would warrant a different decision. My opinion is, that the Crown, upon what is stated in this case, is entitled to a verdict;" which said judgment is reported in volume 18, of the Queen's Bench Reports for Upper Canada, at page 131, and also in the U. C. Law Journal for 1860, page 41.

13. That, sometime after the rendering of the said judgment, the said John Prince apprised Your Excellency's Memorialists that it was adverse to them, and they, after having for several months thereafter, endeavoured in vain to get some satisfactory explanation from the said John Prince, as to the grounds upon which the said judgment had been so rendered, retained the above named John Stuart, then a practising lawyer, to look after their interests in the said island. That the said John Stuart, shortly after his having been so retained, and before the publishing of the report of the case in the usual way, procured from the reporter of the Court, and sent to your Memorialists for their information, a written copy of the report of the said judgment; that the said copy of report afforded your Memorialists the first intimation which any of them had received of the fact—of the existence of the registry of the said Lease, and their holding under it—not having been brought under the notice of the Court, in connection with the said case, and that the said John Prince had relied, in his defence, solely upon the bare possession of upwards of sixty years; that the said John Stuart, when he so sent them the said report, apprised them that the time had passed, before he had been so retained, to make an attempt to set aside the said judgment, on the ground of the case having been defectively presented to the Court, if indeed any such attempt could have been made, at any time, with any chance of success, the said judgment having been given on a special case of facts agreed to by their own counsel.

That, when the said special case was so agreed upon, the said John Prince was well aware of the several facts following: 1st. That the said Lease had existed; 2nd. That it had been registered in the manner which was the lawful, and only possible, one at that early day; 3rd. That evidence of the said registry existed in his immediate neighbourhood at the time of the stating of the said case; and, 4th. That Your Excellency's Memorialists claimed the said Island under a peaceable and undisputed possession, held under the said Lease, for a period of seventy-two years, with the knowledge of the Government, and not by any means, as "squatters," under a possession taken, in the first instance, by a mere intruder "not asserting title."

14. That Your Memorialists, after having been so furnished with the report of the said case, called the attention of the said John Stuart to the said important defect in the stating of the said special case, and the existence, somewhere in the township of Sandwich, of the said Notarial Registry Book, containing the Registry of the said Lease, whereupon the said John Stuart advised the immediate tracing up and securing of the said book, which was accordingly done, and the same was placed in his hands.

15. That the said Thomas McKee, and those deriving their title under him, have enjoyed peaceable and uninterrupted possession of the said island, unquestioned by the said lessors and their successors, and without complaint of the said Lease having been unduly obtained, from the said 1st day of May, 1758, to the present time—a period of upwards of three quarters of a century—as will appear upon reference to the said affidavit of the said Michael Fox, hereinbefore referred to, as also the accompanying affidavits of William Elliott, William Duff and Robert Rynolds, Esquires, and of Madelaine Askin, who was the wife of the late John Askin, Esquire, (all of whom were amongst the most aged and respectable people of that part of the country,) and of Frederick Fisher, an intelligent Indian, and a man famed for his integrity and probity, which said five affidavits, last mentioned, are marked respectively, "H," "I," "K," "L," and "M."

16. That the occupation of the said island, by the McKees and McCormicks, has been, from the beginning, with the full knowledge of the Government, as may be shown by the following, amongst other facts, viz:

1st. The said Thomas McKee was himself deputy agent of Indian Affairs, and gave notice to the Government of his having obtained the said Lease.

2nd. In the year 1812, the Government purchased from the said Thomas McKee, cedar and other timber, on the said island, for the purposes of the fortifications at Fort Malden.

3rd. In the year 1833, when it was determined to erect the Light House on the said Island, permission to do so, as well as the necessary site for the purpose, was first asked for and obtained, from the said William McCormick, deceased, then in possession, by the said William Elliott, who was the senior of the Commissioners appointed to superintend the erection of the said Light House, and who, having been aware ever since the year 1802, (when he first came to the country,) of the precise nature of the McKee-McCormick title to the said island, and, being himself a lawyer, considered such permission necessary preparatory to breaking ground, (all of which will appear by the said affidavit of the said William Elliott, hereinbefore referred to); and,

4th. In the year 1838, the Government again purchased cedar and other timber—which they well knew to have been cut on the said island—from the said William McCormick, deceased, to a large amount, for the repairs of Fort Malden aforesaid.

That Your Excellency's Memorialists respectfully submit, that in consequence of the great lapse of time since the execution of the said Lease, they could hardly be expected to adduce proof of knowledge, on the part of the Government, during the earlier period of the existence of the said Lease, of the facts of its having so existed, and of the occupation of the said island thereunder; living evidence of such facts having had ample time to disappear from the stage, as well as has documentary evidence to become destroyed, lost and mislaid, in the departments of the Government where it might otherwise have been expected to be found.

17. That Your Excellency's Memorialists having learned that it has lately been urged, on the part of the Indian Department, against the validity of the said Lease, under which Your Memorialists so claim, that it had been obtained in violation of express law, respectfully submit, that they are advised that such objection is groundless, inasmuch as no Statute, Imperial or Provincial, Proclamation, Ordinance or Order in Council, prohibiting the acquiring (even by persons, not Indians or half-breeds), by Deed or Lease, from the Indians, lands within the particular territory, in which the Island in question is situate, was passed or made, until many years after the execution of the said Lease, and, in fact, until the passing of the Provincial Act 13 and 14 Vic., cap. 74, in 1850, upwards of sixty years after the execution of the said Lease. Your Excellency's Memorialists beg to submit, with this Memorial, a brief shewing, amongst other things, all the different Acts, Proclamations, and Orders in Council, relating to the subject, passed and made up to, and including the said last mentioned Act; which said brief is marked "N."

18. Your Excellency's Memorialists would respectfully submit, for Your Excellency's consideration, the following circumstances, as, amongst others, further shewing the justice of their claim to have their titles, to their respective portions of the said island, under the said Lease and Will, confirmed by Patents from the Crown, viz :

1st. That a large tract of territory, extending fourteen miles on both banks of the "Ouse" or "Grand River," after having been obtained by the Crown, by cession, was, as Your Memorialists are advised, subsequently given to the Six Nations of Indians, on their arrival in the Province; that the late Colonel Joseph Brant, as their principal chief, and in their name, subsequently re-leased, to the Government, portions of the said territory, from time to time, as it was needed for settlement, the proceeds of which, as sold, having been applied to their use and benefit; that the said Indians, also, in many instances, gave, in some cases by deed, and, in others, by long lease, (known as Brant Deeds and Leases,) portions of the said territory to members of the Indian Department, and others of their friends, which Deeds and Leases (having been given freely and voluntarily) were recognized by the Government, and subsequently confirmed by Patents to such grantees and lessees, and others claiming under them respectively; that Your Excellency's Memorialists would mention, as one instance of the many of such cases, that of one William Dockstader, whose title to fourteen hundred acres, the Government confirmed, by issuing Patents to his several assignees and representatives for their respective proportions.

2nd. That many parties, holding such Deeds and Leases, then unconfirmed by Patents, having turned traitors during the war of 1812, the Government took the necessary steps to confiscate their titles, thereby, as Your Memorialists are advised, fully recognizing the Brant titles in another mode. Your Excellency's Memorialists beg leave to submit the accompanying opinion, on their case, by the Honorable Henry John Boulton, an eminent counsel, upon whose reports, when occupying the position of Attorney General for Upper Canada, Letters Patent were issued for the confirmation of many Indian titles, held under Brant Deeds and Leases, of lands on the Grand River; and who, also, conducted the proceedings for the confiscating of lands, held under such Deeds and Leases, then unconfirmed by Patents, as the property of traitors during the late war with the United States of America; the said opinion is marked "O."

19. Your Excellency's Memorialists further submit, that according to the best information they have been enabled to obtain, the said Thomas McKee, the said lessee, and his son, Alexander, were men of influence among the Indians of Point-au-Pelé Island and its neighbourhood, being half-breeds and chiefs, as well as officers of the Indian Department, and were fully as much entitled to the affectionate regard of those Indians as was Colonel Brant to that of the Six Nations of Indians.

In this connection, Your Excellency's Memorialists beg to call your attention to the accompanying copy of a letter, addressed by the late Major General Sir Isaac Brock, to the late Colonel Proctor, as extracted from the life and correspondence of the former, edited by Ferdinand O. Tupper, Esquire; which said extract is marked "P"

20. That since the death of William McCormick, four of his children, devisees in his will, have died, viz: Charles, on December 18, 1844, a minor, unmarried, and intestate; Alexander, on August 24, 1854; and John, on July 25, 1856, both leaving children and both intestate; Mary, on July 23, 1861, leaving a Will, by which she devised her estate to her executors, Peregrine McCormick and Arthur McCormick, and to her executrix, Elizabeth McCormick, in trust to pay off certain legacies, and to divide the residue amongst her surviving brothers and sisters, and directing a share equal to that of each of her surviving brothers to be divided amongst the children of her brother John.

21. That all the surviving devisees in the Will of the said late William McCormick, and their families, as well as that of the said late John McCormick, continue to occupy the said Island, and all join in this Memorial. That the only parties, having an interest in the island, who do not join in presenting this Memorial, are the children of the late Alexander McCormick; he, having in his lifetime, set up pretensions to a larger share of the island than the other members of the family were willing to admit, or than he was by law entitled to, claiming the whole of Charles' share as devolving to himself; the children now living, Roland Alexander McCormick and Agnes Louisa McCormick, being minors, and under the tutelage of their mother, Mary Burwell McCormick, now residing in the County of Elgin.

22. That proceedings have been taken, and are now pending in Her Majesty's Court of Chancery, at Toronto, for a partition of the interests of the several parties, entitled in any way, to have their respective interests or portions assigned and set off to them in severalty.

23. That, impressed as Your Memorialists are, with the rightfulness and justice of their claim to the said island, the possession thereof by them and those under whom they hold, having been held for so long a period, undisturbed and unquestioned by the Indians, who were the original possessors, as well as by their descendants, the Indians ever respecting the Lease they had so passed, as well by not offering to cede or dispose of the said island by treaties, subsequently made with the Government, or otherwise, as by recognizing the rights of those claiming under the said Lease, by cheerfully paying for the privilege of trapping thereon, year after year. Your Excellency's Memorialists, nevertheless, desire to hold their lands under Patent from the Crown, in order that they may the more fully reap the benefits thereof, by being enabled to raise the necessary means of improving the same, and to be placed under the operation of the municipal institutions of Upper Canada.

And they venture to assert that they are deserving of the favourable consideration of the Government, in this their expectation, to be guaranteed and protected in their holding, not merely from the fact of their deriving their title from the original possessors, but in right of their father, who, in early times, and under difficulties and hardships, subject to great inconveniences and privations, settled with his family upon the island, an exile from society, and, with much toil, strived to achieve the maintenance of his family, and to leave his children each in the possession of a homestead. If, at this day, foreigners are invited to the country, and offered lands free, in order to accomplish the settlement of our wilds, shall not the children of our early pioneers be permitted to receive the reward of their ancestor's toil and endurance and of their own?

Always unhesitatingly loyal to the British Government, and ever true to its interests, Your Memorialists feel that they can appeal with confidence to the guardianship and protection of the Representative of their Sovereign.

Your Excellency's Memorialists therefore humbly pray that Your Excellency will be pleased to take their case into your attentive and favourable consideration, and cause an Order in Council to be passed, providing for the waiving of the said judgment, so obtained against the said Mary McCormick and William McCormick, under the peculiar circumstances hereinbefore set forth, in order that Your Excellency's Memorialists may no longer continue to be in a worse position than they were prior to the filing of the said Information, and for the issuing of Patents of Confirmation, on payment of the fees thereon, to Your Excellency's several petitioners, claiming the said Island, for the respective portions thereof which may be assigned to them in severalty, as the result of the said proceedings for partition.

And Your Excellency's Memorialists will, as in duty bound, ever pray.

(Signed,) JOHN STUART,
Attorney for Memorialists.

Quebec, 25th July, 1865.

SYNOPSIS OF MEMORIAL.

N. B.—The number of the clauses hereunder correspond with those of the Memorial.

1st. May 1, 1778. The Chiefs and Sachems of the Bands of the Ottawa and Chippewa Tribes of Indians, then owning and inhabiting the Island of Point-au-Pelée, lease it, for 999 years, to Thomas McKee, (who was a half-breed and a chief,) his heirs and assigns. Lease witnessed by the late François Baby, Esquire, who represented the County of Essex in several Parliaments. For copy of Lease, see Synopsis of Exhibits (A.)

2nd. Thomas McKee, on Execution of Lease, goes into possession, and retains it until his death, intestate, in March, 1815, when his only son, Alexander, inherits.

3rd. The Lease, after having been duly enrolled, by William Monforton, as a Notary of the Province of Quebec, is captured from Mr. McKee, with his baggage, on the occasion of the retreat of the British Forces after the "Battle of the Thames," in which he had participated. The Notarial Registry Book forthcoming, with Memorial—it is identified, and its authenticity established—vid. affidavits of John Stuart; Synopsis of Exhibits (A). Affidavit of William Elliot; see Synopsis of Exhibits (H) and (H_a), and the affidavits of William Monforton, Charles F. Labadie and Charles Baby, accompanying the Monforton Registry Book.

4th. May 19, 1790. Upwards of two years after the execution of the Lease, Colonel Alexander McKee, the father of Thomas, negotiates a treaty with the Indians, for the cession of the coast off which the Island lies; Deed of Cession enrolled in one of a series of three old registry books, (kept before the establishment of Registry Offices in Upper Canada,) of which, that in question, is one. Synopsis of Exhibits (B).

5th. The Islands lying off the coast, so ceded, not included in Deed of Cession; for copy of Deed of Cession, see affidavit of J. Stuart. Synopsis of Exhibits (B).

6th. The Bands of Indians, in whose behalf the Lease was executed, have become extinct.

7th. In 1815, William McCormick, senior, settled on the Island, as the tenant of Alexander McKee. See affidavit of Michael Fox. Synopsis of Exhibits (C) and Mrs. Askin. Synopsis of Exhibits (L). He continued thereon as tenant until 1823, when he acquired, from Mr. McKee, a conveyance in fee of the whole Island. For certified copy of Memorial thereof, registered, see Synopsis of Exhibits (D). Mr. McCormick continues to occupy and improve the Island until his death, on 18th February, 1840.

8th. Directs, by Will, an equal division of the Island among the eleven children, with certain provisoes and reservations. See Synopsis of Exhibits (E).

9th. In 1847, the Devisees procure the Island to be surveyed by P. D. Salter, P. L. S. For his field notes and copy of map of survey, see Synopsis of Exhibits (F) and (G).

10th. Alexander having, as the eldest, the agency as to the yet undivided interests in the Island, improperly induces the surveyor to set off the farms (specifically devised) to suit his individual interests, and not in accordance with the terms of the Will, excepting so far as that portion of Island called "Middle Island" is concerned.

11th. The survey, consequently, never assented to by the other devisees, excepting as to "Middle Island," and as truly determining the area of the Island and its marshes respectively.

It found the Island to contain 11,649 acres, and that, of that there are 5,413 acres of marsh; this marsh, in consequence of its low level, is utterly irreclaimable; and about 2,000, of the residue, of the 6,236 acres, are liable to be overflowed during anything like a high stage of water; and further, there are at least 500, of the remaining 4,300 acres on bed-rock—slightly covered with soil—which is also unfit for purposes of tillage, there, thus, being less than 4,000 acres of the whole area of the Island available, at all times, as arable land.

12th. In 1859, some of the McCormick family, finding capitalists, with whom they had been negotiating for loans on the security of their interests in the island, unwilling to make advances on property, for which no Patent had ever issued, are induced, by their counsel, to allow him to procure an amicable action to be brought against them at the suit of the Crown, in respect of their possession of the Island, in the hope that a judgment thereon in their favor (and as to their obtaining which, they were led by their counsel to believe that no doubt existed,) must result in the Government consenting at once to issue the necessary Patent for the confirmation of their titles.

An information for Intrusion is, accordingly, filed in the Queen's Bench, against Mary McCormick and William McCormick, (two of the Memorialists,) and, in Easter Term of the year 1859, judgment is, to the great dismay of the Memorialists, rendered against the defendants; the reason for such judgment, proving to be that, in the stating of the special case, which was agreed upon by counsel, for the opinion of the Court, the Indian Lease, and the defendants holding under it, were wholly ignored, (their counsel thus depending upon the long possession, as barring the Crown's right to recover,) and thus leaving it to be inferred, as the Court did, in fact, infer, that "the defendants' possession had been a mere continued one *taken in the first instance* by a mere "intruder not asserting title."

Extracts here follow from the judgment of the late Sir John Beverly Robinson, Baronet, favorable, in many points, to the McCormick title, even upon the erroneously and defectively stated case before him.

13th. The McCormicks kept in ignorance of the grounds on which the judgment had been rendered adversely, until too late to make an attempt to procure its reversal according to the practice of the Court; they had, in the first instance, advised their counsel of the fact of the existence of the Notarial Registry Book, containing the enrolment of the Indian Lease, under which they held.

14th. Giving up all hope of getting from their counsel the required information, as to the grounds of the adverse judgment, they employ new counsel, and who, after procuring from the reporter of the Court, a written copy of the judgment, (before the publication of the printed report in the usual course,) gave them the information; they, thereupon, inform him of the existence of the Notarial Registry Book in question, containing the Indian Lease, whereupon he advises their losing no time in tracing up and getting possession of it, which is done accordingly.

15th. The Island held, under the Lease, from May 1, 1788, until the present time, unquestioned and without complaint, from lessors or their successors, depositions of several of the most respectable and aged people in the neighbourhood shew this, (Synopsis of Exhibits (H) to (L)) both inclusive; and deposition of Frederick Fisher, an intelligent Indian, famed for his integrity, (Synopsis of Exhibits (M).)

16th. The Government had knowledge of the claim to the Island on the part of the McKees and McCormicks from the first.

17th. The acquiring, from the Indians, on 1st May, 1788, of the Lease, by McKee, (even if he had not been a half-breed, as he in fact was,) contended not to have been in contravention of any then existing law, either Imperial or Provincial, (all the Acts and Proclamations ever passed and issued on the subject of the acquisition of lands from Indians, recited in a brief prepared for the purpose, (Synopsis of Exhibits (N).)

18th. The confirmation by the Government, from time to time, of Brant Deeds and Leases of Indian Lands on the Grand River, as also the confiscation of lands, as the properties of traitors, held under such Deeds and Leases, unconfirmed by Patent, (the latter as recognizing on the part of the Government such Indian titles in another mode,) cited as precedents for the granting of the prayer of the Memorial in question. See opinion of the Honble. Henry John Boulton on the McCormick title, (Synopsis of Exhibits (O).)

19th. Colonel McKee's influence with the Indians of the West, deservedly equal to that of Colonel Brant with the Six Nations, as accounting for the giving of the Lease, and its always having been respected, vid. extract from the life of Major General Sir Isaac Brock; Synopsis of Exhibits (P).

20th. Since the death of William McCormick, senior, four of his devisees have died; three of them intestate and the fourth leaving a Will.

21st. All the surviving devisees, and their families, as also that of the late John McCormick, continue to reside on the Island, and all of them join in the Memorial; the only parties having an interest in the Will, and not joining in it, being the children of the late Alexander McCormick, who, in his lifetime, claimed more of the Island than the other members of the family considered him entitled to.

22nd. Proceedings have been instituted in Chancery, for a partition of the interests, of the several parties interested, to be set off to them in severalty.

23rd. Grounds for a reasonable consideration, by His Excellency in Council, of the prayer of the Memorial, stated.

24th. The prayer of the Memorial is, that the Government will, firstly—waive the judgment obtained under the very peculiar circumstances set forth in the Memorial ; and, secondly—that they will confirm, by Patents, the tenure of all those to whom, respectively, shares, or portions of shares, in the Island may be assigned, in severalty, by the suit for partition now so pending.

SYNOPSIS OF EXHIBITS

Accompanying the Memorial of the McCormick family for Patents of Confirmation of their Title to Point-au-Pelé Island.

(*N. B.*—*The numbers of clauses are those, respectively, of the Memorial.*)

EXHIBIT (A.)

Clause No. 1.—Copy of Indian Lease to Thomas McKee, dated 1st May, 1788, of the Island, for a term of 999 years, (renewable,) for a yearly rent of three bushels of corn, or its value if demanded—(a true copy of Lease follows this Synopsis).

EXHIBIT (B.)

Clauses Nos. 4 and 5.—The affidavit of John Stuart, states—

That there are in the Registry Office of the County of Essex, two old Registry Books purporting to have been commenced in Detroit on or about the 16th day of April, 1768, by one P. Dejean, styling himself “Notaire Royal,” and to have been finished on or about the 21st May, 1800, at Sandwich, by William Roe, styling himself “Deputy Provincial Register, Western District, U. C.”

That there is entered in the second, of the said two books, a memorandum, of which the following is a copy : “This Register was sent down to Quebec, by Order of the “Commander in Chief, in the year 1784, where it remained until the year 1789, when “it was brought up from thence by William Dummer Powell, Esq., first Judge of His “Majesty’s Court of Common Pleas for the District of Hesse, and afterwards deposited “in my Office, in the year 1790, in the month of May—and it is now continued ; “*During the interval the Records of the District were in the hands of WILLIAM “MONFORTON, who acted as Notary Public,* to which reference must be had.

“ (Signed,) T. SMITH, C. C. Pleas. District of Hesse.

“ 24th of May, 1790.”

That the said John Stuart, having been retained by the McCormick family, to look after their interests with respect to Point-au-Pelé Island, after the rendering of the judgment against them, in favor of the Crown, and having learned that a Register Book of the above named William Monforton, containing the enrollment of the Indian Lease of the Island to Thomas McKee, Esquire, was in the hands of his descendants in the Township of Sandwich, caused the said book to be traced and discovered, and which book is now in his hands, and which contains the enrollment of the said Lease, a copy of which enrollment is annexed to the said affidavit, and which said book is fully identified, as that referred to in the above memorandum of Thomas Smith, by the affidavits of William Monforton and Charles Labadie, annexed to the said book, and of Charles Baby, Esquire, Barrister and Attorney, and Clerk of the Peace of the said County of Essex ; that the said book contains five hundred and forty pages, (as numbered,) and appears to cover the period between the 10th day of May, 1786, and the 23rd day of September, 1792 ;

That the second of the said Registry Books deposited in the Register Office of Essex, contains the enrollment of the Deed of Cession from the Indians, of the coast, opposite a portion of which the said Island is situate, (a true copy of which said Deed, dated 19th May, 1790, is annexed to the said affidavit) the said Deed of Cession *not* including the said Island;

That the said Deed of Cession is the first instrument enrolled in the said last mentioned book, after its return from Quebec, as mentioned in the said certificate of the said Thomas Smith;

That there appear to be several registries in the last mentioned book, made by the said William Monforton, as a Notary Public, as well before the said book was sent to Quebec, as after its return thence, and evidently in the same hand-writing as that in which his own Registry Book appears to have been exclusively kept.

EXHIBIT (B. (a))

Clauses 4 and 5.—Copy of sufficient of the description of the premises in the Deed of Cession of 19th May, 1790, to shew that it does not include the island of Point-au-Pelé :

“ A certain tract of land beginning at the mouth of Catfish Creek, commonly called “ Rivière au Chaudière,” on the north side of Lake Erie, being the western extremity “ of a tract purchased by his said Majesty from the Mississagas Indians, in the year “ 1784, and from thence running westward ALONG THE BORDER OF LAKE ÉRIE, and up “ the straits to the mouth of the river known by the name of ‘ Chenail Ecarté.’ ”

N. B.—None of the Islands off the coast ceded by this Deed, are referred to in it, excepting “ Bois Blanc ” Island, (as having near its head a small “ run ” at which commences a description of one of the reservations in the Deed ; and the “ Petite Isle au Dinde,” as having above its head “ the beginning of the French settlement,” to which the said reservation extends.)

EXHIBIT (C.)

Clause 7.—Affidavit of Michael Fox, of Amherstburg, Esquire, made 9th May, 1859, states—

That he was, then, in the eightieth year of his age ; that he resided in the Township of Gosfield, immediately opposite the Island of Point-au-Pélée, and at a distance of some twelve or fourteen miles from it, from 1795 to 1841 ;

That he well knew Thomas McKee and his father, and his son Alexander, as also John Askin, Esquire, who belonged to the Indian Department ;

That he was aware, prior to the year 1804, that Thomas McKee had, some years previously, obtained from the Indians, either a Deed or a long Lease, of the said Island ; and also that the said John Askin was, for some years, in possession thereof, under a Lease from Thomas McKee, and that he, during that time, kept a large quantity of stock on it, and as early as the year 1804 or 1805 ;

That he recollects the circumstance of two persons named Justus Allen and Robert Little, respectively, occupying portions of the Island as tenants under John Askin ;

That he is aware that shortly after the declaration of the peace of 1815, William McCormick removed to the Island, and, after having occupied the same for some years, as the tenant of Alexander McKee, (the son of Thomas,) purchased it from him ; and that, although he resided within fourteen miles of the Island, and visited it occasionally for a period of about forty-five years, he never heard of any complaints having been made on the part of the Indians of the occupation of the Island by the said McKees, John Askin or William McCormick, or any person holding under either of them.

EXHIBIT (D.)

Clause 7.—Certified copy of Registry of Memorial of Deed from McKee to McCormick, of the Island—dated 5th September, 1823.

EXHIBIT (E.)

Clause 8.—Certified copy of the Registry of Memorial of Will of Wm. McCormick, dated 30th July, 1839 ; whereby he devised—

1st. To Mary, his wife, a life interest in the Homestead farm, and in two hundred acres of wood-land adjoining ; and also devised to her the rents and profits of three other farms, specified, for the support and education of the younger branches of his family during their minority ;

2nd. He devised to each of his sons, Alexander, John, David and William, a farm, particularly specified ;

3rd. To his daughter Lucinda, and his sons Charles and Peregrine, (all of whom were then under age,) each one of the farms, the rents and profits of which were to be applied towards their support and education during their minority ;

4th. To his daughters Mary and Sarah Ann, he devised the tract known as " Middle Island," which is within the said Island of Point au-Peléé ;

5th. To his son Arthur he devised the " Home Farm " at his mother's death.

(The will contains a proviso that each of the said eleven portions devised in fee should be made equal to 300 acres of tillable land.)

6th. To his sister, Elizabeth, he devises the " Butler Farm " and " Conklin Farm," or the rents and profits therefrom during her natural life.

7th. He devised the profits of all stone, cedar, timber, village plot, church and school lot, and hunting and fishing privileges, to be equally divided among his above named children.

8th. He devises one hundred acres of land, on the Island, not otherwise disposed of, the rents and profits of which were to be applied for the use and support of a school for the benefit of the Island.

9th. Lastly he wills and designs that the portions of the said Island, not hereinbefore appropriated, should be equally divided to his children according to value.

EXHIBITS (F. and G.)

Clause 9.—The field notes of the survey of the Island, in 1847, by P. D. Saltee, shewed the Island to contain 11649 acres, and that there are 5413 acres thereof marsh ; and map of the said survey.

EXHIBITS (H. and H. (a))

Clause 3 and 16.—The affidavits of Wm. Elliott, Esq., made, respectively, 27th February, and 17th July, 1860, state, amongst other things :

That he was at that time, in the eighty-fifth year of his age ; that he came into the township of Sandwich in 1802 ; that he was admitted to the bar, and as an attorney of the courts of Upper Canada, in 1803 ; and that he represented the county of Essex in Parliament.

That he was intimately acquainted with Thomas McKee, from a period shortly after his arrival in Sandwich, as well as with his son Alexander, and with William McCormick ; that he knows that Thomas McKee held a 999 year's Lease from the Indians of Point Pelée Island ; that he has seen it in his hands, and read it, and never entertained any doubts of its genuineness and authenticity.

That, after the late war with the United States, Thomas McKee told him that the lease had been taken from him by the enemy, with his baggage, on the occasion of the retreat of the British forces after the battle of the Thames.

That he was well acquainted with William Monforton, the elder, who was a Notary Public, and who, as such, kept a Notarial Registry under the French Regime.

That, many years after his death, he saw this Registry Book in the hands of some of his descendants, of the same name, in the township of Sandwich ;

That he had lately seen the identical Registry Book in the hands of John Stuart (then) of Windsor, in the said county of Essex, Esquire, and that for the better identifying it as the Registry Book referred to, he had written his name on its first and last pages.

That he is aware that Alexander McKee inherited the interest of his father (Thomas) in the Island, and that he, in or about the year 1823, conveyed his interest therein to William McCormick ;

That he never heard of any complaints having been made on the part of the Indians, of the Lease having been obtained by Thomas McKee in an improper manner, or of the possession of the Island having been held thereunder by him, or any of those holding under him, and that he was in the way of hearing of such complaints had they been made ; That he is aware that the late John Askin, Esq., of Amherstburg, held the Island for a

term of years under Thomas McKee, and that he sub-let portions of it ; That he is aware that cedar pickets and other timber were cut on the Island, during the last war with the United, for the use of the fortifications at Fort Malden, and that Thomas McKee was paid the value of such timber as standing.

That having been, in the year 1833, appointed one of a Board of Commissioners to superintend the erection of the light-house on the said Island, and knowing the nature of the claim of William McCormick thereto, he, as the senior of the Board, applied to the said William McCormick for the necessary land for the purposes of the light-house ; and that the said William McCormick having consented to give it, they proceeded to stake out what was considered to be sufficient, with the understanding that the said William McCormick was to execute a deed of cession thereof to the Crown, after a proper survey and description thereof should be made ;

That he is aware that the two old Registry Books, before mentioned as being deposited in the Registry Office of the county of Essex, were there so early as the year 1805, and that one of them contained the enrollment of the deed of cession, from the Indians to the Crown, of the territory extending from Catfish creek to the Chenail Ecarté.

EXHIBIT (I.)

Clause 16.—The affidavit of William Duff, Esquire, of Amherstburg, made 5th March, 1860, states—

That he was then in the seventy-ninth year of his age :—That he was well acquainted with Thomas McKee and his son Alexander, as also with William McCormick ;

That he was aware that the late John Askin, Esquire, who belonged to the Indian Department, occupied the Island of Point-au-Pelée, for many years, and as early as the year 1804, under Thomas McKee, who, he then understood, held the Island under a long Lease from the Indians, obtained many years previously ; that, as long as he could recollect, Thomas McKee, and those holding under him, enjoyed uninterrupted and peaceable possession of the Island up to the time of the making of his affidavit, so far as the Indians were concerned ; and also so far as the Government were concerned, until within the last two years.

That he has, ever since the year 1804, resided within about 30 miles of the said Island and been in the way of seeing the Indians in passing and re-passing ; and that he has never heard of any complaints having been made by them of the said Lease having been obtained in an improper manner, or of the occupation of the Island thereunder, and that he thinks that, had any such complaints been made, he must have heard them.

EXHIBIT (K.)

Clause 16.—The affidavit of Robert Reynolds, Esquire, of Malden, (of the same age as Mr. Duff,) made on same 5th March, is precisely similar to the affidavit of Mr. Duff, excepting that he states that his knowledge with respect to the Island extends back to 1807, instead of 1804.

EXHIBIT (L.)

Clause 16.—The affidavit of Madelaine Askin, of Amherstburg, made 29th November, 1859, states—

That she is the widow of the late John Askin, Esquire, who belonged to the Indian Department for many years ;

That she was, in 1859, in the eighty-fourth year of her age : That she recollects the circumstance of her husband having, in the year 1804, stocked and occupied the Island of Point-au-Pelée for several years under Thomas McKee, who, she always understood, owned the Island, and whom she knew very well. That ever since the year 1804, excepting the period from 1807 to 1817, she resided in Amherstburg—about 30 miles from the said island—and that she never heard of any complaint having been made, by, or on the part of the Indians, of the occupation thereof by the said Thomas McKee or any of those who have, from time to time, held under him.

EXHIBIT (M.)

Clause 16.—The affidavit of Frederick Fisher, made 9th April, 1860, before Thomas Hawkins, Esquire, (who certifies that he is well acquainted with him, that he bears the character of an honest and upright man, that he understands the English Language well, and that he is particularly intelligent for a person in his sphere of life,) states—

That he is an Indian, as also a Chief of the Chippewa Nation and a christian ;

That he believes himself to be upwards of 50 years of age. That he was well acquainted with Thomas McKee, who, he was always told by their people, had obtained from the Chiefs and Sachems of the Bands, owning the Island of Point-au-Pelé, a long lease of it ;

That he was also acquainted with Alexander McKee, who inherited the Island from Thomas, his father, as also with William McCormick, who, he understood, purchased it from Alexander ;

That he has known the island all his life, having lived in the neighbourhood of Amherstburgh (a distance of about 30 miles from it) ever since the year 1815, and having for the last nine years, paid the family of the said William McCormick, every year, for the privilege of trapping thereon ;

That he has known a number of other Indians of his nation, who have been in the habit of paying the said family for the like privilege, as well before, as during, the time he has been in the habit of frequenting the island annually for the purpose of trapping ;

That he has never heard of any objections being made, on the part of any of the Indians, to pay the occupants of the island for the privilege of trapping thereon ; nor even heard of any complaints having been made by their forefathers or their descendants, of Thomas McKee having obtained the island in an improper manner, or of its having been occupied by him, or any of those holding under him, it having been considered by them (the Indians) that they, the occupants, were its rightful owners.

EXHIBIT (N.)

Clause 18.—Brief shewing all the Acts—Imperial and Provincial—and Proclamations which were in force, at the date of the Indian Lease, as well as all those subsequently passed and issued with reference to the acquiring of lands from the Indians by subjects, proving that the obtaining of the Lease in question was not in contravention of any such Act or Proclamation. (For copy of Brief vide *Infra*.)

EXHIBIT (O.)

Clauses 19 & 20.—Opinion of the Honorable Henry John Boulton, on the McKee—McCormick title, citing the fact of the Government's confirming by Patent Brant Deeds and Leases, and confiscating the tenure of traitors (during the war of 1812, &c.) of lands held under other such Deeds and Leases (not ~~conferred~~ conferred by Patents), as precedents for granting the prayer of the memorial of the McCormick family, as to Point-au-Pelé Island. (For copy of Opinion vide *Infra*.)

EXHIBIT (P.)

Clause 20.—An extract, from the life and correspondence of Major General Sir Isaac Brock, of a letter addressed by him to Colonel Proctor, as shewing the great regard in which Colonel McKee was held by the Indians from which, amongst other things, it is urged that the Indian Lease should be respected. (vide *Infra*.)

APPENDIX.

EXHIBIT (A.)

(Copy of Indian Lease (renewable) as Enrolled.)

This Indenture *made and made* between the Chiefs and Sachems of the Chippewa and Ottawa Nations of Indians, on the one part ; and Thomas McKee, of Detroit, of the other part. Witnessed that the said Chiefs and Sachems of the Chippewa and Ottawa Nations, for and in consideration of the rent and covenant hereinafter mentioned and contained, which on the part and behalf of the said Thomas McKee, his heirs, executors, administrators, are and ought to be paid and performed, hath demised, and to farm letten granted, and by these presents do demise, grant, and to farm let unto the said Thomas McKee, his heirs, executors, administrators or assigns, all that Island known by the

name of Point Pelée Island, near Point Pelée in the Lake Erie : To have and to hold the said Island, and all and singular other the premises, and every part and parcel thereof, unto the said Thomas McKee, his executors, administrators or assigns, for and during the term of nine hundred and ninety-nine years, and fully to be complete and ended. To parcel out the said Island into such lots or parcels as he may think proper, and tenant the same with whatsoever and whomsoever they please to put thereon. Yielding and paying therefor, yearly and every year, during the said term, unto the said Chiefs and Sachems of the Chippewa and Ottawa Nations their heirs and assigns, three bushels of Indian corn, or the value thereof, if demanded, annually, to and for the use of the said Chiefs and Sachems, their nations, heirs and assigns, for and in full satisfaction and payment of all manner of rents whatsoever ; and the said Chiefs, for themselves, their nations, heirs or assigns, do hereby covenant, that the said Thomas McKee's heirs, executors, administrators or assigns may demise, grant or sell any part or parcel of the said Island, for the term herein specified.

In witness whereof, &c., at Detroit, the first day of May, in the year, &c., 1788.

Executed by Seven Chiefs and Sachems, who attach their Potems.

Signed, sealed and delivered
in presence of

(Signed,) { JAMES ALLAN,
 { F. BABY.

APPENDIX (N.)

BRIEF OF CASE

In the matter of the claim of the McCormick Family to Point-au-Pelée Island, in Lake Erie.

This is a petition preferred by the members of the McCormick family, setting forth their title to Point-au-Pelée Island, and praying to be enabled to hold the portions of the Island belonging to them respectively, under their father's will, in fee-simple, and by patents from the Crown, and to be brought under the Municipal Institutions Act of Upper Canada.

It is set forth in the petition, that, in the year 1859, the Crown recovered judgment against the members of the family, on an information for intrusion, filed in the Court of Queen's Bench, at the instance of the petitioners ; the object they had in view in procuring the information to be filed having been to quiet their title. That their case was erroneously and defectively stated for the opinion of the court. And they now ask the Government to waive the judgment which was so allowed to be obtained against the parties made defendants in the suit agreed upon, and, upon the consideration of their case, to effectuate their requests.

I.—First. As to the title of the McCormick family to Point-au-Pelée Island :—

The title of the family to the possession of the Island, rests upon an Indian lease for nine hundred and ninety-nine (999) years, bearing date 1st May, A.D. 1788, and granted by chiefs and sachems of the Chippewa and Ottawa nations of Indians to Thomas McKee, Esquire, a chief and half-breed, and also a Deputy Agent for Indian affairs in the West ; and continuous peaceable possession thereunder from that day to the present.

This Lease appears to have been duly executed, and to have been registered in the way, and according to the form in use, at that early day, in the Territory of Detroit—which comprised in it what is now the county of Essex—namely, in the book for enrolling deeds and other instruments, kept by Notary Monforton, and in fact in the very same series of books in which the Crown itself registered its own Deed of Cession from the Indians of the adjacent coast taken two years after the date of the lease in question.

The Lease is shewn to have been genuine and authentic ; and unless, at the time it was taken, there was an existing law rendering it invalid and void, *ab initio*, the petitioners must be held to have acquired a right for the residue of the term cited by it.

The objection which is said to be taken to it, by the Deputy Superintendent of Indian Affairs, Mr. Spragge, in his Report, is, in effect, that it was not competent for Thomas McKee to take a lease from the Indians, because, he says, there was a Proclamation issued by Sir William Johnson, on 11th October, 1763, promulgating the King's proclamation of 1st May, 1763, forbidding subjects from *making purchases* from Indians in the territories, without the Royal License, which Thomas McKee had not. And that, again, there was a Proclamation issued by General Gage, dated 8th of April, 1771, stating that it was not allowable for subjects to acquire lands in the Detroit Territory from the Indians; he arguing, therefore, that the lease in question is defective and void.

This objection to the Lease may be answered as follows:—

The two proclamations cited are, essentially one and the same, both of them merely promulgating the Imperial Order in Council of George III., of 1st May, A.D. 1763.

We shall proceed to explain the history, nature and intention of this order, and it will be apparent that the effect of the Proclamation is not that stated by Mr. Spragge.

It could not, and did not, render it incompetent for the Indians to *give* a Lease of a tract of their lands, nor him, Thomas McKee—half-breed as he was—to *take* one from them. And, if he could take and transmit, the tenure of the McCormick's should be regarded as good as are titles, for such a tenure, held by Families or Corporations, for Estates in England.

By the Treaty of Paris, after the conquest of Canada, all existing Titles to Lands, and holdings of property were confirmed, and the Government of Great Britain regarded and treated, as owners of the soil, the different Tribes of Indians, in the tracts respectively occupied by them, not already ceded by the French Government.

In order to arrive at the true meaning of the Order, upon which Mr. Spragge's objection depends, it may be well to recapitulate events:—

On 18th September, 1759, occurred the Capitulation of Quebec;

On 8th May, 1760, followed the Capitulation of Montreal;

On 10th February, 1763, was concluded the Treaty of Peace between the Kings of France and Great Britain, whereby he of France renounced Acadia, Canada, Cape-Breton and all its dependencies,—before this cession, by the King of France, was passed, on 1st May, 1763, the Order in Council of George III., promulgated on 11th October, 1763, by Sir William Johnson, and, afterwards, re-iterated by General Gage on 8th April, 1771.

This Order after reciting that valuable acquisitions had been made by the British Crown, and that it was desirous that loving subjects should avail themselves thereof, sets forth that Letters Patent had been granted for the erection of four distinct Governments—Quebec, East Florida, West Florida and Grenada.

It also sets forth the boundaries of the Province of Quebec, which, according to that description, could not have extended westward of a line drawn from Lake Nipissing to Lake Champlain, which would pass in the neighbourhood of Cornwall.

It provides for the Government of the Province, by the appointment of Governors, with directions to summon Assemblies and ordain Laws like those of England;

It provides for Grants of Land to Military and Naval Officers.

And then follows the clause upon which Mr. Spragge relies, and is here copied *in extenso*, viz:

“ And we do further declare it to be our Royal will and Pleasure, for the present
“ as aforesaid, to reserve under Our Sovereignty, protection and dominion, for the use of
“ the said Indians, all the Lands and Territories not included within the limits of Our
“ the said three new Governments or within the limits of the Territory granted to the
“ Hudson's Bay Company. As also all the Lands and Territories lying to the westward
“ of the sources of the rivers which fall into the Sea from the west and north-west as
“ aforesaid.”

“ And we do hereby strictly forbid, *on pain of Our displeasure*, all Our loving sub-
“ jects from making any purchases or settlements whatever, or taking possession of any
“ of the lands above reserved, without Our special leave and license for that purpose
“ first obtained.”

“ And we do further strictly enjoin and require all persons whatever who have
“ either lawfully or inadvertently seated themselves upon any lands within the countries

“ above described, or upon other lands, which, not having been ceded to, or purchased by us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such settlements.”

“ And whereas great frauds and abuses have been committed in purchasing lands of the Indians, to the great prejudice of our interests, and to the great dissatisfaction of the said Indians : In order, therefore, to prevent such irregularities for the future, and to the end that the Indians may be convinced of our Justice and determined resolution, WE DO, with the advice of Our Privy Council, strictly enjoin and require, that no private person do presume to *make any purchase* from the said Indians of any lands reserved to the said Indians, within those parts of our Colonies where we have thought proper to allow settlement ; but that, if at any time, any of the said Indians should be induced to dispose of the said lands, the same shall be purchased only for us, in our name, at some public meeting or assembly of the said Indians, to be held for that purpose by the Governor or Commander in Chief of our Colony, respectively, within which they shall be. And in case they shall be within the limits of any proprietary Government, they shall be purchased only for the use and in the name of such proprietors, conformable to such directions and instructions as we or they shall think proper to give for that purpose.”

I.—The evident intention of this Order in Council, of George III, was to provide for the then immediate want in the new acquisitions. A Government and a temporary one—until more matured and settled arrangements could be made ;—Certainly for the region, then unexplored and unknown, lying between the limit assigned to the Province of Quebec, and the supposed limit of the territory of the Hudson’s Bay Company, the order forbade :

1st. All loving subjects, “ *on pain of displeasure*,” from making purchases or settlements within this region.

2nd. And, as to the subjects within the limits of the Province, who had “ *seated themselves*,” it directed them to remove.

3rd. And it provided that the Crown should have all the bargains from the Indians, when settlements were permitted by the Crown.

The question is, whether this order had the effect of rendering null and void the Lease to Thomas McKee, made in 1788 ?

1st. That order had been revoked and annulled and made void, from and after 1st May 1775, by the Imperial Act 14 George III, chap. 83.

This Act, after assigning new limits to the Province of Quebec, including in them what is now called “ Upper Canada,” provides, by section IV, after reciting that the provisions made by said Proclamation, in respect to the Civil Government of the Province of Quebec, and the powers and authorities given to the Governor and other Civil Officers of the said Province, by the grant and commission issued in consequence thereof, had been found to be inapplicable, &c.

“ That *the said Proclamation*, so far as the same relates to the said Province of Quebec, and the commission and the authority thereof, under the authority whereof the Government of the said Province is at present administered, *and all every Ordinance and Ordinances*, made by the Governor and Council of Quebec, for the time being, relative to the Civil Government and Administration of Justice in the said Province, and all Commissions to Judges and other Officers thereof, be, and *the same are hereby revoked, annulled and made void, from and after the 1st day of May, 1775.*”

And a Government was, by the said Act, constituted for managing the affairs of the Province, consisting of the Governor, for the time being, and a Council of twenty-three members appointed by warrant of His Majesty.

(For this Imperial Act, See Thompson & McFarlane’s Revised Edition (1831) of the Statutes of Upper Canada, published at Kingston.)

By a Proclamation of Lord Dorchester, dated 24th July, A. D. 1788, the Province was divided into the four following new Districts, namely, Lunenburg, Mecklenburg, Nassau, and Gaspé. The District of Hesse comprising all the Territory west of Long Point.

Thus from May 1st, 1775, an end was put to the old regime, and the Proclamation, relied upon, became dead ; and it is, consequently, only in the Legislation, subsequent to that date—first of the Province of Quebec, and second of the Province of Upper Canada—that we have to look for enactments making dealings with Indians illegal.

2nd. But, even if this Proclamation had not been thus formally abrogated and determined previous to the granting of the Indian Lease to Thomas McKee, it should not, and could not, be held to render the lease void at this day.

- (i.) Because it is obsolete and worn out, and wholly inapplicable to the condition of things now, and was so even in 1788—
- (ii.) Because, even in its freshness, it did not accomplish the making *null and void* an agreement properly and formally made by Indians for Lands.
 - (a.) It did not so provide by its words. It says: “We forbid *on pain of our displeasure*.” The effect of such expression would be, possibly, to render the offender liable for a misdemeanor, or subject to the punishment of summary eviction.
 - (b.) The evident intention of the Proclamation was for the summary and immediate enforcement in this manner, the Government of the day being more, of an arbitrary, than judicial character.
 - (c.) It would require an Act of Parliament to make an agreement “*nudum pactum*.”
 - (d.) The Proclamation provided, under its second head, “no one shall *purchase*, without leave, in settlements.” If the case of the McCormicks come under this head, leave must be presumed, because, in 1788 the Indians in possession of the Island leased it to Thomas McKee, and two years afterwards, in 1790, the Government treated with the Indians for the main shore opposite; and it is a fair presumption that the Government then were informed of the case, and they did not then repudiate it, nor has the Government, to this day, attempted to treat with the Indians for the Island.
- (iii.) The term used in the Proclamation is “*purchase*.” It must be interpreted strictly, and *cannot* be held to *apply to leases*.
- (iv.) The original Lessee was a half-breed, and, by law, an Indian, and the Proclamation, while in existence, could not, and should not, be held to prevent him from occupying and holding Indian lands.
- (v.) The Island passed to Alexander McKee, who was also a half-breed and an Indian, and it was not until the year 1823, that he parted with it to William McCormick, the father of the claimants, when the laws in force in the Province of Upper Canada alone were applicable to dealings between Indians and half-breeds on the one side and whites on the other.

(See 13 and 14 Vic., chap. 74, and compare provisions by which, as well persons married to Indians, as the children of an Indian parent, are permitted to hold lands in Indian Reserves. And see also definition of the word “Indian.”)

3rd. The History of Canada may be divided into the following periods, and the Legislation, adopted in reference to the Indians, during each of these periods, was as follows, and, until 1850, it had nothing in it rendering the taking of leases from Indians illegal.

- (i.) THE PERIOD OF MILITARY RULE UNDER THE PROCLAMATION OF GEORGE III, 3RD YEAR, CITED BY MR. SPRAGGE AND EXTENDING FROM 1763 TO 1775.

During this period the Proclamation itself simply *forbade* subjects from *purchasing* from Indians in the Territories; ordered them to remove from lands occupied; and not to purchase without leave.

- (ii.) THE PERIOD OF THE CONSTITUTION OF QUEBEC—extending from 1775 to 1792, under a Governor and twenty-three Councillors, appointed by the King and authorized to pass Ordinances.

During this period an Ordinance was passed—17 George III, chap. 7, intituled, “An Ordinance to prevent selling liquor to Indians, and to deter persons from buying their clothing and arms, and for other purposes relative to the trade and intercourse with the said Indians.”

But this Ordinance enacted nothing against making an agreement with Indians for lands.

(N. B.—This Ordinance was held to be in force in Upper Canada after its erection into a Province.)

(iii.) THE PERIOD OF THE CONSTITUTION OF UPPER CANADA EXTENDING FROM 1792 TO 1840.

During this period several Acts were passed regulating the dealings with Indians, but none in prevention of the purchase of lands.

(iv.) THE PERIOD EXTENDING FROM THE UNION OF THE PROVINCES, FROM 1840 TO 1865.

In 1850 the Act introduced by Mr. Baldwin, 13 & 14 Vic. chap. 74—rendering *agreements* with Indians, *for lands, invalid*, and making it a misdemeanour to treat with them, and various other regulations, for which see Act itself.

This Act is, of itself, evidence of the prior non-existence of any Rule of Law against purchasing or leasing lands from Indians.

Chapter IX of the Consolidated Statutes of Canada embodies the various enactments with reference to the Indians.

II.—As to the Judgment obtained against the McCormicks on the Information for Intrusion.

Referring to the judgment by the learned late Chief Justice Sir John Beverley Robinson, in the case—as reported in Vol. 18, of the Queen's Bench Reports, page 131—it is evident that, had the McCormick claim, to the Island, been made to appear to have been founded upon the Lease from the Indians to Thomas McKee, a half-breed, transmitting to his Son, and by him transferred to William McCormick, their father—the Government never having obtained the cession of the Island, and the McCormicks holding under a title independent and adverse—the decision of the learned Chief Justice could not have been otherwise than the reverse of what it was. And it is evident, from the remarks of his Lordship, that he felt that the case of the McCormicks had not been fairly submitted to the Court, by the special case agreed on for the purpose, and by which their case was made to depend solely upon their undisturbed possession for a period of upwards of sixty years, as barring the Crown's right to recover, thus, by completely ignoring the Indian Lease, not shewing that their "possession had been "adverse to the Crown and not permissive, and had not been a mere continued possession "taken, in the first instance, by a mere intruder not asserting title,"—a "Squatter" in fact.

The important defect, in the statement of the case of the McCormicks, being apparent, from the very judgment of his Lordship, nothing need be added to induce the Government to perform the act of justice of waiving the advantage of the judgment thus obtained.

III. As to the disposition in which it is hoped the claim of the McCormick family will be received, and dealt with, by the Government.

The argument, had under the first head, goes to shew that the McCormicks have a good paper title to the Island, or a right to it, acquired *bonâ fide*. But, in submitting their case, the McCormicks feel they are not coming to a corporation, investigating their title as if for a loan, but to the Government, as *parens patriæ*, mindful of the just claims, and solicitous for the welfare, of all loyal and loving subjects. They conceive that, legally and rightfully, they have acquired the possession and ownership of the Island they occupy, and, in approaching the Government with their case, (even were it the fact that either the Lease, under which they hold, or the possession originally conferred by the Indians and transferred to them, was irregular or deficient in any respect,) the petitioners would feel confident that the Government of the country never would, under any pretence, attempt to deprive them of holdings undisturbed for upwards of three quarters of a century. But, on the contrary, that the Government would protect them in their property, and confirm it to them in the manner most advantageous to them.

IV As to the ways and means by which the requests of the Petitioners may best be effectuated.

The members of the McCormick family, the Petitioners, are ready and willing to surrender to the Crown their Lease, in order that their respective titles under it may be confirmed by patents. And it is respectfully asked that the Government will take a surrender of the reversionary interest of the Indians, if the *bands, who originally owned the Island*, are still in existence. And if, upon enquiry, it should be found that those bands are extinct, then that the Government assume the reversionary interest, and, accepting the surrender of the Lease, issue patents, in the manner prayed for in the petition, to each member of the family as entitled.

The case is a peculiar one. The tract leased in this instance by Indians to a favorite chief, is small as compared with other grants made by Indians and subsequently respected and confirmed, and insignificant as compared with the vast territorial grants made by a sovereign to a few favorites, and which are respected to this day.

In the confirmation of the title to this Island, as asked for, a most loyal and, in every respect, deserving family, will be served, and the country at large, will be advantaged by their dividing up their holdings and inviting settlers to their island to further develop and improve it.

APPENDIX O.

(Opinion of The Honorable Henry John Boulton.)

In Re the McCormick Claim to Point-Pelée Island.

I have read the Brief and Petition to the Governor General, sent to me for my perusal and opinion, and, although I see no objection to the petition, in point of form, yet I think both the Government Agents, and the Claimants to the Island, urge their respective views rather too much upon the idea of a legal paper title being sought to be established.

Previous to the Treaty of Quebec the whole of the present Province belonged, in Sovereignty, to the French King by conquest, but such conquest did not, I apprehend, vest in the French King the soil of the country, belonging to the Indians, and used by them as hunting grounds, but, whensoever the Government required lands for Civil purposes, Agricultural or otherwise, the Indians, represented by their Chiefs, treated with the Government for a cession of so much of the Territory, to be organized for settlements, as the circumstances of the country might require.

The Indians, although occupying and using the country collectively, in a nomadic state—like all other wandering tribes of uncivilized savages—never, individually, reduced any part of it to personal enjoyment, as separate property, and never had, in fact, any individual separate estate or property in the land at all. Therefore, it was not in the power of any Indian to make a title to any portion of land—as property—to anybody, and, therefore, when lands were wanted for cultivation the Chiefs or Headmen of the Tribes (according to Indian usages and the custom of savages everywhere, whether in America or Africa) met in Council and negotiated, by Treaty, for the cession of the land needed, which is the course, (I think I may venture to say) uniformly adopted, on this continent, in dealing with the Indians—whether by the British Government, or American, or Colonial, or Proprietary Governments—except, perhaps, in some exceptional cases, where they may have acquired territory, as the price of peace, after having provoked a war which ended in the subjection of the Tribes engaged. Now the facts, in this case, as represented in the papers before me, shew that the Indians, on the 19th of May, 1790, by their Chiefs in Council, ceded to the Government of the King of Great Britain, most of the Western Peninsula of Canada, lying along the shores of Lakes Erie and St. Clair—but not the Islands adjacent—and making, as is well known, certain reservations for their own use, as camping grounds, perhaps, when they should assemble to transact any business with the Government.

The Grand River Reserve—as it is, I think, incorrectly called—was, at a very early date, acquired, in the same way, from the Tribes, and afterwards a sort of License of occupation (which was neither a Lease nor a Deed purporting to grant a Freehold) was made to the Six Nations of Indians, coming in from the Mohawk country, under Joseph Brant and Sir William Johnson, for their loyalty to the British Crown during the American Revolution. But still no individual Indian acquired a legal estate in any portion of the territory without the intervention of the Crown, for the reasons I have before given, namely, that individual Indians did not acquire any separate estate, the whole being set apart for their general use as a hunting-ground. And this land has been dealt with, by the Indians, through their Chiefs, and by the Government, just as if it had originally been theirs, as the aborigines of the country, for whensoever it has been thought best to have the land organized for settlement and divided into Townships, the Indian Chiefs (of whom Joseph Brant was, during his life, principal) ceded back to the Government, such parts as it was thought best for the benefit of the Indians and to promote the settlement of the country and it was then sold for the benefit of the Indians in general.

Brant, upon several occasions, gave leases of considerable tracts to his friends and leading members of the Indian Department, which, having been done freely and volun-

tarily, were not opposed by the Government, and have since been patented to the parties themselves or those claiming under them, whereas, without the recognition of the Government, these leases were worthless, constituting no title whatever; and yet the Government itself, when I was Attorney-General, confiscated large tracts of land held under Brant Leases being in the hands of aliens who forfeited their estates by treason during the American War of 1812.

Now the lease of Point-au-Pelée Island stands just in the same position, and I have no doubt that, if the McCormicks, instead of being loyal subjects to the Crown, had left the Province and gone to the United States during the war, this Island would have been forfeited in the same manner. Thomas McKee, to my knowledge, was a man of influence as a chief and officer of the Indian Department, and was as much entitled to the affectionate regard of the Indians, to whom the Island belonged, as Brant, or any other leading chief of the Six Nations, was to theirs; and I am sure that if, at that time, the Government (who never owned the Island) had attempted to deprive him of it, while the whole matter was fresh in the minds of all the Indians and inhabitants of that part of the country, it would have created great disgust in the mind of every one—Indian and white settler—and the Indians who assented to the lease, would, in all probability, have resented, in some way, the indignity offered them by the refusal to recognize their act.

The Government, at all events, never had any right to the Island, as it was never ceded to the Crown by the Indians, and it having been in the possession of the lessee and his assigns, claiming title to it, for more than seventy years; I am sure that so unjustifiable an act, as the depriving a loyal family of their patrimony, under the pretence that they have established no *legal paper title to it*, after living upon and improving it for between 70 and 80 years, has not yet been attempted by any Government dealing with the Indians at any time.

If the Crown rests its claim upon the prerogative right of seizing into its own hands all property for which no owner can be found—as, if an illegitimate son had died without issue and intestate, then, in default of heirs, the Crown would take as *parens patriæ*—I do not think any defence could be set up. In the present case, however, it is clear that, if the defendants had been properly defended, the Crown would have been defeated under the provisions of the 9th George III, cap. 16, made expressly to quiet the possession of the subject: where neither the King, nor those under whom he made title, had either been in possession, or taken the profits, for 60 years.

In this case the Crown could have made out no such case, as this Island had never been ceded to it, and no others, than the McCormicks, had any rightful possession under which the Government could establish a claim.

I therefore think that the Government ought, at once, to consent to the setting aside the judgment, which, through negligence or ignorance, has been suffered to be obtained against the two defendants—although they might as well issue patents to those entitled under the Will of the late William McCormick.

I have read the judgment of the late Chief Justice of Upper Canada, Sir John Beverley Robinson, as reported in 18 U. C. Q. B. Reports, p. 131,—*Regina v. McCormicks*,—in which he evidently intimates that it was in consequence of the real facts of the case not being before the court that he was constrained to give judgment for the Crown, as he was well aware of the long enjoyment of the property under the Indian Lease.

Holland House, Toronto, 5th August, 1865.

APPENDIX (P.)

Extract from a Letter addressed by Major-General Brock to Colonel Proctor.

“Fort George, September 17, 1812.

* * * * *

“Colonel E— [Elliott] is a respectable, gentlemanly man; but he, by no means, possesses the influence over the Indians which Captain McK— [Thomas McKee] does; I recommend to you to promote, as far as in you lies, a good understanding with, and between them, and observe a conciliating deportment and language towards the latter that his great influence may be secured and employed, in its fullest extent, for the benefit of your district and for the general good. In conversation with him you may take an opportunity of intimating that I have not been unmindful of the interests of the Indians in my communications to ministers, and I wish you to learn (as if casually the subject of conversation) what stipulations they would propose for themselves, or be willing to accede to, in case either of failure or of success.”

* * * * *

Life and correspondence of Major-General Sir Isaac Brock, K. B., by Ferdinand O. Tupper, Esquire, 2nd Ed., p. 311.

