DOE D. SHELDON V. RAMSAY ET AL.

(1852), 9 U.C.Q.B. 105

Upper Canada Queen's Bench, Robinson C.J., Burns and Draper JJ., 1852

Grant of Governor under his seal-at-arms--Power of Chief of an Indian tribe to act as an agent for the tribe--Power of Commissioners of forfeited estates--59 Geo. III. Ch. 12--Inquisition void for want of certainty--Description in conveyance--Meaning of phrase "more or less."

A grant of lands, in 1784, by the then Governor of the Province of Quebec, &c., under his *seal-at-arms,* to the Mohawk Indians and others, conveyed no legal estate; first, as not being by letters patent under the great seal; secondly, for want of a grantee or grantees capable of holding.

***Held* also, that the mere fact of a chief of an Indian tribe assuming to act as a duly authorized agent, in the name and on behalf of the tribe, shewed no power in him so to act; and therefore, that a lease, signed by him as agent, &c., conveyed nothing.**

And consequently, that such lessee had no estate, which, on his being subsequently attained of high treason, could be forfeited to the Crown, and vest in the commissioners of forfeited estates, under 59 Geo. III. ch. 12.

Though by the 33 Hen. VIII. ch. 20, the Crown, in case of attainder for high treason, would be deemed in actual possession without any inquisition of office, yet such lands only would vest in the commissioners under 59 Geo. III. ch.12. as should be found by an inquisition to be vested in the Crown, and therefore no more land could possible pass by a deed from the commissioners than the inquisition had found the traitor seized of.

And *held.* That the inquisition could not support the conveyance which the commissioners made; for it referred to nothing which could possibly supply proof of identity, and the commissioners were not warranted in going beyond the inquisition and, *semble,* that the inquisition was void for want of certainty.

The defendants -- James Ramsay, Hector Dickie, Mary Kerr, and John Cleator -- defended for a tract of land on the south side of the Grand River, giving a description of it by metes and bounds, not expressing in what township it is, nor what quantity of lands the lines embrace.

The plaintiff in his declaration sued for the land in the township of Brantford, in the county of Wentworth, and described it as "being composed of all that certain tract of Indian lands on the south-west branch of the Grand River, in the township of Brantford, beginning at the white oak tree standing on the bank of the said river, on the south side of said River, above the Indian Mill, near a hut formerly known by the name of Culver's Hut, on the bank of said river, a few rods below said hut, said white oak tree charred on four sides, and four sides hacked, said tree standing two rods from said river, or thereabouts; and running south 10 degrees west 16 chains, to a stake marked B.M.; thence north 80 degrees, west 28 chains, 80 links: thence north 10 degrees east, to the bank of said river; thence along the bank of said river to the first mentioned boundary, including all privileges of the waters of the said river in front of the said lot."

At the trial of this ejectment, at Hamilton, before Robinson, C.J., at the last assizes, the lessor of the plaintiff claimed title under a sale made to him on the 9th July, 1832, by the commissioner of forfeited estates, under the statute of Upper Canada, 59 Geo. III. ch. 12. It was shewn that one attainted of high treason, committed by him in the year 1813, in giving aid to the enemy during the war than carried on between Great Britain and the United States of America. And upon an inquest of office which followed his attainder, it was found and returned by the jury, that at the time of his committing the high treason, he was seized of certain estates mentioned in the inquisition, among which were two tracts thus described: "Also a lease of a certain tract of the Indian lands, containing about 1,400 acres, joining the township of Brantford, leased to him for the term of 999 years; *and another lease for the same term, of certain other Indian lands on the south-west bank of the Grand River, containing about sixty acres, more or less:"* and that he had no other lands to their knowledge.

It was about the last of these two tracts, described as containing "about sixty acres, more or less," that the dispute in this action has arisen.

The inquisition bore date 14th January, 58 Geo. III.

A verdict was given for the plaintiff.

Connor Q.C., and *Galt* with him, in support of a rule *nisi* to enter a non-suit; or for a new trial without costs, on the evidence and for admission of evidence and for admission of evidence after the plaintiff's case closed--objected to the inquisition having been admitted after the plaintiff's case was closed. The evidence was clear as to the quantity of land it was intended should pass--1 Sug. V. & P. ch. 7, sec. 3; Day v. Finn [(a)] . The inquisition is void for uncertainty; and should have set out metes and bounds -- Fullen V. Birkbeak [(a')] . The commissioners could only make a deed such as the title on which they were acting would warrant; they had therefore no right to incorporate this

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(a) Owen, 133.
(a) Carthew, 453.
(b) 2 Rep. 33.
(c) 3 Rep. 10
(d) 8 Q.B. 63.

description in their deed. A deed cannot convey 420 acres under an inquisition which only forfeited 60.

Such a grant from the crown would have been void--2 B1. Com. 347; Doddington's case (b); Dowtie's case (c). There is no provision in the statute 59 Geo. III. ch. 12 for assigning a chattel interest in law.

Freeman, contra--The commissioners must be presumed to have exercised their authority properly--Taylor on Ev. 113, 119; Doe Hopley v. Young (d). He contended that Brant's lease to Mallory, coupled with the inquisition, made that certain which before was doubtful--"*Id certum est quod certum reddi potest,"* and therefore the inquisition not void for uncertainty; and as not producing the inquisition, he said he did not consider it necessary, as the commissioner's deed recites it, and shews how the inquisition described the land.

The statutes and facts bearing on the points in dispute are fully set out in the judgment of the Chief Justice.

ROBINSON, C.J., -- By the statute of 59 Geo. III. ch.12, the Government was authorized to appoint commissioners, "in whom all the real estates which then were or thereafter might become vested in his Majesty by the attainder of persons convicted of high treason, committed during the said late war, should be vested for the purposes mentioned in the act."

And in order that all such estates might be "the better known, described and ascertained, and the rents, issues, and profits thereof recovered for the use of his Majesty, and that due examination might be taken and satisfactorily made of all just and lawful claims to or upon such estates, the act provides that the Clerk of the Crown shall deliver to the commissioners an extract, certified under the seal of the Court of Queen's Bench of all inquisitions, whereby any real or personal estate of any kind whatever shall have been returned as forfeited to his Majesty by the attainder of any person of any high treason, as aforesaid; in which extracts shall be stated the names, additions, and late places of abode of the person attainted; the species of treason of which, and the respective times, places and courts, when and where they were so attainted; *and also the real estates, chattels, real or personal, debts, &c., which in the said inquisitions are found to be forfeited by such attainder;* and that the commissioners shall enter these extracts in a book or register to be kept by them; an extract from which book, signed by any two of the commissioners, shall be sufficient evidence in any court, of the matter therein certified."

And, to the end that all the estates and interest vested in the commissioners under the act may be duly published, so as all persons having interest therein may have notice thereof, in such manner as they may enter their claims upon the same, as provided by the act, it was enacted, "that the commissioners shall cause this register to be open to public inspection without fee, and transmit to the special receiver, to be appointed under the act, an authentic copy of the register."

It is also provided that the commissioners shall send to the clerk of the peace of the district in which any of the lands forfeited shall be a duplicate of every such entry to be affixed on the door of the court-house, and to be inserted in a book to be kept by the clerk of the peace.

Provision is then made for receiving, hearing, or determining the claims of any persons having or claiming any estate, right, title, or interest into or out of any of the said estates vested or to be vested in the commissioners. And it is enacted, "that all and every the estate and interests which shall be entered in the register to be kept by the commissioners according to the directions of the act, to or upon which no claim shall be entered within the time and in the manner prescribed, shall be deemed or taken against all persons, and to all intents and purposes to be vested in the commissioners in virtue of the act."

Then by the 13th clause of the statute, the commissioners are directed to sell all and singular the real estate and chattels vested or to be vested in them by the act, by public auction, according to the best of their judgment; to give ninety day's public notice of the time of place or sale, and of the several particulars then and there to be sold; and to cause an entry to be made in their book of all and every the real and personal estate so sold, and of the buyer's names, and prices paid, &c.; and, upon payment of the purchase-money to the commissioners, to execute deeds of bargain and sale for such real estates as shall be in such manner sold to the respective purchasers thereof; which deeds are required to be registered as other conveyances of lands in Upper Canada.

It was proved on the trial that the extract of the inquisition entered in the commissioner's book, and of which a copy was delivered out by their clerk as the act directs, corresponded literally with the inquisition as regarded the tract of land respecting which this question arises. The date of entry in their books is first March, 1819, and the land is no otherwise described than thus: "And another lease, for the same term, of certain other Indian lands on the south-west bank of the Grand River, containing about sixty acres, more or less." No township, county, or district is named as being that in which these sixty acres are situated.

It was then proved that on the 9th July, 1823, the commissioners of forfeited estates issued an indenture between themselves of the one part and the present lessor of the plaintiff William B. Sheldon of the other part, in which they recite the statute and their own appointment as commissioners, that Mallory had been attainted of high treason, &c., and that amongst other things "the residue of the demised term of 999 years unexpired and yet to come, of and in all and singular the lands, tenements and hereditaments thereinafter described, had by inquest of office been

found to be forfeited to his late Majesty, as having been in the seizing of the said Mallory at the time of the committing of the said high treason; that is to say, a certain tract of the Indian lands on the south-west branch of the Grand River, containing about sixty acres," referring to the record of the conviction and judgment, and to the inquisition. And they recite further, that the said residue of the said demised term of and in the premises aforesaid, in the said county of Haldimand (which county of Haldimand had been nowhere before mentioned, either in the inquisition or extract, or in this deed), having by virtue of the statute become duly vested in the said commissioners, they did, on the 31st day of August, 1820, having given due notice and complied with all the other requisitions of the statute, sell the said residue of the said term of and in the said premises, with the appurtenances, by public auction, to the said William B. Sheldon, he being the highest bidder for the same, according to the provisions of said act, at and for the price or sum of 171. 10*s.* And then their deed witnesses that in consideration of the said sum of 171. 10s., and under and by virtue of the powers and authorities in the said statute contained, they thereby assigned, transferred and set over to the said William B. Sheldon, the present lessor of the plaintiff, his executors, &c., "all and singular the said residue of the said demised term of 999 years unexpired and yet to come, of and in all and singular the said parcel or tract of land situate on the south-west branch of the Grand River as aforesaid, and described in the original lease for the same from Jacob Brant (should be Joseph Brant), agent of the Six Nations Indians, to the said Bonajah Mallory, hereunto annexed, as follows--that is to say, beginning at a white oak tree standing on the bank of said river, on the south side of said river, above the Indian Mill, near a hut formerly known by the name of Culver's Hut, on the bank of said river, a few rods below said hut, said white oak tree charred (should be "blazed") on four sides, and on four sides hacked, said tree standing about two rods from said river or thereabouts; and running south 10 degrees west 16 chains to a stake marked B.M.; thence north 80 degrees west 38 chains 80 links; thence north 10 degrees east to the bank of said river; thence along the banks of said river to the first-mentioned boundary; including all privileges of the waters of said river on the front of said lot, containing fifty-four acres, be the same more or less."

It will be observed that this description, which found its way into the commissioners' deed, is something quite independent of , and wholly in addition to, anything that appears in the inquisition, or in the commissioners' registered extract; and for all that appears, the sale made by the commissioners, and the public notice that preceded it, contained nothing of this particular description, but were in the same general terms as the inquisition. They ought to have corresponded with that, according to the act, and it is to be presumed therefore that they did.

This particular description by metes and bounds, it will be seen, agrees exactly with the description of the premises described in the declaration, except that it calls the land 54 acres more or less, whereas in the inquisition the tract is called 60 acres more or less. The plaintiff claims in this action all the land which, he says, this particular description, by metes and bounds, contained in the commissioners' deed will embrace. How such a description came to be imported into the deed given by the commissioners was thus explained at the trial: Mallory, upon whose attainder the land had been forfeited, had fled from the country during the war, and it was known in what part of the United States he was residing. Sheldon, sometime after he had made his purchase (the time for any persons making claim to any of the land returned as forfeited by the inquisition having necessarily elapsed before the sale), went to Mallory, and obtained from him, or from his agent, the lease, or a lease under which he represented himself to have held the tract in question; thus taking an assignment of it to himself, which is indorsed on the back of it, and which is signed by one William Mallory, as agent of Bonajah Mallory.

This is dated 21st May, 1822, and he must have produced this lease to the commissioners of forfeited estates, for they have framed their deed according to it in point of description and it is referred to in their deed as being annexed.

The commissioners no doubt did this from a desire to give to their conveyance greater certainty; and assuming that this must have been the lease which is referred to in such general and vague terms in the inquisition, although there is a discrepancy between the two in the only thing which looks like certainty in the description given in the inquisition, the latter calling the contents of the tract "about 60 acres," and this lease "about 54 acres,"

At the trial this lease was produced by the lessor of the plaintiff, and he claims to hold according to it.

It is an indenture, made the 25th January, 1805, between the Six Nations Indians, residing on the Grand River, in the Province of Upper Canada, by Joseph Brant, principal chief and agent for the said Six Nations, duly authorized in their name and on behalf to execute leases of such parts and parcels of their lands as by the said Joseph Brant shall be thought fit to be leased, of the one part, and Bonajah Mallory, of, &c., of the other part; and it recites that on the 25th day of October, 1784, at the city of Quebec, upon the representation of the said Joseph Brant, in behalf of the Six Nations of Indians, to the late General Haldimand, then governor and commander-in-chief of the Province of Quebec, &c., he, the said commander-in-chief, in consideration of the early attachment to the king's cause manifested by the Mohawk Indians, and of the loss of their settlements which they thereby sustained, by an instrument in writing by him subscribed, with his seal-at-arms annexed,

and since registered in the Secretary's office of the province of Upper Canada, was pleased to grant, appropriate, and assign to them and such others of the Six Nations as wished to settle in that quarter, six miles deep from each side of the Grand River, at the mouth thereof, and extending in that proportion to the head of the said river, to be enjoyed by them and their posterity forever. And this indenture witnesses, that the said Six Nations of Indians, by Joseph Brant, their agent, in consideration of a peppercorn rent, demised to Mallory, his executors, administrators, and assigns, all that certain parcel or tract of land, being part of the above-described territory, granted by the said commander-in-chief to the said Six Nations, beginning, &c., describing the land precisely as in the declaration in this ejectment, and in the commissioners' deed afterwards made, and stating the tract to contain fifty-four acres, more or less; to hold for 999 years, with covenant of the Six Nations Indians, by their agent, for quiet enjoyment. This instrument is signed by "Joseph Brant, agent," and by Mallory, and they both sealed it.

The commissioners' deed and this lease being produced, the chief contest at the trial was about the extent of the tract conveyed by the commissioners. Their deed, adopting the description contained in Brant's lease, professed to the convey about fifty-four or sixty acres; but the plaintiff, by the effect which he desires to give to the description, would make it embrace about four hundred and twenty acres.

All turns on the point of departure, and that depends on what was the position of the white oak tree spoken of in the description by metes and bounds. The tree itself is no longer standing, and all traces of Culver's hit, which was a Culver's hut, which was a mere shanty, have long ago perished. Upon the point where that hut stood, there was a great conflict of evidence; the plaintiffs' witnesses affirming that it had stood about thirty chains higher up the Grand River, than the defendants' witnesses declare it to have stood. The great difference this would make in the description arises from the circumstance of there being a great defendants' witnesses swore Culver's hut stood, the three lines mentioned in the description would inclose a tract of about sixty acres, lying evenly along the south bank of the Grand River, and parallel with it in that part of its course having the east and west ends of the tract of about the same depth. It may been commonly called sixty acres, upon a computation made of the figure as a parallelogram, supposing the points on the water's edge to be connected by a straight line; but probably the area is more correctly stated in Brant's lease at fifty-four acres, upon a computation, which throws out the curve of the river and the land covered with water. If, according to what the plaintiff contends for, the point of departure is taken on that part of the bank of the river where his witnesses described Culver's hut as standing, which is about thirty chains further to the west, then, measuring from thence south 10 degrees west 16 chains, and form thence north 80 degrees, west 38 chains, 80 links, as we are directed by the description, would carry us so much farther to the west that a line drawn from that point on the course given in the description north 10 degrees east, instead of taking us back to the river, as it was evidently supposed it would do, by a line of about the same length as that measured back form the river at the starting point--viz., 16 chains--would on account of the great bend of the river, not touch its bank except by a line produced 140 chains and 85 links.

The large tract of land embraced by the bend of the river, which would be thus included, is claimed, part of it by Indians whose cleared fields were under cultivation at the time Brant made his lease to Mallory, which clearly could never have been intended to interfere with their possessions, and the remainder by other persons to whom the government has granted the and upon sales made by them for the benefit of the Indians, with their concurrence.

The plaintiff, to shew what the description in Brant's lease would cover, called Lewis Burwell, a provincial surveyor, and relied upon a plan or survey made by Mr. Burwell, in which he had delineated the ground as surveyed by him according to the lines and courses in Brant's lease. He swore that he had commenced this survey, in May 1827, at the request of the plaintiff Sheldon, who employed him for that purpose; that knowing nothing of the former position of Culver's, referred to in the lease, and not having before made any survey on the Grand River, he started from a tree, which Sheldon pointed out to him a the one referred to in the lease as standing near where Culver's hut had stood; and as he proceeded in his survey from that point, the Indians, finding he was running his line through their fields, remonstrated, alleging that there were lands which they had always had in their possession, and which Brant could have made no lease of; and he found it necessary to desist. Afterwards, in 1833, he continued his survey at Sheldon's request, and made the plan produced on the trial.

Not long after he had done this, he was requested by some of those with whose possessions the description as contended for by Sheldon would interfere, to survey their property; and the government, before they made grants on behalf of the Indians, as they contemplated doing about that time, also employed him to survey that part of the country, and he then did not adopt the tree as the starting point, which he had before taken as pointed out to him by Sheldon, but he took depositions of persons whom he examined as to the true position of Culver's hut, and among them a son of Culver then living and was perfectly satisfied, as he swore, from the evidence he received, that he had not been misled as to the starting point when he made the survey for Mr. Sheldon; and laying down a tract by the lines and courses in the lease, taking as his point of departure what he ascertained from the old inhabitants to whom he referred to have been the true position of Culver's

hut and the tree referred to as being near it, he found the tract to embrace about the quantity of land mentioned in the lease; and that it would be such a tract as it must have been intending to lay out, though, taking the survey either way, it would interfere with a reservation of land which seems at an early period to have been assigned to, or intended by the Indians for a family by the name of Kerr.

It seems that Brant had agreed with Mallory to construct a wooden bridge over a small stream running into the Grand River near this tract, and was to give him sixty acres of land for the job. He may possibly have had the consent of the Kerr family to interfere with their tract to the limited extent which his lease was meant to cover.

However this may be, the evidence was such as, I must say, left no doubt on my mind that a survey, such as the plaintiff contends for, never could have been such a survey as formed the basis of Brant's lease. The contents of the area which the respective surveys would embrace, do not, to my conviction, shew this more plainly than the courses and distances set down in Brant's lease; for these shew plainly that an actual survey had been made, in order to obtain the proper terms of that description, and that the intention was to lay down a tract along the river, of moderate depth, to embrace about 60 acres, and to present a parallelogram, which should lie along, and correspond with the river in that part. It was evidently found that to lay down such a tract, the rear line would require to be on a course north 80 degrees west, and so laying down a rear line on that course which would range with the general bearing of the river at that part of it, the two ends of the tract might be on the same course, and would be about the same length, and the three lines would embrace an even and convenient figure. A compass must have been used on the occasion--an actual survey must have been made, for a post is referred to in Brant's lease, as planted at the end of the 16 chains, of which no trace can be expected to be found now. But any surveyor, or any person using a compass, if he had started from the point the plaintiff contends for, as the tree mentioned in Brant's lease, and first run south 10 degrees west 16 chains, then north 80 degrees west 38 chains 80 links, must have seen that the course was carrying away form the river, and would not be the proper course at that point (30 chains higher up the river), for embracing a tract of moderate dimensions lying along the river, and bounded by the river in front. He must have seen that to run the rear line on such a course at that part of the bend of the river, and for such a distance, would take him to a point from whence he could not return to the river by the same course as the line bounding the other end of his tract, without going 140 chains instead of 16, and making one end of his tract about nine times as long as the other, and without containing seven times as much land as was meant to be demised; and giving Mallory the exclusive control over one bank of the Grand River for about three miles, instead of 38 chains.

If any such line had been, it would have been made plain at once that it could not answer the purpose intended, and would have crossed fields that Indians were in actual occupation of.

Independently of the legal questions as to what the commissioners' deed could convey, considering that inquisition on which it was founded, and the quantity of land which it expressed--which latter question indeed would apply as well to Brant's lease as to the inquisition--I found the considerations I have mentioned so convincing that I cannot say I had the slightest doubt on my mind that those witnesses must be in the right who described Culver's hut to have stood at such a point as Mr. Burwell assumed on the evidence to be correct when he made his last survey; and not those witnesses who assigned to it a position so utterly inconsistent with what must have been the actual starting point in the survey on which Brant's lease is founded.

I explained my views very fully to the jury, and in such a manner as could have left them under no doubt that I considered what the plaintiff contended for as altogether unreasonable and inadmissible. They were out a long time, and at length came in with a verdict for the plaintiff which seemed to me a very unsound conclusion, from the evidence.

The verdict seems to me so impossible to be reconciled with reason and probability, and so contrary to the weight of evidence, that if no other question arose in the case, we should have no difficulty in granting a new trial, that the case might receive the consideration of another jury upon the merits. There is no ground whatever afforded by the evidence for assuming any intermediate point between that which the plaintiff contends for as the point of departure, and that which the defendant maintains is the true point. It would be acting arbitrarily, and without any regard to evidence, if we were to adopt any point between. The question therefore, is nothing else then whether we are to adopt as correct the description which embraces 420 acres, or that which agrees with the inquisition and the deed, by which 60 acres at the most were understood and intended to be conveyed. There was, no doubt, evidence that, if believed, may be said to support the opinion formed by the jury that Culver’s hut stood in the position which the plaintiff contended for; but the positive and direct evidence to the contrary appears to me much the stronger; and the most material thing is, that when we come to apply to the ground a description framed upon the supposition that the plaintiff’s witnesses are right in the position they assign to the hut—we find the conclusion irresistible that either the memory of those witnesses must have deceived them, or they must be stating what they do not know.

It is plain an actual survey with a compass was made on the ground, in order to lay out and obtain a proper description of the 60 acres intended by Captain Brant to be leased to Mallory, or 54

acres, excluding the river; the lines also I think, it is equally clear, were surveyed, because a post is referred to as having been planted at the end of a line sixteen chains from the river.

No person with compass and chain could possibly have laid out such a tract of 60 acres, starting from where the plaintiff's witnesses say Culver's hut stood, running the courses mentioned in the description contained in Brant's lease, without finding that instead of striking the river at the east end of the tract by a line of about the same length as at the other end, he would have to go nine times as far, and instead of laying out for Mallory 60 acres of land that would interfere with none of the fields and improvements of the Indians, he would be embracing in his description 420 acres, and many fields which they were actually cultivating, and houses in which they lived, which Brant, it is quite certain, never intended to lease, and which Mallory, it is equally certain, would never have been permitted to occupy, and never could have imagined were intended to be leased to him. There was not the slightest evidence that, from 1805, when Mallory received this lease, till 1812 or 1813, when he fled the country, he ever asserted a claim to any such tract of land as such a description would cover. Nor was it proved upon the trial that the lessor of the plaintiff, for very many years after the year 1820, when he bought this lease forfeited by Mallory of supposed he was buying some interest in a lease, even set up a claim to cover by his purchase such a tract as he now claims to, or attempted to molest those who were cultivating it, and living upon it, as they had been for years before his purchase. If he had believed when he paid the 17*l.* 10*s.* that he was bargaining for 420 acres of land, under a deed which expressed the quantity conveyed any such idea, he should have lost no time in advancing such a pretension, if he ever meant to advance it; for the probability is, that there would have been no difficulty then in ascertaining the position of Culver's hut by such evidence as would have proved the matter beyond all doubt. Perhaps some remains of it were still then in existence, or the tree might have been then standing which was referred to as near it. As it is, the evidence leaves no doubt that neither Mallory himself nor the witnesses, who seem to have perplexed themselves and the jury about the position of Culver's hut, ever had an idea the jury about the position of Culver's hut, ever had an idea that Brant had leased to Mallory more than sixty acres.

It would be strange that neither Brant, nor Mallory, nor any of the Indians, seem to have had the slightest notion that Mallory's lines took in 420 acres, and nearly three miles of the winding course of the river, although Culver's hut was there, and could be seen, and there could be no room for doubt at that time from what point the lines were to run.

How it happened, that when there was a conflict of evidence in regard to a matter, which depended upon memory, and which depended on the position of an object which had perished, the jury should have disbelieved that evidence, which on the face of it was probable and attended with no difficulty, and was consistent with the deed, and with the known bargain between Captain Brant and Mallory, and should have adopted that account which it is impossible to reconcile with the intention of the parties, as expressed in the deed, and with their conduct, it is not easy to understand. And one is the more surprised when it is considered how extremely unreasonable the claim set up is, and what confusion and injustice it would create, if it could be established.

But the question upon the description is not the only question in the case. Various legal objections were taken at the trial, and insisted upon; and the lessor of the plaintiff, by setting up a claim which is in its appearance very repugnant to reason, has thrown upon the court the necessity of deciding some legal questions of no small importance, though perhaps they are not such as can be called difficult.

The lessor of the plaintiff claims the land in question under an inquisition, which gives no other description of the estate than by calling it a lease for 999 years of certain other Indian lands on the south-west bank of the Grand River, containing about 60 acres more or less; and under that lease, which is the foundation of his title, he claims 420 acres, because, he contends, the tract which is so obscurely described in the inquisition was no other than that which Mallory had held under a lease from Brant; and he claims to have the benefit of the description of that tract as it stands in the lease. He thus identifies his title with that lease; and there is no doubt, that whatever was held by Mallory under that lease, is what the commissioners supposed they were conveying to the lessor of the plaintiff.

The first objection is, that Mallory held nothing under this lease of Brant's which the law can recognize to be a legal estate or interest, and which could be forfeited by his treason; and we have in effect determined that he did not, by the judgment which was given in this court in Easter Term, 5 Wm. IV., I the case of Doe dem. Jackson v. Wilkes.

In the first place, the Six Nations of Indian took no legal estate under the instrument given by General Sir Frederick Haldimand. He did not own the land in question, and could convey no legal interest by any instrument under *his seal at arms.* Being Governor of Canada, he could have made a grant of Crown lands by letters patent under the great seal of the province, which would have been matter of record; but he could no more grant this large tract on the Grand River, by an instrument under his seal at arms, than he could have alienated the whole of Upper Canada by such an instrument. Such an instrument could pass nothing.

But secondly, if such an instrument had been made under the great seal, in the ordinary and proper manner, it could pass not legal interest for want of a grantee or grantees, properly described

and capable of holding. It grants nothing to any person or persons by name and in their natural capacity. General Haldimand could not have incorporated the Six Nations of Indians, if he had attempted to do it expressly by an instrument under *his seal at arms,* and still less could he do it in such a manner incidentally and indirectly by implication. A grant "to the Mohawk Indians, and such others of the Six Nations as might wish to settle on the Grand River, of a tract of land, to be enjoyed by them and their posterity forever," could not have the effect upon any principle of the law of England of vesting a legal estate in anybody. It could amount to nothing more than what it was well understood and intended to be, a declaration by the government that it would abstain from granting those lands to others, and would reserve them to be occupied by the Indians of the Six Nations. It gave no estate in fee, or for life, or for a term of years, which the Indians could individually or collectively transmit.

Thirdly, if it could have done so, then the ordinary consequence must have followed, that the grantees could only have alienated it by a deed of their own, or a deed executed by some one as their attorney, under a due authority given by them under seal; and if there had been an attorney duly authorized by them, he could only have conveyed their lands by a deed executed in their name, not in his own.

Nothing is shown here to prove any authority delegated to Captain Brant to part with these lands on the Grand River, so that the Indians could be dispossessed by his act of their interest in it, whatever that might be. Nothing whatever is shown but that Joseph Brant chose to put his name and seal, as "Joseph Brant, agent," to an instrument by which he professed to alien 60 acres of the land of the Indians for 999 years. He was, no doubt, a chief among them; but we cannot say that that gave him any right to alternate to individuals whatever portion he pleased of the lands held by the crown for their use, and upon such terms as he pleased. We cannot recognize any peculiar law of real property applying to the Indians—the common law is not part savage and part civilized. The Indians, like other inhabitants of the country, can only convey such lands as they legally hold, and they must convey be deed executed by themselves, or by some person holding proper authority from them under seal, to convey their estate in their name. If the Six Nations had, in 1805, when Brant's lease was made, held a legal estate in all the lands on the Grand River, we could not hold that Captain Brant could divest them of their right to sixty acres of it, by making a deed to Mallory in his own name, without admitting that he could equally at his pleasure have divested them of their whole territory, by leasing it to Mallory for 999 years, as he did this, at a pepper-corn rent. There is nothing here but the mere execution of a deed in a manner that could bind no one but himself, under the assertion of an authority from the Indians, which is in no manner proved.

Where the foundation is so defective it is to little purpose to consider how far it could be admitted to be a good execution of the power to lease, if any had been proved, to alienate for 999 years, at a pepper-corn rent, a tract professing to embrace 60 acres, but which, according to what the lessor of the plaintiff contends for, embraces 420 acres.

It is my opinion quite certain that Mallory was not seized under the deed which is set up here as the foundation of his title of any legal estate whatever, and so that he could forfeit none; in which respect this case stands on the same ground as that of Denn ex dem. Warren v. Fearnside[(a)], in which, as in this case, land had been sold by the commissioners of forfeited estates after the Scotch rebellion of 1715. The statute 1 Geo. I. Ch. 50, had vested those estates in commissioners in the same manner as our statute already referred to, and no claim being made, they had been sold to the defendant. The land had been forfeited as having been in the seizing of one Plessington, an attainted traitor, to whom a lease had been made the year before the rebellion, which lease the court held to be void, because being a lease for three lives, and so a freehold lease, it was made to commence *in futuro.* The lessee nevertheless had entered, and enjoyed under it, and had paid rent. The lease was void also for another reason, that Plessington was a papist, and disabled by statutes 11 & 12 Wm. III. Ch. 4, from holding. The case was very fully argued, and the Court of Common Pleas determined that the lease, being of a freehold and made to commence *in futuro,* was therefore void: Secondly, that Plessington, entering and enjoying the premises under a void lease, was a mere tenant at will: Thirdly, that a tenant at will has no estate that he can forfeit to the crown: Fourthly, that the lease was also void on the ground of Plessington being a papist, (though on that point the court were not unanimous): Fifthly, that the possession of Plessington (the lease being void) was the possession of Warren: so that as the estate was never out of the possession of Warren, there was no occasion to make any claim before the commissioners under the statute 1 Geo. I. Ch. 50.

The learned judge Foster differed from the rest of the court only on the point of the legal consequence of Plessington being a papist; thinking that he might nevertheless take of the benefit of the crown, and forfeit for his treason; but in all the other points the court was unanimous, and it consisted of DeGray, C.J.; Gould, Blackstone, and Nares, J.J.

The case was several times argued, and it is so far stronger than the present against the right of the owner of the estate and in favour of the purchaser from the commissioners of forfeited estates,

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(a) Wils. 176.
(b)

that there the purchaser under the commissioners had entered and enjoyed, and no claim had been made under the statute, and yet he was dispossessed on the ground that the supposed term which had been treated as forfeited was a void term. Here the beneficial owners of the land sought to be recovered have never been dispossessed, but the purchaser of the supposed forfeited term, which turns out to be no term, is now seeking to dispossess them, and not only so, but under a purchase of a supposed lease of 60 acres, is contending for a right of 420 acres.

That consideration brings up other questions, which have also been raised in this case, but which it is obviously not material to go into—if I am right in my opinion that no legal estate in any land was created by Caption Brant's lease, and that Mallory was seized of no interest even in the 60 acres, which he could have forfeited to the crown by his treason.

I refer now to the exceptions taken by the defendant's counsel, that the inquisition, as regards this lease, was so vague and uncertain in its terms, that nothing could vest under it in its terms, that nothing could vest under it in the commissioners—that the provisions of the Forfeited Estates Act, could not operate upon anything so loose and imperfect; that the commissioners could not, by their deeds effectually convey any more or other lands than were returned and described in the inquisition itself, which was the foundation of their title; that the assuming to convey 60 acres by a description which will embrace 420 acres, if the fact be so, and which description not being contained in the inquisition or extract, cannot be taken to have received the consideration of the inquest, was therefore an unauthorized act, which can prejudice no one; and that independently of all other objections, 420 acres of land cannot pass under a deed which professes only to convey 60 acres more or less.

I do not at present see that the plaintiff's claim could be sustained against all these objections; on the contrary, my opinion is, that some, if not all of them, are well founded, and would be fatal at any rate to this case.

Great scope, no doubt, is given to the maxim *id certum est quod certum reddi potest;* but where is the reference in the inquisition to anything by which it can be made certain what was intended? "Another lease for the same term, of certain other Indian lands on the south-west bank of the Grand River, containing about sixty acres more or less:" this is all the description given of what is forfeited.

For anything said in the inquisition, the land might have been fifty miles higher up or lower down the river; anywhere, in short between the mouth and the source. The fact that Mallory did hold a lease of Indian lands which the commissioners, going beyond the inquest, and for all that appears beyond the evidence before the inquest, have annexed to their deed, does not seem to me to authorize them or us to assume that that must have been the lease to which the inquisition refers. If it be true that the description in the lease will embrace 420 acres, instead of 60, that disproves the identity, for the jury returned no such estate at that in the seizing of Mallory. The inquisition makes no mention of any lease by Brant, it speaks only of "*another lease."*

If the inquisition had returned "sixty acres on the north side of the St. Lawrence," without any further description, would that bind any land, of any quantity, which Mallory could be shewn to have been seized of, between Kingston and the eastern limit of the province?

It would seem rather to be a case calling for a writ of *melius inquirendum.*

The forfeited Estates Act (sec. 12) only vests in the commissioners the estates that had been described in the register which must be, and in this case was, a transcript from the inquisition; and that being all that was vested in them they could sell no more; and it would be inconsistent with the intention of the act to afford protection to all parties who might have claims, either through mortgage or otherwise if under an inquisition, and published extracts and notices, all speaking of a tract of about sixty acres, they should find themselves shut out because they did not understand 420 acres to be included, and because they did not make a claim which there was nothing in the inquisition, or extract, or notice of sale, to shew there could be any necessity for making—nothing but a description contained in a paper, which was in the pocket of Mallory when he left the province, and which had never been seen by the jury or the commissioners till after the sale.

For the reasons I have stated, I think the plaintiff wholly failed to support his right to a verdict; and the rule must be made absolute for a nonsuit.

A nonsuit was moved for when the plaintiff closed his case, on the ground that no evidence had been given of the inquisition which it was contended was indispensable. The plaintiff then produced a copy of the registered extract which, it was argued, should be received in the place of the original, which is made evidence of the inquisition by the statute, and this removed that ground of exception; but the defendant's counsel then objected that the inquisition, as shewn by the extract, could not support the conveyance which the commissioners for forfeited estates had assumed to make to the lessor of the plaintiff, for it referred to nothing which could serve to supply proof of identity; and the commissioners were not authorize to go beyond the inquisition. They could not as it was contended, found their deed upon an instrument produced to them for the first time long after the inquisition had been returned, an instrument which the jury had no evidence of, and could not be supposed to refer to in the inquisition; and by adopting that instrument as their guide, extend the effect of the inquisition from 60 to 420 acres, which the lease would cover according to what the lessor of the plaintiff contends for.

I was under the impression at the trial that the objection was insuperable, but desired to reserved it for future consideration, because both parties had come prepared with witnesses on the point of the locality of Culver's hut, and I thought it desirable, as it might tend to put an end to contention about that fact, to have that point investigated.

If it was clearly understood by the parties, as I believe it was, that it was to be open to the defendant to renew his motion for nonsuit *in banc.* on the ground I have last stated, then our opinion is, that the rule for entering a nonsuit should be made absolute.

The exceptions to Mallory's title, to which I have adverted, do not seem to have been moved as grounds for nonsuit, but in our opinion they are insuperable objections to the plaintiff's recovery.

BURNS, J.---Two questions fairly present themselves in this case for decision, either of which, if against the plaintiff must determine against his right to maintain this action.

First: Supposing that Mallory had such an estate in his lands as could be forfeited, then did the commissioners' deed convey any estate to the lessor of the plaintiff in the lands which he seeks to recover this action? This question naturally subdivides itself into the following: 1—Does the inquisition support the conveyance?; 2—is the conveyance larger in its terms than the inquisition?; and 3—if the inquisition does support the conveyance and the conveyance is not wider in terms than the inquisition, then supposing the verdict to be right as to the starting point of the description, will that be sufficient to convey the lands sought to be recovered here, the quantity of land being expressed to be 54 acres more or less, in the deed. The inquisition in this case was taken by virtue of the royal prerogative, but the title of the crown to the lands does not depend upon office found, for by statute 33 Henry VIII., ch. 20, sec. 2, it is enacted that upon attaint of high treason, whether it be by the course of the common law or by statute, the crown shall be deemed and adjudged in actual and real possession without any office or inquisition found; and if the crown had granted the lands in this case without office found, the grant would have been good.

The statute 59 Geo. III., ch. 12, vested the lands of aliens upon inquisition as therein mentioned, and also the estates real and personal of those attained of high treason, in such commissioners as the government should appoint and declares that such estate should be vested in the manner and for the ends and purposes in this act mentioned. Now, though Mallory's lands would have been deemed and adjudged in the possession of the crown without office, the question is whether under this act any other lands than such as were returned upon inquisition became vested in the commissioners. Although the words of the first section are wide enough to embrace all estates whatsoever, yet the 2nd sect. Declares that to the end that all estates of the said traitors may be the better known, described and ascertained, it is enacted that the clerk of the crown shall deliver to the commissioners a certified extract under the seal of the court, of all inquisitions whereby any real or personal estate of any kind whatever has been returned as forfeited by the attainder, &c.; and in these extracts shall be stated the names, additions and late places of abode of the persons attainted, the species of treason of which, and the respective times, places and courts when and where they were so attainted, and also the real estates, chattels real or personal, debts, goods and effects whatsoever, which in the inquisitions are found to be forfeited by such attainder; and these extracts the commissioners are to enter in a book to be kept for that purpose. The 4th sect. gave power to the commissioners to inquire into such estates and to sell the said real estates. The 13th sect. gave the commissioners power to sell the said real and personal estates by auction, &c.; and it was under this authority that the property was sold in this case. I think the whole scope of the act shews that it was only contemplated to vest in the commissioners such estates as should be found by inquisition to be vested in the crown, because not only the past was spoken of, but the future also; and it is quite clear that in future, after the passing of the act, it would only be such estates as should be returned upon inquisition found which would be vested in the commissioners. If this be so, then it appears to me the validity of the inquisition does come in question, because that is absolutely required to sustain the deed. The stat. 2 & 3 Ed. VI. ch. 8, sec. 8, has been held to apply to all inquisitions.(a) No valid grant could be made upon this inquisition, because it does not state of whom the lands were held, and where nothing was found in that respect, it would be the same as stating that the jury were ignorant, and in such case a writ of *melius inquirendum* would be awarded. Then again, the inquisition says the lands were certain other Indian lands which were on the south-west bank of the Grand River, which may be anywhere from the mouth of the river to its source. This certainty gives no information of the locality of the lands; and though it might be sufficient to have awarded a *melius inquirendum,* yet the description itself, if that is to be acted upon, would support any deed for any lands which might be made within a space of perhaps two hundred miles. I must say I think there is a want of certainty in this inquisition which ought to render it insufficient.(b) If the inquisition can be got over, then comes the question—whether the conveyance is not wider than the inquisition? The inquisition finds as forfeited to the crown a certain tract of land containing about sixty acres more or less, on the south-west bank of the Grand River, and the conveyance upon the face of it tells us that the particular description which is set

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(a) Vide Doe v. Redfern. 12 East, 96; also notes Thomas' Coke, 1 vol., 303, 304; 2 vol. 197.
(b)
(c) Raysing's case, dyer, 208.
(d)

forth contains 54 acres more or less, but the plaintiff says that in fact the description contains 420 acres. The inquisition contains no boundaries but professes to declare that Mallory at the time of his attainder was entitled to about 60 acres more or less. As I have before endeavoured to prove, the question is not in truth how much or what quantity of land Mallory had, or which he did forfeit; but how much and what quantity became vested in the commissioners by virtue of the act of Parliament. Without any particular words of description to limit or enlarge the expression *about 60 acres more or less,* I can never imagine that 420 acres are to pass; and therefore when the commissioners became vested with the estate, it was with that only which had been forfeited, viz., about 60 acres. They do not profess to convey even that quantity, for they call it only 54 acres more or less. For reasons which will appear in the sequel, I cannot bring my mind to believe that more than 60 acres ever became vested in the commissioners by means of the inquisition, and consequently they could convey no more; and if their conveyance is, by reason of a false description, made to embrace more than that, the defendant is not to be deprived of his land for that reason, even though the plaintiff's deed may be thereby rendered void for what he might otherwise claim and ought to have. But, suppose the description is correct, that is applying the external proof upon the ground to it, and that it in truth does embrace 420 acres, that in my opinion does not help the plaintiff, because I think no more than the 60 acres were vested in the commissioners. Suppose, however, that all the land which Mallory owned did become vested in the commissioners, and that the inquisition supports the deed, then when the commissioners professed to sell 54 acres more or less, will 420 pass by that deed under a description which would cover 420 acres? If one were selling a lot by its number or name, and misstated the number of acres, or misstated the boundaries of it, that case may be understood without difficulty; but in this case external evidence must be applied before it can be ascertained whether the description embraces only the 54 or the 420 acres. In such latter case I conceive it is very important that we should look at the quantity the parties intended should be conveyed. To understand such a case, we must rightly comprehend what meaning is to be attached to the expression *more or less.* In a very old case, Day v. Finn [(a)] , it was held that ten acres, *five plus five minus,* did not pass 30 acres; and Yelverton held that by the expression should be intended a reasonable quantity more or less, by a quarter of an acre, or two or three at most; and if it were three acres less than ten the lessee must be content with it. In Portman v. Mill [(b)] the agreement was to sell 349 acres by estimation be the same more or less, but on measurement it turned out to be 100 acres less, and Lord Eldon said with respect to the difference, he never could agree that such a clause would cover so large a deficiency in the number of acres as was alleged to exist there. Sir Edward Sugden mentions a case decided in 1825, of Gell v. Watson, where the sale was according to a plan, and, in enumerating the different quantities, the agreement proceeded to say the whole quantity was about 101 acres, 3 roods, and 29 perches. There was a deficiency of 2 acres in two of the closes which were stated to contain together 8 acres, 1 rood, and 4 perches, and the purchaser was held entitled to an abatement in the price. It is unnecessary to express any decided opinion upon the point whether the description contained in the commissioners' deed, supposing the jury to have found correctly, would pass the whole 420 acres, or should be confined to about 54 acres, because I am clearly of opinion that no more than the quantity mentioned in the inquisition, (suppose that be sufficient), can ever be held to have become vested in the commissioners –thought, if Mallory had more lands than those mentioned, They would be vested in the crown; but the commissioners could convey no more than under the act became vested in them; and because I am fully of opinion that the inquisition itself, in respect of the want of the want of certainty of the description of the lands and of whom held, did not sufficiently authorize the commissioners to sell or dispose of any particular lands as belonging to Mallory—that is, certainly not as applicable to be recovered in this action.

The second question which naturally presents itself is whether Mallory had any forfeitable interest in the lands in dispute between these parties. Suppose the description in the commissioners' deed can be held to embrace the land, it appears from the document intended to be a lease, which the lessor of the plaintiff has put in evidence, that the land in question was part of the lands set apart by the General Haldimand for the Six Nations of Indians. The instrument setting apart these lands is referred to in the lease now produced, as bearing date the 20th March, 1795, and as being duly registered in the office of the secretary of the province. It is matter of history, as is well known, that the British Government were originally the proprietors of the land on the Grand River, and that these lands were set apart by General Haldimand, the then governor of the province of Quebec, in order to permit the Mohawk Indians, and others of the Six Nations, who had lost their settlements situated within the American States, in consequence of their adherence to the British standard, to take possession of and to settle upon them, and which they and their posterity were to enjoy forever. The fee simple in the lands was in the first instance vested in the commissioners; and one question is whether the crown has divested itself of that interest, or only permitted the Indians the use and enjoyment of the lands—the crown acting in fact in the light of a parent and guardian for them, as it were, for these tribes. It never can be pretended that these

(a) Owen, 133.
(b) 2 Russ, 571.

Indians while situated within the limits of this province, as a British province at least, were recognized as a separate and independent nation, governed by laws of their own, distinct from the general law of the land, having a right to deal with the soil as they pleased; but they were considered as a distinct race of people, consisting of tribes associated together distinct from the general mass of the inhabitants, it is true, but yet as British subjects, and under the control of and subject to the general law of England. As regards these lands on the Grand River, the Indians had no national existence nor any recognized patriarchal or other form of government or management, so far as we see in any way; the lands, as appears from the document under which the tribes claim title to them, shew that they belonged to the British Government. There seems to have been no trust created in these lands in any person or body of persons for the Indians, neither was it necessary there should be, for it was more natural the crown should be in a situation to protect their interest and treat them as a people under its care, not capable of disposing of their possessions. Although they are distinct tribes as respects their race, yet that gave them no corporate powers or existence; but so far as the lands are concerned, for all we can see, the government intended that all members of the tribe should be upon an equal footing, and each individual should have an interest in the lands to him and his posterity. The government must have considered these people as placed in such a position, and must have intended to have treated them in that light, and consequently never intended to have parted with the proprietorship of the soil. It is quite clear from the instrument signed by General Haldimand, that the government never did more than through the governor of the province permit the Indians the occupation of the lands. This permissive occupation constituted them, as it were, mere tenants at will to the crown; and if that be so, then it follows that they could grant no interest to Mallory such as it is pretended in this case which could be forfeited by reason of his treason, and the plaintiff can have no title through the inquisition. Beside this view of the question there is another, which appears to be beset with insurmountable difficulties. The lease which the plaintiff produces purports to be made between the Six Nations of Indians, residing on the Grand River, by Joseph Brant, principal chief and agent duly authorized in the name of them, the said Six Nations, and in their behalf to execute leases of such parts and parcels of their lands as by the said Joseph Brant shall be thought fit to be leased of the one part, and Mallory of the other part. It is not proved or shown how or in what manner Brant had or could have such authority mentioned; and , supposing the government intended the Indians to have something more in the lands than a permissive occupation of them, it is difficult to conceive that any such authority as here pretended to be exercised amounts to a legal right of disposition. Brant professes to lease the land in dispute for a period of 999 years, and one of the absurdities of the instrument is that it professes that the Six Nations of Indians covenant with Mallory for quiet and peaceable possession. It is a novel thing in our day to see a whole nation enter into a personal covenant for quiet enjoyment of lands, and the surprise with which that novelty strikes the mind is not the less because the parties who entered into such covenant happen to be a body of North American Indians. As before remarked, these tribes cannot be looked upon or treated as corporate bodies, without being created such in some way known to our law; and, so far as we know, there were no means by which Brant could be appointed or have delegated to him the authority of each individual member of the tribe for himself and his posterity, to grant and dispose of the lands as he thought fit to be leased. We read that Abraham and Abimelech entered into a covenant in regard to a well, and the same thing occurs even to the present day, that the chiefs of the nomadic tribes of some parts of the east bind the tribe in respect of their dealings, though the tribe, with other tribes, is under the government of a superior authority. Whether the Indian tribes of this continent acknowledge such absolute authority, and whether it would require to be delegated by a council, I do not know; but, whatever may be the Indian laws or customs in this respect, I take it to be clear that the property in the lands which were confessedly at one time in the crown, must be dealt with and disposed of according to the general law of the country, unless we see that the crown has intended it to be governed by some other law. Most certainly by our law, without something more than a person designating himself an agent, and signing himself as such, a who body of persons could not be bound by the act of one. The government perhaps in transactions with a tribe may recognise the acts of those known to be the principal chiefs as being the acts of the whole body; but that is a very different matter from calling upon a court of justice to give effect to the alienation of lands, which, for all we can see, must be governed by the same rules and laws which regulate the title to all property within our jurisdiction.—No authority is shewn in any way which could warrant Brant disposing on behalf of the Six Nations of these lands by such an instrument as produced in this case. It is very true the Indians are not contesting the validity of the act of their chief; but inasmuch as the plaintiff undertakes to prove them and forfeited them by reason of his treason , the defendant has a right to put the plaintiff to prove a strictly legal title, and forces upon our consideration the question whether in truth Mallory had any legal interest upon which the inquisition can attach. The case of Dunn on the demise of Warren v. Fearnside (*a)*, bears out this position.

Whether the jury have arrived at a sound conclusion in regard to the starting point of the description of the land may well, I think, be doubted; but that, however, was a matter within their province to decide.

Upon the legal right, however, of the lessor of the plaintiff, I feel clear he must fail, and that he never can succeed in this action, or in any action of ejectment founded upon this inquisition and Mallory's title under the instrument produced at this trial.

DRAPER, J., being concerned in this case when at the bar, gave no judgment.