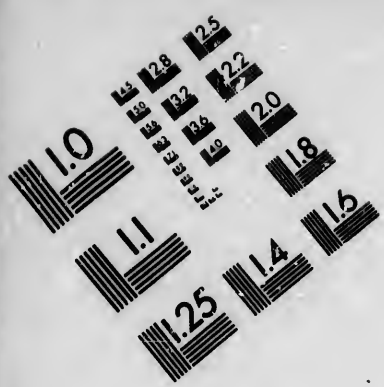


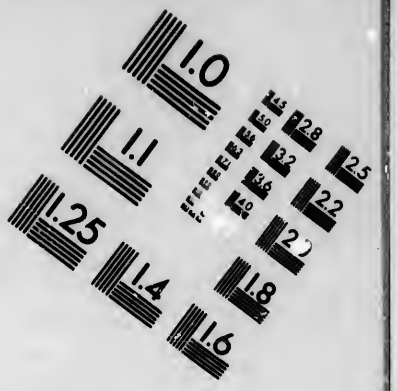
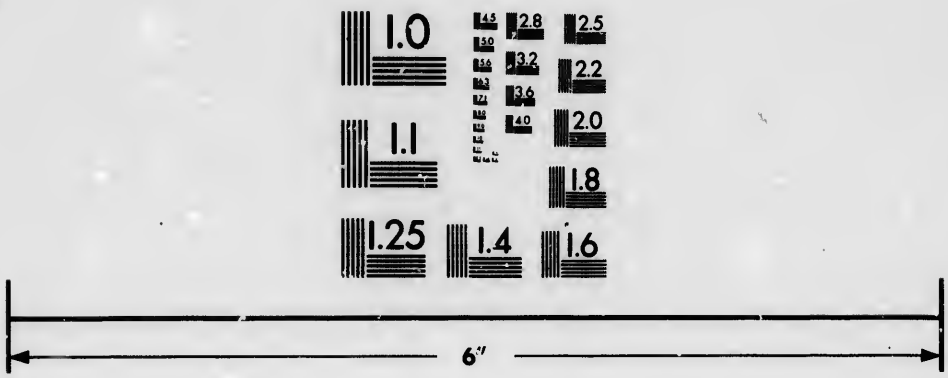
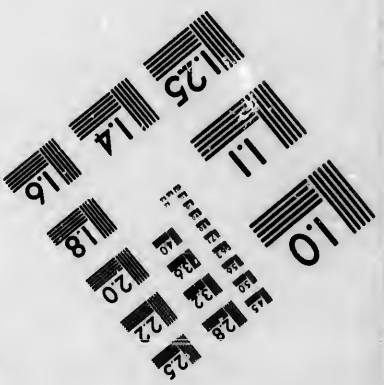


IMAGE EVALUATION TEST TARGET (MT-3)





Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

Technical and Bibliographic Notes/Notes techniques et bibliographiques

The Institute has attempted to obtain the best original copy available for filming. Features of this copy which may be bibliographically unique, which may alter any of the images in the reproduction, or which may significantly change the usual method of filming, are checked below.

L'Institut a microfilmé le meilleur exemplaire qu'il lui a été possible de se procurer. Les détails de cet exemplaire qui sont peut-être uniques du point de vue bibliographique, qui peuvent modifier une image reproduite, ou qui peuvent exiger une modification dans la méthode normale de filmage sont indiqués ci-dessous.

- ☐ Coloured covers/ Couverture de couleur
- ☐ Covers damaged/ Couverture endommagée
- ☐ Covers restored and/or laminated/ Couverture restaurée et/ou pelliculée
- ☐ Cover title missing/ Le titre de couverture manque
- ☐ Coloured maps/ Cartes géographiques en couleur
- ☐ Coloured ink (i.e. other than blue or black)/ Encre de couleur (i.e. autre que bleue ou noire)
- ☐ Coloured plates and/or illustrations/ Planches et/ou illustrations en couleur
- ☐ Bound with other material/ Relié avec d'autres documents
- ☐ Tight binding may cause shadows or distortion along interior margin/ La reliure serrée peut causer de l'ombre ou de la distorsion le long de la marge intérieure
- ☐ Blank leaves added during restoration may appear within the text. Whenever possible, these have been omitted from filming/ Il se peut que certaines pages blanches ajoutées lors d'une restauration apparaissent dans le texte, mais, lorsque cela était possible, ces pages n'ont pas été filmées.

- ☐ Coloured pages/ Pages de couleur
- ☐ Pages damaged/ Pages endommagées
- ☐ Pages restored and/or laminated/ Pages restaurées et/ou pelliculées
- ☑ Pages discoloured, stained or foxed/ Pages décolorées, tachetées ou piquées
- ☐ Pages detached/ Pages détachées
- ☑ Showthrough/ Transparence
- ☑ Quality of print varies/ Qualité inégale de l'impression
- ☐ Includes supplementary material/ Comprend du matériel supplémentaire
- ☐ Only edition available/ Seule édition disponible
- ☐ Pages wholly or partially obscured by errata slips, tissues, etc., have been refilmed to ensure the best possible image/ Les pages totalement ou partiellement obscurcies par un feuillet d'errata, une pelure, etc., ont été filmées à nouveau de façon à obtenir la meilleure image possible.

☑ Additional comments:/ Commentaires supplémentaires: Docket title page is bound in as last page in book but filmed as first page on fiche.

This item is filmed at the reduction ratio checked below/
Ce document est filmé au taux de réduction indiqué ci-dessous.

10X	14X	18X	22X	26X	30X
				✓	

12X	16X	20X	24X	28X	32X

The copy filmed here has been reproduced thanks to the generosity of:

Bibliothèque nationale du Québec

The images appearing here are the best quality possible considering the condition and legibility of the original copy and in keeping with the filming contract specifications.

Original copies in printed paper covers are filmed beginning with the front cover and ending on the last page with a printed or illustrated impression, or the back cover when appropriate. All other original copies are filmed beginning on the first page with a printed or illustrated impression, and ending on the last page with a printed or illustrated impression.

The last recorded frame on each microfiche shall contain the symbol → (meaning "CONTINUED"), or the symbol ▽ (meaning "END"), whichever applies.

Maps, plates, charts, etc., may be filmed at different reduction ratios. Those too large to be entirely included in one exposure are filmed beginning in the upper left hand corner, left to right and top to bottom, as many frames as required. The following diagrams illustrate the method:

L'exemplaire filmé fut reproduit grâce à la générosité de:

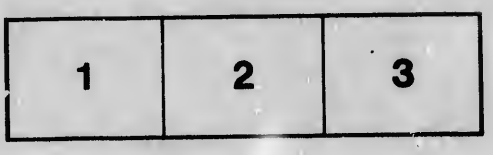
Bibliothèque nationale du Québec

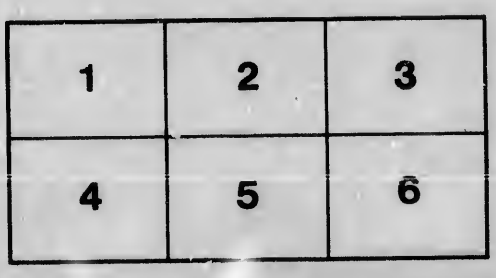
Les images suivantes ont été reproduites avec le plus grand soin, compte tenu de la condition et de la netteté de l'exemplaire filmé, et en conformité avec les conditions du contrat de filmage.

Les exemplaires originaux dont la couverture en papier est imprimée sont filmés en commençant par le premier plat et en terminant soit par la dernière page qui comporte une empreinte d'impression ou d'illustration, soit par le second plat, selon le cas. Tous les autres exemplaires originaux sont filmés en commençant par la première page qui comporte une empreinte d'impression ou d'illustration et en terminant par la dernière page qui comporte une telle empreinte.

Un des symboles suivants apparaîtra sur la dernière image de chaque microfiche, selon le cas: le symbole → signifie "A SUIVRE", le symbole ▽ signifie "FIN".

Les cartes, planches, tableaux, etc., peuvent être filmés à des taux de réduction différents. Lorsque le document est trop grand pour être reproduit en un seul cliché, il est filmé à partir de l'angle supérieur gauche, de gauche à droite, et de haut en bas, en prenant le nombre d'images nécessaire. Les diagrammes suivants illustrent la méthode.





COURT OF APPEALS.

JAMES BURNS,

Appellant,

and

GEORGE BURREL,

Respondent.

The Appellant's Case.

A. STUART,
for Appellant.

COURT OF APPEALS.

JAMES BURNS,

PROVINCE OF LOWER CANADA, } **COURT OF APPEALS.**

IN A CAUSE, between

JAMES BURNS,
(Plaintiff in the Court below,)

Appellant,

AND

GEORGE BURREL,
(Defendant in the Court below,)

Respondent.

THE APPELLANT'S CASE.

THIS was an Action brought by the Appellant against the Respondent in the Court of King's Bench for the District of Quebec, for the recovery of a sum of £90, due for the use and occupation by the Respondent of a house of the Appellant situate in the Upper Town of Quebec.

The action in its form was a general action of indebitatus assumpsit.

The Respondent pleaded, first, the general issue.

Secondly,—A plea of peremptory exception, in which he expressly admits that he did occupy, possess and enjoy the premises mentioned and described in the Appellant's declaration, but says that he ought not to be compelled to pay for that use and occupation, because he held the said premises under a lease, by virtue of which he became entitled to the use as well of the said premises as of other premises specified in the said lease, of which said other premises the Appellant had not put him in possession.

With this plea of peremptory exception the Respondent filed an incidental demand, wherein he recites a certain lease by John Grave's, the Appellant's attorney, unto him the Respondent, as well of the premises mentioned in the Appellant's declaration, as of another house built of stone situate in Angel street and the bake-house in the rear of the said house, and avers that he the Respondent subsequently to the execution of the said lease, did lease and demise unto one John Parker part of the aforesaid premises—that the said Appellant had not caused the said Respondent to have and to hold the said house built of stone in Angel street and the bake-house in the rear thereof. And that he the Respondent had in consequence been prevented from carrying on his trade and business of a confectioner and had been exposed to an action of damages on the part of the said Robert Parker, for not putting him the said Robert Parker into possession of the premises by him the said Respondent, demised and leased unto him the said Robert Parker. The Respondent concludes for the moderate sum of £500 damages.

This incidental demand was filed on the 10th day of October 1816.

By the rules of practice of the Court below it is provided, "That the "rules and orders, hereby prescribed, with respect to pleadings upon *demandes* in chief, and each and every of them, shall, in all things, apply to, and "be, the rules and orders of this Court, with respect to all pleadings upon incidental cross *demandes*, upon which pleadings are by law required."—Rules of Practice, sect. 7, §. 43.

And also, "That every incidental-cross-*demande* shall be deemed and "taken to be a distinct action, and shall not be permitted, in any respect, to "delay the proceedings of the Plaintiff or Plaintiffs, in any case, in which any "such incidental-cross-*demande* shall be instituted; it being nevertheless here-"by provided, that nothing in this rule shall extend, or be construed to extend, "to any matter of *reconvention*, or *compensation* which shall amount to, and "be pleade as a *défense* to the *demande* in chief."—Ib. sect. 7. §. 39.

The letter and the spirit of the Rules of practice go to keep separate the principal and the cross-demand, and to give to the incidental defendant the same delays, which he would have had, if the incidental demand had been brought as a demand in chief. The rule to plead therefore to this incidental demand, expired only in vacation and before the Appellant could have been shut out from his wright to plead, a demand of a plea must have been served upon him.—See Rules & Orders, sect. 7. §. 8. & §. 28.

The Respondent however, without previous notice to the Appellant, obtained, on the nineteenth of the same month of October, a rule to proceed *ex parte* on the incidental demand. This proceding came to the knowledge of the Appellant in the subsequent vacation, and on the very first day of the ensuing term, the Appellant pointed out this irregularity, and moved that the rule to proceed ex parte might be set aside. The Court below, on the fifth of the month of February, discharged the Appellant's rule. The order of the Court of the 19th October and that of the 5th February following, are the first and second Judgments appealed from.

The Appellant immediately moved to discharge the rule to proceed ex parte upon payment and costs, filing pleas instanter and taking short notice of trial. The parties were heard and twice reheard upon this rule, and it was only on the 19th of April following that the Court below pronounced its Judgment discharging the rule with costs. This is the third Judgment appealed from.

The Respondent having thus excluded the Appellant from the cause, proceeded, on the 10th of May 1816, to the adduction of evidence. He examined Thomas Majoribauks, David Robertson, Pierre Langlois & Pierre Allard.

No continuance of the enquête was asked or ordered. By the rules of the Court below and by the practice of the Courts of every civilized country, he could not be admitted to offer any further testimony.—See Rules & Orders, sect. 8. §. 8. & 9.

Yet finding that he had not made out his case, he, on the 12th of June following, produced and examined another witness. Feeling still that his evidence was not sufficient, he, on the 19th of June, without having obtained any further continuance of the enquête, produced and examined two other witnesses, and filed a great variety of documents.

With the aid of these irregular proceedings, the Respondent obtained, on the 13 October 1817, a Judgment condemning the Appellant to pay the enormous sum of £250.—From this Judgment also the Appellant appealed.

On the part of the Appellant it is contended, 1. That the rule to proceed ex parte, of the 19th October, was obtained prematurely and contrary to the letter and spirit of the general rules and orders of the Court.

2. That if this were otherwise, that rule ought to have been discharged upon the Appellant's offer to pay costs, plead instanter and take short notice of trial.—Courts are unwilling to adjudge upon the rights of parties, without first hearing them, and wherever they can without delaying the Plaintiff give to the Defendant the opportunity of being heard and cross-examining the Plaintiff's witnesses, this opportunity is afforded.

In the English Courts, notwithstanding the extreme strictness which prevails in their proceedings, the rule to proceed ex parte, is uniformly discharged upon the Defendant offering the terms, which were in this instance offered by the present Appellant.

3dly. The evidence, as well parole as written produced and filed by the Respondent in the Court below, subsequently to the day upon which the Respondent entered upon his enquête, was received contrary to the letter and spirit of the general rules and orders of the Court.

4thly. There is no sufficient evidence in the cause to warrant the finding of the Court, for so large a sum as that awarded to the Respondent, by the final Judgment in the cause.

QUEBEC, 12 January, 1819.