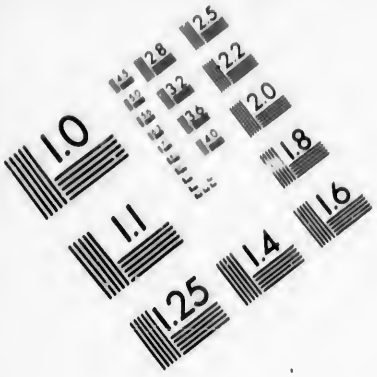

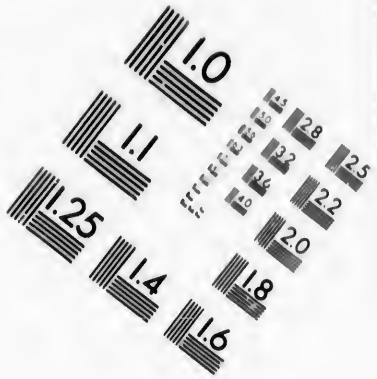

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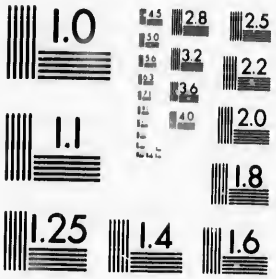

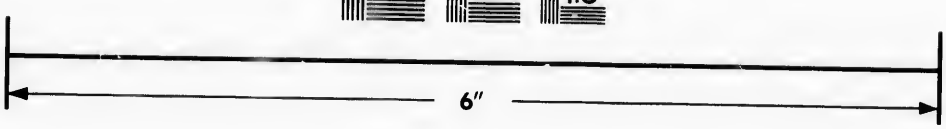

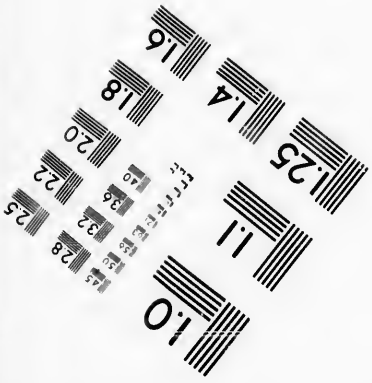

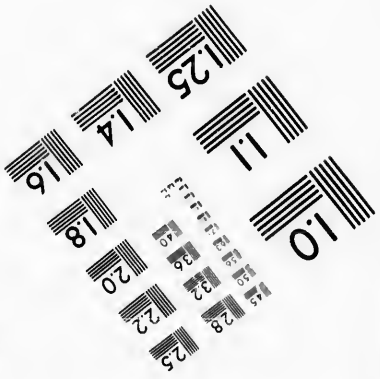

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Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Forget v. *Ostigny, from the Court of Queen's Bench for Lower Canada, Province of Quebec; delivered 30th March* 1895.

Present:

The Lord Chancellor.
Lord Watson.
Lord Hobhouse.
Lord Macnaghten.
Lord Shand.
Lord Davey.
Sir Richard Couch.

[*Delivered by the Lord Chancellor.*]

The Appellant is a member of the Montreal Stock Exchange. The action which has given rise to this appeal was brought to recover a sum of $1,926. 87, the balance alleged to be due from the Respondent in respect of certain contracts entered into by the Appellant on his behalf and by his directions for the purchase and sale of shares in various Joint Stock Companies. The Respondent pleaded first:—that the claim was prescribed by lapse of time, and secondly:—that the transactions which gave rise to it were gambling transactions on the rise and fall of shares and that therefore the action could not be maintained.

In view of this latter defence it is necessary to state the facts with some particularity. The

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transactions between the parties commenced with the purchase by the Appellant in December 1882 of 25 shares of the Montreal Street Railway Company. Additional shares were subsequently purchased in the same undertaking. Purchases were also made of the shares of other Companies. The price paid for the shares purchased was debited to the Respondent by the Appellant with ¼ per cent. commission added. The shares so purchased were sold from time to time and the proceeds were credited to the Respondent less a commission of ¼ per cent.

It is not in dispute that all these transactions were entered into at the instance and on behalf of the Respondent. When a purchase of shares was to be made he furnished the Appellant with a small portion of the purchase money which would be required: thus in the case of the first transaction to which allusion has been made he paid $62. 50. In every case delivery of the shares was obtained by the Appellant from the member of the Stock Exchange from whom he purchased and the shares were duly paid for. The money necessary for this purpose beyond that supplied by the Respondent was raised by the Appellant by means of loans from a Bank, the shares serving as security. The loans needed for the Respondent's transactions were not always raised specifically upon the shares purchased for him. The Appellant acted as broker for many clients, and the advances which were required for the purpose of completing contracts entered into on their behalf were raised by hypothecating to a Bank their several securities and obtaining the advance of a lump sum.

When the shares purchased for the Respondent were sold they were redeemed from the Bank and delivered to the purchaser. In respect of the advances obtained from the Bank, the Appellant charged the Respondent 1 per cent. more

than the interest for which he had made himself liable to the Bank. If between the time of the purchase and that of the sale of particular shares dividends were paid upon them these dividends were credited to the Respondent.

It should be added, as reliance is placed upon the fact, that the Respondent was a bank clerk with a salary of $900 to $1,000 a year.

It is conceded that the only law prevailing in Canada upon which the Respondent can rely for the purpose of establishing that the Appellant is not entitled to recover the sum claimed is Article 1927 of the Civil Code of Lower Canada. It is in these terms:—

"There is no right of action for the recovery "of money or any other thing claimed under a "gaming contract or a bet."

In order therefore to sustain his defence it was incumbent on the Respondent to shew that the money sought to be recovered was claimed under a gaming contract or a bet. The learned Judge who tried the case, and on appeal the Court of Queen's Bench for Lower Canada (Hall J. dissenting), thought he had made this out—hence the present appeal.

The defence turning upon the question whether the claim is founded upon a gaming contract it is essential to ascertain the exact nature of the obligation relied on by the Appellant. Unless there was a gaming contract between the parties to this action so that the Appellant in order to make good his claim must rely on such a contract the defence obviously fails.

What then was the nature of the contract between these parties?

The Appellant was employed by the Respondent as his mandatary or agent to make certain contracts of purchase and sale on his behalf. The contracts made, which were unquestionably within the authority given by the Respondent,

were certainly not gaming contracts as between the parties to them. They were real transactions, the shares purchased and sold were in every case delivered and the price of them paid or received as the case might be. All this is not in dispute. The Appellant having entered into these contracts as agent for the Respondent the latter was *primâ facie* bound to indemnify the former against any liability incurred in respect of them. He was on the other hand exclusively entitled to the benefit of them. If the shares purchased increased in value the result was a gain to the Respondent and did not involve any loss to the Appellant. If on the other hand the shares decreased in value while the Respondent sustained a loss no gain resulted to the Appellant. In neither contingency therefore did the Respondent's gain involve a loss to the Appellant. His remuneration was in any event a fixed commission of ¼ per cent. It would be of course an abuse of language to apply the term "bet" to such a transaction. Their Lordships cannot think that it is any more legitimate to speak of it as a gaming contract between the Appellant and the Respondent.

In the Courts below much stress was laid on the fact that the Respondent was known to the Appellant to be a bank clerk with a small salary and possessed of little other means. This was regarded as bringing home to him the knowledge that the Respondent had in view not investment but gambling. The other circumstances mainly relied on were that the Respondent never asked for nor received delivery of any of the shares purchased; that the purchase money was raised by a loan procured by the Appellant; that the Respondent was not in a position to furnish the whole of the purchase money and in fact only provided the Appellant with a small margin.