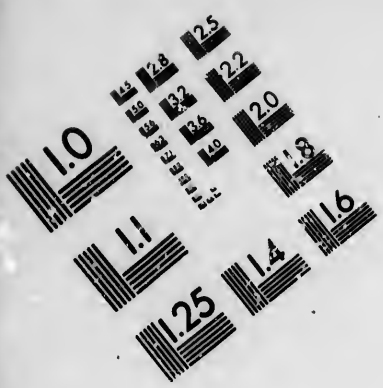

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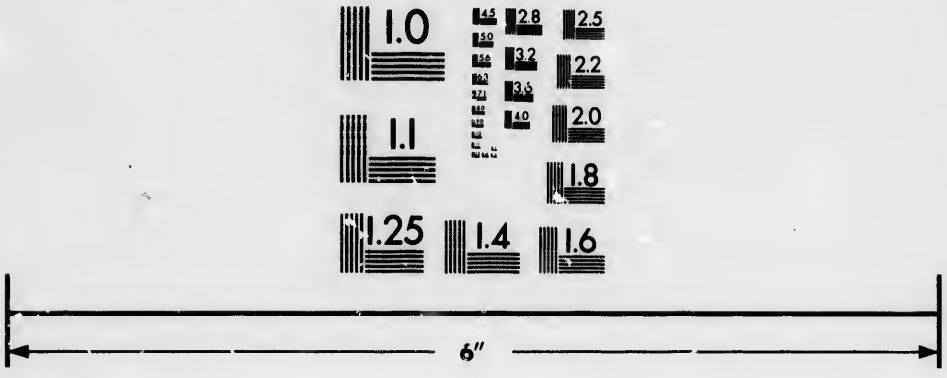

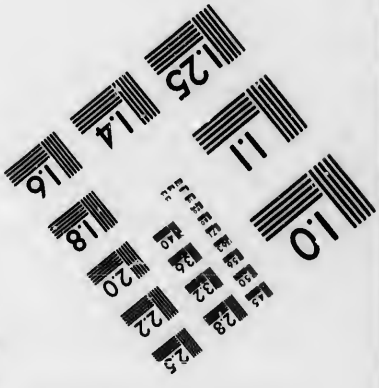

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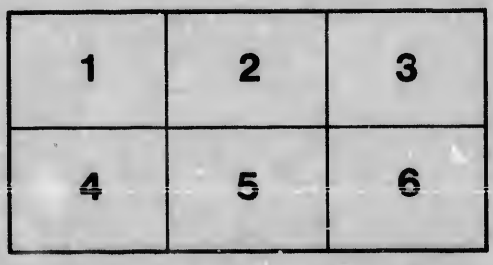

PROVINCE OF LOWER CANADA.

IN APPEAL.

WILLIAM BURNS, Esq.
Appellant.

AND

MOSES HART,
Respondent.

THE APPELLANT'S CASE.

PROVINCE OF LOWER CANADA.

Court of Appeals.

In a Cause—between

WILLIAM BURNS, Esquire,
(Defendant in the Court below,)
APPELLANT,

AND

MOSES HART,
(Plaintiff in the Court below,)
RESPONDENT.

APPELLANT's CASE.

THE declaration states that the Respondent, on the seventh day of June, 1809, purchased from the Appellant at a public Auction the Brigantine Star, at and for the sum and price of £215. That the Appellant had no legal authority to sell the said vessel: that the Respondent afterwards, to wit, on the 12th July, 1809, offered to abandon said vessel to Appellant:—

That she remained upon his, the said Respondent's hands, until the 20th February, 1810:—

That there was due to him for the *care* he took of the said ship the sum of £48:—

That the damages which he suffered by reason of the repairs which he made, &c. &c. amounted to £170 16 8:—

The Defendant pleaded a *Defense au fonds en Droit*, and a *Defense au fonds en fait.*

The Replications are general.

The Court below over-ruled the *Defense au fonds en droit*, and ordered *preuve respective.*

It appears by the evidence in the Cause that on the 17th June, 1809, the Appellant adjudged to the Respondent as the last and highest bidder, the Brigantine Star for the price of £215: That the Defendant took possession of the Vessel, and subsequently promised to pay the purchase money. The Appellant engaged to deliver up the Register on the Monday following the sale, which he was ready to do, but the Defendant did not call to receive it.

It does not appear that the Appellant entered into any other obligations.

The Respondent pretending not to be satisfied with the title protested against the Appellant but retained possession of the Vessel till the spring of 1810. The Respondent appears to have expended a sum of about £50 in repairing the Vessel; but, in consequence of the negligence and improper manner in which she was laid up for the winter by the Respondent, she sustained injuries which diminished her value £100 and upwards.

The parties having been heard the Court below pronounced the following judgment—

"The Court having examined and considered the pleadings by which "the issue hath been raised and perfected upon the *Defense au fonds en fait* "in this cause fyled the evidence adduced and heard the parties by their "respective counsel, doth adjudge and condemn the Defendant to pay to "the Plaintiff the sum of sixty-three pounds and ten pence, currency, for "the causes stated and set forth in the Plaintiff's declaration, with interest "thereon from the twenty-fourth day of September last, the day of the "service of the writ and declaration in this cause upon the Defendant "until perfect payment and costs."

The

The Appellant's objections to this judgment are

I. That by law the contract of sale upon which the Respondent's action is founded was a mere nullity, and that therefore no action of damages lay for the breach of it.

The 26. G. III. c. 60, s. 17, enacts, "that when and so often as the "property in any ship or vessel, belonging to any of His Majesty's "subjects, shall be *transferred* to any other or others of His Majesty's "subjects, in whole or in part, the certificate of the Registry of such "ship or vessel shall be truly and accurately recited, in words at length, "in the bill or other instrument of sale thereof, and that otherwise such "bill of sale shall be utterly null and void to all intents and purposes."

Not long after the passing of this Statute it was decided that a bill of sale, not containing a recital of the certificate of registry, was absolutely void; although the grand bill of sale was delivered at the time of the transaction, and the person to whom the transfer was made took possession of the Ship as soon as she returned to England.—*Rolleston & al. vs. Hibbert & al.* 3. *T. R.* 406.

The 34 Geo. III. c. 68. s. 14. to remove doubts which had arisen upon the construction of the 26 of the King, enacts "That no transfer, "*contract or agreement for transfer*, of property, in any ship or vessel, "made or intended to be made after the first day of January, 1795, "shall be valid or effectual for any purpose whatsover, either in law or "equity, unless such transfer, contract or agreement for transfer, of "property in such ship or vessel, shall be made by bill of sale, or in-"strument, *in writing*, containing such recital as prescribed by that "clause."

Whether the transaction between the parties in the present cause is to be considered as a sale, or as an agreement to sell, the result is the same; it is "not valid or effectual for any purpose whatsoever either in law or "equity," not having been made "by bill of sale or instrument in writing" containing the recital prescribed by the 26 Geo III.

But it has been said that the sale of the Ship in question by the Appellant without power to give a title was a fraud, and that therefore the Court might award damages—In answer to this it is to be observed—

1. That the evidence in the cause proves that the Appellant acted with the utmost good faith.

2. That the allegations of the declaration amount only to an averment of a breach of contract.

3. That if a mere breach of contract is sufficient to take a case out of the Statute, the Statute is rendered nugatory, because if this were law, the same remedy would exist upon a breach of this ineffectual and invalid agreement as upon the breach of a valid and effectual one—to wit, an action of damages.

4. That even in the case of a wilful and fraudulent refusal to complete the title by the indorsement on the certificate required by these acts, where all the other formalities have been observed, it is extremely doubtful and is yet undecided, whether the High Court of Chancery itself, can afford relief.—11 *Ves. Jr.* 621. *& seq.*

The analogous Statutes of the English Law are—the Statute of frauds—and the annuity acts—in the French Law the Ordinance of Donations.

Under these Statutes it was never argued that the mere breach of the Contract was a fraud which entitled the party to have the Contract considered as valid.

The construction given to the registry acts has not been restrictive; on the contrary, it has been declared by high authority that– "If Judges "could have any leaning in their minds on such occasions they would "not have any inclination to put such a construction on the words of "this act as would tend to evade the wholesome provisions of it." *Ld. Kenyon*, 3. *T. R.* 412.

The

The same doctrine was held by Lord Thurlow (11 *Ves. Jr.* 625) and by the present master of the Rolls, Sir Wm. Grant (11 *Ves. Jr.* 642).

It has been said, that this was a case of great hardship upon the Respondent. If this were true it might be answered that "the doctrine of "hardship is not a favorable subject in a Court of law, in any case; still "less so when Judges are called upon to judge according to the words "and spirit of an act of Parliament. The words of the Statute are so "plain and so decisive that it is impossible to get over them."——*Buller, J.* 3. *T. R. p.* 414. But in truth this is not one of those "cases that have arisen upon the coustruction of this act of Parliament that are calculated to distress the feelings of the Court."

For, II. The claim of the Respondent is as unfounded in equity as in law.

1. The Respondent, aware of the invalidity of the sale, kept the vessel for some time and attempted to sell her, thereby to speculate at the Appellant's risque. It was only after he had failed in his attempts to effect an advantageous sale that he began to consider how he could get rid of the bargain altogether. The first idea that struck him is a curious one and exhibits the honor and probity of the Respondent in a very respectable view.—It is mentioned in the testimony of Mr. Aylwin, when an action is instituted against him he denies the existence of the contract; under cover of the registry Acts he effects his retreat: And he now unblushingly asks damages for the non-performance of that contract, the nullity of which he in the former suit averred, and the very existence of which he denied.

2. The Respondent asks the reimbursement of expences incurred in repairs, and a renumeration for his care and trouble, when by his own neglect and want of care the vessel was depreciated from £215 to £100 whilst she remained in his possession.

Is it not obvious that so far from having an action for the recovery of these expences he was and still is liable to an action of damages for his misconduct?

The reasons of Appeal assigned by the Appellant are,

1. The general reason.

2. That the Court below overruled the Appellant's demurrer, whereas the same ought to have been maintained.

3. That the 34th of the King requires agreements of transfers of Ships to be in writing and because the pretended agreement of transfer on which the Respondent's action is founded was by parol.

4. That the pretended contract or agreement for the alledged non-performance of which the Court below hath awarded damages against the said Appellant was by the law of the land utterly null and void to all intents and purposes—and that by law damages cannot be awarded for the non-performance of a contract or agreement which is utterly null and void to all intents and purposes.

5. That the said Respondent so negligently kept the said Vessel whilst she was in his possession, that when the said vessel was returned to the said Appellant she was of less value than at the time the said Respondent entered into possession of her; and that the said Appellant could under no circumstances be by law compelled to pay the said Respondent for repairs which the negligence of the said Respondent had made of no value to the said Appellant.

6. That the action of the said Respondent is unfounded in law and in equity.

Quebec, 18th July, 1812.