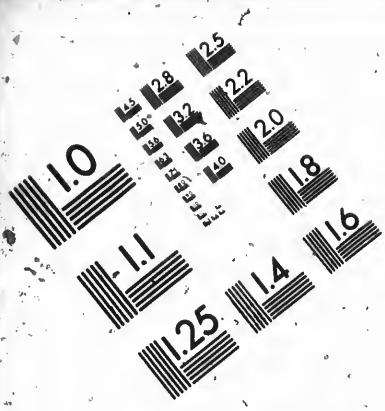

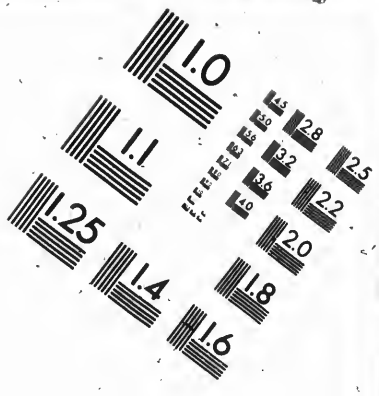

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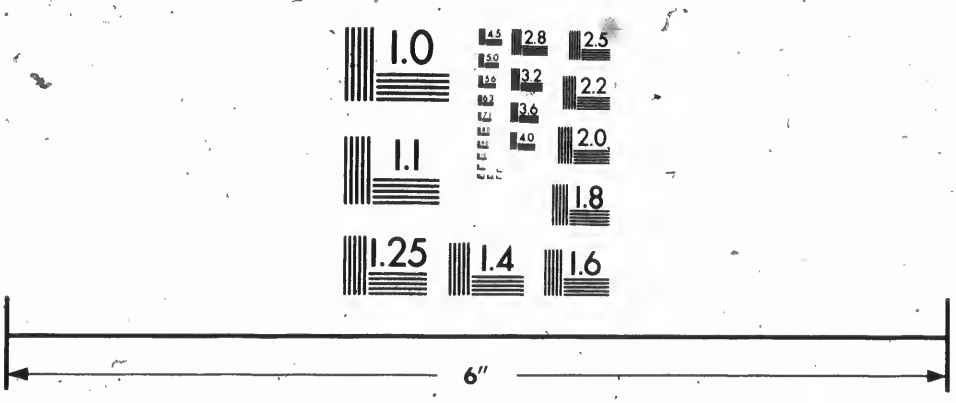

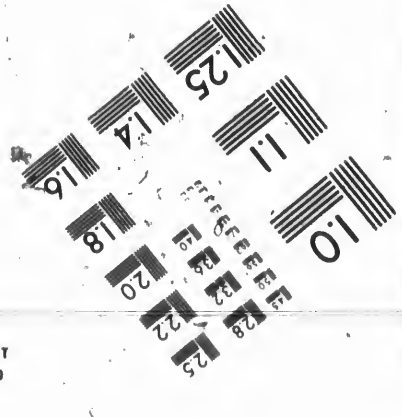

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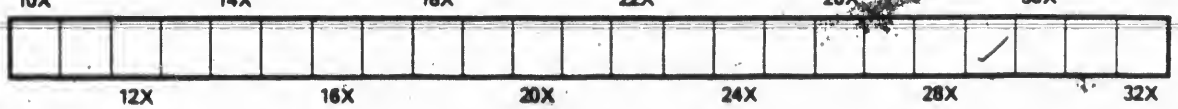

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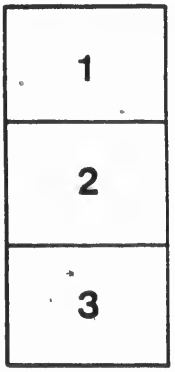

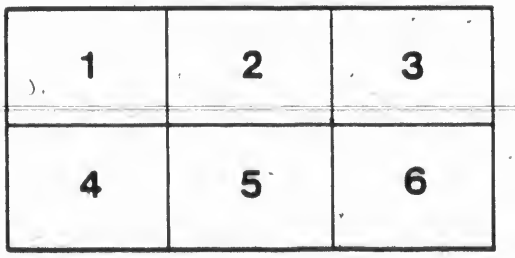

PROVINCE OF CANADA, } District of Montreal. }

IN THE QUEEN'S BENCH.

In Appeal from [illegible] Court, Montreal.

WILLIAM HENDERSON,

(Defendant in the Court below),

Appellant;

and

GEORGE MILLS BRADFORD,

(Plaintiff in the Court below),

Respondent.

RESPONDENT'S CASE.

The [illegible] (Defendant below) to pay to the Respondent £[illegible], [illegible] in January, 1853—under a [illegible] of a [illegible] to the Appellant, [illegible] George Bradford [illegible], Respondent's [illegible], of [illegible] the 2[illegible], 18[illegible]; the Respondent being in the rights of his father, by Notarial transfer and assignment, of the 1[illegible] April, 1849.

The [illegible] Declaration [illegible] Deed of Bargain and Sale of the tract of land in question, which is described [illegible] follows:

"A certain tract or parcel of land [illegible] in the Township of Chatham, and being parts "of lots [illegible] two in the [illegible] of the said Township of Chatham, butted and bounded as follows, to wit: [illegible] in front by [illegible] Davis; in rear by "John [illegible] joining on the [illegible] of the Seigniory of Argenteuil; and on the "West side to the Vendor and Charles Bradford; including all the land belonging to the "Vendor, in the said [illegible] one and two [illegible] of River du Nord, and including said "River, with all and every the [illegible] thereto belonging." Also, the clause of the said Deed as to the payment of the price, which is in the following terms: "The "present bargain and sale is made in manner as aforesaid, subject to such clauses, conditions "and stipulations as are set forth and contained in the Letters Patent of the said Township, "and for and in consideration of the price and sum of one pound [illegible], for "each and every superficial [illegible] in the tract of land [illegible] sold, "the said tract of land to be surveyed, and the quantity [illegible] by [illegible] sworn Surveyor, "at the request, [illegible] and expense of the said Vendor, within [illegible] of the date hereof, "in order [illegible] of purchase money, which [illegible] "hereby [illegible] himself, [illegible] to pay [illegible] to be paid to the Vendor "or order, or [illegible] as follows: £30 currency on the 1st January now next "coming, and the [illegible] by yearly instalments of £20 same currency each; the first instal-"ment to become due and payable in the month of January, 1848, and [illegible] to pay "a like sum of £20, each [illegible] year, at the same time, until actual payment of the "whole amount of said purchase money, the whole without interest, and [illegible] "and hypothecation of the above [illegible] tract of land and premises."

The [illegible] then sets forth, that the Plaintiff had caused the land to be surveyed on the 1st October, 18[illegible], by Donald [illegible], sworn Land Surveyor, in order to ascertain the quantity of land, and that it was found to contain 127[illegible] acres, as per [illegible]'s *procès verbal* filed, (Plaintiff's Exhibit No. [illegible]) amounting, at the rate mentioned per acre, to £1[illegible]8 [illegible]. 3d. Cy.;—that on the 8th February, 18[illegible], the Plaintiff caused another survey to be made by Alexander McDonald, also sworn Land Surveyor, as per his *procès verbal* of [illegible], (Plaintiff's Exhibit No. 4,) and that on the 8th January, 1853, the Plaintiff caused a Notarial Copy

of the Deed of Sale or transfer from his father and of Sinclair's *procès verbal* of survey, to be served upon the Defendant, with a demand of payment of the sum of £60, being the amount of the three instalments of £20 each, the last of which became due on the 1st January, 1859, and were unpaid, for which sum of £60 the Plaintiff prayed judgment.

To this Action the Defendant pleaded *four* Pleas:—

1. A *defense en fait.*

2. That by an after *Acte* between the Plaintiff's father and the Defendant, before the same Notaries, of the 27th December, 1847, it was declared that the tract of land as designated in the Deed of Bargain and Sale had not been correctly described, and that the true designation and description thereof should be as follows:—"A certain tract or parcel of land situate in "the said Township of Chatham, and being parts of lots numbers 1 and 2 in the 5th range "of the said Township of Chatham, butted and bounded as follows, to wit: bounded in front "by Moses Davis, Esquire, in rear *by a line at right angles, dividing the said tract from the* "*land of John Earl on number one*, joining on the East side to the line of the Seigniory of "Argenteuil, and on the West side by land belonging to the vendor and Charles Bradford, "including all the land belonging to the vendor on the South side of the said North River, "from the front up to the said right angle line, dividing him from John Earl as aforesaid, and "including the said River up to the said right angle line only."

That the Deed of sale remained unaltered, in other respects, and that the agreement as to the survey of the land "was a condition precedent to be performed, or fulfilled by or on the "part of the said George Bradford, senior, before he could legally compel the Defendant to "pay the said purchase money or any part thereof; that neither the said George Bradford, Sr. "nor the Plaintiff or his assigns, had ever yet performed or fulfilled the said condition precedent, and that neither of them has ever caused a good, sufficient, correct, and proper survey, "and *procès verbal* of the said tract of land to be made, by duly sworn Land Surveyors, or "by a duly sworn Land Surveyor, and that the quantity of land contained in the said tract "is still unascertained, and the same is still unknown to the Defendant." Conclusion for dismissal of Action.

The *third* Plea sets up the description of the land as given in the *procès verbal* of Sinclair, and alleges that he, the Defendant, was never made or called upon to be, and was not a party to the survey made by Sinclair, or to that made by McDonald; that moreover these Surveyors did not conform to the statute 12 Vict., chap., 35, relating to surveys, and particularly to the 11th, 15th, 16th, 18th and 20th sections thereof, which sections are not set forth in the Plea, and that the surveys and *Proces Verbaux* were null. Conclusion to have the same declared to have been and to be invalid, ineffective and null and void, in so far as they relate to Defendant, and for dismissal of Plaintiff's action.

The *fourth* Plea states, that by the pretended survey by Sinclair the tract of land sold was found to contain 127¾ acres, composed of two parcels, one of 52¼ and the other of 75½ English acres, but "that at and before the time of purchasing the whole of the said tract of "land from the said George Bradford senior, the said George Bradford senior represented the "said whole tract of land as forming part of lots one and two in the *fifth* range of lots in the "said Township of Chatham, and that he, the said George Bradford senior, was proprietor and "owner thereof and entitled to sell the same," that in fact he the vendor was not such owner, but that the 75½ acres was the property of Moses Davis, and formed part of a tract of land sold by him by Deed of 11th March, 1847, before Coursolles and Colleague, N. P., to James Pollock and John Pollock, and which was sold by the said Pollocks to John Hammond by Deed of the 29th March, 1848, before DeLaronde and Colleague N. P., and that the same 75½ acres were sold by Hammond to the Defendant and his son James Henderson, by Deed of the 14th October, 1851, before DeLaronde and Colleague N. P.

That under the said Deed the Defendant and his son were proprietors of the East half of lots 1 and 2, in Block A, in the *fourth* range of Chatham, containing 333 acres including the 75½ acres above referred to, and that they had by themselves and their said *auteurs*, openly, peaceably and uninterrupted held and possessed the said 75½ acres, as proprietors, for more than 30 years, and that by reason thereof, "neither the said George Bradford senior, nor the Plaintiff, as "his assign, ever was entitled to demand and have of and from the Defendant payment of any "purchase money for the said 75½ acres, or any part thereof, under and by virtue of the said "Deed of Bargain and Sale, from the said George Bradford, senior, to the said Defendant, "mentioned and declared on in the Plaintiff's declaration."

Conclusion for the dismissal of Plaintiff's action.

The Plaintiff fyled general answers to these Pleas, also a special answer to second Plea, admitting that the after *acte* of the 27th December, 1847, was passed, and alleging that a proper survey was made, as set up in the Plaintiff's declaration, and that the number of superficial acres contained in the tract was duly ascertained, and was, and is, the quantity in Plaintiff's declaration mentioned.

To the *third* Plea.—That the vendor sold the land at a specified price per acre, and that the only obligation resting on him was to ascertain, by survey, the number of superficial acres, which was in fact done; that the Defendant entered upon and still possessed the whole tract, and that the formalities required by law for cases of surveys and for the regularity of *Procès Verbaux*, as between contestant parties, and parties at variance, as to boundaries, do not apply to the stipulations in the Deed of Sale, and the Defendant could not obtain his conclusions by reason of the pretended nullities in the *Procès Verbaux*, nor continue to occupy and possess the land without paying for it.

To the *fourth* Plea.—That the Defendant had been put in possession by the vendor of the whole tract, and had continued to occupy it and still does so, and had never been troubled in the possession and enjoyment thereof, and that contriving to evade payment of the *prix de vente*, he, the Defendant, had voluntarily acquired, under the Deeds set up, a tract of land in *fourth* concession, of which he pretended the 75½ acres to be part, and could not thereby oblige the Plaintiff to discuss the validity of the title of George Bradford, senior, or to warrant the Defendant against the pretended titles set up in his Plea.

A further answer was also fyled to the *fourth* Plea, setting up title to the lots in question, derived, first, by Letters Patent from the Crown, 13th July, 1799, to Louis Panet; second, by Deed from Panet, the Patentee, to the Rev. Richard Bradford, of 2nd February, 1808, Gray and Colleague, N. P.; third, by Deed to George Bradford, senior, from Richard Bradford and others, of the 17th December, 1832, Bondy and Colleague, N. P.; setting up also prescription of 30 years, &c.

The *fourth* Plea was not supported by any evidence as to possession, and was moreover abandoned at the argument so that it is unnecessary to do more than refer to it.

The Plaintiff examined three witnesses, namely, the Surveyors, MacDonald and Sinclair, and George N. Allbright, also a Land Surveyor.

MacDonald verified the survey of Sinclair, on the 8th February, 1853, previous to the institution of the Action. He produces a plan or sketch of the lots in question (No. 28 of Record) and states that his *procès verbal* (24½ of Record) is correct, and that the part colored red on the sketch is the land referred to in his *procès verbal*. He makes the superficial contents of the portion of the lots sold 126 acres, 1 rood and 34 perches.

Sinclair swears to the correctness of his *procès verbal*; that the Defendant was in possession of the lots in December, 1848, and also that at the date of his *procès verbal*, (No. 6 of Record), 1st October, 1852, was in possession of the lots as described in his *procès verbal*, and as mentioned therein; that the Defendant acquiesced in, and was present at the survey, and also that witness' *procès verbal* is in accordance with the description given in the *Defendant's* Exhibit No. 1, being the Deed of Sale to Defendant, with a copy of the after *acte* on the margin; the line going at right angles with the side line of the Township; and that the chain bearer was sworn for the purposes of the survey.

Allbright was present at survey; proves that Defendant was also present, and lived on the lot; and identifies the lots as being those mentioned in the Letters Patent of Deeds of Sale (Nos. 19, 20 and 21 of Record) referred to in the special answer to the Defendant's fourth Plea.

Two witnesses, Cushing and Centre were examined for Defendant.

Cushing was brought up with a view to prove the position of the line between the 4th and 5th concessions, and whether it ran through the Henderson lands; but the objection to *parole* evidence as to this point was maintained at Enquête, and no motion was made to revise the ruling.

Centre says he saw a post pointed out 12 or 14 years since by Charles Bradford, as marking the line between the 4th and 5th ranges of Chatham, and also saw a post pointed out in June, previous to his examination, by James Bothwell, as being on the line between the 3rd and 5th ranges of Chatham. He knows nothing personally of the matters at issue.

The Defendant contended at the argument that the Plaintiff's Action must be dismissed.

First.—Because the after *acte*, varying the boundary of the land was not set up in the Declaration. It will be seen that by the original Deed, the lands are bounded "in rear by John Earl;" by the after acte they are said to be bounded "in rear by a line at right angles "dividing the said tract from the land of John Earl, on number *one*."

This correction pointed out that the part of lot two, sold to Defendant, was not bounded in rear by Earl's lands, and indicated that the dividing line in rear of No. 1, was a line at right angles from the side line of the lot, being the Seigniory line. This, in fact, was the line surveyed, and it was sufficient to answer and prove that the superficial contents mentioned in the Declaration, were ascertained by the line at right angles from the side line. Besides, there is no allegation made, nor was it even pretended in argument, that there had ever been any dispute or difficulty as to the *rear* boundary as settled by the after *acte*, or that any fault had been found with the boundary at right angles from the side line as established.

[illegible] t [illegible] with.

To this, it [illegible] answered, [illegible] with, as is [illegible] by [illegible], and [illegible] that he had [illegible] interest in [illegible] this quantity [illegible] t [illegible] by the Court, in the said [illegible], and Judgment [illegible].

[illegible] It is submitted that [illegible] obligation [illegible] ies, "[illegible], at the [illegible]." A formal [illegible] boundary [illegible], as it is not even [illegible] for, and [illegible] it [illegible] in [illegible] of it [illegible].

F[illegible] in the Plaintiff, by [illegible] of the ambiguity of the transfer to the R[illegible] from [illegible], [illegible] *de* [illegible] (No. 5 of [illegible])

It will [illegible] George [illegible], senior, [illegible], with [illegible] and his d[illegible], [illegible] his particular [illegible]. To the Plaintiff he [illegible], in the [illegible] Chatham, also "the [illegible] of £1[illegible] to [illegible] and owing, be[illegible], and pay-"able by William [illegible] senior, of Chatham, [illegible], by yearly payments of "twenty pounds; the first of which will become due [illegible] payable in the month of January "next (1850), and [illegible] continue regularly afterwards, [illegible] year at the same term of January, "until [illegible]ly paid—*the whole* [illegible] *to the Deed* [illegible] *unto the said Henderson,* "*by the said assignor, before Coursol*[illegible] *and Colleague, N*[illegible], bearing date of the day, "month, and year therein mentioned."

This, it is submitted, is a sufficient identification of the debt transferred, [illegible]ly as the instalment of 1850 must have been paid—the present action being for the three instalments due on 1st January, 1851, 1852 and 1853. It appears also by the protest (No. 8 of Record), made notarially on behalf of the Plaintiff, and served on the Defendant, that the description of the land is given therein in full, and the *proces verbal* of Sinclair is therein also set out by [illegible] and the contents of the land given at 127¾ acres, and the Plaintiff is declared to be subrogated in all the rights of his father in respect of the lands and monies, nor is there anything to seriously create a doubt as to the identity of the debt transferred with that sued for.

Fifth.—Because Sinclair's *proces verbal* contains the words "making in all one hundred "and twenty-seven and three-fourths acres, sold by the late George Bradford, in his life-time "of Chatham, to JAMES [instead of WILLIAM] Henderson, who is at present occupying the whole of it."

This, it is submitted, cannot invalidate the Deed of Sale, as it is shewn clearly that the land surveyed was the land sold to William Henderson, the Defendant.

Sixth.—Because part of the lands sold fell within the 4th concession. This is not proved in any way, and was raised under the Plea which was abandoned.

There is nothing of Record to contradict the *proces verbaux* fyled, nor has it ever been contended that the Defendant was not put in possession of the whole of the 127¾ acres, the price of which is now sued for, nor that he is not now in possession thereof.

There is no evidence to shew that any part of the land sold by Plaintiff's father to Defendant, is included in the purchase made by the Defendant and his son, from Hammond, under the Deed No. 13 of Record.

That Deed only purports to convey the East half of lots numbers 1 and 2, in Block A in the *fourth* concession, and not any land in the 5th concession.

It is submitted, therefore, that the Judgment of the Court below ought to be maintained.

A. & W. ROBERTSON,
Attys. for Respondent.

MONTREAL, 7th April, 1859.

APPENDIX.

COPY OF JUDGMENT.

The 31st December, 1858.

PRESENT:

The Honorable Mr. Justice Smith.

"The Court, having heard the parties by their Counsel upon the merits of this cause, having "examined the proceedings, proof of Record and deliberated, considering that the said Plain- "tiff hath established by evidence the material allegations of his said Declaration, and that "the Defendant hath failed to establish the allegations of his said exception, and that by "reason of anything contained in the said exception the said Plaintiff cannot be barred from "having and maintaining the conclusions of his said Action and demand.

"The Court doth overrule and set aside the said exceptions with costs, and the Court "doth condemn the said Defendant to pay to the said Plaintiff the sum of sixty pounds cur- "rent money of this Province of Canada being the amount of three instalments of twenty "pounds each, claimed by the said Plaintiff in and by his said Action as due in the month "of January, one thousand eight hundred and fifty-three, under and in virtue of the deed of "bargain and sale by one George Bradford, senior, to the said Defendant, of the tract or parcel "of land therein mentioned, passed before Maitre Coursolles and his Colleague Notaries Pub- "lic, on the twenty-third day of November, 1846, and also under and in virtue of a deed of "agreement and sale and transfer by and between the said George Bradford, senior, and the "said Plaintiff and others, the heirs of the late Martha Smith, their mother, and the deceased "wife of the said George Bradford, senior, passed before Maitre De La Ronde and Colleague, "Notaries Public, on the eighteenth day of April, one thousand eight hundred and forty-nine, "and whereby a larger sum of money, of which the said sum of sixty pounds is part and par- "cel, was transferred by the said George Bradford, senior, to him the said Plaintiff, as being "due by the said Defendant to him the said George Bradford, senior, under the deed of sale "hereinbefore first mentioned, with interest upon the said sum of sixty pounds from the four- "teenth day of October, one thousand eight hundred and fifty-three, date of the service of "process in this cause, until actual payment, and costs of suit—distraits to Messieurs A. & W. "Robertson the substituted Attornies of the said Plaintiff."

"MONK, COFFIN & PAPINEAU,
P. S. C."