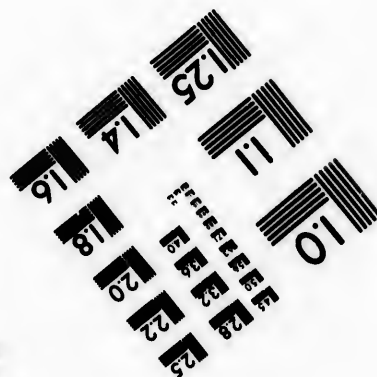
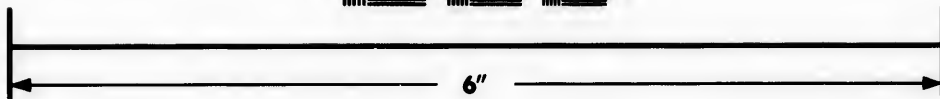
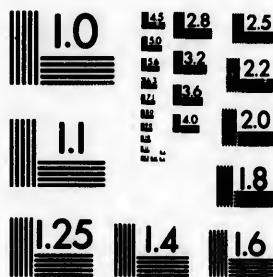


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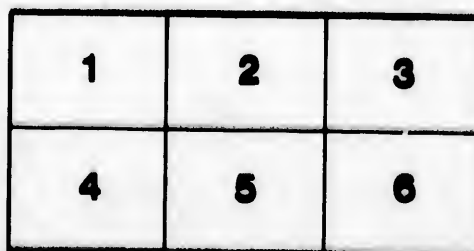
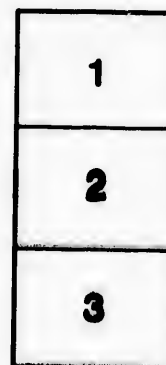
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IN THE SUPREME COURT

OF THE

PROVINCE OF ONTARIO

HER. H. SIMONSON, PLAINTIFF (RESPONDENT)

AND

THE BANK OF MONTREAL, DEFENDANT

AND

W. J. O. BOURCHIER, Attorney at Law, of A. J. Galt,
DEFENDANT (APPELLANT)

J. B. SMITH, O.C.,
ADVOCATE FOR APPELLANT

COSTIGAN & ROY,
ADVOCATES FOR RESPONDENT

1901

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OTTAWA, N.W.T.



IN THE SUPREME COURT
OF THE
NORTH-WEST TERRITORIES.

BETWEEN

GEO. H. SEXSMITH, PLAINTIFF, (RESPONDENT)

AND

THOMAS MURPHY, DEFENDANT

AND

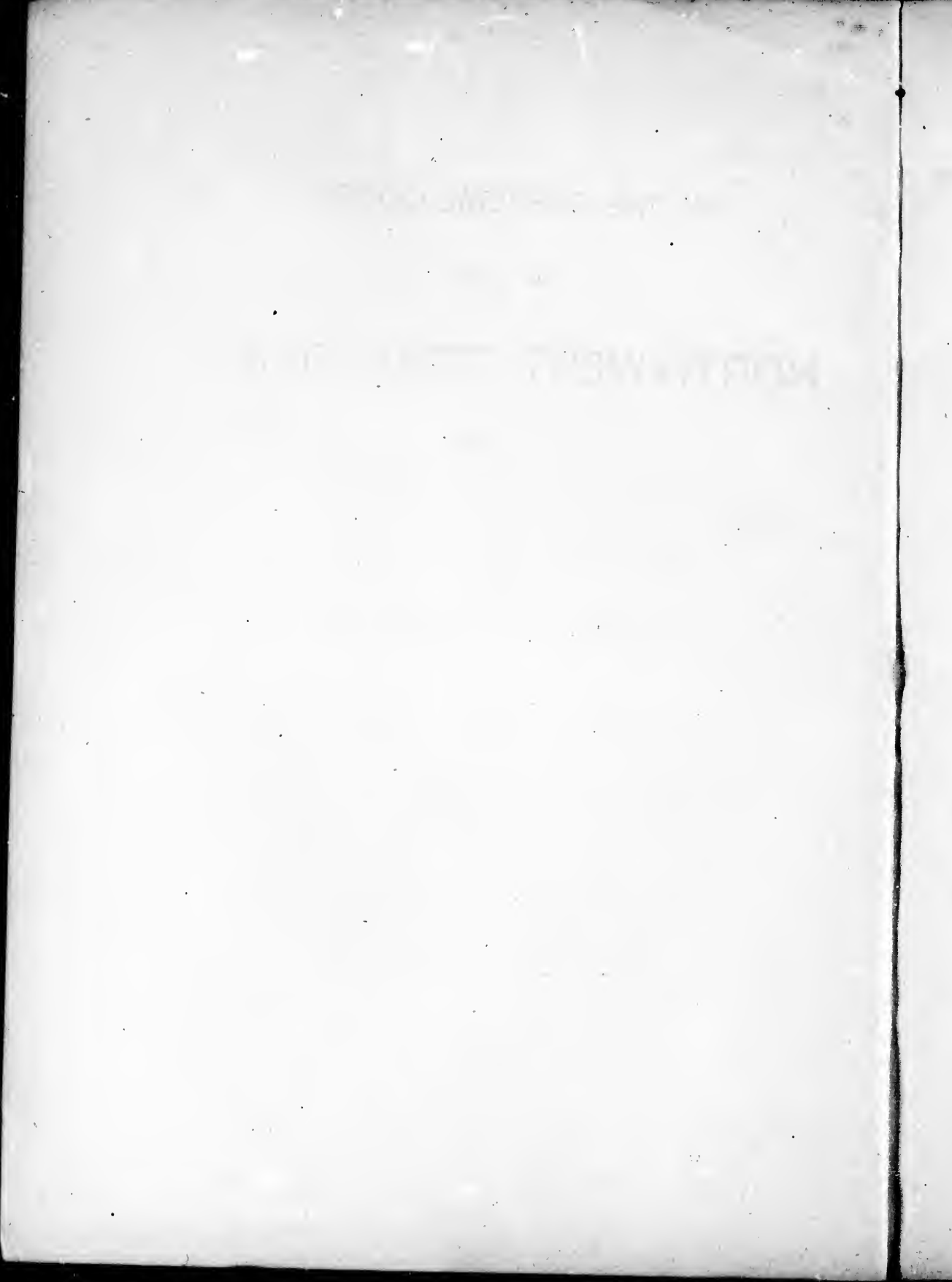
W. J. O. BOURCHIER, Assignee of the Estate of A. J. Ross,
DEFENDANT, (APPELLANT.)

J. B. SMITH, Q.C.,
ADVOCATE FOR APPELLANT.

COSTIGAN & BOWN,
ADVOCATES FOR RESPONDENT.

1891

PRINTED BY THE TRIBUNE POWER PRESS.
CALGARY, N.W.T.



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IN THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

IN THE MATTER OF AN APPEAL TO THE SUPREME COURT OF THE
NORTH-WEST TERRITORIES IN BANC.

BETWEEN :

GEORGE SEXSMITH, Plaintiff, (Respondent.)

AND

THOMAS MURPHY and A. J. ROSS, (Appellant) Defendants.

Upon the application of the above named Appellant and upon reading the affidavit of James Bruce Smith this day filed ;

10 I do order that the above named Appellant do have until the end of the 11th day of May, 1891, to file the appeal books herein.

And I do further order that the said appeal be prosecuted in the name of W. J. O. Bouchier, Assignee of the estate of A. J. Ross, Appellant, instead of said A. J. Ross.

Dated at Chambers this 24th day of April, A. D. 1891.

CHAS. B. ROULEAU, J.S.C.

IN THE SUPREME COURT OF THE NORTH-WEST TERRITORIES,
NORTHERN ALBERTA JUDICIAL DISTRICT.

BETWEEN

GEORGE H. SEXSMITH, Plaintiff,

AND

THOMAS MURPHY and A. J. ROSS, Defendants.

STATEMENT OF CLAIM

1. The defendant Murphy unlawfully detains from the plaintiff the plaintiff's goods and chattels, that is to say :—One bay gelding with black points about 15½ hands high, four years old, branded **TR** on the nigh shoulder (the top portion of the brand being indistinct) and **S** on

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the nigh hip, and one iron grey gelding four years old, about 15 hands high, branded on the nigh shoulder and having a white star on forehead and two white hind feet.

2. In the alternative the plaintiff says that he has suffered damage by the defendants refusing after demand to deliver up to him the goods and chattels mentioned in the 1st paragraph.

3. And the defendant Ross after demand refused to deliver to the plaintiff the said goods and chattels and has sold them to the defendant Murphy and converted the proceeds of the sale to his own use.

The plaintiff claims:—

- 10 (1.) The return of the said goods or their value and \$100 damages for their detention.
 (2.) \$300 for their conversion.

Delivered this 15th day of August, 1890 by Messrs. Costigan & Bown, of Stephen Avenue, in the Town of Calgary, in the Judicial District of Northern Alberta, Advocates for the Plaintiff.

STATEMENT OF DEFENCE.

DEFENCE OF THE DEFENDANT ALEXANDER J. ROSS.

1. The defendant Ross says that the plaintiff was not at the time of the replevin of the said horses or at any other time, the owner of the said horses and that the said plaintiff never had any interest whatever in the said horses.

20 2. The defendant Ross denies that he at any time refused to deliver the said horses to the plaintiff.

3. The defendant Ross further says that no demand whatever was made upon him the said defendant Ross by the said plaintiff or by any other person acting for him, for the delivery of the said horses before action brought.

4. The defendant Ross claims the said horses as his property subject to the terms of a lien note given to him by the co-defendant Murphy, dated the 17th day of July, A.D. 1890.

Delivered this 2nd day of September, A.D. 1890 by Lafferty & Nolan, of the town of Calgary, District of Alberta, Advocates for the said defendant, Alexander J. Ross.

REPLY.

The plaintiff as to the defence of the defendant A. J. Ross says that: He joins issue.

30 Delivered the 17th day of September, 1890, by Messrs. Costigan and Bown, of Stephen Avenue, in the Town of Calgary, in the Judicial District of Northern Alberta, Advocates for the plaintiff.

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IN THE SUPREME COURT OF THE NORTH-WEST TERRITORIES,
JUDICIAL DISTRICT OF NORTHERN ALBERTA.

BETWEEN

GEORGE H. SEXSMITH, Plaintiff,

AND

THOMAS MURPHY and A. J. ROSS, Defendants.

Mr. Costigan for the Plaintiff.

Mr. Cave for Defendant Murphy.

Mr. Nolan for Defendant Ross.

10 Mr. Costigan Action of Replevin for pair of horses and calls witnesses.

GEORGE H. SEXSMITH sworn. I am the Plaintiff. I reside at Calgary. I am builder carpenter and joiner. I know the defendant, Alexander J. Ross. I know the horses described in the statement of claim. They are my property. About the last of May or first of June, 1890 sometime Mr. Ross came to me in the shop where I was working and I was making some work in the shop, and we got talking about carpenter work, and he said he had a house he had got up the Summer before out on his ranche. He said it was too small and he wanted to put an addition to it. He asked me what kind I thought could be built to it to make it have the best appearance. I told him I could not tell without I was to see the building that was up. He said I had better come out with him and see the building. I went out with him and told him what 20 I thought would be the best for him to do, and drew a kind of a pencil sketch of the ground of it, and told him what I thought it would be, and he agreed to have it done that way, so he asked me what it would cost; I told him in the neighborhood of \$200. He then wanted a stable built; then he said to me, I have a lot of horses but no money, and unless you take your pay in horses I cannot build; so I told him I would take horses if I got horses to suit me. He said I had better come with him and see the horses and pick out what I wanted. I told him there was no need of that, I would take the horses for the work. He said no, he would have nothing at all to do with it without I would go and pick the horses and buy them out and out, and then there would be no trouble afterwards about them; so I went up with him next evening to his ranche, about 9 miles from Calgary. He had the horses put in the corral. I went with him and looked 30 at the horses, and saw he had only two horses I would have at all out of the pile. They were this team in question, two geldings. I asked him what he wanted for that team; he said that team was worth \$275 or \$270. I says, that decides it Mr. Ross, and I turned round to walk away. I said I can't give that for them. He says, hold on, come back; what will you give for them? What do you think they are worth? I told him the way I was doing his work I wanted to build a house up there that would be an advertisement for me. I could give \$250 for them on the contract; so he kind of hesitated a little while and then said, "Well, it's a go." He says what will the buildings cost me? Then I says they will cost \$260; he said, I thought you said you would fix up the stable for \$40; I said that was only one storey high and the other half storey is worth \$20; that is the work; he was furnishing the material. He said, all right, its a 40 go; he says, there are the horses, take them; I said, what do you mean by a go? you mean

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the horses are mine as payment on the contract? He said yes, there they are, take them. I said yes, I will take them, Mr. Ross; so we stood talking a little while, while I was to commence the work in payment for the horses right away; I told him as I was to commence the work right away I had not time to bother with the horses, I had not time if I commenced right off to bother with them, and no place in town to keep them, and I asked him if he would let them run on his ranche there, so that they would be handy for me to train them in the evening after I quit work; he said to me they had been in harness but were not broke. I asked him if he would let them run there on the ranche; he said, yes; that is, you take the same chances as my own if anything happens to them; I will not be responsible for them, they will be at your own risk; I

10 said no, I do not want you to be responsible for them, any further than to tell me if they get out of the enclosure, break out; he said he would let me know if they got out and he came and let me know; he said the horses had got out of the field; that was the first time they got out; he said that they got out twice but he said he got them in all right; that time he said all the horses was out. After that awhile he came down again and Eshelman was standing at the back of his warehouse where he had his implements and I was standing talking to Eshelman; Ross came down from his ranche in the morning and came up where we were standing, and said, well, all the horses are out again; I asked him if mine were out along with the rest: he says, yes, yours and all are gone out; I said well, I had better get ready and go up and get them in; he says, well you had better wait until to-morrow morning when I come down, as I have sent

20 out to get mine in; he says, yours will very likely come in with them; they will not separate; he says if they don't come in I will let you know in the morning when I come down, and they will not be far away; and he came down next morning, came to the shop and told me they had come in with his all right. The next part was Skerving from Chatham was here and he went up with Mr. Ross, stopped there all night. In the morning Ross had the horses corralled and I asked him to corral mine with his to shew to Sherving so he could see what sort of a choice I had made in buying. All this time I had been working steady at my part of the contract. I was working in the shop making sashes, doors and frames and cornices to have it all ready to go up. He said he would have them all corralled; he got them in the corral and I

30 and Ross and Skerving went to the corral and I was pointing out the team I had bought; we were just a step in front of Ross. When we came up to the corral I pointed those two horses out to Skerving and I said there is the horses Mr. Ross sold me for doing his work. Ross heard me; he was right there; I think Ross pointed them out too, these same horses; Skerving made answer and said they were a pretty nice looking team but I had paid a good price for them; he asked if they were mine now; I said yes, I said as I had no place in town to keep them Mr. Ross was good enough to allow them to run there until I got ready to use them. Ross said nothing to contradict this; he admitted that I purchased the horses when Skerving said I had paid a big price for them; Ross said, you don't know the price of horses here; if you knew the price you would not think it a high price: he has got a good team. Skerving said, I am going to the Lakes. I asked Ross for a buckboard; he says, well, these horses are too wild; I don't

40 want to let my rig behind them. He said, of course you can take the horses, I have nothing to do with them, but I don't want my rig broke up. So I left them there, said no more, and Skerving and I went up to the lakes on foot. The next morning, when Ross came into town he asked me what I was mad at, I didn't stop at his place. I told him I was not mad. I knew if he stopped he would not get back to town that night, and we wanted to get back that night. He said he thought I had got mad because he had not let me have the buckboard. We had no further conversation about the horses until I missed them out of the field. I wanted to go up

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to measure the cornice of the old building. I was getting out new cornice for the gable building. I spoke to Ross about it. He said well, you can go up with me to-night we generally went up at 7 o'clock, so I went up to his place in town at 6.30 and he was gone. He sent three men the same way when I was to go with him he went without me. He knew on those occasions I was expecting to go with him. I then said to him, if I could not go with him I would have to hire a rig as I wanted to get the measure of the cornices. So he says come and go with me to-night; so I went up early that night to his place in town about half-past five and sat there until he went and I went with him. This was somewhere in July, about the first. Could not say it was in July. The horses were selected about the 16th June, and it was about a month after that I went up with Ross on this occasion. The next morning after Ross had got his breakfast he went out to get his horse to come back to town, and I went out with him. When we went to where the horses were I could not see my horses in the gang of horses, and I says Mr. Ross my horses are not here, where are they? Have they got out? I says; he said no, he had them out haying; out haying, I said, what business have you to put them out haying? He says that won't hurt them, I had no other team to cut hay with and that will not do them any harm. I told him he had no right to touch them, to do anything with them at all, so that was all that passed then. We came into town and on the way in I said to him, Mr. Ross there is something very strange about those horses, your action with them. I was told by the young man that stopped at your place that you had sold them. Ross said, what in hell does he know about it? I did not do any such thing; I have them out haying. So we came into town and I went and saw my lawyer about it. After this Ross came into the shop to see me and says, what fuss are you kicking up now? I told him I was not kicking up any fuss, if there was any fuss it was him kicked it up, and he said to me it will always be disputing until this work is finished, and unless you will sign a writing and take another team and be satisfied with it, I will stop the work. I says you will not stop the work. I will go on and finish my contract; It will only take two weeks to finish it if you get the stuff on the groun; he said he would stop the work if I would not sign the writing and agree to take another team. I told him I would not do any such thing. I would stand by my first contract, and the team I first got from him; it was mine and I would have it. He says if you put it in law it will be five years in law and you will make nothing out of it, because, he says, there was nobody by when we made the bargain; you will get up, you will swear to your contract; I will get up and I will swear right contrary, and what are you going to do. Well, I says, we will have to leave it to the justice of the Court. Then he said, well you look for justice here you don't get much. You get into Court, you get sworn out of it. I told him I would have to run my chances. I would sign no writing or make no new contract. I would carry out the contract as it was. The horses were mine. He said I might as well give it up, I never would set my eys on them again. I said to him, if I don't I cannot get them, of course, but I said mind you, Mr. Ross, I am sure to find them if start to look after them. So he turned around and went out of the shop. When I was done with all the work I had done in the shop I went to him and asked him to take the stuff up on the ground, so that I could go on with my contract; he was to do that by the bargain. He said he could not do it, he had no team to take it up. So I went up and saw my lawyer. In consequence of what my lawyer told me I took a witness and went and asked him again to take the lumber out (paper shown him.) I received that paper in the Post Office directed to me (put in no objection, marked "A.") I found the horses back in the mission back of Calgary in a little log stable in the possession of the defendant Murphy; I asked Murphy for them; I demanded him to give them up and he said he would not; he said he could have no action against Ross if he gave them up. I told him he might

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better give them up and not get into cost about them, for he would get into cost, for they were my horses; no one was present at that time; afterwards I met him in the street, talking with Charles Jackson, and I demanded them again. We came over about the same words; he said he would not give them up. He said he had bought them and had given a lien note on them for payment. I told him I would replevy them. He said, of course you can take them then. He says, this is no surprise, I expected you would be after them every day from what Mr. Ross told me, but Mr. Ross told me he thought he would suit you with another team. Jackson was present at this time. I explained that after that this demand was made three days after they were replevied. This was on Saturday and on Tuesday they were replevied and returned to
 10 me and I kept them in a pasture.

Xm. by MR. NOLAN.—I am a carpenter. I have got a carpenter's shop in town. I work in it pretty much every day. I did some work for Major Walker last week. About the horses Mr. Ross came into me in the shop about the building; this was the first of it. I don't know but what I did tell Ross before this that I wanted to get some horses, and I went out with Ross to his ranche. All the conversation did not take place then about my telling him he had only two horses that I would take and my offering \$250 all took place at the ranche at the time we made the contract. I can't tell the exact date or the day of the week. I don't know what night in the week it was. I went out with Ross to see the horses; I don't remember; I don't think it was a Saturday night; it could not be; we should not corral horses on Sunday. It
 20 was not Sunday when I made the bargain. I would not buy horses Sunday and for that reason I know it was not Saturday night I drove out with Ross. I think I swore I purchased a pair of horses about the 16th June. It may have been a day earlier or a day or two later. If the 16th was Monday, a day earlier would be Sunday, but I know it was not Sunday I purchased the horse. The agreement between Ross and I was he did give me the team of horses, the transaction was he delivered me absolutely a team of horses and I was to go on and make addition to his buildings at a future date I commenced right away. I made out a bill of the lumber and he went and got it. Whatever date the bargain was made this was the terms of it. I got delivery of the horses; he said there they are, take them; They were in the corral. There were 14 or 15 horses besides in the corral. I don't think there were 20. I would not think from the
 30 number in the corral there were. I did not halter them at that time or rope them at that time. I did not have my hand on either of them at that time. Nothing is wanting to shew the bargain between us. No money passed at the time. No one present at that time only Ross and I; the boy who corralled the horses was in the far end of the corral. He could not hear what we said, he was too far away. I say that positively he could not hear; neither of us talked very loud. I don't think he could have heard; I could not hear that distance. On this day this contract was made. I became the absolute owner of that team of horses. I was to begin work right away, and that was somewhere about the 16th June. I was to put an addition to the house that was then 16x24, one storey high, a partition across the centre of it, dividing it into two rooms. I was to put 2 bay windows in the part that was up. I was to side the
 40 old building up; it had been boarded up before. I was to tar paper and side it. I was to stud the lower part of the old building so as to receive lathing. The studding was in 4 feet apart and I was to put studding in between. I was to change the stairway; it ran from the front. I was to change them so as to run the other way. I was to put a verandah 16x5 across the end of the addition I was to put up. I was to build a stable 24x30 a storey and a half high. He was to find materials and board me while I was doing the work. I had nothing

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to do with anything but carpenter work; I was not to go to work on that immediately. I was to go to work at shop and make the doors and sashes and frames and he was to take them out as soon as I was ready and they were all made. These horses were replevied about 15th August I guess. On that date I had done all that is done now; I calculate \$200 worth. I have done nothing of this contract at the ranche. Whatever I have done in this contract I did at my own workshop. I made all the doors and sashes and frames; by frames I mean frames of openings; the verandah part and cornice and brackets are all made. Also the brackets that are outside for the bay window; also the cornices and carvings; there is a balcony on top of one of the bay windows, and the turned railing is all made ready to set up, and the cornice I got out for the old building being next the road. The front board is all carved and cut and ready to put in. I told him I would not make much out of the contract. I did this work myself. All I got from the mill was the turning, and he got the lumber dressed by the plainer. I had to dress it afterwards. Ross knew this and was in and out two or three times a week when I was working. I was to do a good job, nothing was mentioned about approval. I told him I could do him a good job; I showed Ross the work and he was well satisfied. The day the work was stopped I asked him if it suited him, and he said yes, he had no fault to find with it. I remember all that took place between Ross and I about the \$275 and \$260 Ross did not tell me that when the work was done if he had not horses to suit me he would give me cash. The horses were my property after that date and when Skerving came up from Chatham I took him to the lakes to see the country. The lakes are on the next section to Ross; Ross says his place is 9 miles from Calgary and we went a mile further. The horses were my property. Skerving and I went out on foot. If it is 21 miles from here there and back we went it on foot. I did not take my team because they were at the ranche and Ross would not let me have the buckboard, because they were too wild. It is pretty hard work to get a buckboard in town only when I hire a livery rig. Ross did not refuse to let me take the horses away. I asked him to let me have his horse to ride up and get my horses. He said he would but he would not let me take the rig with my horses. Ross did not on that occasion refuse to give me the buckboard. I swear that Ross did not tell me that he had sold the team when I asked for them where they were. Ross never told me before I brought this action that he had sold the horses to Murphy. Ross never told me to my knowledge before this action was brought that he had sold the horses. I don't remember that he did, I don't think he did. Ross handed me over a team of horses on my undertaking I would do certain work. Mrs. Ross was not present during the conversation between myself and Ross in which this contract was settled. It took place at his ranche. We went out the night before and returned the next morning. I think I did not remain there a whole day. I have been there a whole day at other times and remained over Tuesday. I don't know the day I made the estimate for the lumber. I made it out when I returned from the ranche immediately after returning the day we made the contract for the horses. Mrs. Ross was not present the time the bargain was made. I am confident of that because it (?) was not at the corral. She was at the ranche. We left her there when we went out to the corral. The contract was not discussed in the house, nothing more than what the buildings were to be like. I told Mr. Ross what the buildings would cost. Mrs. Ross was not present. This took place at the corral. I did not give any figures at the house. According to my contract the portion of work done was worth \$200. I could not tell how many days I was working at it. I commenced to make out the bill immediately. Went to the factory for the stuff and commenced working at it, in two or three days after and continued until I asked him to take up the stuff. Mr. Ross stopped me from

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doing any new work after I had replevied the horses. It was not estimated that the work in the shop would take two weeks. I told him that the work at the ranche would take two weeks. Ross was to supply the lumber. There was no lumber on the ground when he stopped the work. He told me to go to the mill and get the lumber I worked on. I have no real estate in this town. I have the personal estate that is in my shop, about \$800. I don't know whether I have any more property that is exempt from seizure. It would not be exempt in Ontario. I have my tools. I understand that I did get possession of the horses. If Ross said that I was not to get the horses until the work is done he is mistaken as to the bargain. I do not believe Mr. Ross will say it. I cannot tell how much work I had done when Skerving came up. I had
 10 some of the sashes and doors and I think three or four frames made. No time was specified when the contract would be filled more than I was to get it done that fall.

EX. BY MR. CAVE.—I did not try either of the horses before I bought them. I have driven them since the Sheriff has handed them over. I have found them middling quiet.

RE.-EX BY MR. COSTIGAN.—When I came back from the ranche Ross told me to make up the bill of lumber. I made up the bill and he took it; that was the day I came back from the ranche; he took the bill and went to the Eau Claire. This was the day I made the bargain. I made up the bill next day. He took the bill and went to Eau Claire. He got into town from the ranche that day somewhere about 10 or 11 o'clock in the morning. The stores were open in town that day. I never haltered or roped the horses in Ross' premises. I never did until
 20 they were replevied. The doors and sashes are in my shop, still on my hands. The rough lumber for working with was to be left at the station up the railroad, about 9 miles up west of Ross, and Ross asked me if I could let him have the team to draw the lumber up with his team. I told him I did not know, I did not like to let everyone drive them if they were as wild as he stated, but I said if he got a good man to drive them I would not see him stuck on the lumber, that I would drive them myself before I saw him stuck on the lumber.

MR. COSTIGAN tenders the evidence of A. H. Skerving under commission. No objection.

A. H. SKERVING DEPOSITION READ.

Evidence of A. H. Skerving taken at Chatham under commission dated 14th October, 1890 before W. E. McKrough, Commissioner.

- 30 1 Q. What is your name, place of residence and occupation?
 A. Archibald Hugh Skirving, Chatham, Ont., Policeman.
- 2 Q. Do you know George H. Sexsmith, the plaintiff in this action? where does he live, and what is his trade or occupation?
 A. I know George H. Sexsmith. He lives at Calgary, Alberta. His trade, Carpenter.
- 3 Q. Do you know A. J. Ross, one of the defendants in this action, where does he live and what is his trade or occupation?
 A. Yes, I know A. J. Ross and he lives at Calgary, Alberta. His trade is a photographer.
- 4 Q. When and where did you last see these parties?
 A. I last saw these parties in June last at Calgary.
- 40 5 Q. Do you know whether the defendant Ross sold the plaintiff Sexsmith a pair of horses? If so how do you know it?

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A. I know that he agreed to let George Sexsmith have a pair of horses for building an addition to his (defendants) ranch near Calgary. I understood it from Sexsmith and then from Ross.

6 Q. Did you ever have any conversation with the defendant Ross in the presence of the plaintiff Sexsmith or in his absence in connection with a pair of horses and in connection with which Sexsmith's name was mentioned? If so when and where? what was said as near as you can remember?

A. On the morning of 25th June Ross had all his horses in the corral and I and Sexsmith and himself were present looking over the fence; I asked Sexsmith which were his two horses in the presence of Ross. Sexsmith pointed me out two which he said were his. Ross did not say anything that they were not his. The one was a bay horse, the other was a dark horse; I think it was a dark iron grey horse. I had another conversation with Ross afterwards on the following Saturday. Sexsmith was not present. Ross says you are pretty fellows not to call at my place yesterday. We had been near his place on Friday, looking at some land. He said "Mrs. Ross saw you and fully expected that you would call" and he says "I guess Sexsmith is mad because I would not let him have my buckboard yesterday to drive one of his horses" he says "the horses have not been broken and would smash the rig all to pieces." I said "No, I do not think George was mad, that we were in a hurry and we knew if we stopped at his place we would have had to stop an hour or two.

20 7 Q. If any conversation took place can you describe the horses spoken of, if so do so?

A. One was a bay horse and the other a dark horse, and I think iron grey. I think they were the two best horses in the bunch.

8 Q. Do you know of any other matter, thing or circumstance touching the matters in question in this action that would establish the fact of a sale of a pair of horses by the defendant Ross to the plaintiff Sexsmith?

A. I only besides the above know what Sexsmith told me.

9 Q. At the time you asked Sexsmith which were his two horses, was Ross close enough to hear?

A. Yes.

30 10 Q. Did he also hear Sexsmith's answer and see him point?

A. Yes, I should judge so. We were all together.

11 Q. How close were you together?

A. Four or five feet apart.

12 Q. Then what one said could easily be heard by the others?

A. Yes.

13 Q. Do you know from Ross why the horses were left on the ranch?

A. I know from Sexsmith.

CROSS-EXAMINED BY MR. MARTIN—

14 Q. Could you tell whether these were mares or horses?

40 A. No. I was'nt close enough to tell.

15 Q. Ross never pointed out the horses?

A. No. I think it was Sexsmith.

16 Q. You never heard from Ross that these particular horses were Sexsmith's?

A. No, he did not describe them but I always understood that the two horses pointed out to me by Sexsmith were the ones sold him by Ross.

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- 17 Q. How did you understand that?
A. Because in conversation with him Ross never said they were not his.
- 18 Q. How near were you to the horses.
A. About 30 or 40 feet, there were a number together.
- 19 Q. How many?
A. I should judge about 20 or 25.
- 20 Q. Were these horses making a noise?
A. No.
- 21 Q. Whose possession were the horses in at the time you saw them?
10 A. I do not know; but the corral belonged to Ross and the horses were in the corral.
- 22 Q. Do you know if Sexsmith had other horses?
A. I don't know whether he had other horses but these two.
- 23 Q. How do you know he had these two?
A. I asked Sexsmith which were his two horses in the presence of Ross, and he (Sexsmith) pointed them out to me, and Ross did not say they were not his.
- 24 Q. You stated that Sexsmith was to build something, what was it?
A. He was to build an addition to Ross's ranch.
- 25 Q. What was he to receive for doing so?
A. He was to get these two horses.
- 20 26 Q. Was it on the completion of this addition that he was to receive possession of these horses.
A. I don't know.
- 27 Q. Do you know if that building (being the addition) was ever completed?
A. I don't know.
- 28 Q. Is Sexsmith any relation to you?
A. None whatever.
- 29 Q. How did it come that you were together?
A. I knew him in Chatham and when I arrived in Calgary I hunted him up and renewed our acquaintance.
- 30 30 Q. If you had seen these same horses that Sexsmith had pointed out on the following day in some other place, could you have identified them?
A. I don't know that I could, as I did not take very particular notice of private marks.
- 31 Q. Did you always understand that this building was only in contemplation?
A. I understood that it was to be commenced at once.
- 32 Q. Do you know anything about the size of the building, the material it was to be constructed of or the time in which it was to be completed?
A. I do not.

Signed, A. H. SKIRVING.

Signed, W. E. McKEOUGH,
40 Commissioner.

CHARLES JACKSON sworn.—I live about two miles west of Calgary. I know the plaintiff Sexsmith and the Defendant Ross and Murphy. I was present when Sexsmith and Murphy had a conversation about a pair of horses in Calgary on Main Street. Murphy and I were talking together. Sexsmith approached him and told him he had a team of horses of his and that he wanted them without any further trouble. Murphy said he would not have them until

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he could see Ross. In the meantime Ross was away. He said I expected there would be trouble about the team when I got them. Murphy said this. As I understood the team had been sold to Sexsmith when he got them, or words to that effect. He said Ross said when he sold him that team he thought he could suit Sexsmith with another team, and asked Sexsmith if Ross could not suit him with another team. Sexsmith wanted the team he bargained for. He was going to him then and he had no other horses than those that he wanted. That was about all.

XI. BY MR. NOLAN.—Mr. Sexsmith is merely an acquaintance of mine. He never lived with me nor I in his house. I have part of a place rented and he had part of another adjoining.
 10 This lasted three or four months. It was under the same roof but a partition between. He was not a particular friend of mine more than anyone else. I was intimate enough to become one of the sureties on the Replev in Bond. As a rule I never see a man stuck if I see he is a responsible party. So far as I have heard and know, I believe Sexsmith to be a responsible party. He has not proved anything different. I have had a little dealing with him. I believe him to be an honest man. A great many men's word is worth more than their money. I think I knew the day before he was going to replevy the horses. The day before they were replevied. Sexsmith left the horses out to pasture after they were replevied with a man named Frank Westaway. Not with me. I drove them once after they were replevied. They are not in my possession now. I came to drive them because my horse got away from me and there was a Sunday
 20 School pic-nic on the Bow and Sexsmith offered to drive me. He said he would drive me with his team and it happened that morning he would not go and left the team with me. I have not seen the horses frequently since they were replevied. I saw them Thursday, Friday and Saturday after they were replevied. They have not done any work. I know they have been at pasture. I have not seen the horses. It is not likely that they would be worked while at pasture. I know Sexsmith has not worked them. I don't know if Westaway has.

MR. COSTIGAN asks the defendant Ross to produce a lien note, which he does produce, marked as (Ex. B.) identified. Plaintiff's case closed.

MR. COSTIGAN applies to amend the 5th paragraph of the Statement of Claim, by substituting for it as follows: "And the defendant Ross wrongly converted the said goods and chattels
 30 to his own use." No objection. Allowed.

MR. NOLAN on behalf of Ross applies to amend the Defence of Ross by pleading a denial of the conversion as alleged in the 3rd paragraph as amended and by pleading that the Statute of Frauds has not been complied with.

MR. COSTIGAN.—No objection to the first, as to the second he objects. I will allow the amendment.

MR. NOLAN submits plaintiff has not succeeded. (1) Where there is a contract for the sale of horses when the value of £10 between two parties, that contract must be in writing unless there is immediate delivery, part payment or part performance of the contract.

There was no delivery and no possession changed.

40 I decline to stop the case at this point.

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MR. NOLAN calls witnesses for the defence.

ALEXANDER J ROSS sworn. I am one of the defendants in this action. I was added as a party after the original writ in this action was issued. I carry on business in Calgary as a photographer. I also rent a ranche about five miles west from town. I am in the habit of buying and selling horses. I know the plaintiff Sexsmith. There was some conversation between Sexsmith and I as to a team of horses. On about the first week in June Mr. Sexsmith came to me. I was putting an agricultural implement in one end of the building where he was living and residing, and asked me if I had any carpenter's work to do. That he was going to take up land and he wished to do so somewhere handy and wished to get a horse or a team of horses or mares. He preferred mares. He says you have a lot of horses. I said yes. He said if you want any work done I would like to do it and take pay in that way, as I am not very busy at present and would like to do the work for you because if I go on a ranche and do some work it will help me to get work from other men in the same way. Well I said I did not know of any I wanted done at present but I would think over it and let him know later. He came to me in a short time again and talked about the same thing over again. I told him at present I had nothing I was very particular about having done, but I might possibly let him do some work on my ranche, providing it would not cost too much and we could come to an understanding about it, the price and how it was to be done. If he came out some night with me I would drive him out. He could see the building and give me an idea of what it would cost and the probable cost of the lumber it would take to do this work. We settled that he would come out some Saturday night and stay over Sunday. I drove him about I think the 14th June, Saturday night, anyhow he stayed Saturday night. Sunday he looked round the building, came in and sat down and said it is not going to cost much to do the work here, all that you want done. We had been talking before we went out to look around the house. I explained to him further what I would like to have done and the way I wanted to have the house fixed. We talked it over, my wife was there, she made several suggestions about how she would like to have it arranged. Mr. Sexsmith sat down and figured right then and there what he would do the work for and the probable cost of the lumber, he said he would do the work and the house for \$200 and the lumber would cost from \$180 to 200, perhaps a little more and perhaps a little less. I told him I wanted a stable built as well and to figure on a stable about 22x28 or 24x30. I was not particular which. He figured out that and said the work he would do for about \$40. Then he kept figuring and making a kind of rough sketch of what was going to be done until about noon. After that the man I had working for me rounded up the horses and put them in the corral and we went down and looked at the horses. I did not round them up particularly for Sexsmith to look at the horses, but I told him he might as well go down and look up the horses and see if there was anything there that suited him. I told him I could not give him mares and if there was anything there that suited him and we could agree about the price of the horses we could settle about his going on with the work. He went down. There were some 20 horses in the corral and he looked them over and commented on this one and that one and finally selected this big team and said that was the best team in the corral. He liked them best of any. He stayed there awhile. I was waiting for another man to come; he did not come. We walked about to the house, we had some more conversation in the house about the matter, my wife suggested she thought this thing was going to cost too much. I had better consider the matter, be sure of what the lumber and everything was going to cost. Then Mr. Sexsmith asked me what I valued these horses at. I told him I valued them at \$300. Well, he said he thought

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that was altogether too much. I said I did not think so. I could sell that team for \$300. I says I let you put your price on your work, now what would you consider my team worth? putting your price on it. He said I would consider they are not worth any more than \$250; then I said that was \$50 less than their value. I said if he liked to take that team on the contract at \$275 he could have them and nobody could have them any less. I told him I knew I could sell the team at \$300. I said he could not buy a team like that for \$250. He repeated a conversation he had with a man at the mill one day. He did not say it was a team, he said it was a bigger horse and did not know it was a better horse and the man said he sold horses like that for \$125 each. I said that was a good man to buy horses from, he was either a fool or

10 he did not have any more horses like that to sell. He said he did not know whether the man had horses to sell or not but that is what he told him. Then he said he did not think he could give \$275 for these horses, he thought it was a little too much. I said I was not anxious to have the work done anyway, and it did not make any difference to me if he wanted to go with the contract at these figures he gave me, he could go on with it and finish it and if I had horses to suit him when the contract was finished I could give him horses, or if not I would pay him in cash. If that did not suit him he need not bother any further about the work. He went on figuring again and he figured the stable to cost \$60 instead of \$40. That is his work. Well, I says how is it the first time you figured at \$40 and now it is \$60. He says, well first time I made a little mistake and I figured it larger this time. Well I repeated if he wanted to go on

20 with the contract and take horses when the contract was finished, if I had horses to suit him and if I had not to take the cash, and if he did not want to do the work on those conditions I did not want it done at all. He was perfectly satisfied to do it but he was very anxious to get the work to do. It was settled there that he could do it on these conditions. I was to furnish all the lumber and hardware and he was to do the work. My wife came in and asked him when the work was going to be commenced and how soon he was going to finish it as we were only going to be living there for the summer; she wanted it for the summer and not for the fall. If it was not going to be done for the summer it might just as well wait for next spring. Mr. Sexsmith was to make the doors, sashes and windows, and he said he would be ready to come out and work on the building in

30 two weeks. I said I don't think you can make all those doors and sashes in two weeks or anything like it, and you had better get the doors and sashes at the factory, as you can get them cheaper there than you can make them and so much quicker. He says Oh, I can make them quick enough for that and I can make them so much better. He said all the doors and sashes generally used in this country were made at the factory and I thought they were good enough. He says they won't cost any more than if made at the factory. I can make them as cheap as you can get them at the factory and a good deal better. I said all right if you think so, go ahead, all I want is to get them done quickly. That is about all I remember that happened on that day. That was Sunday. We drove in Monday morning, got in here about 9 o'clock, a few minutes after 9 o'clock. Coming in on the road I told him to get out the estimate of the

40 lumber as quick as he could and get it at the factory. Previous to this we had a talk about getting the lumber. I said I would get from Walker at the Eau Claire which ever would furnish it the cheapest. He said he could furnish the estimate of the lumber that day but he did not do it for several days after that. Finally he got the estimate of the lumber ready and showed me what it would cost. I told him to take it down to Walker and see what he would furnish it for. I also got an estimate from the Eau Claire mill of what they would furnish the lumber for. He had both of them with him. I did not on that occasion nor on any other occa-

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sion sell the team of horses to Sexsmith. I remember when Skerving went there I drove him and Skerving out. Mrs. Ross was present during most of the conversation with the plaintiff on the Sunday and while he was figuring ; she heard the terms and heard the whole bargain. I did not or the plaintiff point out the two horses to Skerving and say they were his horses. I saw him point out the horses but he is altogether mistaken as to where they were pointed out ; the horses were up around the house. I had rock salt out and the horses were licking the salt on the hill around the house and they walked around and were looking at them. I told the man that was working for me to drive them up. They were seen down at the base of the hill. Mr. Skerving said when all the horses came up he would like to see a horse broke, he had heard so

10 much about horse breaking in this country. I told the young fellow to catch a small colt and ride him so that this man would see a horse breaking. In the meantime Sexsmith and Skerving were walking along pointing to this one and that one and I was not paying any attention to what they were saying. They were not referring to me in the conversation at all. I did not hear Sexsmith tell Skerving those two horses were his. Sexsmith asked me for the bay horse the next day after he and Skerving were looking at the horses. They stayed that night at my place. I lent them a horse and rig to look up land. It was not one of these horses. Sexsmith did not on a subsequent occasion ask me for a buckboard. He asked me for a horse. This was the day after they were at my place. They stayed one night and all the next day looking up land and they found when they came in that the land they had selected was taken up and

20 wanted to go back and look for another place. Sexsmith came to me in the afternoon of the day after they came in and said I would like to get that bay horse. He never said it was his horse, but wanted the loan of it. I refused to loan it to him. I told him he could get a rig at the livery stable for \$2 or \$3, and I considered I had given them the team for one day and I had done all I had a right to. They walked out the next day and footed it and walked passed my place. They were so mad they would not go in to get their dinner. Both stopped at my corral talking to my hired man long enough to get their dinner and also stopped at a neighbours so it could not be for time. I met Skerving after that in the afternoon of the next day and I says were you folks mad about anything? Did'nt we treat you right and well enough when you were at my place the other day. My wife asked me did I do anything to insult you people

30 when you did not come near the house. He said oh no, you used us very well, better than we expected to be. There was no conversation whatever about a buckboard. He says I think George is pretty tired to-day. That ended up the conversation between him and I. I claim these two horses now as my property. I sold the horses to Murphy. I got that lien note for them so that my ownership is subject to the terms of that lien note. I never asked permission from Sexsmith to use these horses. I never parted with the possession of these horses until I sold them to Murphy. I never said to him on that Sunday, there are the horses, take them. I never said anything of this kind at any time. The words "it's a go" is an expression I never made use of. I did not tell Sexsmith the horses were out haying. He came out with me one evening, said he wanted to take some measurement for something or other about the buildings.

40 He stayed all night and got up early in the morning. I don't know where he was. We had our breakfast and the man had my horses all hitched up. I said did you get the measure you wanted, if you did we will pull out. I went to get the team. He said I got the measure all right. We got into the rig and, driving into town, somewhere on the road he says "I did not see the big team in the field." I says "Did'nt you." He says "no;" after a while he says you never told me that they were sold. I says did he. Yes, he says. He says are they sold. I said yes. He says

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where are they now. I said they are out haying. He said I thought I was to have that team. I said I thought so too if you were to pay me for them, but you could not give \$275 for them and another man could give \$300. There was no understanding that you were to have the team at your figures. If I had't a team to suit you when your work is done I will pay you in cash. I got \$40 or \$50 more out of that team than will pay you. He says "that is all right" then the cash will suit me just as well because I can get a better team for that money" and he repeated the storey about the man at the mill again. I never accepted any work that he had done at his shop. He asked me to approve of some such he did. This was after Costigan came and spoke to me on the street. I just simply turned round and said I would not look at it or have anything to do with it. I had not at any other time accepted or approved of the work that was done. I never to my knowledge saw him at work on my stuff for me or that he stated to be my work. He pointed to a pile of sashes one day and said that is mine. I never mentioned Sexsmith's name to Murphy in any way whatever until after the Replevin.

20 XM. BY MR. COSTIGAN.—I never sold these horses to Sexsmith or any other horses. I never said I did. I have as good a memory as the average. I have a good memory. If I say anything that is not true my memory is not to blame. I never said to anyone that I had sold a particular pair of horses to Sexsmith. I know Mr. Eshelman. I think his name is Jacob. I don't know his name. I heard his wife call him jike. J. P. Eshelman is the name I know him by. He was working for me a long time. I never told him I had sold these horses to Sexsmith. I do not remember meeting Eshelman in my shop one morning and speaking to him about my bargain with Sexsmith. I may have spoken to him about the bargain. I may have told him I made a deal with Sexsmith. Very likely I did. I remember the time Sexsmith and I went to the ranche and we looked at the horses. I don't remember meeting Eshelman after I came back. I will swear positively I did not tell Eshelman after I came back—I have sold that big team to Sexsmith. If it would seem that I did he is lying under a mistake. I did not tell anything of the kind. I never in my life referred to these horses as Sexsmith's horses. I know Charles Jackson. I know where his place is. I remember going to his place with a man named White. I took White out to see some rake Jackson had to sell. I met Jackson there that day. I did not then refer to these horses to Jackson as Sexsmith's horses. Positive of that nor to either of the horses as Sexsmith's. Question—Did you not state to Jackson on this occasion words to this effect: Sexsmith wanted to loan my buckboard to hitch up his horses. I refused to let him have the buckboard as I was afraid they might smash it or damage it. Answer — I positively say I never said anything of the kind to Charley Jackson or his brother.

Adjournment until to-morrow morning at 10 o'clock, Wednesday, 26 November, 1890.
Alexander J. Ross X. XM. continued.

40 It is not true that on the occasion of my returning from the ranche where I had the conversation with the plaintiff about the horses in my place of business in Calgary, Eshelman being engaged there sorting the mail, I told him I had sold these horses to Sexsmith. I did not tell him so that day or any other day. I will swear I am not mistaken about that. I did not say to Charles Jackson or his brother that Sexsmith wanted my buckboard to put one of his horses in, but I would not let him have it as I was afraid he would break it. Charles Jackson's brother is named Thomas. Charles and Thomas Jackson and White were together at Jackson's place. That's the only time I was ever there. I am not mistaken about having said this. If I had said

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it I would have remembered it. Sexsmith's name was never mentioned while I was there. (Paper shewn him.) This is the lien note I received from Murphy. Mr. Costigan offers this note in evidence (read B). When Skerving was out there the horses were knocking about my door. They were not in the corral. Sexsmith is mistaken, that was the evening, not the morning at all. I am just as sure about that as about its being Sunday. He is mistaken when he says that we were looking over the fence, I heard Skerving's evidence read. He is mistaken when he says I asked Sexsmith which were his two horses in the presence of Ross. If he says that was asked in the corral he is mistaken. I did not see him point out the horses to Skerving. If I had seen him do so I would not have contradicted him simply because I would have thought he was blowing to his friends. I drove Sexsmith and Skerving out and they drove in with a horse and rig belonging to me. I was dealing in Winnipeg in land. I was in the boom. I left there, came here, went into photographing business, also ranching, selling pianos and agricultural implements, been in that business. Last year Mrs. Ross was living at the ranche. As a rule I went out every night. Went out Saturday nights and as a rule stayed until Monday morning. There was nothing said about these particular horses in Mrs. Ross' presence to Sexsmith except that he would have them at my price. There was less said in her presence than anything else. Sexsmith asked the price of the horses in Mrs. Ross' presence. I told him that I wanted \$300 for them. He wanted them for less. Mrs. Ross laughed. He said he did not think that they were worth that. I don't remember but I think he said so in Mrs. Ross' presence what he thought the horses were worth. I think he did. That is all I remember that took place about the horses in Mrs. Ross' presence. The whole matter was discussed in her presence. The price of the horses was not discussed in her presence until after we came back from the corral and then there was very little. Mrs. Ross has been living in town lately. This conversation in presence of Mrs. Ross took place on a Sunday. Did not go out to the corral at all on Monday morning before we left for town. Arrived in town that Monday morning a few minutes after nine. I remember the time because that is the time I usually get in. I left that ranche that morning a few minutes before eight. Cannot state how many minutes. Takes from an hour to an hour and a half to drive in; it took me quite a little over an hour that day, just an hour and fifteen minutes. I generally get up in the morning about 6 a.m. or half-past six.

30 EX. BY MR. CAVE.—When these horses were taken from Murphy by the Sheriff they were in Murphy's possession by my consent and by arrangement between Murphy and me.

MARY ROSS sworn. I am the wife of the defendant Ross. I have met the plaintiff. I remember his going with Ross to the ranche last summer. That was his first visit to the ranche. I was stopping out there, he arrived in the evening. I think very nearly or about dark. The first time I am not positive whether it was on Saturday evening or not. I think it was. He remained over Sunday two or three times. I remember the following day his having a conversation with Ross in my presence. That conversation was on Sunday. He came out specially to look at the place and talk about improvements, and he figured and finally said he would do so much work for a certain price. There was considerable talk over what would be done and the price I remember distinctly because I was referred to every now and again about the plans of the house. There was considerable talk about prices and so on, but finally the price was decided to be \$260 for a certain amount of work. Other prices had been mentioned but that was the final and the pay was to be either in money or horses. How the horse question came up, we were afraid perhaps we would not have the cash to spare to pay straight cash and when

the work would be done and he had agreed to take horses if it was not convenient for us to pay the money. We had talked that way. He had looked at a bunch or band of horses and preferred the look of two of them, but there was nothing said that he should positively get those two horses. Mr Ross had named a price for these horses. I heard Ross mention a price to Sexsmith It was \$300. I don't remember Sexsmith saying anything but there was positively nothing decided about Sexsmith getting these two horses. I did not hear Sexsmith say he would accept the offer of \$300. I did not hear him say anything at all. I did not see Mr. Ross draw a pencil sketch of the improvements, but I saw Mr. Sexsmith draw a sketch, because he referred to me and asked me if we would have such and such things. I did not say anything
 10 about agreeing to \$200 for the improvements. I did not agree at all. Sexsmith went out at the ranche several times on Saturday night. Ross came out in the evenings during the work but Sunday was the only day time he was at home.

XI. BY MR. COSTIGAN.—They left the ranche that morning pretty early. I cannot say the time. Mr. Ross generally left between 7 and 8 o'clock. Don't remember the time he left this particular morning. He usually got up six or half-past six. Generally six o'clock. They were in and out the house this Sunday. Really I did not observe them together. They may have been. I don't think they were out of the house together Monday morning. They may have been but I don't think so. They were not that I know of. I won't swear they were not. They may have been. I hardly think it. I did not see them. I do not know for sure. They
 20 were both out of the house at the same time. I don't think they were. My reason for saying that is my husband is always in a hurry going to town. Sexsmith I think was up earlier than my husband. I said nothing when the price of \$260 was mentioned for the improvements. I raised no objection.

RE-X BY MR. NOLAN.—I don't know of my own knowledge that Mr. Ross was out of the house at all before going to town that morning, we had a man stopping there at the time. I think his name was Morgan. Mr. Ross sometimes hitched the horse himself. I do not know he did it this particular morning.

Case closed for defendant Ross.

MR. CAVE for defendant Murphy reads Judge Rouleau's order and asks me to decide the
 30 question between all parties and calls.

THOMAS MURPHY sworn.—I am one of the Defendants. I live on the mission. I am a contractor at teaming or whatever I can get to do. I heard the evidence of Jackson and Sexsmith. I heard their account of meeting me when they demanded the horses from me. I heard them state that I said I always expected trouble in connection with these horses as Mr. Ross told me he had sold these horses to Sexsmith. That is proving I never said any such words or anything to that effect. Ross never mentioned the name of Sexsmith to me before the Sheriff took the horses. Question—How came you by these horses? Answer—I bought them from Mr. Ross on 17th July. Mr. Costigan objects to any evidence of sale to the witness, claiming
 40 that he has not in his Defence set up property in himself but by par. 4 set up merely an agreement to purchase. I rule the evidence admissible under the 2nd paragraph of his Defence, also under the 3rd par.

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I give security for these horses.

TO MR. COSTIGAN—It was given by a lien note.

BY MR. CAVE—(paper shown him.) That is the security. These horses were taken from me by the Sheriff, they were at that time in my hands by consent of Ross. At the time the horses were taken from me I was using them. It was a matter of inconvenience to me their being taken. I had a contract to supply hay to the railroad at the time to Mr. Strelvel and Mr. Laidlaw. I had two contracts besides some sub contracts under those who I was supplying a load to now and again.

10 At the time the horses were taken from me by the Sheriff I had the team in daily use in my business. These horses would be worth in business such as mine about \$3 a day for work of that kind. For my business it would be worth my while to pay \$3 a day for a team of horses.

XM. BY MR. COSTIGAN.—I never paid the \$300 for this team. They were replevied away from me. I had not a chance to pay for them. I don't know of any horses hired for less than \$3 unless for a certain length of time or when a person was using a whole lot of horses. Horses with a driver are employed on construction for \$2.50 a day as long as the work lasts.

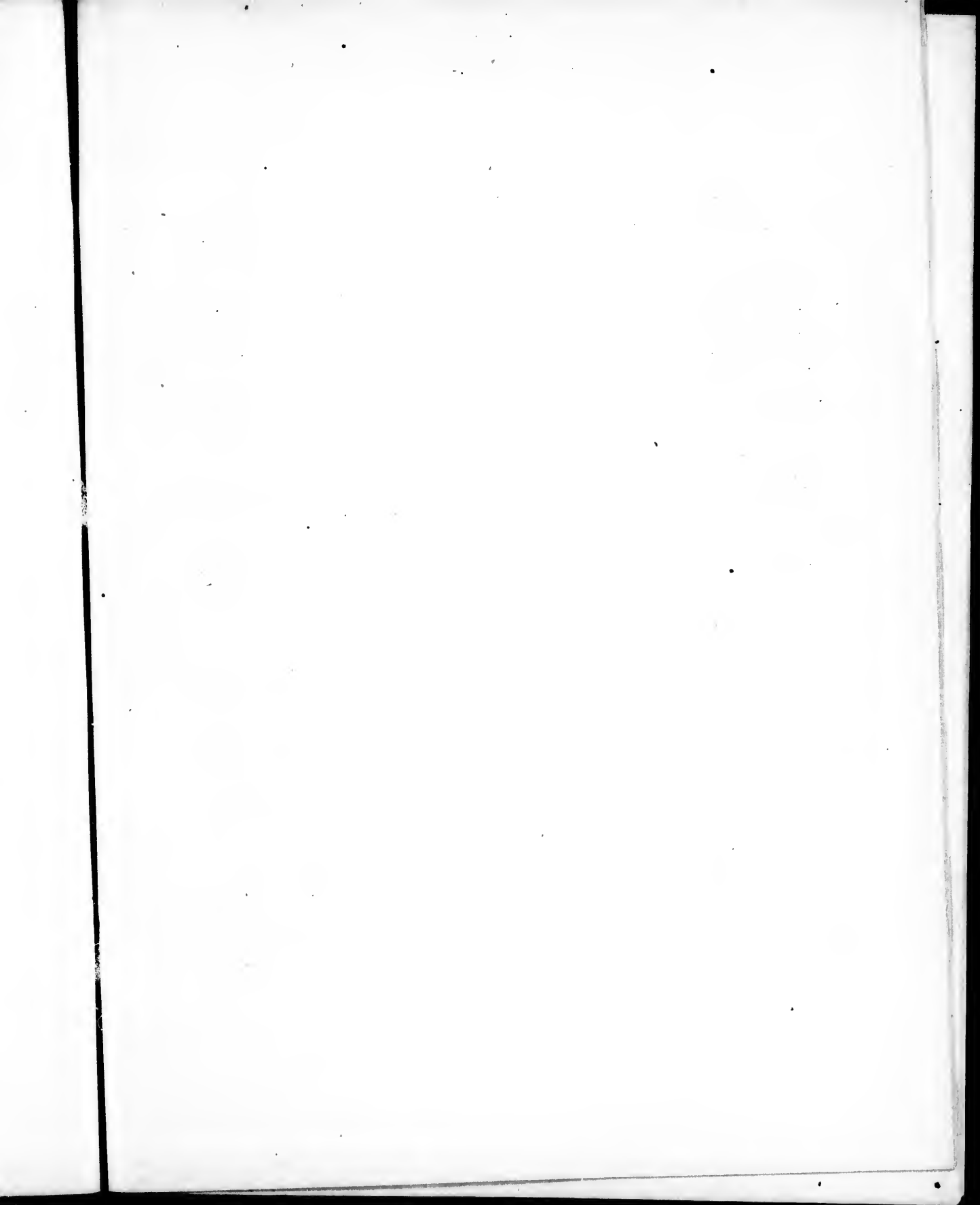
20 XM. BY MR. NOLAN.—I never heard Sexsmith's name mentioned by Ross in connection with these horses. I first heard of Sexsmith having any claim on the horses, was coming to demand the team. I did not know anything about Sexsmith or who he was. The horses were replevied on 12th August (to Judge.) I got the horses on 17th July. Case closed for defendant Murphy.

MR. COSTIGAN asks to call witnesses to contradict Ross. To call Eshelman, Charles Jackson and Thomas Jackson as to the particular conversation he cross-examined Ross about.

MR. NOLAN says no objection to Eshelman and Thomas Jackson, but objects to Charles Jackson, as he has been sworn before. I allow it.

30 JACOB B ESHELMAN sworn.—I live in Calgary. I am a married man. I know the defendant, Alexander J. Ross. I was in his employ for some time here in Calgary. I remember his being in conversation with me in respect to a pair of horses and Sexsmith. It took place in Mr. Ross' studio. I had just returned from the post office in the morning and was reading my correspondence when Mr. Ross came in and stated that he had sold the big team. When I asked him to whom, he said to the old man, meaning of course Mr. Sexsmith speaking of Sexsmith in that way. I know the team he referred to and knew it at that time. I know them because I had seen them frequently. It must have been sometime the beginning of June last or the end of May. I am not very sure. It was not July anyway, I am sure of that. No chance of my being mistaken. I would not be sure he mentioned the price. He said Sexsmith was doing work for him. He was to finish a building for him and put an addition to it and the horses were to be in payment of the work.

XM. BY MR. NOLAN.—I remember this all along. It was not at all necessary to remind me of it. No person reminded me of it recently. I perfectly recollect all that was said. Certainly there was a conversation about it between Mr. Sexsmith and myself. I did not go to



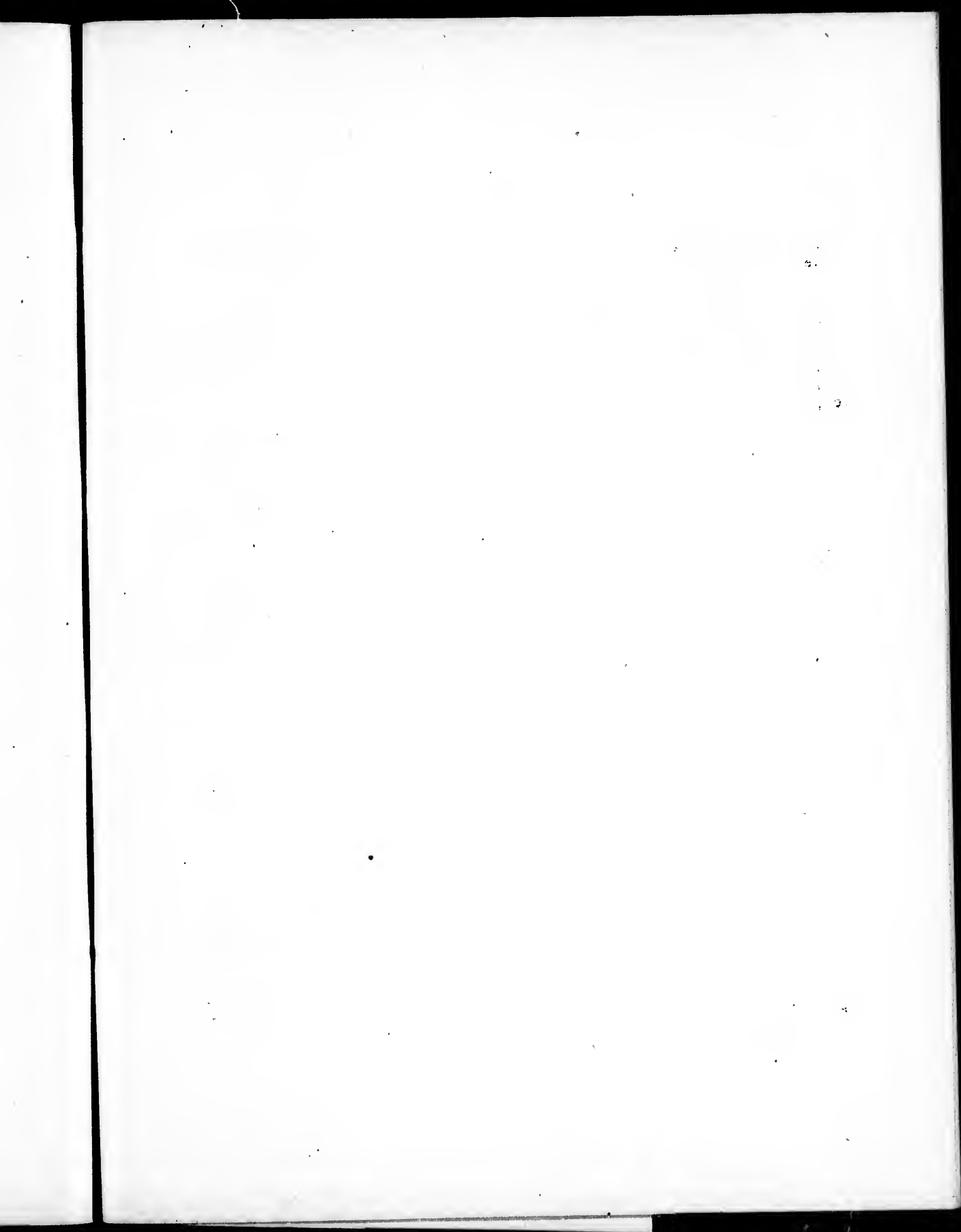
Sexsmith nor he to me. We happened to meet, Sexsmith suggested it first. I could not state how long ago this was; it was somewhere after the arrangement was made. It was more than a month ago, it is not after I left Ross' employment. Ross said he sold the big team to the old man. He mentioned a name. He mentioned Sexsmith's name. I think he said. I think I said in my direct examination he mentioned Sexsmith. I said speaking of Sexsmith in that way. I know who he meant. I think I have reason to think that by the old man he meant Sexsmith. I am prepared to swear he mentioned Sexsmith's name. He did. His name occurred in that conversation. I say he spoke of the old man meaning Sexsmith because afterwards he spoke of Sexsmith. Ross said Sexsmith was doing work for him. It is not as I understand it that the horses were to go in payment of the work. If I swore that Ross told me that, I was mistaken. I understand the horses were sold and the work was to be done in payment of the horses. Ross described the team as a gray and bay. He mentioned them as a gray and bay. I think he had another gray and bay in his possession. I know he had but this was the big team. I am sure Ross did not refer to another gray and bay. I know exactly what he referred to. I think that was the only match big team he owned at the time. I don't know what teams, he may have had other big horses. He called the team the big team. They were matched in size and weight and he hitched them and drove them together. He may have had smaller match teams. I am not quite friendly with Ross at present. I was at the time and up to a short time ago. I was in Ross' employment. You may call it he discharged me, I am not in his employment now. I caused a writ to be issued against Ross recently and there is at present a case pending in this Court in which I am plaintiff and Ross defendant. This would be somewhere about the beginning of June or end of May. I would not say it was earlier than that. I am not positive as to the time.

XI. BY MR. COSTIGAN.—I claim Ross owes me for certain monies or commission for wages and I have brought an action to recover it.

CHARLES JACKSON recalled.—I remember Ross going to my place in the country with one White. Mr. Ross, my brother and myself were present when something was said about a horse and buckboard and Mr. Sexsmith. How the conversation happened to take place was this. In consequence of something I had heard I asked Ross why he did not let Sexsmith have a horse and ride out to his place. He said he offered him a horse and he would not take it. He said he wanted to drive his team or one of his horses, I forget which in one of his rigs, and he would not let him have one, the team had run away and broken one rig and that was quite enough, or words to that effect. My brother heard this conversation. We were walking together from my house to his.

XII. BY MR. NOLAN.—I don't think I am interested in the plaintiff succeeding in this case any more than I went his bond as stated before. I am not altogether aware if Sexsmith does not succeed I will have to pay a portion of the money in the bond. I understand it was to see that he would have the team here when the suit would come off. I did not think the bond read I would be liable for damages. I am not sure I read the bond. I could not say for certain that I was in it. I did not understand it in that way. This conversation took place coming from my place to my brother's.

RE-XI. BY MR. COSTIGAN.—The other bondsman is Mr. Walker.



XM. BY MR. NOLAN.—White was driving the team when this conversation occurred. He had a pretty wild team and he was driving it. He was not near enough to hear when this conversation was going on.

THOMAS JACKSON sworn.—I know defendant Ross. I remember his being at my brother's place with a man named White. I recollect a conversation about a pair of horses and Sexsmith. Ross was talking about Sexsmith going out to look for land—the day before he went out walking. He said he wanted to bring down his horses and put them in one of his rigs and he said he was afraid to let him have the rig for fear he would smash it. He said he had smashed one on him already. He said his horses Sexsmith's. His
10 rig, Ross'.

XM. BY MR. NOLAN.—I could not state what date this was. It was about haying time as near as I can remember, if I remember right. Ross said Sexsmith went out the day before. I do remember right. Ross said he went out walking looking for land the day before. If I remember right it was not my brother introduced the conversation about Sexsmith going out walking, it was Ross himself. I don't think my brother asked Ross why he would not lend Sexsmith the horse. I was there. I don't think my brother asked him why he did not let Sexsmith have the horse. Ross was talking about his going out to look for land and what a fool he was for walking. This conversation took place up at our place, not in the house outside. I have a horse and my brother. We were walking from my place over to his. Sexsmith is not a particular friend of mine, nothing more than an acquaintance. He has not been living in the same house with me. My brother and I are working together. I am aware my brother has become security for Sexsmith in a way for the horses. I do not understand the particulars of it. I do not suppose I will have to contribute my share to my brother if he has to pay a portion of that bond. I was not asked to go into it.
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RECESS.

MR. NOLAN addresses the Court for Ross.

No evidence that the two horses replevied are the same two horses.

The person replevying should be entitled to the immediate possession.

The only evidence of sale to plaintiff is plaintiff.

Not probable that Defendant handed over the team before the work was done on his simple
30 assurance he would do work for him.

No evidence of any former transaction between them.

Renews his objection that the sale is void under Statute of Frauds. Is it likely the defendant would hand him the horses before the work was done.

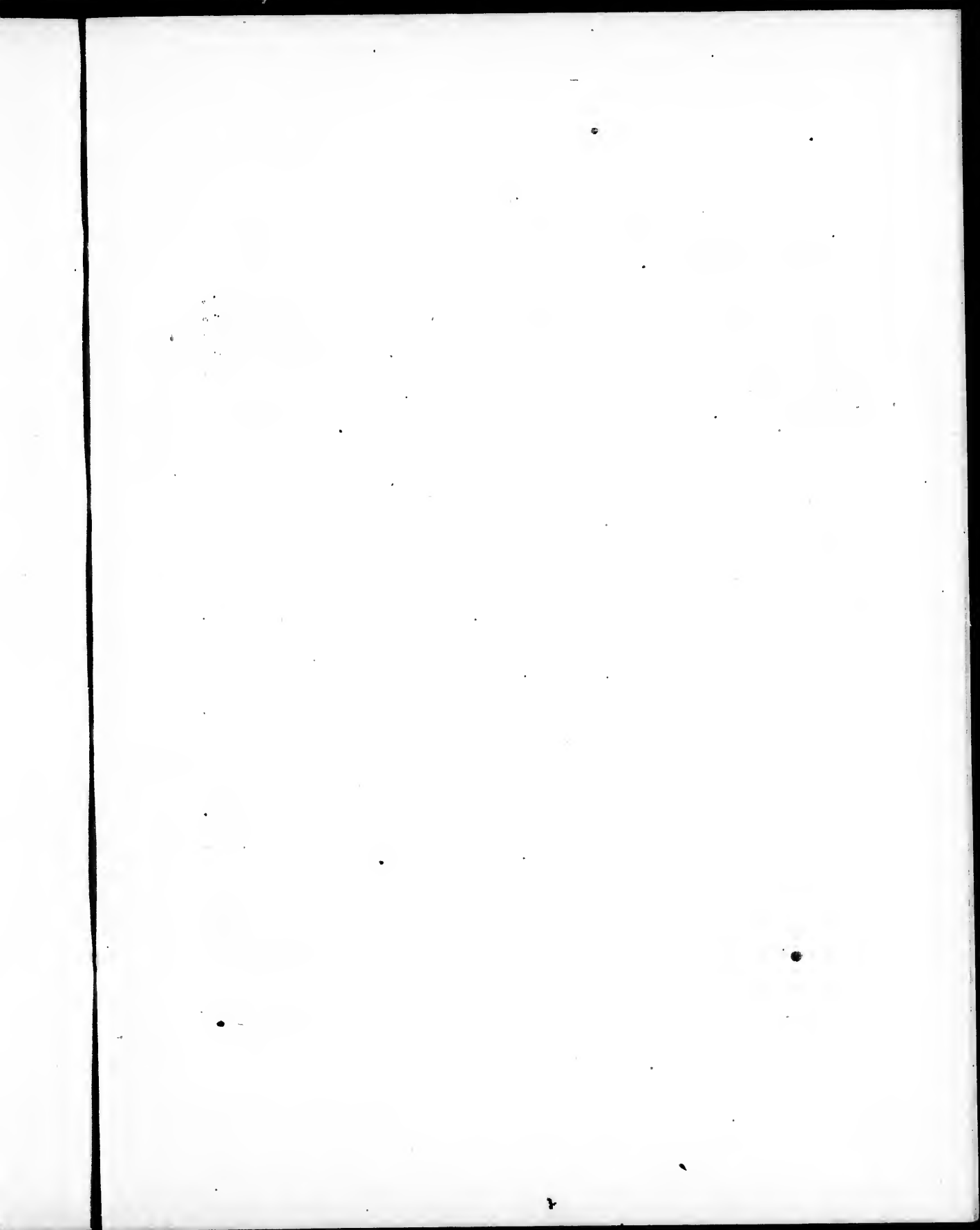
As to contract being on Sunday, he intimates he may apply to amend the pleading. I state I will hesitate to allow such an amendment.

As to Eshelman's evidence he says the conversation took place 1st of June or last of May. Sale was the 15th of June. Eshelman is prejudiced. Ross says it was two weeks after he refused horses to Sexsmith he was at Jackson's ranche. Jackson is one of the sureties.

MR. CAVE address the Court for Defendant Murphy.

40 Claims a return of the horses and damages for their detention by reason of the replevin.

MR. COSTIGAN addresses Court for plaintiff.



Ross has not contradicted the facts that he tried to get Sexsmith to sign a paper to take some other pair of horses.

That he told Sexsmith he would go into the box and swear against him.

MR. NOLAN says he denied the whole conversation.

He did not deny telling Sexsmith twice that the horses had got out. He did not deny he asked for his team of horses to haul the lumber. That he went out 3 times to place when the plaintiff wanted to go out to measure the cornices. Sexsmith swore that Ross stated he would allow the horses to remain at Plaintiff's risk. Sexsmith swears the delivery was made at the corral in the morning before they came to town. Mrs. Ross knew nothing about that. If I believe the evidence of Skerving, Ross has sworn to what he knows to be untrue.

Ross was the first person who mentioned about Thomas Jackson and then the brother was sent for. He was not a witness at first. Ross' man was there and would have known these men were at the corral.

Thursday, 27th November 1890.

EXHIBIT A.

CALGARY, ALBERTA, 27TH AUGUST, 1890.

MR. GEORGE H. SEXSMITH,
CALGARY.

SIR,—We are instructed by Mr. Alexander J. Ross, Photographer, Calgary, to notify you to do no work whatever for him till you are further notified. Mr. Ross will not be responsible for any work you may do after receipt of this notice.

Yours etc.,

(Signed) LAFFERTY & NOLAN,

Advocates for A. J. Ross.

EXHIBIT B.

CALGARY, Alberta, July 17th, 1890.

B.R. No.

On or before the first day of 18 for value received, I promise to pay to A. J. Ross, or order, the sum of \$300.00 DOLLARS, at their office in Calgary, N.W.T., with interest at 7 per cent. per annum till due, and one per cent. per month after due till paid. Given for one bay horse, branded IR on left shoulder; one dark grey horse, branded IR on left shoulder; three mules branded; one Ramsay wagon; two sets double harness.

And in consideration of value received and the accommodation obtained, I hereby (as to the debt and liability hereby created) waive, renounce and give up all right to exemption from seizure and sale under execution of any land, goods or chattels that would otherwise be exempt.

The title and ownership of the goods for which this Note is given, shall remain, at my own risk, in A. J. Ross, until this Note or any renewal or renewals thereof is fully paid; and if default in payment is made, or should I sell or dispose of or attempt to sell the under mentioned land which I own, or if for any reason A. J. Ross, should consider this Note, or any renewal or renewals thereof, secure, they have full power power to declare the same due and payable, even before maturity of the same, and also take possession of the said goods and hold the same until this Note, or any renewal or renewals thereof are paid, or sell them at public or private sale, the proceeds thereof to be applied on the amount unpaid after deducting all expenses connected with such taking possession and sale; and taking and sale of said goods shall not be a release of my liability for the balance of said price.

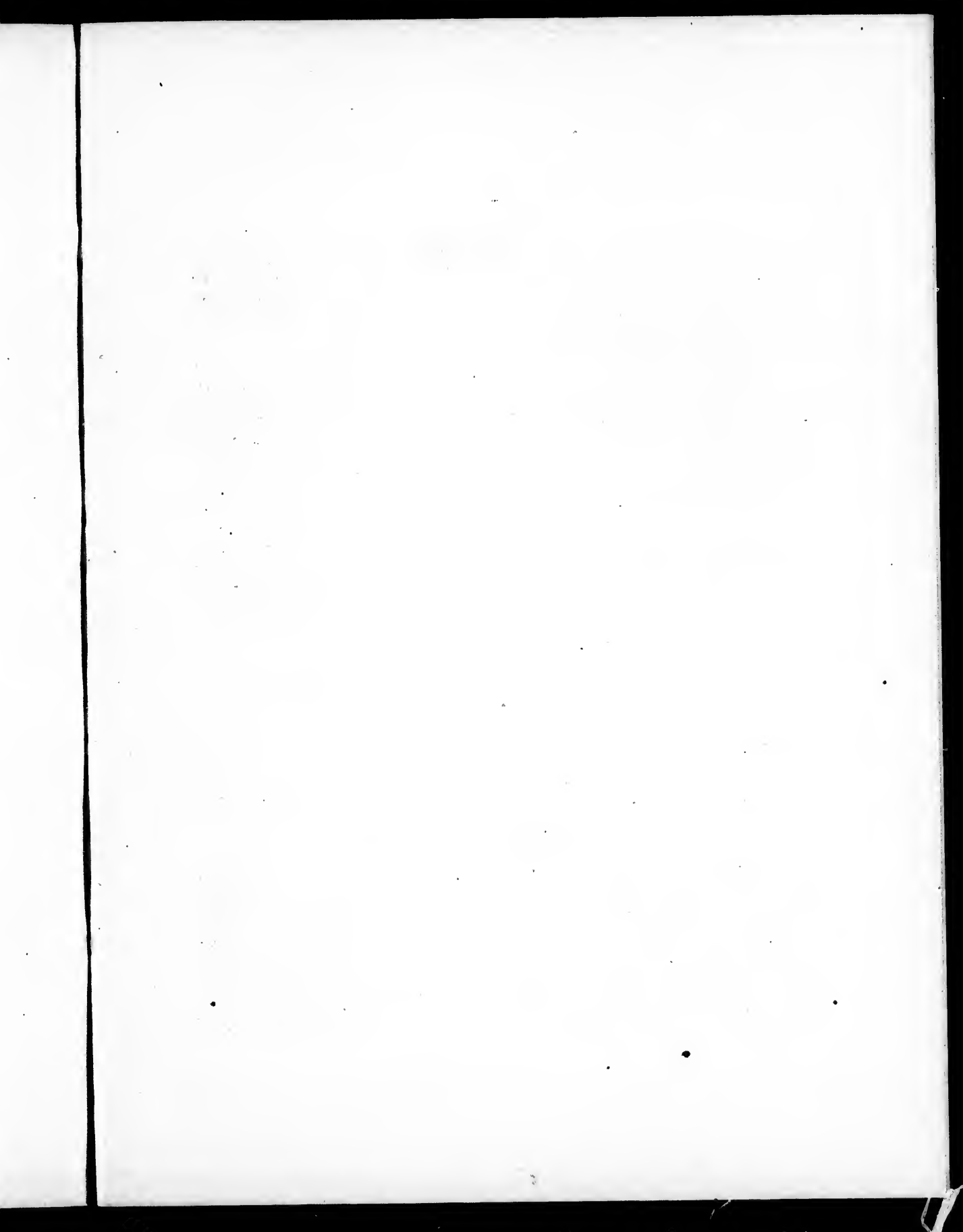
The land above referred to is Sec. No. Tp. No. Rg. No. No. acres

Calgary Post Office.

. Agent.

(Sgd.) THOMAS MURPHY.

(Sgd.) A. M. HAMILTON, Witness.



JUDGMENT

I find that the property in question was sold absolutely by the defendant Ross to the plaintiff and that it was agreed between Ross and the plaintiff that from the time of such sale that the horses should be kept in Ross' premises and that such possession by Ross should be as bailee for the plaintiff, that is, I accept the plaintiff's version of the transaction and I hold that this is a sufficient acceptance and receipt under the Statute of Frauds.

I find for the plaintiff on all the issues and order.

Judgment for the plaintiff for \$2 damages and costs against both defendants.

As between the defendant Murphy and the defendant Ross I find that the defendant Murphy is entitled to indemnity as against the defendant Ross and I do order that judgment be entered in favor of the defendant Murphy against the defendant Ross for \$500 and his costs of defending this action, including a Counsel Fee of \$30 but no execution to be issued on such judgment without leave of a Judge obtained by application at Chambers. If the defendant Ross on or before the 2nd January next retire the lien note given by Murphy to him now in the Imperial Bank, and give the said note up to Murphy to be cancelled and pay the amount of the judgment and costs awarded to the plaintiff and the costs awarded to the defendant Murphy, he may apply to the Judge in Chambers to have satisfaction of the judgment entered at his cost. If he fail in any of these conditions the defendant Murphy may apply to the Judge in Chambers to have execution issued on his judgment against Ross for such amount as the Judge may on hearing the parties determine to be sufficient to keep him Murphy indemnified and harmless. Nothing in this order as between the defendants to affect the plaintiff in any way.

Correct. E. L. WETMORE, J. S. C.

IN THE SUPREME COURT OF THE NORTH-WEST TERRITORIES,
JUDICIAL DISTRICT OF NORTHERN ALBERTA.

BETWEEN

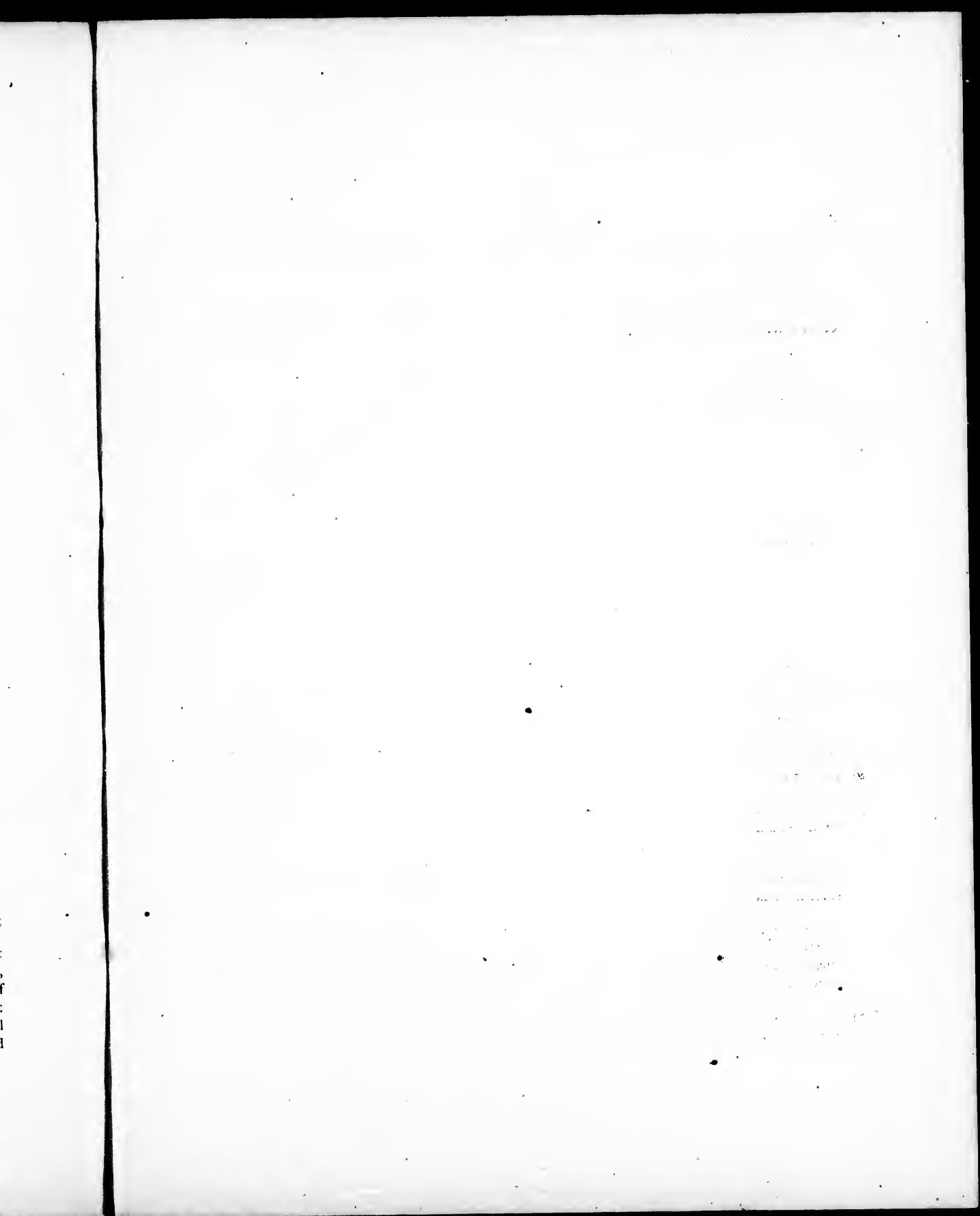
GEORGE H. SEXSMITH, Plaintiff,

AND

THOMAS MURPHY and A. J. ROSS, Defendants.

TAKE NOTICE that the defendant A. J. Ross appeals from the verdict against him in this action, and against the judgment of the Honorable Mr. Justice Wetmore, given or entered thereon on the Twenty-seventh day of November, A. D. 1890, so far as the same concerns him;

AND TAKE NOTICE that at the Sittings of the Supreme Court of the North-West Territories in Banc, to be held at Regina at 10 o'clock in the forenoon on the 1st day of June, A. D. 1891, or so soon thereafter as Counsel can be heard, a motion will be made on behalf of the said defendant A. J. Ross to the Court in Banc for an order that the said finding, verdict and judgment, obtained against the said defendant in this action, be set aside and a new trial had between the parties, on the ground of the discovery of fresh evidence on behalf of the said



defendant since the trial of this action, as disclosed in the affidavits of the said defendant, George White, Herbert Morgan and Edward McArthur, this day filed; or for an order reducing the damages awarded against the said defendant, on the ground that the same are excessive;

AND TAKE NOTICE that upon such motion the Court will be moved to grant an order allowing the said defendant to read such affidavits, and the said defendant hereby gives notice of his intention to read such affidavits.

DATED AT CALGARY this 10th day of December, 1890.

To the above named Plaintiff and Messrs. Costigan & Bown, his Advocates.

JAMES BRUCE SMITH,
Advocate for A. J. Ross.

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BETWEEN

GEORGE H. SEXSMITH, Plaintiff,

AND

THOMAS MURPHY and A. J. ROSS, Defendants.

I, Alexander J. Ross, of the town of Calgary, in the North-West Territories of Canada, Photographer, one of the above named defendants, make oath and say:—

1. This action was tried on the Twenty-fifth and Twenty-sixth days of November last past at the town of Calgary before the Honorable Mr. Justice Wetmore, and the said Judge on the Twenty-seventh day of November aforesaid directed judgment for the plaintiff to be entered
20 against me.
2. At the trial of the said action Mary M. Ross and I, this deponent, were the only witnesses examined on my behalf.
3. That Herbert Morgan, Edward McArthur and George White, all of the District of Alberta, were necessary and material witnesses on my behalf in this action, as shown by their several affidavits made herein.
4. That I was not aware that the said White, Morgan and McArthur, or any of them, were material witnesses in my behalf in the said action, or were in possession of any knowledge whatever relating to any of the matters in question in this action, until after the trial of the said action as aforesaid.
- 30 5. I verily believe that if the said plaintiff is allowed to retain possession of said horses, in question herein, I will not be able to recover the price thereof from him.

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6. The said Morgan White and McArthur, were mentioned during the course of the said trial by the plaintiff and several witnesses on his behalf, which mention was the first intimation of any kind I had that they knew or could know of anything in connection with the matters at issue.

7. After the said trial I took steps at once to send for White to High River, about forty-five miles from Calgary, and obtained leave to see Morgan at the North-West Mounted Police Barracks at Calgary, and sent nine miles into the country for McArthur, and ascertained from them that they knew the matters contained in their several affidavits filed on this motion, which contradict a good deal of the material evidence given against me at said trial.

10 8. The said Morgan, White and McArthur reside in the District of Alberta, and had I known the nature of the evidence for the plaintiff, and that they could have given any evidence respecting the matters at issue, I would have had them, the said Morgan, White and McArthur at the said trial, but I had no idea whatever that they knew the facts contained in their several affidavits and if a new trial is granted I can and will subpoena them for the trial and obtain their attendance thereat.

9. The plaintiff is, as I am informed and verily believe, entirely worthless, and if my horses are left in his possession pending a new trial or pending this appeal, I may be without any recourse either to recover them or their value.

10. This application for a new trial is made bona fide and not for any purpose of delay.

20 SWORN before me at Calgary, in the
North-West Territories, this 9th
day of December, A.D. 1890. (Sd.) A. J. ROSS.
(Sd.) W. L. BERNARD,
A Notary Public in and for the North-West Territories.

IN THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.
NORTHERN ALBERTA JUDICIAL DISTRICT.

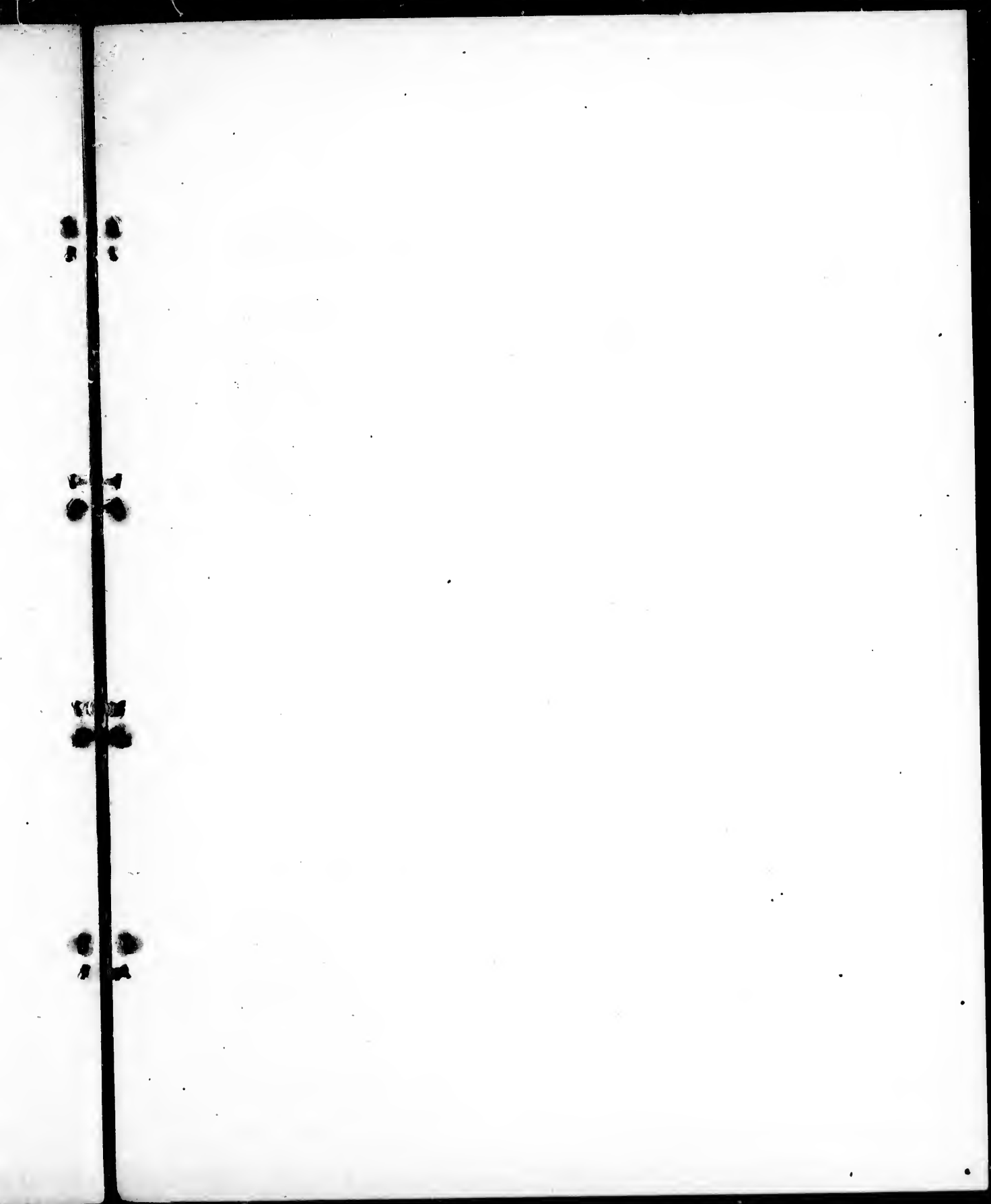
BETWEEN :

GEORGE SEXSMITH, Plaintiff,

AND

30 THOMAS MURPHY and A. J. ROSS Defendants.

I, Edward McArthur, of the town of Calgary, in the North-West Territories, rancher, make oath and say:



1. I am the Mr. McArthur referred to in the evidence of the above named plaintiff given on the trial of this action at the last Sittings of this Court at Calgary before the Honorable Mr. Justice Wetmore.

2. I was staying at the house of the defendant Ross on his ranche near Calgary at the time the defendant Ross drove the plaintiff out to said ranche to take the measurements referred to in the said plaintiff's evidence.

3. At the said time the plaintiff asked me "where that grey horse and bay horse of Ross' were," and I said I did not know the horses, and did not know where they were, but I further told him that one Frank Hamilton had been there and drove away four or five head of Ross' horses into Calgary.

4. I never told the said plaintiff that the horses in question herein were sold by the defendant Ross to the defendant Murphy, or to any other person, and the said plaintiff never intimated to me in any way whatever that he the said plaintiff had purchased or agreed to purchase any horses from the defendant Ross.

SWORN before me at Calgary, in the
District of Alberta, this 5th day of
December, A. D. 1890.

W. L. BERNARD,

(Sd.) E. McARTHUR.

A Notary Public in and for the North-West Territories.

20 IN THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.
NORTHERN ALBERTA JUDICIAL DISTRICT.

BETWEEN :

GEORGE SEXSMITH, Plaintiff,

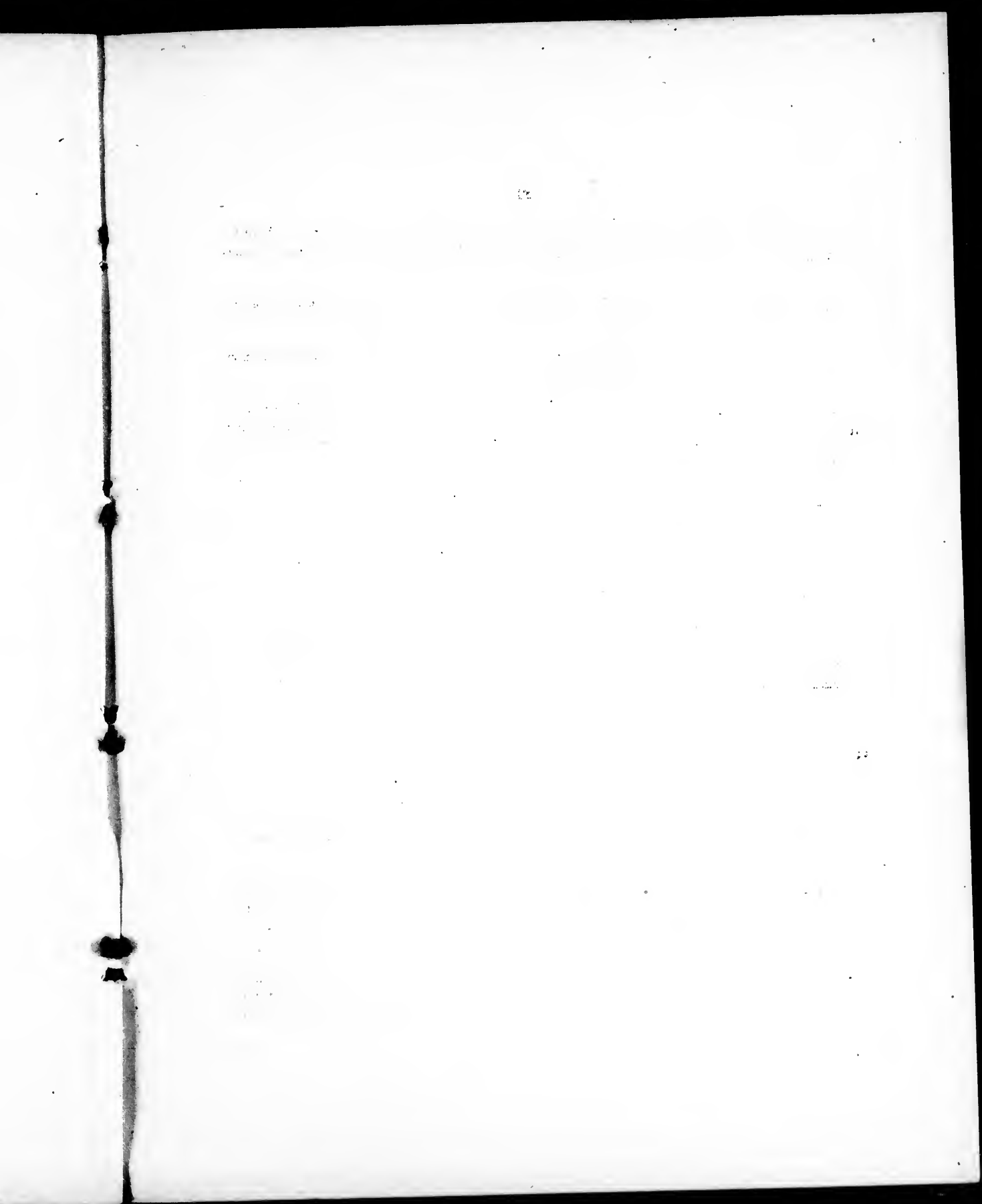
AND

THOMAS MURPHY and A. J. ROSS, Defendants.

I, George E. White, of High River, in the District of Alberta, rancher, make oath and say:

1. I am the Mr. White referred to by Charles Jackson and Thomas Jackson for the plaintiff at the trial of this action before Mr. Justice Wetmore at the last Sittings of this Court at Calgary, as being present at a conversation between Jacksons aforesaid and the defendant Ross about the team of horses in question in this action and remember said conversation.

2. I drove on that occasion with said Ross to Jackson's place and was present throughout the entire conversation between said Jacksons and Ross and near enough to hear all that was said.



3. During such time Sexsmith's name was not mentioned nor was anything said about his being at Ross not letting him have a buckboard to hitch his team in, meaning the team in question in this action which he now claims to have purchased from Ross.

4. I remained in their presence till Thomas Jackson went back to where he was working and Charles Jackson, Ross and myself all left the place together for Calgary.

5. I am sure I would have heard such conversation if it had taken place but did not know of the trial or tell Ross anything about what I knew until to-day.

6. The conversation was about some cattle and some old machinery that Jacksons were wanting to sell, and Ross and I went there to see about buying a horse-rake from them and had no occasion to introduce either Sexsmith's name or business.

SWORN before me at Calgary, in the
District of Alberta, this 2nd day of
December, A. D. 1890.

(Sd.) JOHN C. F. BOWN,

A Notary Public in and for the North-West Territories.

(Sd.) GEO. E. WHITE.

IN THE SUPREME COURT OF THE NORTH-WEST TERRITORIES,
JUDICIAL DISTRICT OF NORTHERN ALBERTA.

BETWEEN

GEORGE H. SEXSMITH, Plaintiff,

AND

THOMAS MURPHY and A. J. ROSS, Defendants.

1, Herbert Morgan, of the town of Calgary, in the District of Alberta, ranche hand, make oath and say:—

1. I was working as a ranche hand for the defendant Ross at his ranche near Calgary during the month of June last past, and was present at the said ranche on the evening, referred to in the evidence adduced on the trial of this action at the last Sittings of this Court, when the said defendant Ross drove the plaintiff and one Skerving from Calgary to said ranche.

2. The said defendant's band of horses referred to at the said trial were not, nor were any of them, in a corral during the said evening, or at any time during the following day, but the said horses, including the team in question in this action, were running at large in a field on the said defendant's ranche.

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3. On the morning next following the said evening referred to the said defendant Ross drove away from his said ranche to Calgary immediately after breakfast, leaving the plaintiff and the said Skerving at his, the said defendant's house, and I swear positively that the said plaintiff, the defendant Ross and the said Skerving were not at the corral on the defendant Ross' ranche, together during any time of the said morning.

4. In the forenoon of the same day, soon after the said Ross drove away as aforesaid, the said plaintiff and Skerving drove away from the said ranche with a horse and buckboard belonging to the said Ross, to look at some land, as I was informed by them and believed, and returning to the said ranche in the afternoon of the same day, when I accompanied them to
10 Calgary, where they remained, and I then with said horse and buckboard returned to said ranche.

5. Two days subsequent to the said day last above referred to, the said plaintiff and Skerving walked through the said Ross' pasture on said ranche, and on their way back to Calgary and in the absence of the said Ross, stopped at the corral where I had placed the said Ross' band of horses for breeding purposes ; this is the only time the plaintiff and Skerving were at the said corral when Ross' horses were enclosed therein.

6. On two occasions the plaintiff came out to the said Ross' ranche, coming each time on a Saturday evening and remaining over the next following Sunday ; on the first occasion the plaintiff told me he was buying a bay horse and a grey horse, and on the second occasion he told me he came to buy the ranche and all the horses belonging to Ross.

20 7. The said defendant never told me that the plaintiff owned any horses, nor that he, Ross, had sold or agreed to sell him any horses.

SWORN before me at Calgary, in the
North-West Territories of Canada,
this 6th day of December, A.D. 1890
(Sd.) GEO. MURDOCK.

(Sd.) HERBERT MORGAN.

A Justice of the Peace in and for the North-West Territories.

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