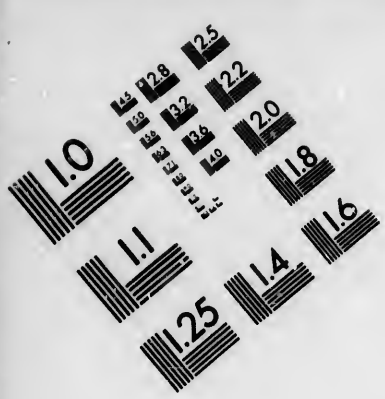

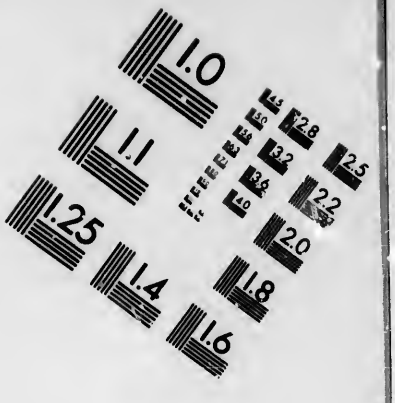

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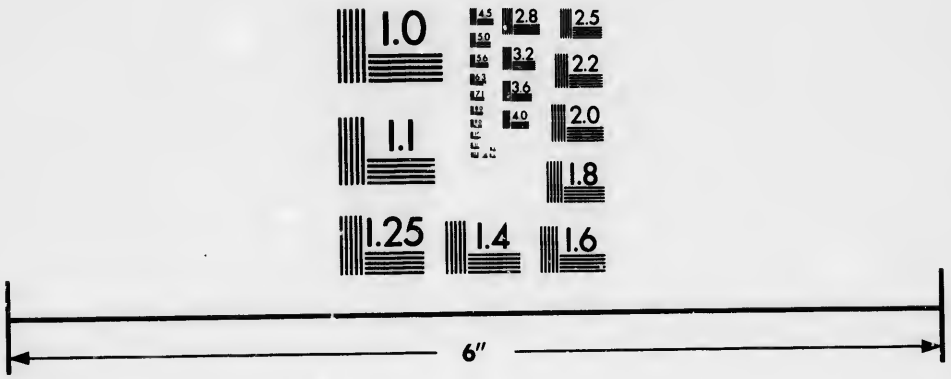

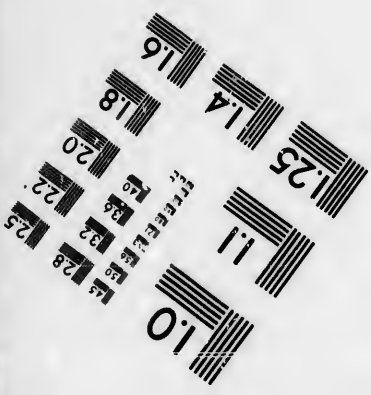

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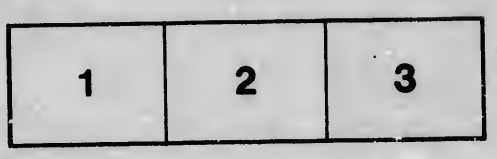

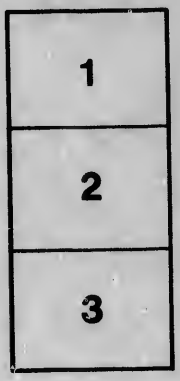

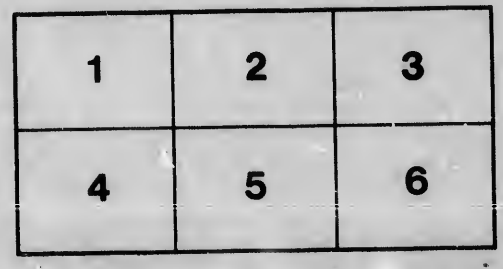

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IN APPEAL

JAMES BLACK,

Appellant,

AND

CHARLES GRAY STEWART

Respondent.

THE APPELLANT'S CASE.

A. STUART, for Appellant.

IN APPEAL

JAMES BLACK,

PROVINCE OF LOWER-CANADA. } *Court of Appeals.*

In a case between

JAMES BLACK,

APPELLANT,

&

CHARLES GRAY STEWART,

RESPONDENT.

THE APPELLANT's CASE.

THIS was an hypothecary action brought by the Appellant, as Curator to the vacant estate of the late Honor Jordan, otherwise called Honor Dunn, against the Respondent as *détenteur* of a house and lot of ground in the Upper Town of Quebec, for the recovery of a sum of five hundred pounds with interest, for which the said house and lot of ground were mortgaged.

The declaration states that the mortgage was created by a judgment rendered in His Majesty's Court of King's Bench for the District of Quebec, in favor of the said Honor Jordan against one William Harris, who at the time of the rendering of the judgment was proprietor of the said house and lot of ground.

To this action the Respondent pleaded the prescription of ten years *entre présens.*

The evidence in the case is principally written evidence.

It appears from it

That the judgment in question was rendered on the twentieth day of April, on thousand eight hundred and two.

That on the first day of May following William Harris's attorney sold the lot of ground and premises mentioned in the declaration to one Janet Brydon.

That on the twenty-fourth day of January, one thousand eight hundred and eleven, Janet Brydon transferred the said house and lot to the present Respondent.

That some time previous to the said last mentioned transfer, to wit, on the twenty-eighth day of January, one thousand eight hundred and nine, Honor Jordan departed this life at Quebec, without leaving any heirs in this Province.

That the present Appellant was appointed Curator to her vacant Estate, on the twenty-fourth day of May, one thousand eight hundred and sixteen.

Upon the above facts, an abstract question of Law arises.

Does the prescription of ten year *Entre présens agés et non-privilégiés franchement et paisiblement sans inquietation d'aucune hypothéque*, established by the 114th Article of the Custom of Paris run against a vacant Estate.

Nouv. Coll. de Jur. V V. Desherence Biens vacans.

By the Law of Canada, the goods and lands of persons dying within this Province, and not leaving apparent heirs, are originally and solely vested in the Crown, without any transfer or derivative assignment, either by deed or law, from the former Proprietor, and this under that ancient branch of the Royal prerogative which is known by the name of *Droit de Desherence*.

Nouv. Coll. de Jur. V. Curatelle § IX. 9.

The King's Courts accordingly may, and in France did appoint, Curators to Estates of such persons, without taking the advice of the friends of the deceased.

As the prescription of ten years *entre présens agés et non-privilégiés*, does not run against the King, neither does it run against a vacant estate.—Bacquet Tr. du *D. de Desherence*, p. 838, *& seq.* Cout. de Par. par Ferriere, vol. 2, p. 299, *& seq.* p. 323; and Dumoulin, I. 889, who says in so many words, *Præscriptio non currit hæreditate vacante.*

It is true that Pothier in his Treatise of Obligations, No. says, that the prescription of 30 years runs against a vacant estate, and it was upon this authority that the Court below founded its Judgment.

The true reason why the prescription of thirty years has been held to run against vacant estates is that they are assimilated to other successions, and the right to demand them is therefore extinguished by the lapse of thirty years. *L'opinion communément suivie au Palais* (says Bacquet) *à la quelle il se faut arrester, est que la prescription de trente ans est suffisante pour exclure le Roi et les hauts Justiciers des confiscations aubaines, bastardises et Desherences, attendu que ce sont successions déférées l'action et poursuite des quelles se prescrit par trante ans* petitio enim hæreditatis quæ est actio personalis mixta sive in rem scripta triginta annis præscribitur lege hæreditatis. Cod.

Before the Conquest of this country by Great Britain, the only prescription which could have been pleaded against a vacant estate, was the prescription of thirty years. Whether even that prescription could be pleaded since the conquest might well be questioned, as it is an undoubted prerogative of the Crown of Great Britain, equally binding throughout the whole of the King's Dominions, that *nullum tempus occurrit regi.* However this may be, the Appellant trusts that he has shewn that the prescription of ten years *entre présens agés et non-privilégiés* does not run against a vacant estate and that the Judgment of the Court below is erroneous and ought to be reversed.

Quebec, July, 1817.