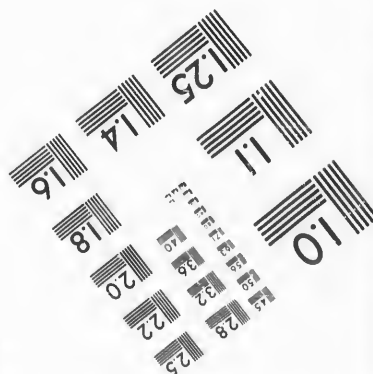
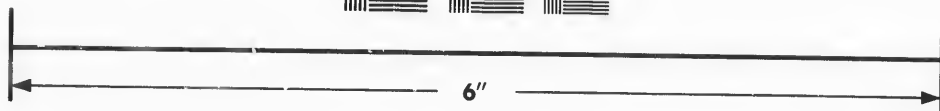
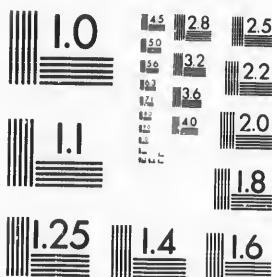


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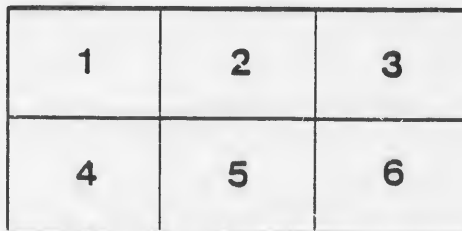
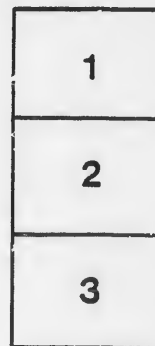
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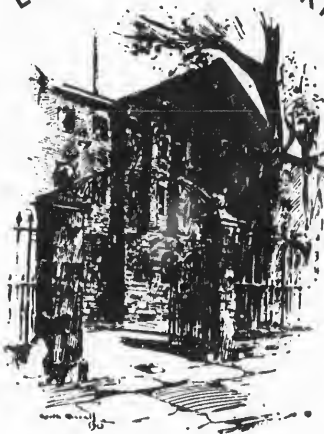
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In the Supreme Court,

1880.

Guysborough, SS.

CAUSE :

Jesse Cumming, Plaintiff.

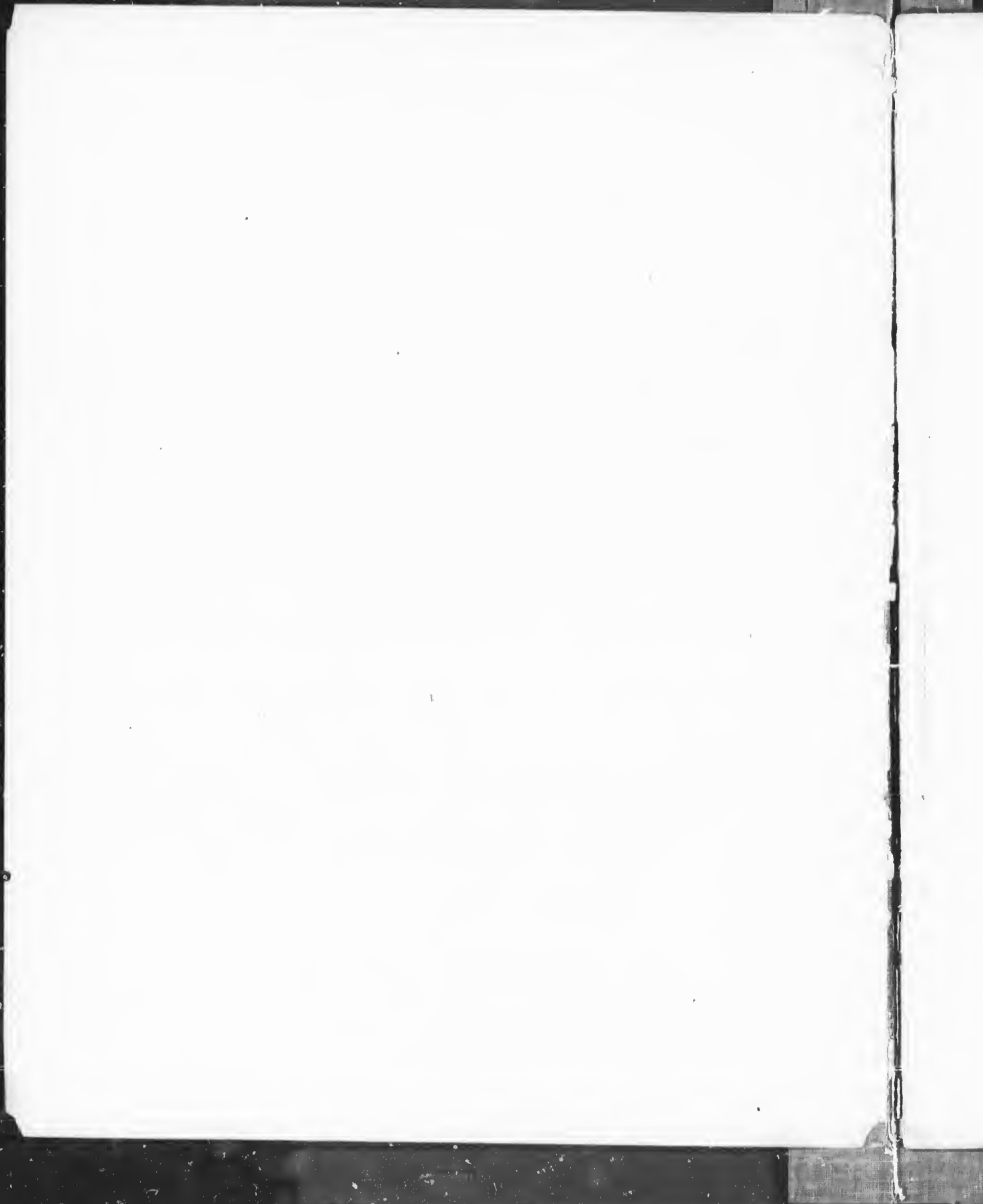
Versus

Edward Malay, Defendant.

HALIFAX, N. S.

WM. MACNAB, LAW PRINTER, PRINCE STREET.

1881.



In the Supreme Court,

1880.

Guysborough, SS.

CAUSE :

Jesse Cumminger, Plaintiff.

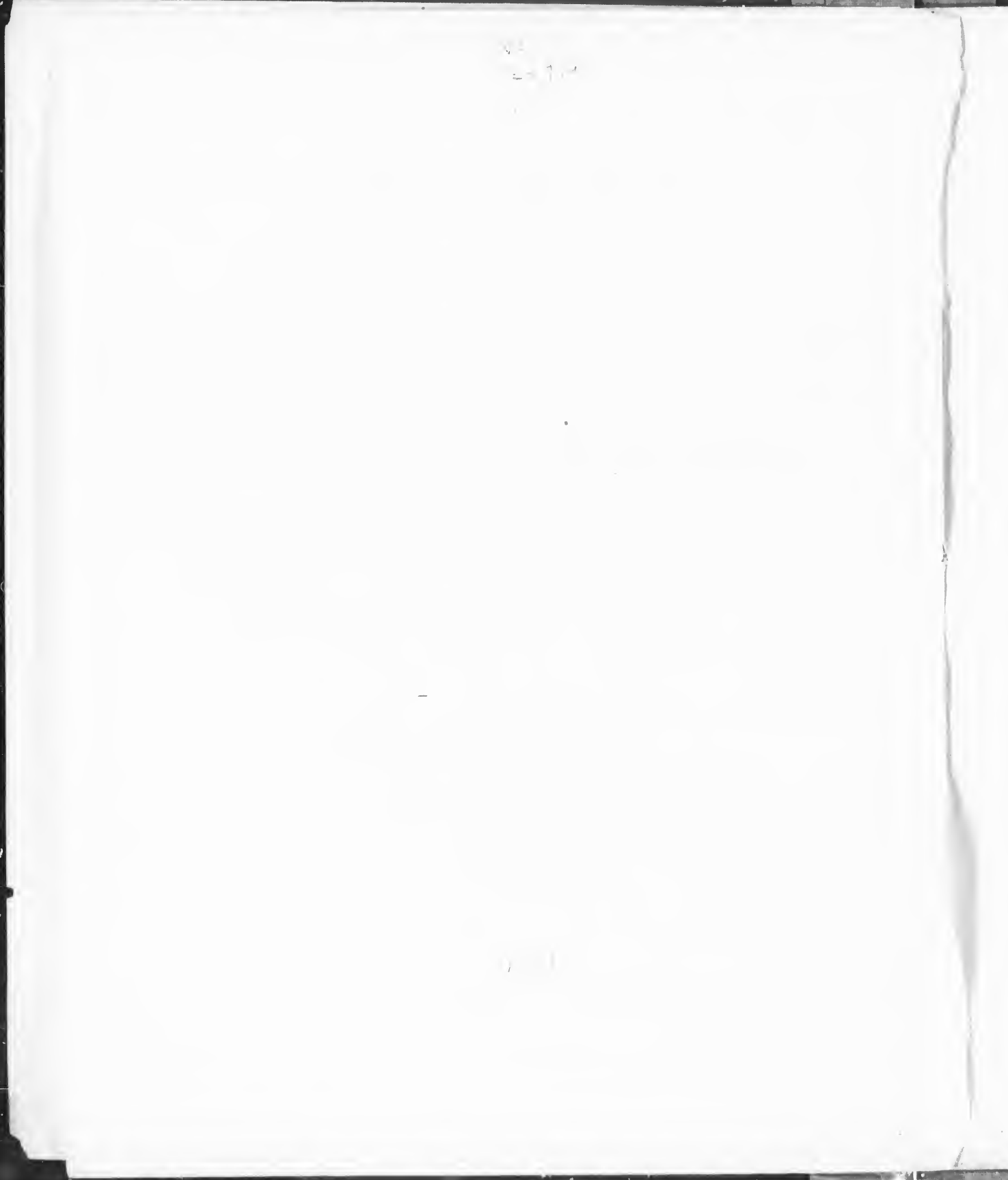
Verus

Edward Malay, Defendant.

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1881.



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GUYSBOROUGH S.S.

IN THE SUPREME COURT, 1880.

Cause—

JESSE CUMMINGER, *Plaintiff.*

vs.

EDWARD MALAY, *Defendant.*

It is hereby ordered, by consent of parties, their counsel and attorneys, that the verdict entered by consent for the defendant herein be set aside, with costs, on the following grounds:—

10

1st. Because said verdict is against law and evidence.

2nd. For the improper reception of evidence.

3rd. For the improper reception of testimony, and on the grounds taken at the trial with leave to the Court to draw inferences of fact and enter a verdict for the plaintiff if such Court should see fit.

Unless cause to the contrary be shewn within the first four days of the ensuing December term of this Honorable Court at Halifax.

Dated this sixth day of October, A. D., 1880.

By the Court,

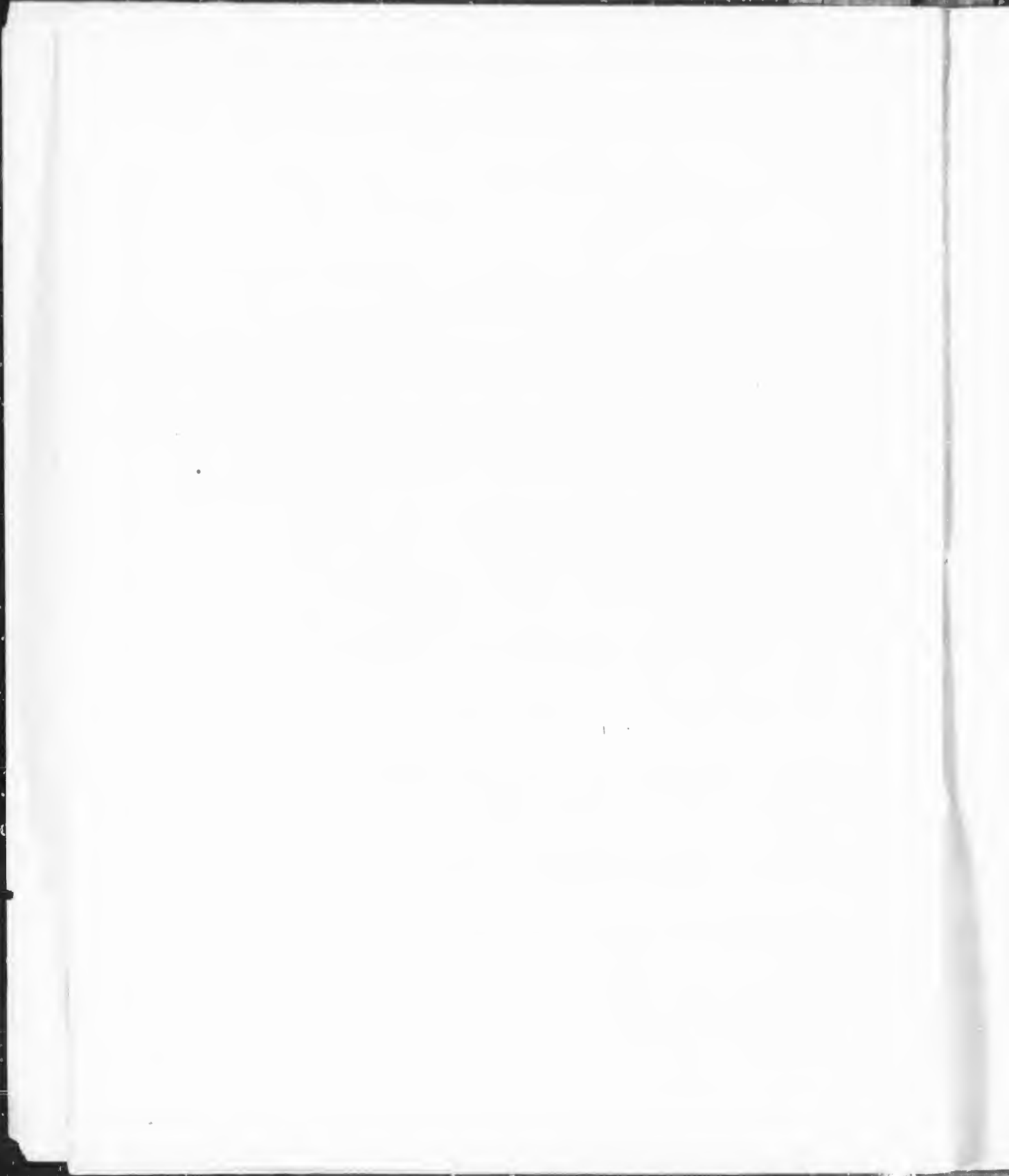
(Sgd.) EDWARD CARRITT, 20
Prothonotary.

On motion of MR. WEEKS, Counsel with Plaintiff.

GUYSBORO', S.S.

IN THE SUPREME COURT, 1880.

*To wit—*Be it remembered that on the 2nd day of August, 1879, Jesse Cumming-
ger, by HUGH McD. HENRY, his attorney, sued out of this honorable Court a Writ of
Summons against Edward Malay, of Two Mile Lake, in the County of Guysborough,
yeoman, and thereby alleged that the said defendant withholds the possession, to which
the said plaintiff claims to be entitled, of a certain lot of land situate on the eastern side
Two Mile Lake, in the County of Guysborough, and described as follows: Beginning 30



at a stake standing on the eastern bank of the Antigonish branch of Saint Mary's River, thence running south fifty-six degrees and thirty minutes, east by the south-western line of land occupied by Duncan Cameron one hundred and four chains, to a stake, thence south thirty degrees and thirty minutes, west twenty-two chains, to a stake, thence north fifty-six degrees and thirty minutes, west sixty-three chains, thence south thirty-three degrees and thirty minutes, west seven chains and fifty links, thence north fifty-six degrees and thirty minutes, west fifty-five chains, to the said branch of Saint Mary's River, thence north-eastwardly along the said branch to the place of beginning, containing two hundred and fifty acres, more or less, and for the withholding of which he claims two hundred dollars damages. 40

The said defendant by Angus McGillivray, his attorney, says for a plea to the plaintiff's declaration, that the said plaintiff is not entitled to the possession of the lot of land claimed by him.

And the said defendant by Angus McGillivray, his attorney, for an amended plea pleaded by leave of the court to the plaintiff's writ of summons says, he only defends for a part of the premises claimed by the plaintiff, and which is thus described: That certain lot, piece or parcel of land, situate lying and being on the east side of the east or Antigonish branch of Saint Mary's River, in the County of Guysborough, and is bounded as follows, that is to say:—Beginning at the south-west corner of lands of Duncan Cameron at the said east or Antigonish branch of said river; 50 thence eastwardly along the southern line of the said lands of the said Duncan Cameron, four hundred and sixteen rods, or to the western line of lands of the said Duncan Cameron and of lands of John D. Cameron; thence southwardly along the said last-mentioned line eighty rods, or to a spruce corner tree on the said last-mentioned line; thence westwardly parallel to the said southern line of the said lands of the said Duncan Cameron, four hundred and seventy-two rods, or to the said east or Antigonish branch of said river; thence northwardly along the several courses of said east or Antigonish branch of said river to the place of beginning, containing two hundred acres more or less, and he disclaims all right to the possession of the residue of said premises; and 60 as to the part for which he defends, says that the said plaintiff is not entitled to the possession of the part of the said premises above specified.

SUPREME COURT, GUYSBORO', 5th Oct., 1880.

CUMMINGER vs. MALAY.

WEEKS, Q. C., opens.

JESSIE CUMMINGER, plaintiff.

The Land.—I know the land on the plan attached to grant A W, marked A. It is bounded north by Duncan Cameron; westerly by the river, the Branch. It is at the foot of the Lochaber lake. James Malay occupied this land A forty years ago; he died about ten years ago. Thomas Malay, the son, occupied the piece of land A 70 shortly before the death of his father, James.

Paper B W tendered, withdrawn.



EDWARD CARRATT called and sworn.—I am the Prothonotary of the court. Mr. WEEKS asks witness to produce the record roll in *Jessie Cumminger vs. Thomas Malay*. (Mr. MCGILLIVRAY objects, that this is contrary to practice.) The witness produces B W, and says the filing is in his hand-writing. This paper has remained filed with me from the date of filing, third August, 1870, till the present time. [Mr. WEEKS tenders paper B W as the record in this suit. Mr. MCGILLIVRAY objects, because it is not a record: not signed by the officer of the Court, nor signed by an attorney; it is not a record as the law requires; there is a fatal objection in the erasure.]

80

[I receive the paper, subject to the objection.]

[Witness stands aside.]

C. M. FRANCHVILLE—I am son of Edmund H. Franchville, High Sheriff in his life time of this County. He was High Sheriff 30th January, 1874, and this is his hand-writing, the signature to paper C W. I administered the oath to the witness, and this is my signature as a J. P., which I was. He proves the Registrar's signature. Deed C W tendered; objected to, and received.

W. D. R. CAMERON—I am the Registrar of Deeds of the district of St. Mary's, in the County, and this signature to the writing endorsed on this paper D W is mine. This paper is a true copy taken from the records in my office. The original is not in my office.

90

[Plaintiff resumes his evidence.]

Father and son lived together at the time of father's death. Old Malay I mean. Thomas was on the property for a number of years. Thomas, after father's death, remained in possession till three or four years ago. Defendant lived on other property while Thomas was on the place. The widow died about two years ago. She lived on this property till time of her death. I first knew defendant to be on this place A after Thomas Malay had left the place. I demanded possession of the property before suit from defendant. He refused. This deed. The first lot described in this deed C W covers the piece in dispute, A W. I know Duncan Cameron's south line; it is the north line of this. The land in dispute does not touch Lochabar lake. It is a little north of the land. The Adam McKeen lot, the William D. Hall lot, and my own lot (40 acre lot B) lie to the south of the land in question. The land in the grant is the same that James Malay occupied and that Thomas occupied. The original writ and declaration in this cause is read.

100

Cross-examined.—I am in my 60th year. James Malay's wife was Rose Ann Taylor before marriage. I know James intimately; he always resided on the land in question; before he went there he resided at the cross-road, St. Mary's, with his wife. I knew Wentworth Taylor, brother of the wife; was a land surveyor. Ephraim was a brother, and lived near the land in question. They lived there after James and his wife moved on the land in question. Defendant is the son of James and Rose Ann. I have known him for years. Before his marriage he resided on the place in question with When Thomas went off and defendant went on to the place it was four or five or six years ago. There was a fence between the house of defendant and lot A. The widow always lived on A. James was round the County working while the widow lived there. He was a laborer.

110



Re examined—Edward lived on the place on plan on grant marked Adam McKeen. I don't know whether the fence I said was between him and lot A was north or south of the red line on northerly bound of Adam McKeen's lot.

Affidavit E read. Deed D W tendered.

120

(Objection that the affidavit is insufficient under the Statute. No evidence by witness to the Deed.)

Deed D W read, subject to objection.

ALEXANDER CUMMINGER.—I knew old James Malay thirty years and upwards. I know the land in dispute. He resided thirty years ago on the land in dispute. I don't know anything to the contrary that he resided there till his death—I think about ten years ago. Edward was one of the younger members of the family. I don't know of anyone else being in possession. There was a fence at the south of Duncan Cameron. I don't know how many years James lived on the lot.

Plaintiff rests.

130

MR. MCGILLIVRAY for non-suit.

Defendant was in possession when the grant issued.

No evidence that the Thos. Malay in Deed D W is the defendant in the judgment of which record is claimed. The copy of Deed D W is insufficient. It does not show that original was ever proved by the witness.

There is no certificate of the proof. It does not appear that the deed was ever proved.

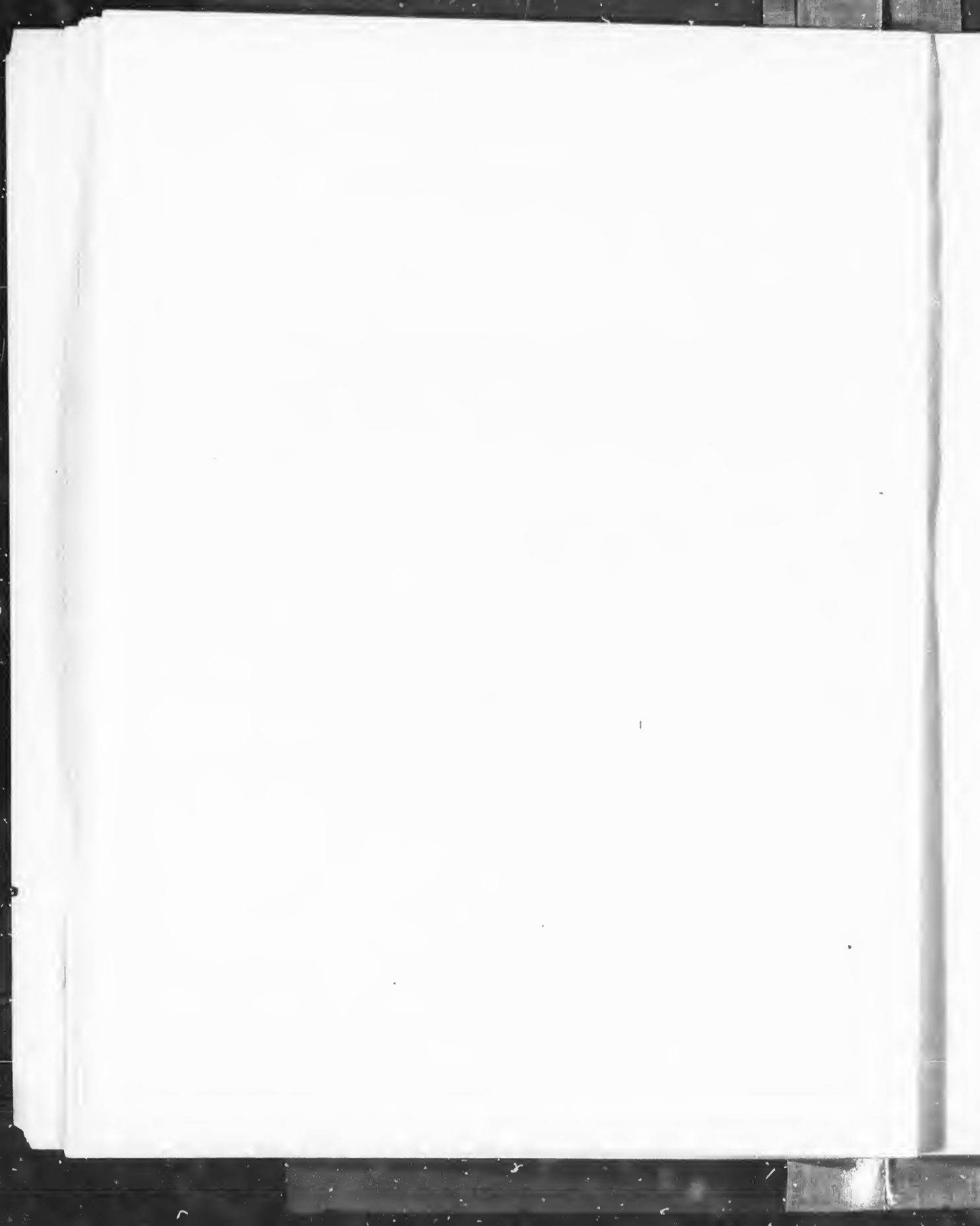
The description is uncertain, the locus cannot be ascertained, and there is no evidence to identify it. Land granted by Deed must be granted with certainty.

The land in Deed is not that in the declaration. The sheriff's Deed insufficient and irregular because there was no record before issue execution. 140

Nothing to show that the deed from sheriff (C W) contains the same land or any part in deed from James to Thomas Malay.

MR. MCGILLIVRAY opens defence.

EDWARD MALLAY.—I am 39 years of age. My mother's name was Rose Ann. She had been Taylor. My father's name was James. I lived on the land in dispute at Loehaber Settlement, a mile away from Loehaber Lake. Duncan Cameron bounds me on the north and easterly, John D. Cameron, Adam McKeen and John D. Cameron on the south. The East Branch river bounds me west. East branch of St. Mary's river I claim there two hundred acres. This plan F W represents my land. 150 About one hundred acres has been cultivated. I live there now. My mother always lived on that land. My father lived there. He made it his home. It has been my home most of my life. I had been off and went finally to live on six years the 14th February last. There was seven years I did not live on it, but my means were expended there all the time. Previous to moving the last time in the present house I



built that house. This was fourteen years ago. My father died nine years ago last January and my mother died three years last March. She was living with me at the time of her death. My brother Thomas never had possession of that place. He was back and forward there, and the day I went into it last he left there. Thomas wanted me to take charge of mother, and said if he had any right there he would give it up to me. He had done work to the house after I built it and while he was back and forward with my father and mother, and I paid him for this work when I last went to live on the place. The witness stands aside. 160

JOHN S. STEWART.—I wrote this paper, G W, and it was executed in my presence and witnessed by me. There was a seal where the marks now are on the paper and usual place. It was executed by James Malay, father of defendant.

Deed 11th March, 1862, G W, read by consent.

The defendants' evidence resumed—

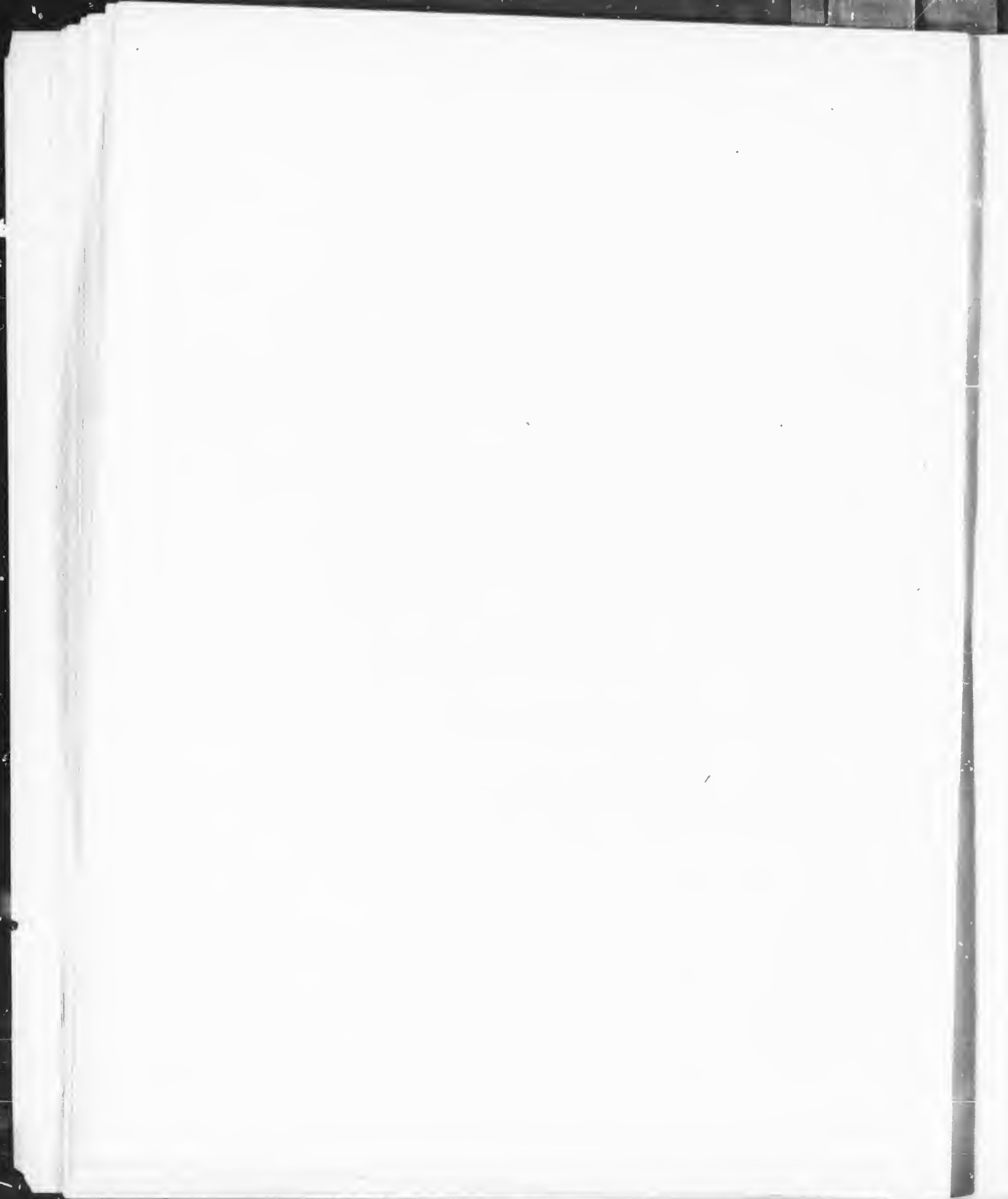
Thomas Malay said about fourteen years ago that he was bound to have all that property yet. Sterns was living there on the place, and Thomas said father could not give a Deed. Thomas said that father might give a dozen Deeds. He said he saw the Deed from father to Sterns. He said father had no right to Deed, and he said he, himself had no right to Deed because he did not get the Deed from the right party. (This is objected to.) He said the land was mother's. Twenty-two years ago my father came after me and my parents put me in possession of the place, and my mother was there present, and ever since my means were expended on the place. I have been on it most of the time, and had possession from the time I was given possession. Thomas left home six years last February. He had lived, for two years previously to that, in the house I built, and for which I paid him for repairs. I had lived off and on, and sometimes permanently, on the place all along. Previously at the time Thomas went there, eight years ago, there was good stock; when he left the stock was gone. He left my mother destitute. Sterns, about fourteen years ago, went off. He had been in an old house, and when he went away he gave me all the rights he had. He had been in the same house as my father and mother. He was married to my sister. What I was put in possession of, and what I always possessed, is represented by the heavy line on plan F W. (The witness points out the lines, as in the amended plea, and says the north line has been fenced thirty years, and the south line, in parts, have been fenced over twenty years, on the river it has always been a meadow. I know of my father trying to sell the land, and my mother forbid it. (Objected). Father then said it was no use to try and sell, as it belonged to my wife. This was over twenty-five years ago. I heard my father say repeatedly that the land belonged to mother, and he could do nothing with it. 170 180

Witness stands down.

JOHN S. STEWART recalled.

This paper H W was executed by Rose Ann Malay in my presence. I read over and explained it, and she made her mark and it was delivered in my presence.

Deed, 16 April, 1875, from Rose Ann Malay to Edward Malay, marked H W, read without objection. 190



Defendant's evidence resumed.

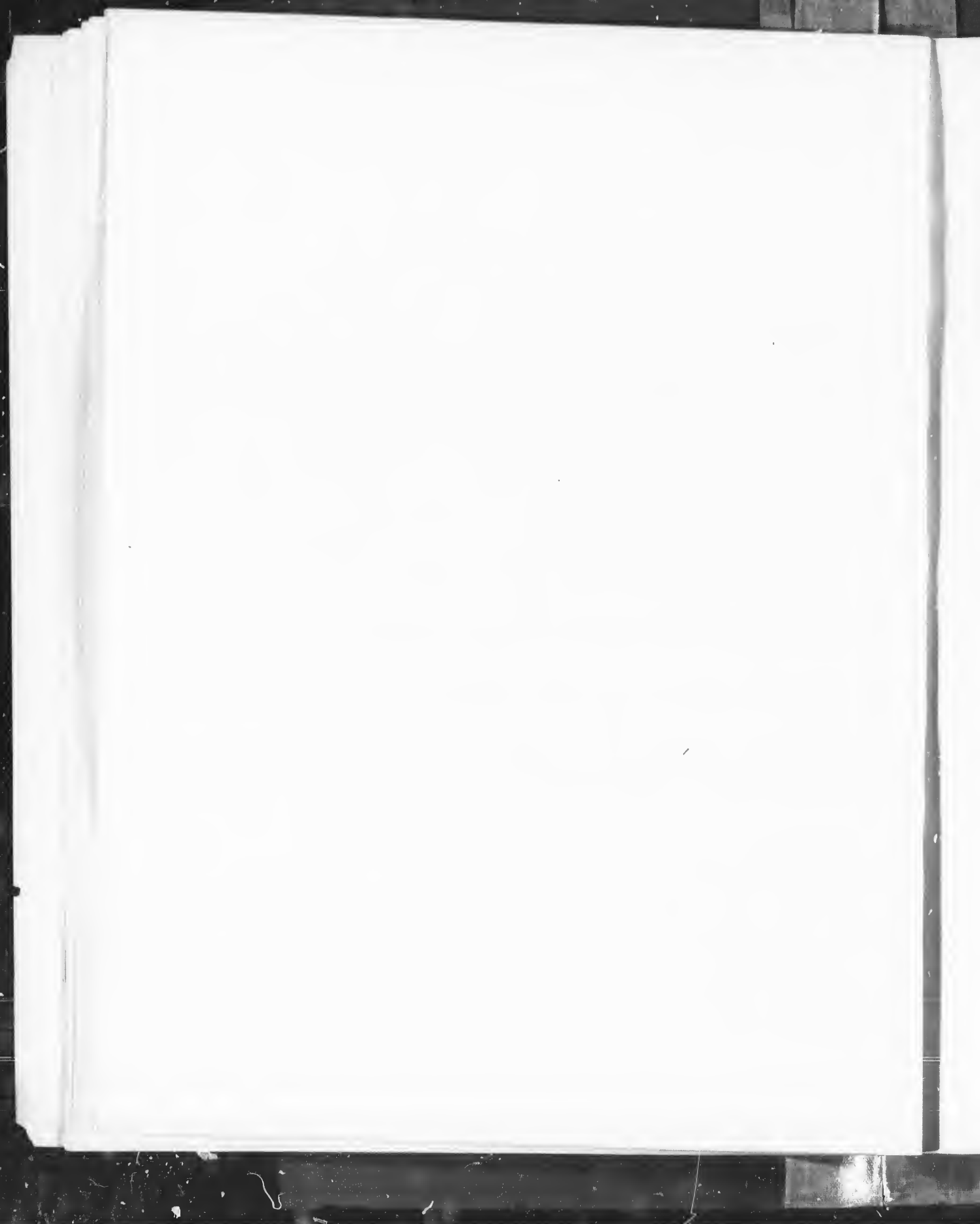
This deed H W covers the land in question.

200

Cross-examined—My brother Thomas is fifty-nine. In my first recollection, he lived two miles away from this on another property. My brother did not live fifteen years on this last named place. I can't say any nearer. When I was nine years of age I lived with my sister, back and forward for a couple of years. I hired then for a year two miles from home. I was home and worked about and earned something in the community, which I took home. About three months is the longest period I was from home since.

For about six years I was not living permanently in the house I built, but part of the time in a house adjoining and other places. The old house was in existence when I first remember. My father and mother left that when I was quite young. They 210 built a house on the place near where I afterwards built. My brother Thomas had nothing to do with the building of any house on the place, that I know of. He was away when father and mother built the house near where I built. At the time part of the south line of Cameron's was built. I don't remember of the south fence of the disputed lot at that time; 200 rods was always kept up on the south after I built in one place and more in another place. Father was eighty-eight years old when he died. About fifteen or twenty acres were cleared when father and mother moved in the second house. I never heard my father say how long he had been on the land. Occasionally, as far back as I recollect, father was working on the land. What Thomas said of giving up right was, that he would give up right to anything about the place 220 if he had anything there to me. He did not claim any right. I heard flying rumors of a sheriff's deed to Cumming. (I decline to permit a question as to whether the witness knows of the right and title of Thomas Malay in lands described to witness.) The counsel then read the description of the bounds in the deed C W, and asks if the witness knows of such land? He says that if at the foot of Lochaber lake, as described, they are a mile away from the land in dispute. The foot of Lochaber lake is south. I know of a small lake or still-water on the west side of the road leading from Sherbrook, and this is my west bound. I know Dunean Cameron's south line. The witness is asked if the description read to him from the deed C W is the land in dispute? He answers that a part of it is like the land, but a part of it is different. I 230 do not claim a strip, all the way across between the bottom claimed in the writ.

DUNCAN CAMERON.—I live north of Edward Malay for forty years. James Malay and his family lived there forty years ago. James Malay continued in possession of James Malay told me while on the land that it was his wife's—that is the two hundred acres in possession of defendant now. James told me his wife got from her father. We made the line between us according as we would clear. There was a line fence on the south ever since I went there and a line on the west and on the south of what Edward claims now. My son is on the east. There is a softwood tree on the south-east corner. Malay and his wife held within these lines forty years ago. A good deal of it has been cleared—the most of the 100 acres in the front. 240 James Malay said he left his wife, went to Newfoundland, and while he was away, her brother and father built a house on this land and gave it to her, and put her in possession, and he found her in possession when he returned. He said it was his



wife's land. Defendant helped his father and mother pretty often to my knowledge. I knew Thomas went out of the County.

Cross-examined.—I don't know whether the old man had returned when I first knew the family living there. The old man on his return told me that the land was exchanged, that Taylor bought from Bent, that it was got from Bent for his wife by her people. I reject evidence of conversation as to a Deed to Thomas. The defendant I know was oftenest on the property. I can't say any sum defendant contributed 250 to his family.

JOHN S. STEWART recalled, (he only having been called to prove Deed previously.) I live a mile from defendant, at the south end of Lochaber Lake. I have known defendant's parents 35 years, and have been frequently at their place while they lived. I know the land on which James Malay resided. I know Duncan Cameron is on the north of defendant. John D. Cameron is on the east. The east branch is the west of this land. Description of Deed G W is read. The witness shows that this covers the land marked Edmund Malay on plan F W e. cap: the lower part, about one half of it easterly from the road, that at the time of the Deed G W. James Malay, defendant's brother, was at the time of the making of Deed 260 G W in possession of the lower part.

Defendant rests.

It is here agreed that a verdict be entered for defendant, subject to the opinion of the Court, and with power for the Court to draw inference of fact, and a rule *nisi* passes accordingly.

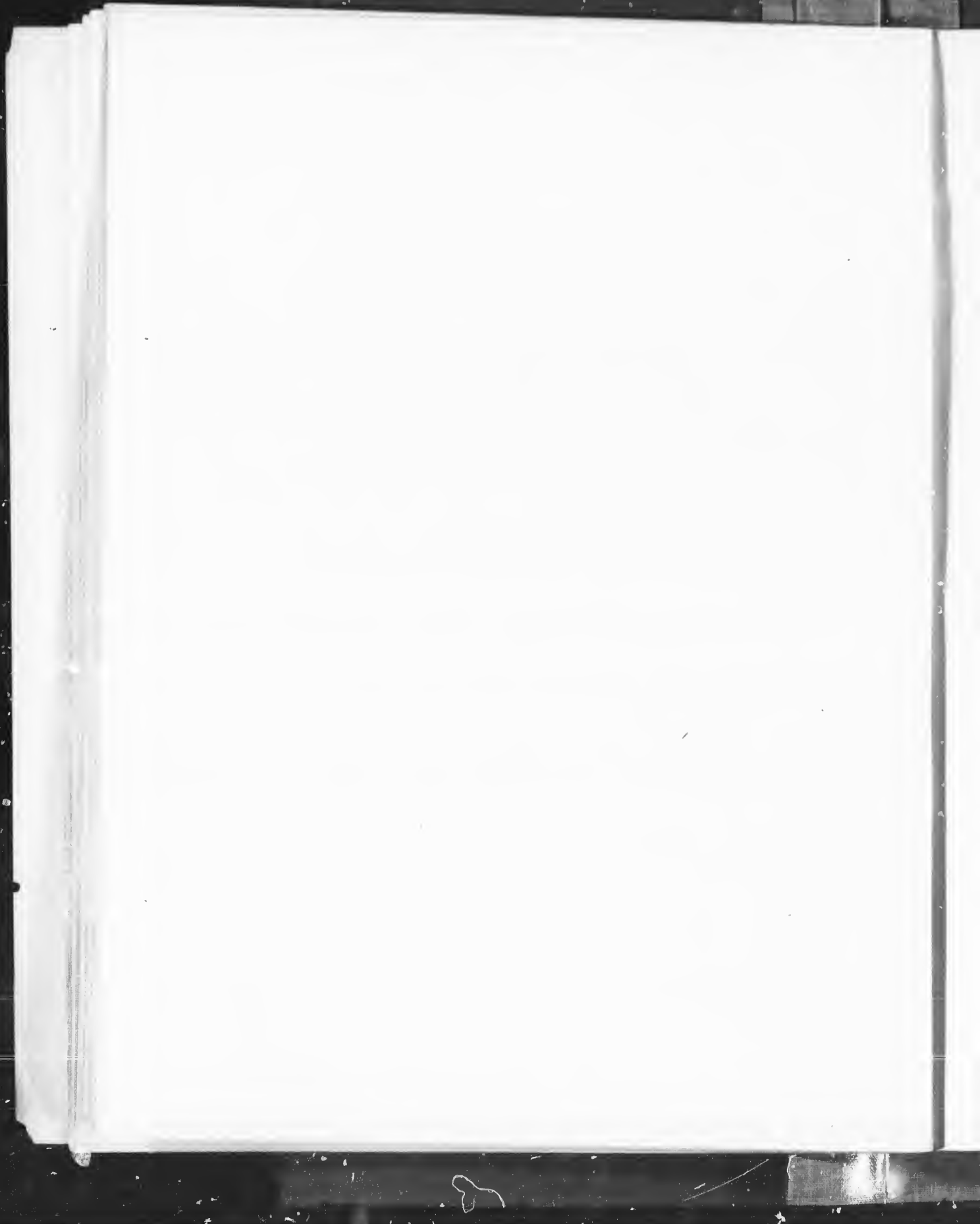
A W.

A Deed from Crown to Jesse Cumminger, of Goldenville, St. Mary's, in the County of Guysborough, merchant, of two lots of land containing, together, two hundred and fifty eight acres, situate, lying and being in the County of Guysborough, and 270 bounded as follows: The lot marked "A" on the annexed plan, containing two hundred and eighteen acres, and the lot marked "B," containing forty acres. Beginning at a stake standing on the eastern bank of the Antigonish branch of St. Mary's River, thence running south fifty-six degrees and thirty minutes, east by the south-western line of land occupied by Duncan Cameron one hundred and four chains to a stake, thence south thirty-three degrees and thirty minutes, west twenty-two chains, to a stake, thence north fifty-six degrees and thirty minutes, west sixty-three chains, thence south thirty-three degrees and thirty minutes, west seven chains and fifty links, thence north fifty-six degrees and thirty minutes, west fifty-five chains, to the said branch of St. Mary's River, thence north-eastwardly by the branch to the place of beginning. 280

Dated the 14th day of July, 1876.

Consideration, \$113.50.

Registered in the Office of Registry of Deeds at St. Mary's, aforesaid, at 5 o'clock, April 29, 1879. Book of Grants, No. 2 p.p. 75, 76.



B W.

IN THE SUPREME COURT, AT GUYSBOROUGH, ON THE TENTH DAY
OF FEBRUARY, A. D. 1867.

GUYSBOROUGH COURT.

*Jessie Cumminger sued out a Writ of Summons against Thomas Malay, with the
particulars annexed as follows:—* 290

Feb. 4, 1879. To balance of settlement at date \$439 12½

The plaintiff claims interest on the above sum, from date until judgment.

And the said Thomas Malay has not appeared. Therefore it is considered that the said Jesse Cumminger recover against the said Thomas Malay, four hundred and thirty-nine dollars and twelve and one half cents, together with three dollars and seventeen cents for cost of suit.

JESSE CUMMINGER,
Attorney in person.

C W.

300

Deed from Edmund F. Franchville, Sheriff of Guysboro County, to Jesse Cumminger, conveying all that lot of land situate at the foot of Lochaber Lake, so called, adjoining lands owned by Duncan Cameron, and described as follows:—Commencing at or near a small lake or still water on the western side of the road leading from Sherbrook to Antigonish; thence running easterly along the said Duncan Cameron's southerly line, one and a quarter miles; thence southerly, eighty rods, more or less; thence westerly, one and a quarter miles, or until it strikes the shore of said lake or still-water; thence northerly by the several courses of said lake or still-water, to the place of beginning, containing two hundred acres, more or less. Also a certain lot of land bounded on the north by the above described lot, and on the south 310 by lands owned and occupied by one William Harte, containing one hundred and fifty acres, more or less.

Consideration, \$442.29½.

Dated JANUARY 30th, 1874.

Reg. book F. p. p. 107-9, MARCH 2nd, 1874.

D. W.

Deed, dated 26th day of March, 1868, from James Malay, Senr., of the District of St. Mary's, County of Guysborough, Farmer, to Thomas Malay, of the same place, conveying all that certain piece of land, situate at the foot of Lochaber lake, adjoining 320 Duncan Cameron's south line and running easterly, following the same course of the said Duncan Cameron's south line, one and one-fourth of a mile; said lot of land or-



merly owned by the late William Rent, Esq., and containing two hundred acres, more or less.

Consideration, \$320.00

Registered at 4 p. m., March 31st. 1868.

Certificate thereon—

I certify that the within paper writing is a true copy of a deed of James Malay to Thomas Malay, as the same is registered in the office of Registry of Deeds for the District of St Mary's, at Sherbrooke, in the County of Guysborough, Book E., page 170. 330

(Sg'd.) W. D. R. CAMERON,
Registrar.

E W.

GUYSBOROUGH S.S.

IN THE SUPREME COURT, 1880.

Cause—

JESSE CUMMINGER, *Plaintiff.*

vs

EDWARD MALAY, *Defendant.*

340

I, Jesse Cumminger, of Goldenville, in the County of Guysborough, the plaintiff above named, maketh oath and say:

1st. I say that the Deed of land from James Malay to Thomas Malay, conveying two hundred acres of the land in dispute in this action, is not in my possession or under my control.

2nd. I say that I never had the said Deed in my possession or under my control, and that since this action, and within a few days of the trial of this cause, I have made diligent enquiries for the original of said Deed and have been unable to procure the same.

JESSE CUMMINGER.

350

Sworn to before me at Guysborough, in the County of
Guysborough, this fifth day of October, A D., 1880.

EDWARD CARRITT,

*Commissioner for taking affidavits to hold to bail
in the Supreme Court for the County of
Guysborough.*

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G W.

Deed quit claim from James Malay, of St. Mary's, in the County of Guysborough, yeoman, to George Sterns, of St. Mary's, aforesaid, releasing and forever quit claiming 360 all that certain lot of land situate on the east side of the east branch of St. Mary's River, in the County of Guysborough, beginning on the south line of Duncan Cameron's lot of land on the east bank of the river aforesaid, thence on the said Duncan Cameron's south side line following the several courses thereof eastwardly until it strikes the rear line, thence southwardly on said rear line following the several courses thereof until it strikes the north line of a lot of land owned by James Malay, junior, thence on the said James Malay, junior's north side line following the several courses thereof westwardly until it comes to the main road, or Antigonish road, so-called, thence by the several courses of said road southwardly until it strikes one Thomas Malay's lot of land, thence westwardly on the said Thomas Malay's north side line until it comes to the river aforesaid, thence northwardly by the several courses of said river to the place of beginning, containing one hundred and thirty acres, more or less. 370

Consideration, £100.

Date, March 11, 1862.

H. W.

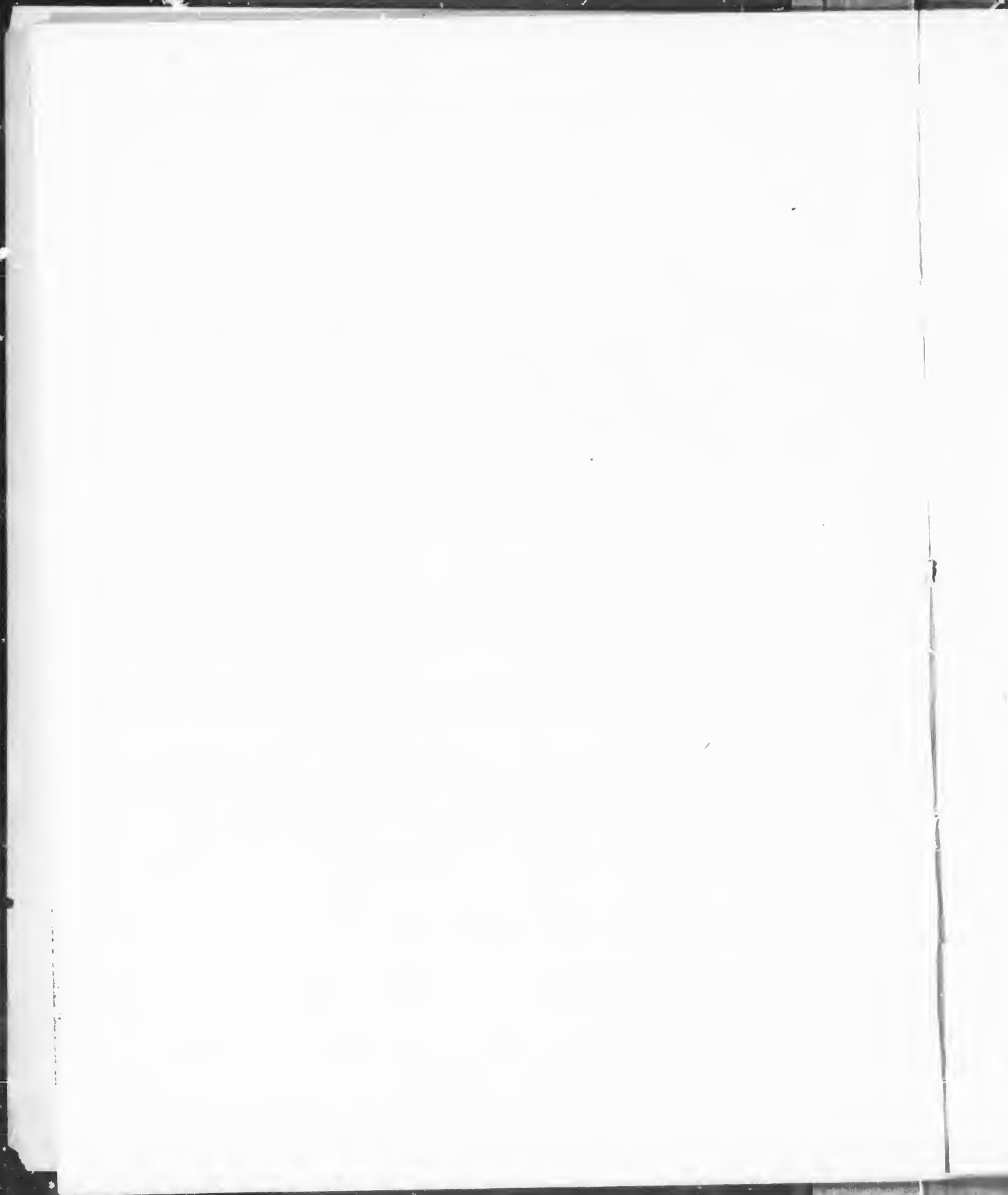
Know all men by these presents that I, Rose Ann Malay, of St. Mary's, in the County of Guysboro' and Province of Nova Scotia, for and in consideration of the sum of four hundred dollars, lawful money of the Province aforesaid, to me paid by Edward Malay of St. Mary's, in the County and Province aforesaid, the receipt where- 380 of I do hereby acknowledge, have remise, released and forever quit, claimed and do by these presents remise, release and for ever quit claim unto the said Edward Malay, his heirs and assigns forever, all that certain tract, piece or parcel of land situate, lying and being on the east side of the Antigonish branch of the St. Mary's River and Little Lake, so called, in the County and Province aforesaid, and bounded towards the west by the aforesaid branch and lake; towards the north by lands of one Duncan Cameron; towards the east and rear by lands of one Cameron and Adam McKeen's lands; towards the south by lands in possession of said Adam McKeen, and of Edward Malay aforesaid, containing in the whole three hundred acres, more or less.

To have and to hold the same, together with all the privileges and appurtenances thereunto belonging to him, the said Edward Malay, his heirs and assigns, forever.

In witness whereof I hereunto set my hand and seal this, the sixteenth day of April, in the year of Our Lord one thousand eight hundred and seventy-five.

(Sg'd.) ROSE ANN ^{her} MALAY. [L.S.]
mark.

Signed, sealed and delivered
in presence of
(Sg'd.) JOHN S. STEWART.



Received on the day of the date of the foregoing quit claim Deed from the herein named Edward Malay, the sum of four hundred dollars lawful money of the Province of Nova Scotia, the same being the consideration money herein mentioned to be paid by him to me.

(Sg'd.) ROSE ANN ^{her} × MALAY.
mark.

In presence of
(Sg'd.) JOHN S. STEWART.

