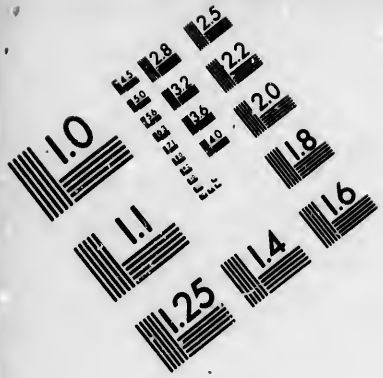

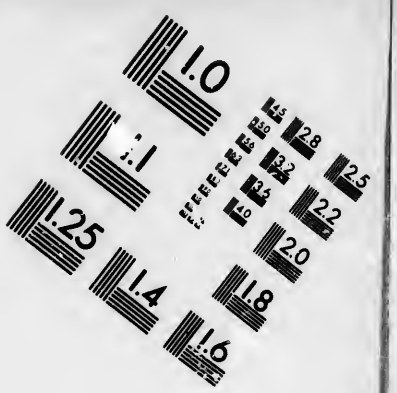

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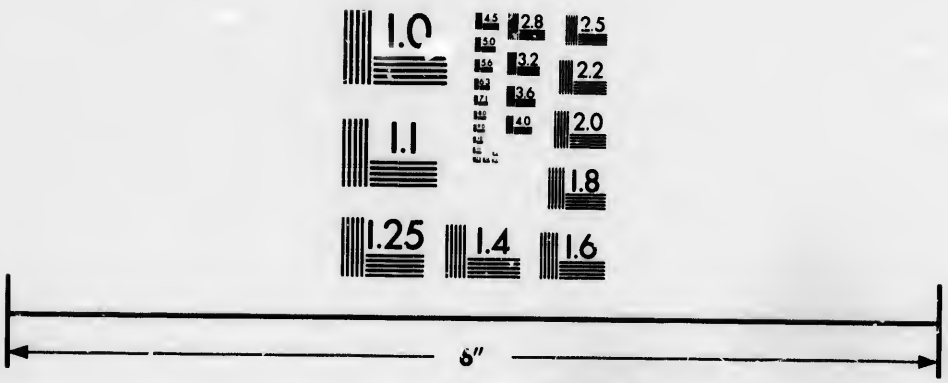

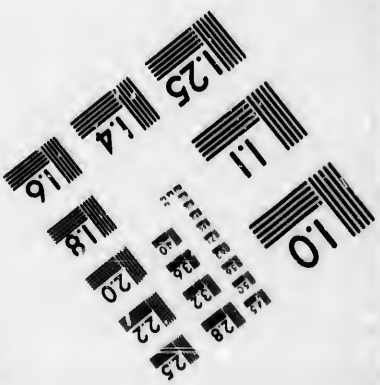

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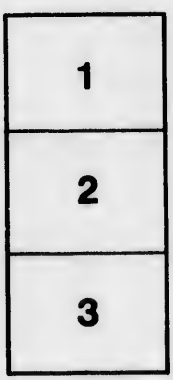

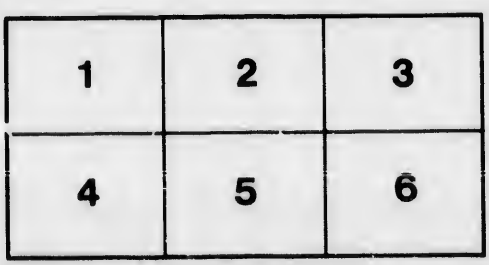

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COURT OF APPEALS.

JOSEPH RUEL & MARIE COULOMBE, Appellants

and

ANTOINE DUMAS & THERESE BOURGET, Respondents.

Case of the Respondents.

A. STUART,
for Respondents.

COURT OF APPEALS.

JOSEPH RUEL & MARIE COULOMBE, Appellants

PRVINCE OF LOWER CANADA, } **COURT OF APPEALS.**

IN A CAUSE, between

JOSEPH RUEL & MARIE COULOMBE his wife,
(Plaintiffs in the Court below,)

Appellants,

AND

ANTOINE DUMAS & THERESE BOURGET his wife,---*(Defendants in the Court below,)*

Respondents.

CASE OF THE RESPONDENTS.

THE facts, out of which the present litigation between the above parties originated, are the following.

On the 20th. September 1805, the above named Thérèse Bourget and one Joseph Ruel, son of the above named Appellants, in the presence and vith the consent of their respective parents, executed before Miray, Notary Public and witnesses. a contract of marriage, whereby the parents of Thérèse Bourget gave to her, *en avancemant d'hoirie*, various articles, and the above named Appellants gave to their son accepting thereof *pour tous droits successifs paternels et maternels* a lot of land situate in the seigniory of Lauzon. At this period the lot of land in question was worth no more than £25.

This contract was followed by the solemnization of their marriage.

Its duration however was not long. Before the 12th. of June 1806, Thérèse Bourget became a widow, and on that day we find an inventory commenced of the effects and lands of the community which had subsisted between Thérèse Bourget and her departed husband by Voyer. notary public.

To this inventory the Appellants were parties, and the above mentioned lot of land is mentioned in it as belonging to the said community.

After the lapse of some time, Thérèse Bourget consented to become the wife of the above mentioned Antoine Dumas, the proprietor of a lot of land adjoining that which belonged to the widow. Their common funds and common industry were applied to the improvement of the lot of land which had been given by the Appellants to their son and daughter in law, as above mentioned.—And at the period of the institution of the present suit in 18 this lot of land had been by them so much improved, that the witnesses state its value to have risen from 600 to 7 or 8000 livres.

The Appellants having been taught to believe that in consequence of some supposed informality in the marriage contract, they might appropriate to themselves the fruits of the industry of the Respondents, brought their action in the Court of King's Bench for the District of Quebec, for the recovery of the lot of land in question.—The action brought by them is not a special action, stating the particular grounds upon which they purposed to proceed and praying that the marriage contract might be declared null and void, and they restored to the possession of the lot in question, but is a general petitory action.

To this action so brought, the Respondents pleaded,

1st. The general issue.

2dly. Several pleas of peremptory Exception, and first, the marriage contract and grant therein contained from the Appellants to their son. Secondly, that the said Joseph Ruel & Marie Coulombe his wife craftily and subtilely contriving and intending to defraud and deceive as well the said Thérèse Bourget as such person as might thereafter marry the said Thérèse Bourget and more particularly the said Antoine Dumas, and to induce and encourage the said Thérèse Bourget and the person who might thereafter intermarry with her, to lay out and expend large sums of money and bestow great work and labor in ameliorating and improving the said lot of ground and premises, and intending by some subtile device to obtain the possession of the said lot of ground

ground and premises, after the same had been so ameliorated and improved, did on the twelfth day of June, in the year of our Lord 1806, in and by a certain inventory made and executed, at the parish of St. Joseph Pointe Levy aforesaid, by and before Charles Voyer notary public and witnesses, declare & acknowledge that the said lot of ground and premises had been so as aforesaid by them given to the said Joseph Ruel the younger and the said Antoine Dumas and Thérèse Bourget, relying as well upon the gift from the said Joseph Ruel & Marie Coulombe to the said Joseph Ruel the younger as upon the said last mentioned declaration, acknowledgment and confirmation of the gift, did afterwards, to wit, on the first day of August, in the year of our Lord 1807, intermarry, and did with the knowledge of the said Joseph Ruel and Marie Coulombe, lay out and expend divers large sums of money and did bestow work and labour of a large value in ameliorating and improving the said lot of ground and premises.

With these pleas the Appellants filed the marriage contract, & the inventory.

The Appellants filed a general replication to the plea of general issue and a special answer to the pleas of peremptory exception.

In this last they aver that the marriage contract was null and void, inasmuch as François Bourget the elder and Pierre Bourget named in the said deed, as instrumentary witnesses were related to the principal contracting parties therein, to wit, the said François Bourget the elder, as paternal uncle of Joseph Ruel the younger and as paternal grand-father of the said Thérèse Bourget, & the said Pierre Bourget as father of the said Thérèse Bourget: and inasmuch also as the deed was not signed by the said instrumentary witnesses, but by Pierre Coulombe who they aver was the maternal uncle of Joseph Ruel the younger.

In support of this special answer the Appellants filed various extracts of marriage and burial entries, certified principally by one Mr. Masse, styling himself in some *Priest*, in others *Priest & Curate*, but in none *Curate* of the Parish, from the registers of which these entries purport to be extracted; he filed also the marriage contract upon which the Respondents rely.

The cause was inscribed on the Roll of *enquêtes*.

These conscientious donors were examined upon *faits & articles* and were both constrained to admit that marriage contract in question was executed previous to the marriage, but add that they have since understood it was not valid.

The possession of the land in question by the Respondents and their successful efforts to improve it are established by the parole testimony in the cause.

Upon the whole case it is contended on the part of the Respondents,

1. That to operate the nullity of any instrument some certain, express & imperative rule of law must be produced by the party alledging the nullity. —(Rep. de Jur. verbo Nullité)

2. That there is no rule of law prohibiting relations from being instrumentary witnesses.—The French Ordonnances require merely there shall be two witnesses.—(Ord. de François I. à Ys. sur Thille, en Octobre 1535, c. 19. art. 66.—de Blois en 1507, art. 247.)

The only Ordonnance which speaks of the qualities of the witnesses is that of 1735. And all that it requires is that the witnesses be *mâles, regnicoles et capables d'effets civils*.

From the competency or incompetency of a witness in a civil suit, nothing can be inferred as to his competency or incompetency as an instrumentary witness.

Thus women, children and foreigners are admissible witnesses in civil suits and inadmissible as instrumentary witnesses. Relations within certain degrees are in virtue of an express statute inadmissible in civil suits. The affection felt by them to one of the parties, the close connexion of their own character and honor with the character, and honor of a near relative necessarily biases their judgment, discolours the objects which have passed under their view and renders them unable to give a true and faithful picture of the conduct & language and acts of the parties. An instrumentary witness on the other hand certifies but one particular act, and that act a palpable and taugible one, the execution of an instrument. The cases in which he can be called upon to depose respecting the instrument are few, and they all relate solely to this simple question, was the instrument executed or not? The only care in which in France they were prohibited from being instrumentary witnesses, was the case of resignation of church-livings, and this by particular statute, (Rep. de jur. verbo) and even here the prohibition did not extend so far as in civil suits. It embraced only relations to the degree of cousin german

german inclusive. In civil suits it extended to second cousins. A strong confirmation of this doctrine is found in the Provincial declaration of the 6 May 1733, Edits et Ordces. t. I. p. 499.

In the examination of the various irregularities in marriage contract, which are there specified and to which relief is afforded no case like the present, is to be found. And this evidently because it required none; relations being by law competent witness to marriage contracts.

But, secondly, there was no sufficient evidence of the alledged relationship. In notarial instruments *omnia præsumuntur ritè & solemniter acta*. Now the greater part of the marriage and burial entries are not certified in legal form, and there is no evidence of the identity of the persons witnessing the contract with those named in these extracts.

The Appellants call upon the Court to *presume* that the Notary was grossely and culpably regardless of his duty.

And thirdly, whatever might be the situation in which a *bonâ fide* purchaser would stand in respect of his land, the Appellants, by whom the contract was made, cannot now set it aside, it having received its full and complete execution: in the subsequent intermarriage and co-habitation of the parties, and a third person (Antoine Dumas) having acquired an interest in the land. It is contrary to the first principles of legal equity, that one man shall profit at the expence of another, or that he shall be allowed to lead another into error and avail himself of that error for his own benefit. This would be to make Court of Justice accessory to a fraud: Nemo debet alterius detrimento locupletari. As to the second objection of the Appellants, that the instrumentary witnesses have not signed the deed, it is to be observed that there is no law which requires, that instrumentary witnesses shall sign the deed.

On the contrary, the French Ordonnances contemplate and advert to the case of their not signing it.

Thus Charles the IX. at the Etats d'Orléans in 1560, says: Seront tenus les Notaires de faire signer aux parties et aux témoins instrumentaires, *s'ils savent signer*, tous actes et contrats qu'ils recevront. The same words; seront tenus faire signer aux parties et aux témoins instrumentaires s'ils savent signer, are met with in the Ordon. of Blois A. D. 1579, art. 165.

In the following article of the same Ordonnance, it is provided that the Notary, s'il est ès villes et gros bourgs esquels vraisemblablement on puisse recouvrer témoins qui sachent signer et que la partie qui s'oblige ne puisse signer, shall cause at least one of the witnesses to sign.

This clause of the Ordonnance is merely directory, does not create any nullity and is besides confined in its operation to the cities and towns.

The Respondents have deemed it necessary to enter into a more full statement of their case than is perhaps usual, because they are persuaded that the more fully the claims of the Appellants are examined, the more satisfactorily will it appear that they are not only contrary to good conscience and to equity, but also to law.