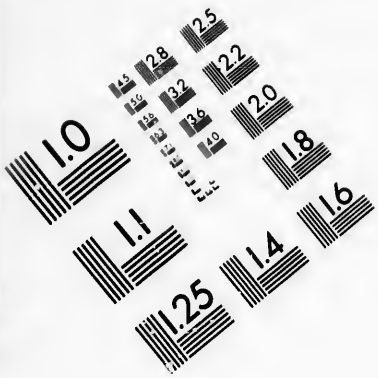

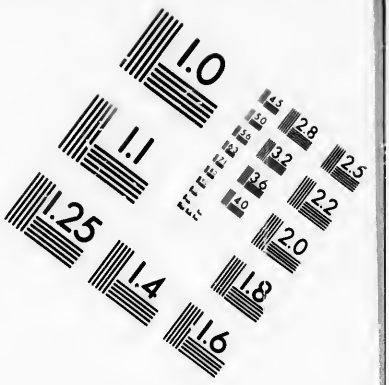

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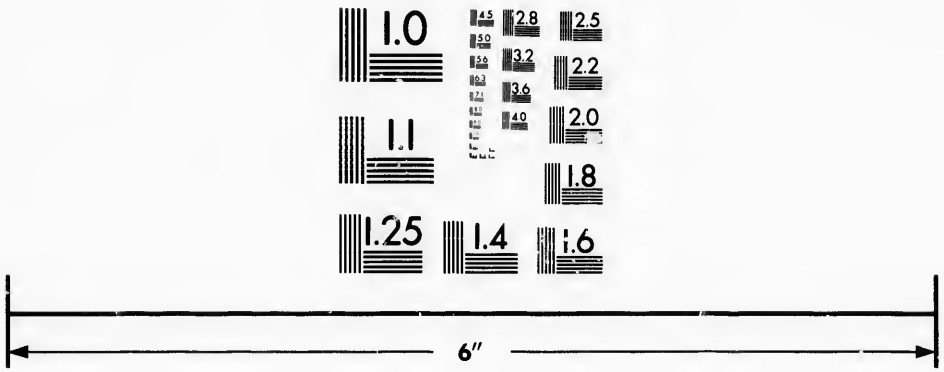

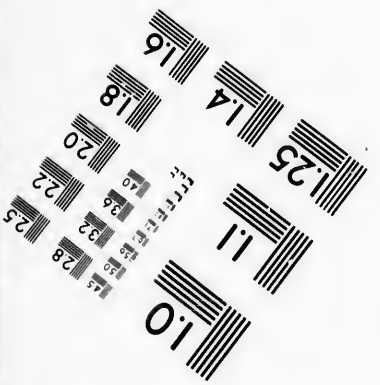

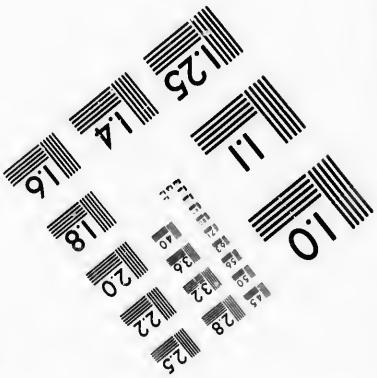

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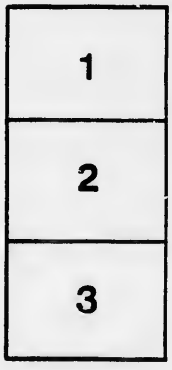

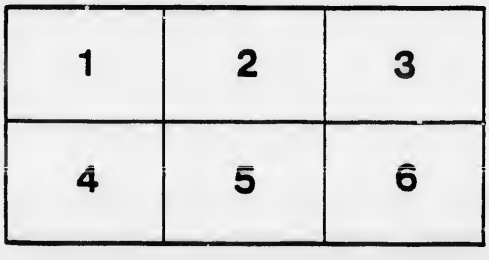

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Court of Appeals.

In a Cause between
JOHN JOHNSTONE,
(Defendant in the Court below,)
Appellant;

and

CALVIN FULLER,
(Plaintiff in the Court below,)
Respondent.

Respondent's Case.

Filed 17 November, 1820.

C. R. OGDEN, for Respondent.

Court of Appeals.

In a Cause between
JOHN JOHNSTONE,
(Defendant in the Court below,)
APPELLANT ;

PROVINCE OF
LOWER-CANADA.

Court of Appeals.

IN A CAUSE BETWEEN

JOHN JOHNSTONE,
(Defendant in the Court below)
APPELLANT;

AND

CALVIN FULLER,
(Plaintiff in the Court below)
RESPONDENT.

RESPONDENT's CASE.

THIS action was instituted in the term of February last at Montreal. The Plaintiff by his declaration set forth that whereas at Chatham in the District of Montreal, on or about the first day of May, one thousand eight hundred and eighteen, by a certain covenant or agreement in writing, duly made and executed, the proper hands of the said Plaintiff and the said Defendant and one Duncan McCallum, being thereunto subscribed, he the said Plaintiff, on the one part, did in and by the said agreement demise, lease and to farm let to the said Defendant and the said Duncan McCallum, for the space or term of two years, commencing from the said first day of May, one thousand eight hundred and eighteen, a certain farm situated in Chatham aforesaid, and known by lots number ten and eleven in the fourth concession, and the said Plaintiff did further bind himself to put the dwelling house, barn and fences upon the said farm in good repair, and also to find seed for the first year, likewise, one Cow entirely for the use of the said Defendant and the said Duncan McCallum, and the said Plaintiff did agree to find and provide one plough, one harrow, two hoes, two scythes with rigging, two rakes, two forks, one axe, one shovel, with any other necessary implements for cultivating the said farm, the said tools to be returned with the farm, to wit, after the expiration of the said Defendant's lease, all tare and wear to be excepted, the said Defendant to carry the said tools to the Smith and the said Plaintiff to be accountable to the Smith for the repairing of the said tools; and the said Plaintiff did further agree to bind himself to find one pair of oxen with sled, cart and chain-yoke, for the use of the farmers, to wit, of the said Defendant and Duncan McCallum, the said oxen to be given sound and returned the same, and if any of the cattle should die by sickness it should be to the loss of the said Plaintiff; and the said Plaintiff further agreed to give a garden for the use of the said farmers, to wit, of the said Defendant and the said Duncan McCallum; and the said Defendant and the said Duncan McCallum on their parts and in consideration of the said lease, promise and undertakings of the said Plaintiff, did promise and agree amongst other things to give *to the said Plaintiff* the one half of the hay, the one half of the grain with one third of the potatoes, *the whole amounting in value to seventy-five pounds current money of Lower-Canada, raised and produced upon the said farm, being due and deliverable to the said Plaintiff by the said Defendant for the use and occupation of the said farm as aforesaid*—and that although the said Plaintiff had at all times been ready and willing to fulfil and had fulfilled and performed all and every the obligations, matters and things which in and by the said covenant he was bound to do, yet the Defendant although often demanded, had neglected and refused to deliver to the said Plaintiff the before mentioned quantity of hay, grain and potatoes or any part thereof, since the same became due and deliverable, nor had he paid the value thereof in money to the said Plaintiff, but the same to do had wholly refused and still refuses.

To this the Plaintiff added a count in *indebitatus assumpsit* for the use and occupation of the said lot of land or farm, and a *quantum mernit* thereon, and concluded that the said Defendant might be adjudged and condemned to deliver to him the said Plaintiff immediately, the one half of the hay, the one half of the grain, and the third part of the potatoes, for the causes mentioned in the first count, and in default of so doing, to pay to him the said Plaintiff, the sum of seventy-five pounds current money aforesaid, due to the said Plaintiff for the causes mentioned in the second and third counts, with interest and costs.

The conclusions of the Respondent's declaration relate expressly, 1st, to the delivery of one half the hay, the one half of the grain, and the third part of the potatoes for the causes mentioned in the 1st count, and in default of the Appellants so doing, then to pay to the Respondent the sum of £75 current money, for the causes mentioned in the 2nd and 3rd counts of his declaration, with interest and costs of suit.

The Respondent filed a paper writing, intituled, "Agreement between John Johnstone, Duncan McCallum, and Calvin Fuller," and examined three witnesses.

The first witness Levi Levit stated, that the Appellant had been in possession of the premises described in the declaration, from 1st May, 1818, that he verily believed that the half part of the produce raised yearly

yearly upon the said farm could not to be estimated at less than seventy-five pounds, and that the Plaintiff ought in justice and in reason to receive that sum for the yearly rent of the said farm, and that he would willingly give the Respondent sixty pounds for the half part of the produce raised upon the said farm, &c.

The second witness, William Heathe, was present when the covenant or agreement, filed in the said cause, was signed by the parties and signed the same as a witness to the execution thereof, that he knows "the Respondent to be a man of good character, *that he the* Respondent *performed and fulfilled all "the obligations in the said agreement binding on him, and that the* Appellant *never complained to* "him *that the* Respondent *had never fulfilled the same*, that the said Respondent ought to receive for "the yearly rent of the same, from seventy to seventy-five pounds, in consideration that he the said "Respondent furnished all the farming implements and cattle necessary for cultivating the same."

The third witness, John McCallum stated, that he had "a knowledge that the Respondent leased "the farm, situate in Chatham aforesaid, to the Appellant as mentioned and described in a certain "agreement in writing between the Respondent, the said Appellant, and one Duncan McCallum, that "the Respondent leased the same on the first day of May, one thousand eight hundred and eighteen, "for two years then next ensuing, and that on or about the third or fourth day of May, in the year last "aforesaid, the said Appellant entered upon and took possession of the said farm, and from that time had "continued in the enjoyment and possession of the said farm, that he knew most all the matters and "things mentioned and stipulated in the said agreement, and had a knowledge that the said Respondent "on his part did perform and fulfil every thing incumbent upon him to do, as stipulated in the said "agreement, that he worked upon the said farm for a long time, and that the same was in good order ex- "cept the pasture-fence which the said Respondent was not bound to repair, and he very believed that "the half part of the produce raised upon the said farm yearly, and each year, since the said Appel- "lant had occupied the same, ought to be worth at least sixty or seventy pounds a-year." He also "proved the signatures to the said agreement."

Upon this evidence the cause was heard upon the merits *ex parte*, the Appellant Defendant in the Court below not having thought fit to file a Plea.

And on the 5th June, 1820, the Court below pronounced the following judgment, "the Court having "heard the Plaintiff by his Counsel, the Defendant not having pleaded to this action, examined the pro- "ceeding and evidence of record and deliberated thereon. It is considered that by virtue of the lease "made and agreed on between the Plaintiff on the one part, and the Defendant, and one Duncan Mc- "Callum, on the other part, in the beginning of May, one thousand eight hundred and eighteen, of the "farm and premises mentioned in the declaration in this cause, for the space of two years, to expire on "the first day of May last, the Plaintiff is entitled to recover from the Defendant one fourth of the hay, "one fourth of the grains and one sixth of the potatoes raised and produced upon the said farm; "and it is therefore ordered and adjudged that the Defendant do deliver up to the said Plaintiff in the "space of eight days after the service of this judgment, the just fourth part of the hay and of the "grains and the just sixth part of the potatoes raised and produced upon the said farm since the said "lease, and in default of so doing, it is ordered that he do pay over to the said Plaintiff, the sum of thirty- "five pounds, current money of this Province, for the value thereof and costs of suit."

It is from this judgment, so favorable to the Appellant (reference had to the evidence) that the present Appeal has been brought.

C. R. OGDEN,

Attorney for Respondent.

Quebec, 15th November, 1820.

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R. OGDEN,

for Respondent.