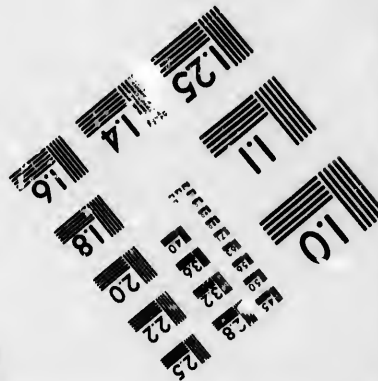
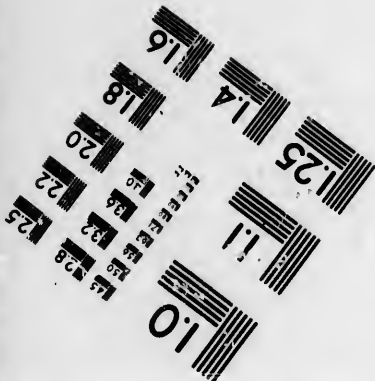
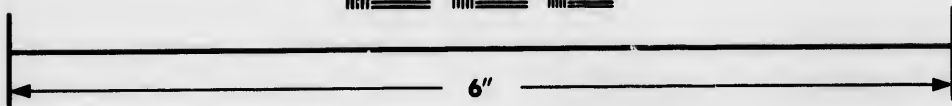
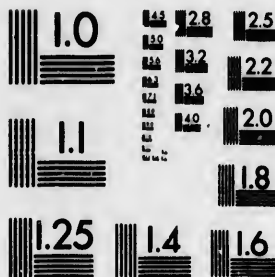


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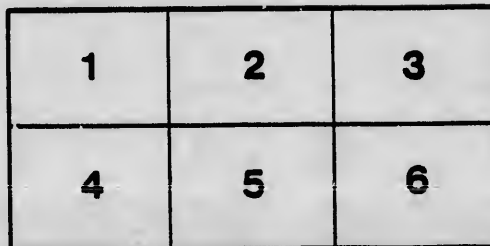
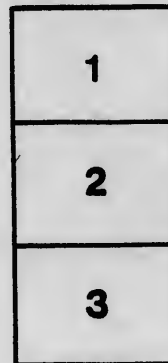
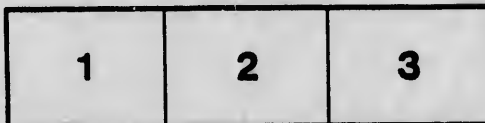
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No. 43.

**Queen's Bench,**

APPEAL SIDE.

JOHN J. DAY,

APPELLANT:

&

JAMES SUTTHORP,

RESPONDENT.

RESPONDENT'S CASE.

Printed

1880.



PROVINCE OF  
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NO.

# Court of Queen's Bench.

## APPEAL SIDE.

NO. 48.

JOHN J. DAY,

(Defendant in the Court below.)

APPELLANT,

AND

JAMES SCULTHORP,

(Plaintiff in the Court below.)

RESPONDENT.

## THE RESPONDENT'S CASE.

This is an Appeal from a Judgment of the Superior Court at Montreal, rendered on the 29th day of February 1860, in favor of the Respondent, in an action brought by him against the Appellant.

The action in the Court below was to recover the amount of a Promissory Note for \$1000, dated 22nd August 1859, made by Wm. Smyth & Co., payable three months after date to their own order, and by them endorsed to the Appellant who endorsed the same to the Respondent, and interest thereon and costs of Protest.

To this action the Defendant pleaded as follows:—

And the said Defendant for Plea to the action and *demande* of the Plaintiff, saith, that he expressly denies the allegations of the said Plaintiff's declaration except in so far as the same are hereinafter admitted, and says, that true it is, that the said Wm. Smyth & Co., in the Declaration of the Plaintiff in this cause filed mentioned to wit: William Smyth of the City and District of Montreal, gentleman, then Leather Merchant, trading by the name of Wm. Smyth & Co., made the Promissory Note mentioned in the said Declaration of the said Plaintiff, and signed and endorsed the same with the said name of Wm. Smyth & Co., and delivered it to him the said Defendant; but it is not true, but on the contrary it is expressly denied, that he the Defendant then and there endorsed the same and delivered it to the said Plaintiff as in the said Declaration mentioned. And the said Defendant in fact saith; that he the said Defendant endorsed the said Promissory Note for the accommodation of the said William Smyth, and delivered it so endorsed to the said William Smyth to enable the said Wm. Smyth to get the same discounted at the Molson's Bank or raise money thereon for his own benefit, through the said Plaintiff, but, with the understanding and upon the express condition, that the said Plaintiff should first endorse the same by putting his name above the name of him the said Defendant on the back of the said note between the name of the said Wm. Smyth & Co., and that of the said Defendant, so as that the said Plaintiff should be primarily liable as endorser to the said Defendant, should the same not be paid at maturity by the said Wm. Smyth. That for the purpose of enabling the said Plaintiff so to endorse the said note, he the said Defendant, when he so endorsed the same, left a space between the signature or endorsement of the said William Smyth & Co., on the back of the said note, and the signature or endorsement of him the said Defendant. That having, upon the condition and with the understanding aforesaid, so endorsed and delivered the said note to the said William Smyth, the said William Smyth afterwards delivered the said note to the said Plaintiff, with the understanding and upon the express condition, that he the said Plaintiff was to and should put his name above the name of the said Defendant on the back of the said note



between the name of the said Defendant and that of the said William Smyth & Co., so as that the said Plaintiff should be primarily liable as endorser to the said Defendant should the same not be paid at maturity by the said William Smyth, and the said William Smyth did in fact then make known and declare unto the said Plaintiff, that the said Defendant had endorsed the said note with the understanding and upon the condition aforesaid, and that he the said Plaintiff was to put his name between the name of Wm. Smyth & Co., and that of the said Defendant endorsed on the back of the said note. That the said Plaintiff having received the said note from the said Wm. Smyth, with the understanding and upon the condition aforesaid, no right of action hath accrued or can accrue to the said Plaintiff thereon against him the said Defendant. That moreover the said Plaintiff, when the said William Smyth so delivered the said note to him the said Plaintiff, had notice that the said William Smyth's authority to use the name of the said Defendant as endorser on the said note was restricted to the understanding and condition aforesaid, and that in whatever manner the same might be discounted or the money raised thereon by the said William Smyth through the said Plaintiff, he the said Plaintiff could have no recourse against the said Defendant as endorser to him of the said note.

That although the said Plaintiff had notice of the condition and understanding upon which the said William Smyth obtained the endorsement of the name of the said Defendant, on the said note, and that the authority of the said William Smyth to use the name of the said Defendant thereon endorsed was restricted as aforesaid, yet the said Plaintiff, on the delivery thereof to him by the said William Smyth, got the same discounted at the Molson's Bank, without first so putting his name between that of Wm. Smyth & Co., and the said Defendant. That on or about the fifteenth day of September last the fact that the said Plaintiff had so got the same discounted at the Molson's Bank, without first so putting his name between that of the said Wm. Smyth & Co., and the said Defendant, came to the knowledge of the Defendant, and upon the said Defendant intimating to the Cashier of the said Molson's Bank that he the said Defendant had endorsed the said note with the understanding that the name of the said Plaintiff was to appear between that of the said Wm. Smyth & Co., and the Defendant on the back thereof, the said Cashier made it known to the Plaintiff, who thereupon, long before the said note reached maturity, at once took up and retired the same from the said Bank, and having so retired and paid the same and the said note having been delivered to him by the said Wm. Smyth with notice as aforesaid his only recourse is against the said Wm. Smyth and not against the said Defendant."

The Respondent replied specially as follows:—

"The said Plaintiff, for answer to the Plea filed in this cause by the Defendant, saith, that it is not true that the Promissory Note filed in this cause by the said Plaintiff, and recited in his declaration was received by him on the pretended understanding and conditions, in the said Plea stated, but on the contrary, that the said note was received by him in the usual and ordinary course of business, and without any special understandings and conditions whatever; that moreover the said note was one of a series of note transactions, bearing the endorsement of the said Defendant, in all of which the signature of the said Defendant, as of course, preceded that of the said Plaintiff, and, with respect to all which endorsements, the said Defendant was paid by the makers of said notes a commission of one per cent on the amount of each such note; and that he the said Plaintiff discounted all the said notes including the note presently sued on, on the faith of the security resulting from the endorsement of the said Defendant, without which endorsement the said Plaintiff would never have discounted the said notes, or any of them.

And the said Plaintiff further saith, that true it is, he retired the said note from the Molson's Bank before maturity, in order that he might personally control the said note, but not for any of the pretended reasons assigned in the said Plea.

And the said Plaintiff lastly saith, that all and every the allegations, matters and things in the said Plea set forth and contained, except in so far as the same exactly correspond with the allegations of the Plaintiffs' Declaration, or are hereinbefore expressly admitted to be true are false, untrue and unfounded in fact, and the said Plaintiff hereby expressly denies the same and each and every thereof, and that the same are moreover wholly insufficient in law."

The following is the Judgment rendered by the Court below :—

" The Court having heard the parties by their counsel upon the merits of this cause, having examined the proceedings, proof of record, and deliberated; considering that the signature and endorsement of the Defendant on the Promissory Note, Plaintiff's exhibit number one, is proved, and that such endorsement is unrestricted and unconditional and precedes that of the said Plaintiff; considering that it appears from the evidence that the Plaintiff hath paid and satisfied the said Note as Indorser thereon subsequent to the said Defendant; considering that the said Promissory Note was delivered to the said Plaintiff by the said Defendant by the maker thereof and that the condition upon which the said note was endorsed and delivered by the maker thereof, viz: that he the said Plaintiff should write and sign his name thereon as Indorser over and before the name of the said Defendant, was not made known to the Plaintiff, as a condition of the Defendant's Indorsement at the time of the delivery to him of the said note, and moreover that it does not appear that any condition was exacted by Wm. Smyth, the maker of the said note and the Agent of the said Defendant in that behalf, at the time of the delivering of the said note to Plaintiff for his indorsement, and considering further, that the said Plaintiff did not agree to any special condition or receive, Indorse and negotiate the said Promissory Note on the condition alleged in the Defendant's Plea; considering further, that there is nothing in the evidence of Record to defeat or impair in law, the Plaintiffs' recourse against the said Defendant, as waged by the present action, and that the Defendant has failed to establish his Plea in this cause filed, doth dismiss the said Plea, and doth condemn the Defendant to pay and satisfy to the Plaintiff, the sum of One thousand and two dollars and fifty cents, current money of this Province, to wit: the sum of One thousand dollars, amount of the Promissory Note, Plaintiffs' Exhibit number one, dated Montreal, twenty second August one thousand eight hundred and fifty-nine, made by Wm. Smyth & Co., payable three months after date to the order of themselves at the Molson's Bank here and by the said Wm. Smyth & Co., endorsed and delivered to the said Defendant, who endorsed and delivered the said note to the Plaintiff and the sum of two dollars and fifty cents for the costs of the Protest of the said note, with interest upon the said sum of one thousand dollars from the 25th day of November one thousand eight hundred and fifty nine, date of the said protest, and on the said sum of two dollars and fifty cents from the twenty-eighth day of November, one thousand eight hundred and fifty-nine, until actual payment and costs of suit."

The Respondent respectfully submits, that this judgment is entirely consonant with the evidence of record and the law applicable to the case, and that it ought to be confirmed by this honorable Court with costs.

*Arthur H. H. H. H.*

*Attorneys for Respondent.*

Montreal, 21st July 1860.

