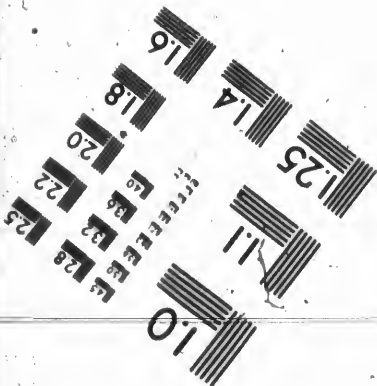
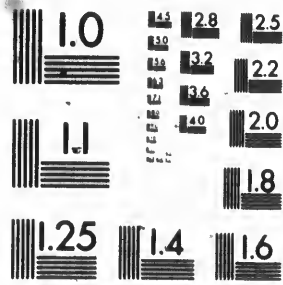


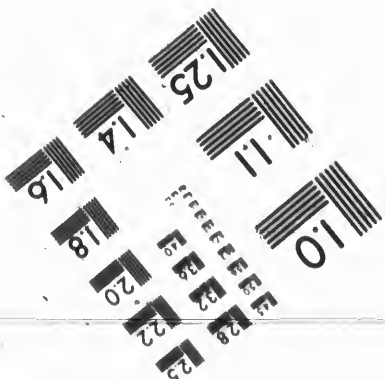
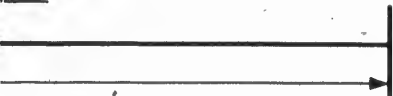
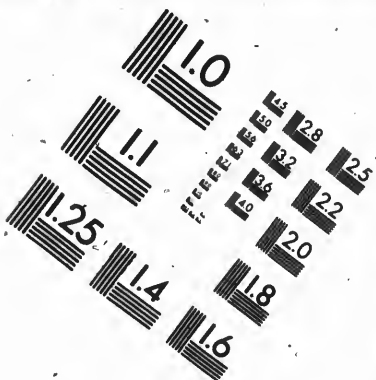
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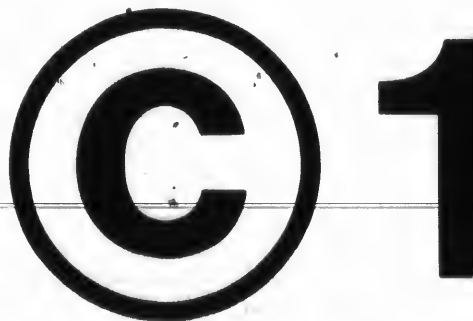
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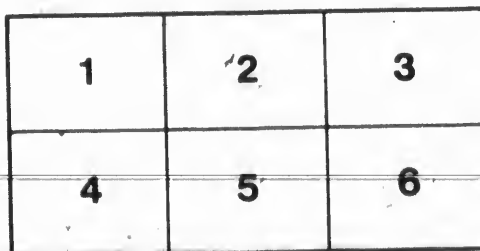
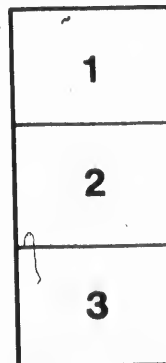
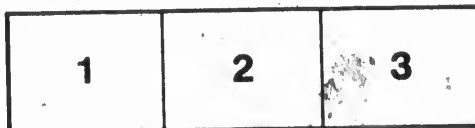
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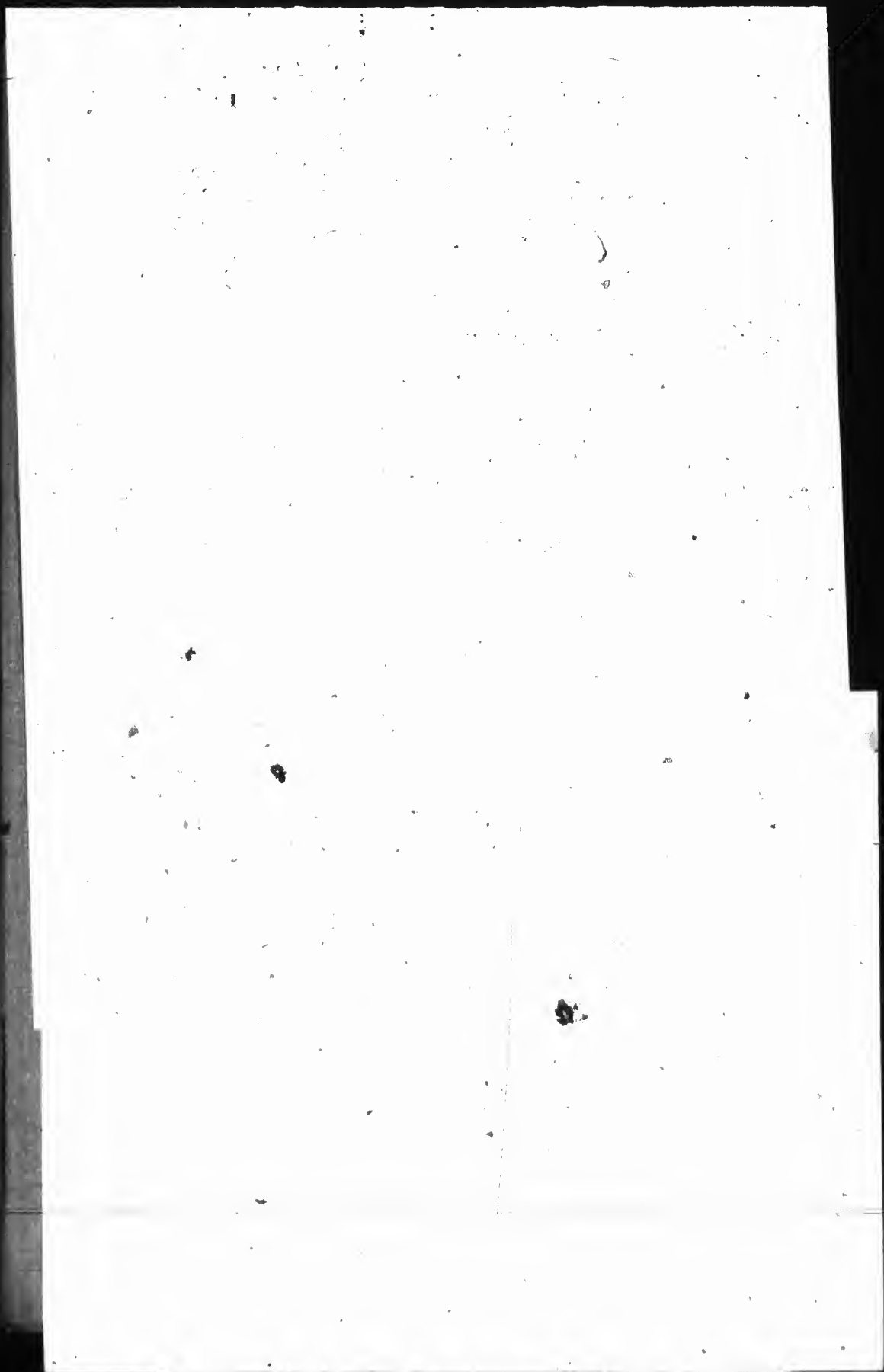
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# Journal of the Court

## APPEAL SIDE

NO. 74

EXAMINED TO BE PRINTED

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LONDON: 1874

Printed by the Court Office  
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## APPELLANT'S CASE

This is a memorial from a judgment returned by the Superior Court at Montreal, on the 26th day of November 1873, by the Honorable Mr. Justice Gwynne, in a proceeding by a party, who has obtained the judgment of the Court, to be set aside, and the case to be retried, on the ground that the Appellate Court has not done justice to the facts, and the law applicable thereto.

The facts of the case are as follows: In a certain case of 1870, the Appellate Court, on the 26th day of March 1871, and on the 10th day of May 1871, in the Appellate Court, the Honorable Mr. Justice Gwynne, in a proceeding by a party, who has obtained the judgment of the Court, to be set aside, and the case to be retried, on the ground that the Appellate Court has not done justice to the facts, and the law applicable thereto.

That, on the 26th day of March 1871, the Appellate Court, on the 10th day of May 1871, in the Appellate Court, the Honorable Mr. Justice Gwynne, in a proceeding by a party, who has obtained the judgment of the Court, to be set aside, and the case to be retried, on the ground that the Appellate Court has not done justice to the facts, and the law applicable thereto.

That, on the 26th day of March 1871, the Appellate Court, on the 10th day of May 1871, in the Appellate Court, the Honorable Mr. Justice Gwynne, in a proceeding by a party, who has obtained the judgment of the Court, to be set aside, and the case to be retried, on the ground that the Appellate Court has not done justice to the facts, and the law applicable thereto.

That, on the 26th day of March 1871, the Appellate Court, on the 10th day of May 1871, in the Appellate Court, the Honorable Mr. Justice Gwynne, in a proceeding by a party, who has obtained the judgment of the Court, to be set aside, and the case to be retried, on the ground that the Appellate Court has not done justice to the facts, and the law applicable thereto.

That the only remittances or payments made by the said Defendant on account of his said indebtedness, are one Bill or Draft on Sheffield in England for Sixty-nine pounds nineteen shillings and eight pence Sterling, and another Draft or Bill on Messrs Cross & Sons England, for One hundred and Eighty-six pounds, fourteen shillings and five pence Sterling. And after giving credit for these amounts the said Defendant is presently indebted to the Plaintiff for the causes aforesaid, and for balance of interest on such sales aforesaid after due, in the sum of Two hundred and nineteen pounds, five shillings and nine pence Sterling, and interest thereon since the first day of March instant, as shewn more fully by the account current herewith filed, which said amount last mentioned, at the current rate of exchange between this city and England aforesaid, (which the Plaintiff avers to have averaged and to be presently one per cent premium or advance) is equivalent to Two hundred and Sixty-eight pounds and four pence currency."

Then followed the general *indebitatus assumpsit* Counts.

The following is the Plea set up by the Respondent:—

"The Defendant for plea to the Plaintiff's action, saith, that under and by virtue of an agreement made at Liège in Plaintiff's Declaration mentioned on the ninth March Eighteen hundred and fifty-seven, between the Defendant and the Plaintiff, it was understood and agreed that the Plaintiff was to consign to the Defendant all the guns &c. for the Canada Market or trade, the Defendant agreeing to render an account sales monthly of the guns sold, and also if the amount should be sufficiently large, to send the Plaintiff a Bill or Draft for the amount payable at a Banker's in London; that in conformity with the said agreement the Plaintiff consigned at divers times, subsequent to that date, to the Defendant large quantities of guns and pistols for sale for the Plaintiff on consignment in Canada, upon which the Defendant paid and disbursed large sums of money for duties payable and other charges, to wit the sum of Two hundred pounds currency; that by the said agreement the said Defendant was to receive a reasonable commission for the sale of the said goods, and for all incidental trouble, and was and is entitled thereto, to wit the sum of Sixty pounds, but the said Defendant saith that the said agreement did not contemplate nor did the Defendant at any time agree to warrant the sales, nor was such commission a guarantee commission, and the Defendant saith that the said Defendant sold certain of the said goods and furnished account sales thereto, and remitted large sums of money, to wit the various sums credited in the exhibits of the said Plaintiff filed in this cause; that the Plaintiff's exhibits one (1) two (2) three (3) and four (4) contain the said account sales, that after said sales divers of said guns and goods were returned and thrown back into the possession of the said Defendant which were not paid for and were moreover in bad condition and order, and never have been realized for by the said Defendant; and the same are still on hand unsold, and unsealable, amounting in all to the value and sum of One hundred and Ninety-seven pounds, thirteen shillings and one penny Sterling, the whole as per list, herewith filed, which said goods the Defendant hath offered to return to the Plaintiff, and hath always been and still is ready to return and give up the same and hereby offers to deliver the same to the Plaintiff or to his agent in that behalf, that in fact the said Defendant rendered the said account sales to the Plaintiff and remitted him the full value of the goods sold and realized by Defendant, and the said Defendant is not now indebted to him the said Plaintiff in the sum of money demanded by this action, or any part thereof, but has the said goods, ready to be delivered to his order, of all which the Plaintiff was duly notified; that save and except as hereinbefore mentioned, all, each and every the allegations, matters and things in the Plaintiff's Declaration set forth and contained are untrue.

Wherefore the said Defendant prays acts of his readiness and offers to deliver and restore the said goods, so on hand to the Plaintiff or his agent, and prays the dismissal of Plaintiff's action with costs of which *distraint* to the undersigned Attorneys."

The Appellant answered, "that true it is (as stated in said plea) that the Defendant agreed to render an account sales monthly of the guns sold, and also, if the amount would be sufficiently large, to send the Plaintiff a Bill or Draft for the amount payable at a Banker's in London, but, with that exception, and except also in so far as the allegations of the said plea exactly correspond with the allegations in the Plaintiff's Declaration contained, all and every the allegations, matters and things in the said plea set forth and contained, are false, untrue and unfounded in fact, and the said Plaintiff hereby expressly denies the same and each and every thereof, and the same are moreover insufficient in law."

The commission charged in the account sales and account current rendered by the Respondent is a commission of 7½ per cent, which the Appellant established, by the evi-

dence of three competent witnesses examined by himself, and by the cross examination of Mr. Leeming who was examined by the Respondent, to be a guarantee or *del credere* commission, as understood by the trade in Montreal, and as authorized and recognized by the Tariff of the Montreal Board of Trade, in the absence of any agreement to the contrary. In addition to which, according to the Respondent's own showing, he was bound to make monthly remittances of his sales to the Appellant, by "Bill or Draft for the amount payable at a Bankers in London," if the amounts of the sales should be sufficiently large, no reservation or restriction whatever being stipulated for by Respondent, in case of non-collection of his sales. Moreover the account sales were rendered unreservedly, and in all cases brought down the net amount of sales as an amount due to the Appellant, at the dates therein indicated. The liability of the Respondent is also clearly admitted by him in his letter of the 18th September 1858—(Paper 29 of the Record).—Besides all which there is no sufficient proof that the Respondent has on hand the guns and pistols referred to, much less that they were ever sold and returned to him for the causes in his said plea stated.

Under the circumstances, the Appellant was clearly entitled to a simple condemnation against the Respondent, for the full amount of his demand, but instead thereof the learned Judge who heard the case in the Court below rendered the following judgment:—

"The Court having heard the parties by their counsel upon the merits of this cause, having examined the proceedings, proof of Record and the admissions made and given by the Defendant, and having deliberated, considering that the Defendant is liable and accountable to the Plaintiff for the balance of the said consignments of goods made by the Plaintiff to the Defendant for sale on Plaintiff's account, and by the Defendant thereof received, and considering that the Defendant is not liable to the Plaintiff to guarantee his said sales of the said Goods and that no such guarantee was agreed between them or has been established against Defendant, considering that previous to the institution of this action, to wit, on the sixteenth of December, one thousand eight hundred and fifty-eight, the Defendant held to the order of the Plaintiff, a quantity of the said goods amounting to the sum of Two hundred and Sixty-one pounds, three shillings and one penny currency as set out in Defendant's statement by him filed in this cause as his exhibit number four, (No. 4) as follows, to wit:

Montreal, 10th Decr. 1858.

Statement of Guns and Pistols held to the order of Messrs. Renkin Frères, Liege by James Foley.

			s.	d.		s.	d.
5	SINGLE GUNS.	1102	8	11	3	4	7
14	" "	I T 1148	15	0	11	5	0
9	" "	" "	17	0	7	12	0
6	" "	I D "	17	0	5	5	0
10	" "	" "	16	0	7	18	0
1	" "	8194	23	0	1	3	0
3	" "	" "	25	0	3	10	0
1	" "	" "	24	0	1	4	0
4	" "	" "	20	0	4	0	0
4	" "	4967	10	5	2	2	0
3	" "	1140	25	0	3	18	0
0	DOUBLE GUNS	690	25	0	7	10	0
0	" "	700	26	3	10	10	0
7	" "	713	27	0	9	9	0
9	" "	" "	30	0	13	10	0
9	" "	715	31	3	7	18	0
7	" "	" "	28	0	2	17	0
7	" "	" "	32	0	11	7	0
6	" "	717	26	0	10	16	0
12	" "	" "	35	0	11	0	0
7	" "	726	35	0	13	13	0
6	" "	" "	35	0	10	10	0
8	" "	728	42	0	17	0	0
5	" "	" "	37	0	0	7	0
4	" "	730	45	0	9	0	0
1	" "	" "	40	0	2	0	0
3	" "	748	55	0	7	16	0
1	" "	950	100	0	5	0	0
1	" "	" "	101	0	5	7	0
1	" "	" "	110	0	6	10	0
1	" "	" "	67	8	3	7	0
1	" "	1055	110	0	5	10	0
4	" "	740	40	0	6	0	0
1	" "	730	78	0	3	15	0
6	" "	748	11	6	3	9	0
0	PAIRS PISTOLS.	103 F. D.	10	4	3	7	0
41	" "	" "	9	0	0	5	0
111	" "	101 F. P.	17	0	0	17	0
1	" "	104					
			Currency £	301	3	1	



*Min*









