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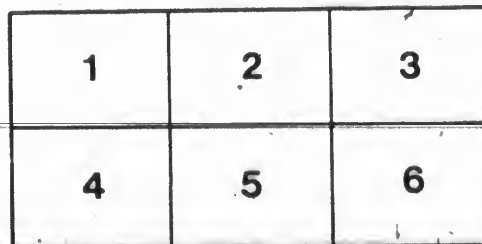
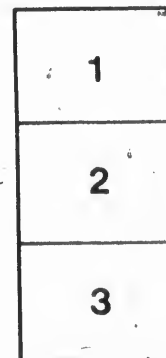
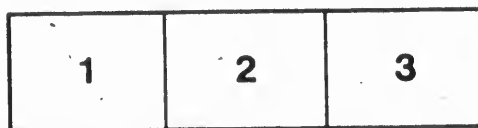
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Queen's Bench,

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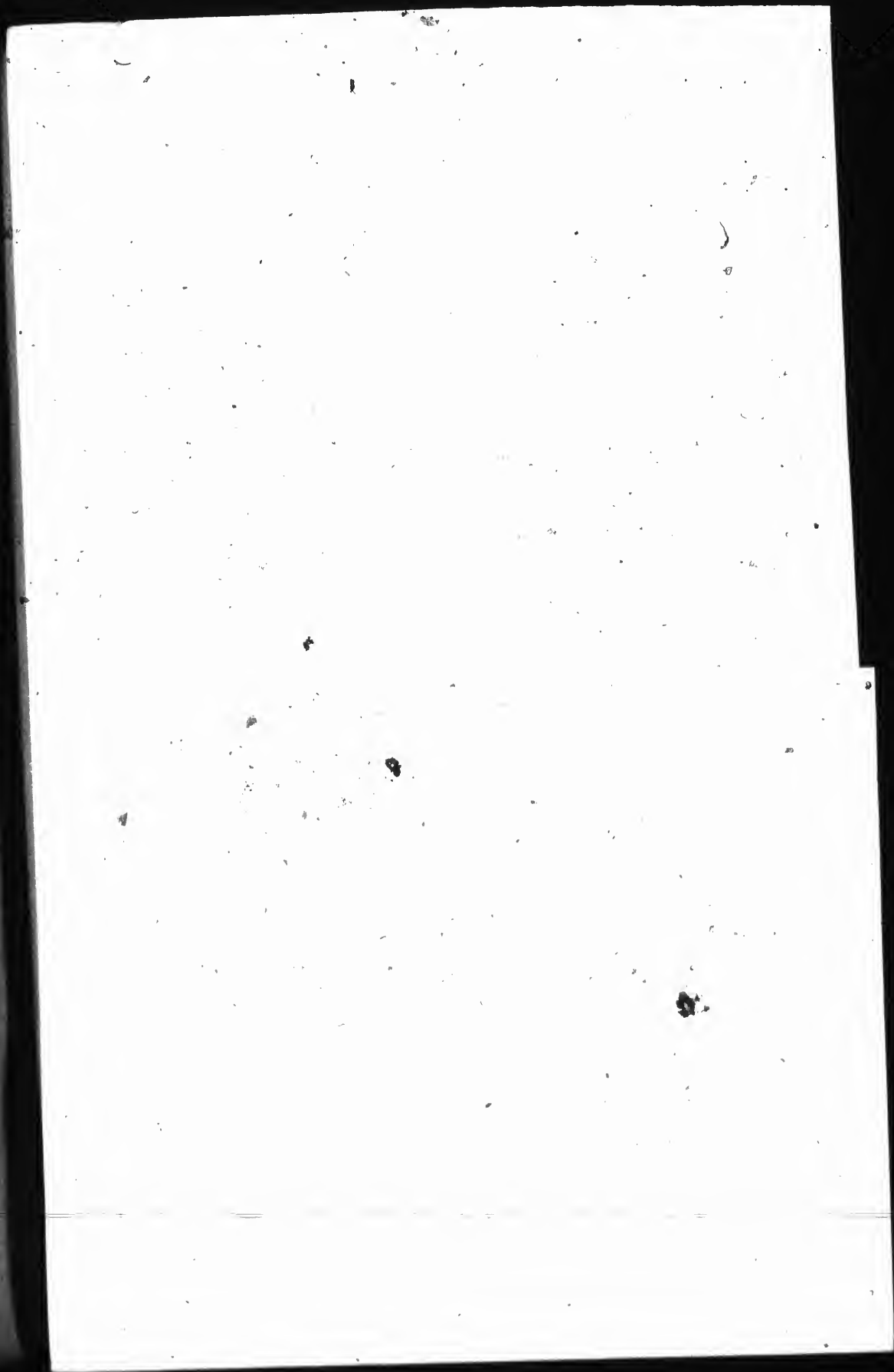
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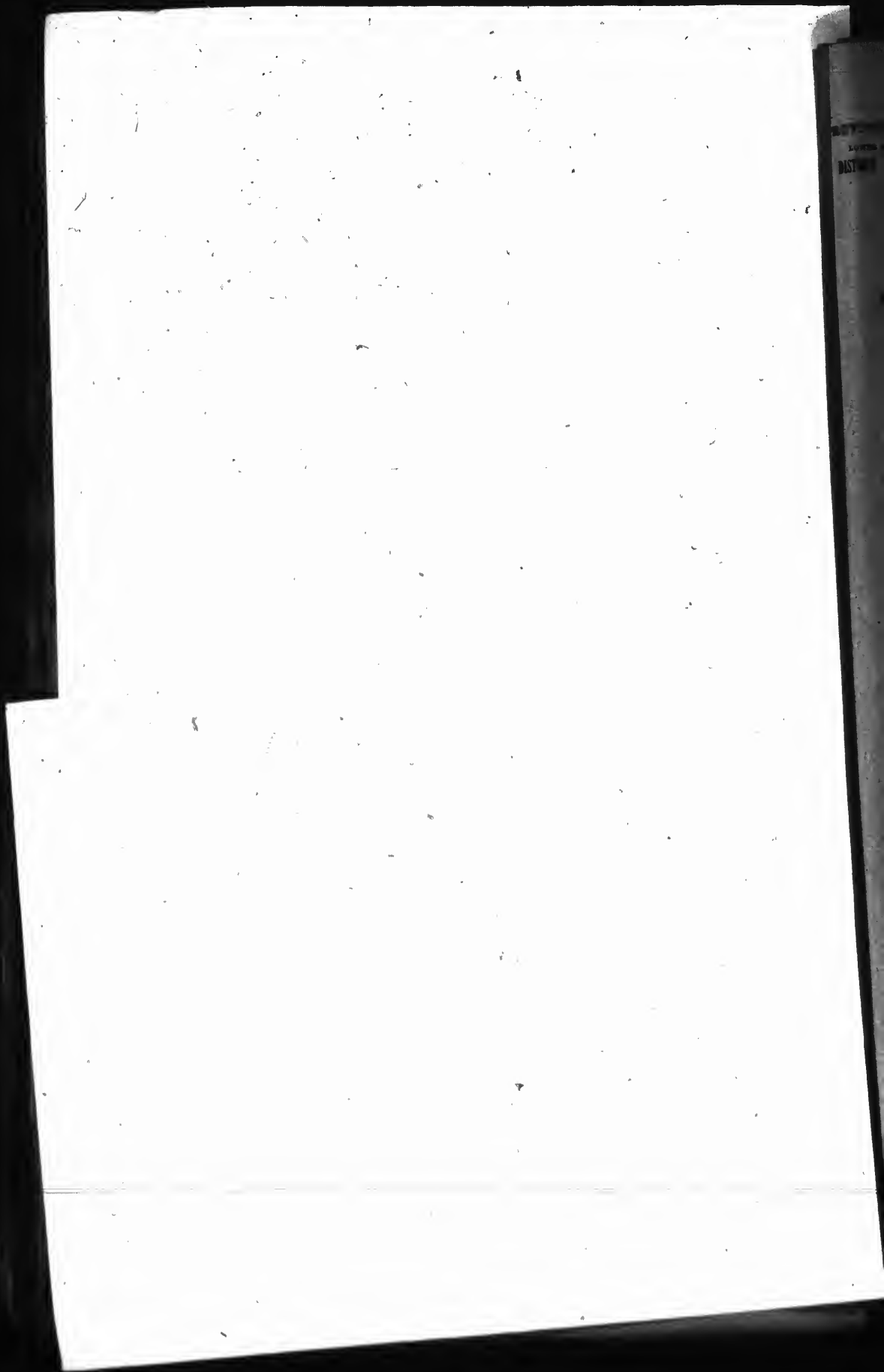
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( *Case of Queen's Bench* )

APPEAL SIDE

No. 44

JAMES T. ...

( *Plaintiff in Error* )

... vs. ...

( *Defendant in Error* )

REPORTER'S CASE.

That an appeal from a judgment rendered in the Supreme Court of the State of New York, in the case of ... vs. ... rendered on the 10th day of February 1889, by the Honorable Mr. Justice ...

The value of the goods taken was valued to amount to the sum of \$279.04 and ...

That on or about the 10th day of August 1888, ...

That the ...

That by the ...



That the only remittances or payments made by the said Defendant on account of his said indebtedness, are one Bill or Draft on the said Defendant for Sixty pounds nineteen shillings and eight pence Sterling, and another Draft or Bill on Messrs Cross & Sons in London, for One hundred and thirty six pounds, five shillings and five pence Sterling. And after giving credit for same accounts the said Defendant is presently indebted to the Plaintiff for the same amount, and for balance of interest on such accounts should after due date of the same be two hundred and thirty six pounds, five shillings and nine pence Sterling, and interest thereon from 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 thirty six pounds and four pence currency."

Then followed the general *indebitatus assumpsit* Counts.

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

"The Defendant for plea to the Plaintiff's action, saith, that under and by virtue of an agreement made at Lidge 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 thereof, 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 unsaleable, 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 *distrains* to the undersigned Attorneys."

The Respondent 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 Appellant is a commission of 7½ per cent, which the Respondent established, by the evi-

denance of three competent persons examined by himself, and by the Court, and that of Mr. Leeming who was examined by the Appellant, to be a guarantee or of creditors' commission, as understood by the Court in the case, and as authorized and recorded in the Treaty of the General Board of Trade, in the terms of the said Treaty, and that the Appellant, in consequence of his sale to the Defendant, of a bill or Draft for the sum of £1000, payable in London, if the amount of the said bill or Draft is not fully paid, the Defendant is liable to the Appellant for the amount of the said bill or Draft in case of non-payment of his bill. Moreover the account sales were rendered to the Respondent, and in all cases brought down the net amount of sales as an amount due to the Respondent, at the date therein indicated. The liability of the Appellant, is also clearly admitted by him in his letter of the 13th September 1868—(Paper 29 of the Record).—Besides all which there is no sufficient proof that the Appellant has on hand the guns and pistols referred to, such as that they were ever sold and returned to him for the reasons in the said paper stated.

Under the circumstances, the Respondent was clearly entitled to a simple condemnation against the Appellant, 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 therefor 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, 16th Decr. 1868.

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

			£	s	d	¢
5	SINGLE GUNS.	1102	8	11	3	4
15	"	I T 1148	15	0	11	6
9	"	"	17	0	7	13
6	"	I D "	17	0	7	6
10	"	"	23	0	7	10
1	"	6194	20	0	7	10
2	"	"	24	0	7	4
1	"	"	30	0	4	0
4	"	4367	10	0	2	2
4	"	1140	25	0	3	18
3	DOUBLE GUNS	090	25	0	7	10
8	"	700	16	3	10	0
8	"	"	27	0	9	0
7	"	713	30	0	13	10
9	"	"	31	3	7	16
5	"	715	28	0	7	17
4	"	"	32	0	11	7
7	"	717	30	0	10	15
6	"	"	35	0	31	0
12	"	726	39	0	13	13
7	"	730	35	0	10	10
6	"	"	43	0	17	0
6	"	728	27	0	9	7
5	"	"	45	0	8	0
4	"	750	40	0	2	0
4	"	"	32	0	7	18
3	"	745	100	0	5	0
1	"	520	107	0	5	7
1	"	"	110	0	5	10
1	"	"	57	0	3	7
1	"	1085	110	0	5	10
1	"	744	40	0	8	0
1	"	745	75	0	3	15
1	"	746	11	0	2	9
1	"	133 F. D.	10	0	2	7
41	"	"	9	0	0	3
111	"	133 F. P.	17	0	0	17
1	"	160	17	0	0	5

Currency 261 2 1

Considering that the Defendant's title was transferred by him conveyed to the Plaintiff of the said statement in Plaintiff's account of the said goods in the said statement mentioned the sum of Forty pounds and two pence, less the value of part of the said goods so held as afloat—thereby by Plaintiff's account of the said goods, balance amounting to the sum of Forty pounds and two pence, less the value of part of the said goods, and considering that it is admitted by the Plaintiff and Defendant that the said Defendant is indebted to the said Plaintiff in the sum of Sixty pounds, currency, for the value of the said goods, the sum of One hundred pounds, wherefrom amounting the consideration of the amount set out in the said statement, there actually was due to the Plaintiff at the expiration of such term on the sum of Forty pounds and two pence, less the value of part of the said goods in hand as afloat, doth a judgment against the Defendant to pay to the said Plaintiff the sum of Eighty pounds, eight shillings and three pence, together with the said sum of Three hundred and one pounds eleven shillings and four pence, with interest on the said several sums, from the fifth day of March One thousand eight hundred and fifty-nine, date of the service of this action, unless the Defendant do within eight days from the service of this Judgment upon him, deliver up to the Plaintiff the balance of the said goods in the said statement mentioned, less those for which the said sum of Forty pounds have been by him received, whereupon the said Defendant shall only be held to pay to the Plaintiff the said sum of Eighty pounds, eight shillings and three pence with interest as aforesaid, the whole with costs to be taxed as in a contested action of first class."

The Respondent considering as before stated that he was entitled to a simple condemnation against the Appellant, according to the conclusions of his declaration, has also Appealed from the said judgment, such Appeal bearing the number 73 on the records of this Court. Under any circumstances the Respondent respectfully submits, that the present Appeal which seeks to reverse the judgment of the Court below is *oto*, cannot be maintained.

*B. B. B. & Co. Solicitors*  
*Att. for Respondent*

Montreal, 9th August 1860.

Depositions of witnesses examined in Court below by Respondent.

**JAMES HUTTON**:—I am now, and during the last Seventeen years have been, a Commission Merchant carrying on business as such in this City. My business has been entirely confined to that of hardware. During the whole of the above period, the uniform rate of Commission for selling Merchandise without guarantee, has been Five per cent., and with guarantee an additional Commission of two and a half per cent. These rates cover every description of trouble, including that of remitting. I am a member of the Montreal Board of Trade, and I now produce a printed copy of the rates of Commission, sanctioned by that body.

*Cross-Examined.*

All consigned goods are subject to be returned as a matter of course if unsold or unsaleable.

*Re-Examined.*

Should an account sales be rendered of consigned goods and the charge of seven and a half per cent be made, the debt is of course guaranteed.

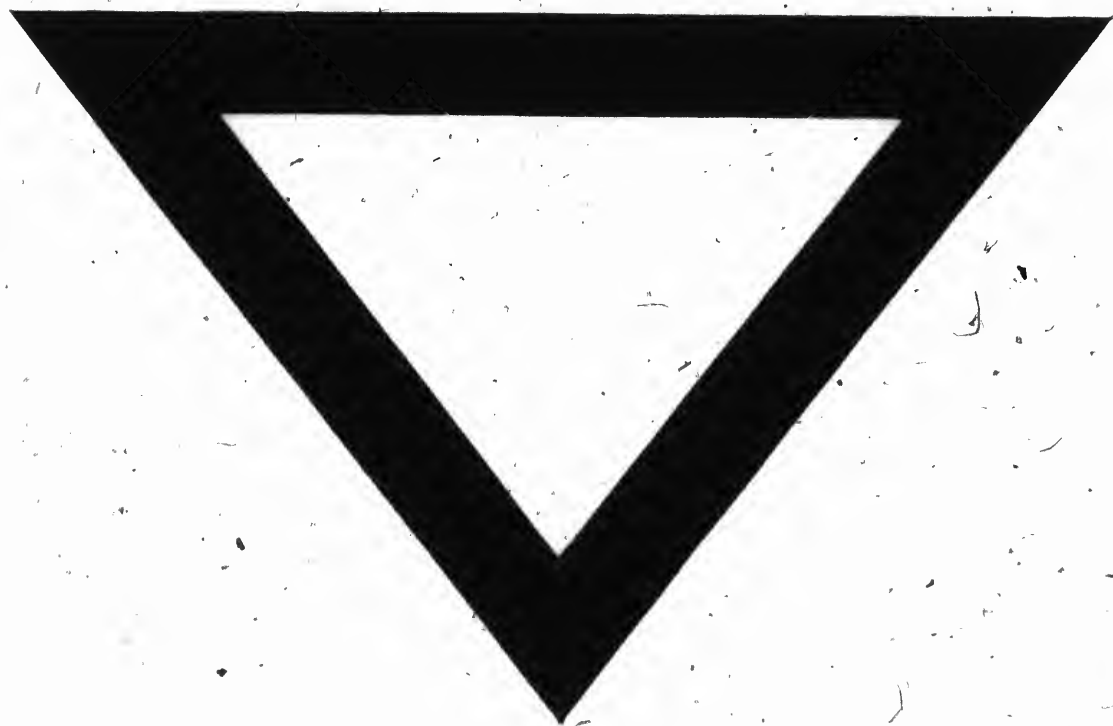
**JOHN G. DINNING**:—"I am now and during the last four or five years have been Secretary of the Montreal Board of Trade. For many years previously, I was engaged in the General Commission business in this City. The uniform rate of Commission for selling Merchandise in this City without guarantee, has been during my experience Five per cent. and with guarantee an additional commission of two and a half per cent. These charges include every description of trouble, including that of remitting. The paper produced by James Hutton is a true copy of the rates of Commission sanctioned by the Board of Trade, so far as the Commissions of the above character are concerned.

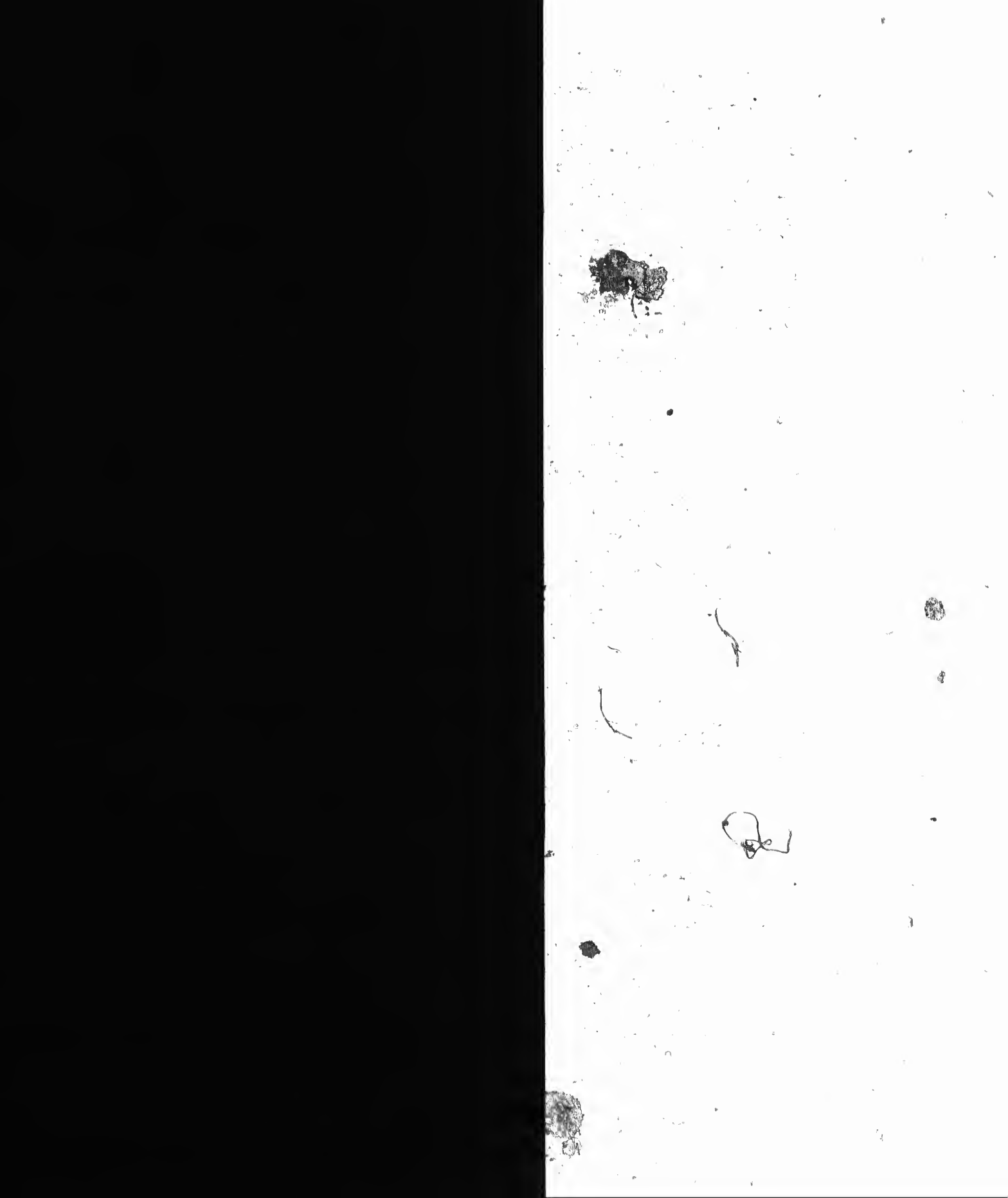
*Defendant declines Cross-Examination.*

**THOMAS WORKMAN**:—"I am now and during the last twenty-five years have been engaged in the Hardware business in this City. During that time I have frequently sold goods on Commission. When nothing is specially agreed to the contrary, seven and a half per cent Commission has been always considered as a guarantee or *del credere* Commission. This Commission is considered to cover every description of trouble including that of remitting money.

*The Defendant declines Cross-Examination.*







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