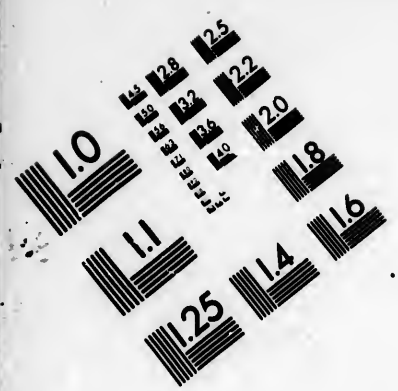



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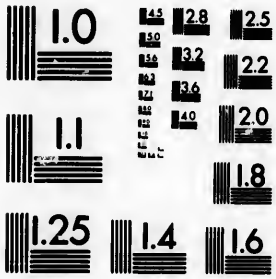


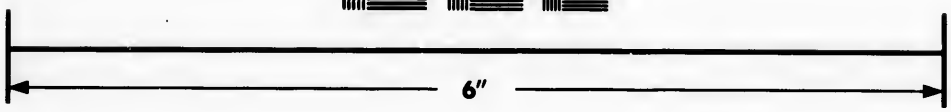



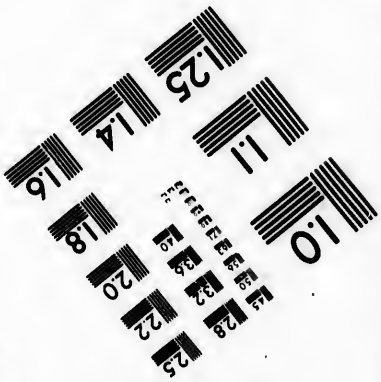


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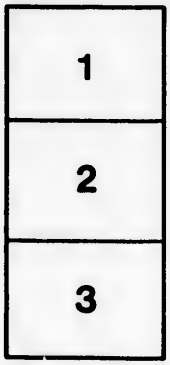


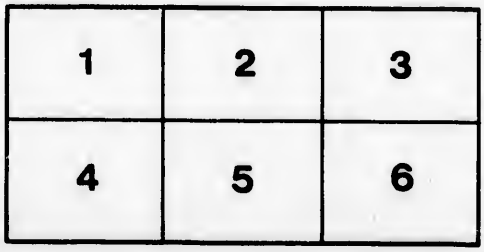


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*No.*

# IN APPEAL.

ANDREW LEAMY,

*Defendant in Court Below,*

**Appellant.**

AND

HARDOIN LEONNAIS,

*Plaintiff in Court Below,*

**Respondent.**

## APPELLANT'S CASE.

*Filed this* 185

PROVINCE OF CANADA,
—LOWER CANADA.—

# In the Queen's Bench.

(APPEAL SIDE.)

ANDREW LEAMY,

(*Defendant in the Court Below.*)

APPELLANT.

AND

HARDOIN LEONAIS,

(*Plaintiff in Court Below.*)

RESPONDENT.

## *APPELLANT'S CASE.*

THE Judgment from which this Appeal is instituted, was rendered by the Superior Court sitting in the District of Ottawa, on the 4th February, 1857.

The Respondent, as sole Assignee of the Estate of Jacob Dennison, sued the Appellant for £215 16s. 2d., and in his Declaration, his title is set forth substantially as follows:

Jacob Dennison became a bankrupt on the 26th February, 1844. At a meeting of the creditors held on the 13th March, 1844, the Respondent and Andrew Cowan were chosen Assignees, accepted the office and gave the required notices.

At a special meeting of the creditors, on the 26th June, 1850, it is stated that Andrew Cowan resigned, and the Respondent was named sole Assignee. At the same meeting, the creditors having failed to name another in his stead, it was ordered by the Court that the Respondent should remain sole Assignee; the latter thereupon accepted the office and gave the required notice.

The Declaration then avers, that the Appellant was indebted to Jacob Dennison before he became a bankrupt, in £215 16s. 2d. for goods sold, &c., and concludes accordingly.

To this action, the Appellant pleaded—1st. *A defense au fonds en droit*—and 2nd. *Et defense au fonds en fait.*

Under his *defense en droit*, the Appellant contended, that the Respondent's declaration did not contain the allegations of facts necessary in law, to vest in him, as sole Assignee, the Estate of Jacob Dennison: That it is not the choice of Assignees by the creditors, nor the acceptance by them of such office, that vests the Estate in them; but, on the contrary, it is an instrument such as is described in the Statute 7 Vic. cap. 10, sec. 30, by which it is enacted:—

"That as soon as such acceptance shall be signified to the Judge or "Commissioner, as aforesaid, he shall, by an instrument under his hand and "seal, declare the choice or appointment of such Assignees, and their accept-

" ance; and the said instrument shall be executed in duplicate, one of
" which shall be lodged in the office wherein the other papers in the case
" are hereinafter required to be finally deposited,—and the other shall be de-
" livered to the Assignees; and either of such duplicates purporting to be
" under such hand and seal, shall be received in all Courts in this Province,
" as *prima facie* evidence, that the same was executed on the day in which
" it purports to bear date, and that the Assignees named therein, were duly
" chosen and appointed, and accepted the office, and of their authority to
" bring and defend actions in that character."

The declaration having made no mention of such an instrument, it clearly does not establish *prima facie*, the right of the Assignees to sue in that capacity.

Then the 31st sec. of 7 Vic., cap. 10, enacts, " That the said instru-
" ment so signed and sealed, as aforesaid, shall vest and be construed to
" vest in the Assignees named therein, all the property of the Bankrupt," &c.

The Respondent not having declared upon the instrument described in this statute, his action wants the only basis which could possibly vest in the Respondent and Andrew Cowan, the bankrupt Estate of the said Jacob Dennison; and, consequently, a material link is wanting in the Respondent's title, as disclosed in his declaration.

Again, supposing the Estate of Dennison to have been vested in the Respondent and Andrew Cowan, as stated in the declaration, after the latter was removed, and before the remainder of the Estate not already disposed of, could be legally vested in the Respondent as sole Assignee, it was necessary for him to conform to the 32nd section of the same Act, regulating this matter; which enacts, after establishing the manner in which any Assignee may be removed:—

" That upon such removal, or upon any vacancy by death or other-
" wise, the said creditors may, in manner before mentioned, choose other
" Assignees in their place, who shall notify their acceptance, and obtain the
" same kind of instrument from the Judge or Commissioner, and give notice
" thereof, as the original Assignees are required to do; and all the Estate of
" the Bankrupt not before lawfully disposed of, shall forthwith and henceforth
" become vested in such new Assignees, as if they had been originally
" elected or appointed as aforesaid."

Nothing in the declaration shews that the Respondent even did obtain the instrument described above, the only legal title which could give him authority to sue as sole Assignee.

Notwithstanding these omissions, the Appellant's demurer was dismissed, and the case fixed for evidence.

At *enquete*, the Respondent failed to produce the documents above described, under the hand and seal of the Judge or Commissioner of Bankruptcy, the only means, as the Appellant contends, by which the Respondent's title could be made out.

To establish the original debt by the Appellant to Dennison, he examined one witness, John Murphy,—this witness being unable to prove the demand as set forth in the bill of particulars, stated that on the 21st June, 1842, there was a balance of £185 16s. 10d. due Dennison by the Appellant,

on a settlement of account between them, for which he states the Appellant gave his draft. This, it must be remarked, is evidence adduced by the Respondent from his own witness on his examination in chief.

The same witness further establishes, that the draft above mentioned, was dated on the 21st of June, 1842, drawn on Messrs. Pemberton & Brothers, at sight, and payable to Dennison, or his order.

Upon this evidence, the case was heard, and judgment rendered in favour of the Respondent, for £184 4s. 4d., the Court below considering that the Respondent had established the material allegations of his declaration.

It is obvious in this case, that the material facts to be proved by the Respondent, were—1st. The Debt by the Appellant to Dennison: 2nd. The Transfer of the debt to the Respondent and Cowan, according to the 31st sec. of 7 Vic., cap. 10: and 3rd. The investment of the same debt in the Respondent, according to the 32nd sect. of the same Statute.

Supposing the sum of £184 4s. 4d., proved as a debt from the Appellant to Dennison. The Appellant contends, inasmuch as the Respondent has established by his own evidence on his own examination, that before Dennison became a Bankrupt, he had received from the Appellant a negotiable instrument or bill, in payment of that sum, the Respondent could not in law recover upon the original consideration, without proving that the bill or draft was dishonored, or that it was in the hands of the Respondent.

The documents described in the 31st and 32nd sections of 7 Vic. cap. 10, are so obviously the only possible evidence that could establish the remaining two links in the Respondent's chain of title, according to the express words of the Statute: And their absence from the proof of record, so fatal an omission of the most material evidence, that it is difficult to imagine what reasons the Respondent can urge in favor of the judgment in his favor under these circumstances.

PETER AYLEN,
Attorney for Appellant.

Aylmer, 21st September, 1857.