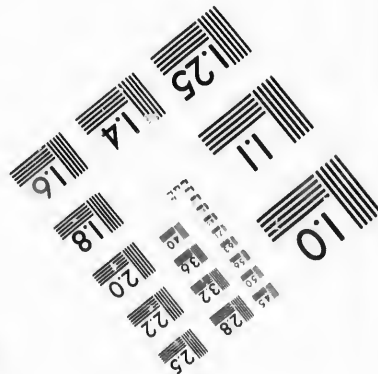
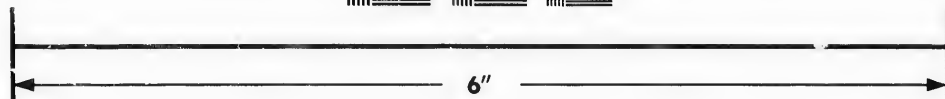
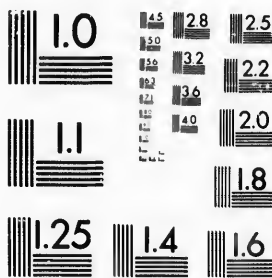


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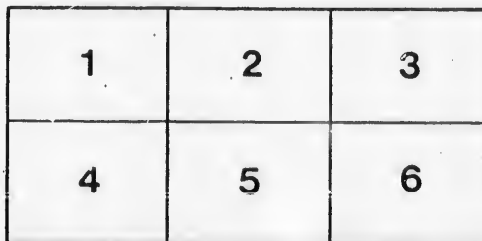
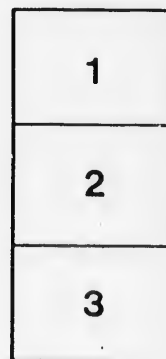
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No. 74.....

QUEEN'S BENCH,
LOWER CANADA.

APPEAL SIDE.

ALBERT G. WOODWARD,

Appellant.

AND

HANNAH BELKNAP,

Respondent.

APPELLANT'S CASE.

File 5th March 1859
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Man. M. to Diego Journal
No. 74.....

Province
LOWER CANADA

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LOWER CANADA, TO WIT: }

COURT OF QUEEN'S BENCH.

APPEAL SIDE.

ALBERT G. WOODWARD,

(Plaintiff in the Court below.)

APPELLANT.

AND

HANNAH BELKNAP,

vs *qualité,*

(Defendant in the Court below.)

RESPONDENT.

APPELLANT'S CASE.

THE PRESENT APPEAL is from a judgment rendered by His Honor, Mr. Justice Sbert, in the Circuit Court for the District of Saint Francis, on the 30th day of June, 1858.

The action of the Appellant was to recover the balance of an account due by the late Joseph Bailey, the husband of the Respondent, and the amount of a small account due by her as Tutrix to her minor children, heirs of the late Joseph Bailey. The pleadings are referred to at length in the Petition in Appeal which is printed in the Appendix. Owing to the fact that the Appellant, during a great part of the time specified in his account, had no clerk in his employ, and the inability of the Respondent in her quality of Tutrix to give admissions in the cause, a great deal of evidence had to be adduced in proof of the account of the Appellant. Inasmuch, however, as by the judgment of the Court below, the account of the Appellant is formally declared to have been proved, by far the largest portion of the evidence adduced in the cause has no bearing upon the question to be determined by the present appeal. All those parts of the evidence which the Appellant conceives affect the points at issue are printed in the Appendix.

The only question that arises in this appeal is, whether the Appellant accounted to the late Joseph Bailey for the sum of £79 16s. 4d., and the sum of £6 5s. 0d., received by the Appellant from the firm of Nelson and Butters, at Montreal, to be carried to the late Joseph Bailey, at Sherbrooke. The former sum was received by the Appellant on the twenty-fifth day of May, 1853, the latter on the 13th day of September of the same year.

The pretension of the Respondent is that these sums were never accounted for by the Appellant and they are set up by her in compensation of the Appellant's account. That this position is untenable will appear, as the Appellant humbly maintains, from the statements and declarations of the late Joseph Bailey a short time before his death, from the acts of the Defendant herself after the death of her husband, from the nature of the dealings between the Appellant and the late Joseph Bailey and from many circumstances which are brought out in evidence. The Appellant will briefly advert to the facts relied upon by him in this appeal.

On the 26th day of May 1853, the late Joseph Bailey was indebted to the Plaintiff in the sum of £19 14s. 4d. It is hardly necessary to remark upon the improbability that the late Mr. Bailey, requiring to use actively in his business as a manufacturer, the whole of his available means, would make an advance to the Appellant of more than £60, or would allow him to retain such a sum in his possession for a period of ten months without comment or remonstrance. That sum, together with the contra account of Bailey was sufficient to pay the whole account of the Appellant for nearly a year in advance, and to leave a balance in favor of Bailey, at the time of his death, of upwards of £20. The witness Thomson, who was a neighbor and intimate friend of Bailey, speaks strongly from his knowledge of Bailey's position and business, of the extreme improbability of his leaving sums so considerable in the hands of the Appellant for so long a time.

The statements of Bailey a short time before his death agree with the pretension of the Appellant that he accounted to Bailey for all moneys received. He stated, not long before his death, to Appellant in the presence of the witness Hyndman that he (Bailey) was deeply indebted to the Appellant. The same admission, in substance, was made by Bailey in the hearing of the witness Burns. It is inconceivable that Bailey could have been so greatly in error, as the pretensions of the Respondent would indicate him to have been.

The Respondent, in her answers upon *faits et articles*, states that her late husband, so far from admitting to her that he was indebted to the Appellant, stated that the Appellant was indebted to him. That this assertion of the Respondent is at variance with statements by Bailey to others upon the same subject will appear by reference to the evidence of the witnesses Hyndman and Burns already referred to. Let us see how far it is corroborated by the acts of the Respondent after her husband's death. When the Appellant presented his account to her she did not express any surprise at finding the indebtedness of her husband so considerable, nor did she then remember the pretended statements of the late Mr. Bailey, in regard to the balance of account being against the Appellant, but she merely wished to look over the account. It will be observed that, at this time, the Respondent had in her possession the account, Defendant's Exhibit No. 10, which is an account of Nelson and Butters and contains the charge of £8. 5s. 0d., afterwards claimed to be due by the Appellant. It is but fair to presume that while the account of the Appellant was in the Respondent's hands for inspection she wrote to Nelson and Butters for information respecting those of her husband's business transactions with which the Appellant was connected, and received in reply the letter Defendant's Exhibit No. 9, dated 23rd April, 1854. A few days afterwards (May 4th) the Respondent transferred to the Appellant moveable property to the amount of £28 15s. 0d. in part payment of the Appellant's account against the late Mr. Bailey.

The fact that no charge appears in the books of account of Bailey against the Appellant, of the moneys in question in this cause, tends strongly to establish the pretension of the Appellant that they were immediately accounted for by him to the late Joseph Bailey. His books of account were kept with accuracy and care, as will appear in comparing many of the charges in the Appellant's account for orders paid and the charges in the accounts (Nos. 25, 26, 27, 28 and 29 of the Record) copied from Bailey's account books. The force of this fact (the absence of any charge against Appellant) was felt by the Respondent for with her approbation, if not upon her express direction, charges were made in the books by her son of the sums alleged to be unaccounted for by the Appellant.

A few days after the Appellant brought the £79 16s. 4d., from Montreal for Bailey, the latter paid to the witness William Brooks, upon a promissory note, the sum of sixty pounds. It is extremely improbable that this sum came from any other source than from Nelson and Butters. It represents almost the exact balance which would remain in Bailey's hands after deducting the £20 credited by the Appellant upon his account. It is natural to suppose that when Bailey wrote to Nelson and Butters that he was in need of money and wished to have the balance due him remitted he had particularly in view the note due to Brooks which was shortly to mature.

After the witness Burns was examined, the Appellant ascertained that he could prove material facts, upon which he had not been interrogated. The Appellant therefore petitioned to be permitted to examine Burns a second time. This application was refused. The Appellant would refer the Court to his petition and affidavit and also to the vague and unusual terms of the counter affidavit of the Respondent. The rejection of the Petition of the Appellant would, he conceives, under the circumstances, warrant the reversal of the judgment of the court below.

It is hardly necessary for the Appellant to comment upon the evidence in the cause. Besides the facts and circumstances alluded to it is established that the moneys in dispute, were not received in the regular way of business but rather as the friend and neighbor of Bailey, and for his accommodation. Upon this point the Appellant would refer to the depositions of the witnesses Butters, Brooks and Thomson.

Had the late Joseph Bailey lived to effect a settlement with the Appellant, the suit which gives rise to the present appeal would probably have been unnecessary. Nor, under ordinary circumstances, would the Appellant have troubled this Honorable Court with a matter so trifling in amount. But he conceived that the assertions of the Respondent put in question his character for integrity and that his duty to himself required him to submit the judgment of the court below to review of this Court.

The Appellant is confident that a just appreciation of the evidence of record in the cause must lead to a reversal of the judgment appealed from.

THOMAS W. RITCHIE,
For Appellant.

Montreal, February 1859.

APPENDIX.

COPY OF PETITION IN APPEAL.

COURT OF QUEEN'S BENCH.

APPEAL SIDE.

To the Honorable the Chief Justice and Justices of the Court of Queen's Bench, holding the said Court on its Appeal Side:

THE PETITION OF Albert G. Woodward, of the Town of Sherbrooke, in the District of Saint Francis, Trader, Plaintiff in the Court below, HUMBLY SHEWETH:—

That heretofore, to wit, on the twenty-first day of February, one thousand eight hundred and fifty-six, your Petitioner instituted an action in the Circuit Court, at the then Sherbrooke Circuit, against Hannah Belknap of the said Town of Sherbrooke, widow of the late Joseph Bailey, in his lifetime of the same place, Pail Manufacturer, in her quality of Tutrix duly appointed to Andrew J. Bailey, Hannah Bailey, Edward Bailey, Joseph Bailey, Jesse Bailey, Emily Bailey, Frederick Bailey and Ellen Bailey, minor children, issue of her marriage with the said late Joseph Bailey, deceased, Defendant in the Court below, for a sum of twenty-six pounds and one shilling, currency, for the balance of an account (annexed to the declaration in the said cause) for goods, wares and merchandise, by your Petitioner sold and delivered, and money lent to the said late Joseph Bailey, at his request, and for money by your Petitioner paid, laid out and expended to and for the use of the said late Joseph Bailey, and at his request; and for goods, wares and merchandise, by your Petitioner sold and delivered and money lent to the said Hannah Belknap, in her said quality and at her request, and for money by your Petitioner paid, laid out and expended by your Petitioner to and for the use of the said Hannah Belknap in her said quality, and at her request, the whole at Sherbrooke aforesaid, in the then Sherbrooke Circuit.

That to the said action, and demands of your Petitioner in the said Circuit Court, the said Defendant in her said quality, pleaded amongst other things that on the thirteenth day of September, one thousand eight hundred and fifty-three, your Petitioner became and was indebted to the late Joseph Bailey, in the sum of eighty-six pounds one shilling and four pence currency as and for so much money then and theretofore by him received of and belonging to the said late Joseph Bailey, from Nelson and Butters, traders, in the City of Montreal, end not accounted for or paid to the late Joseph Bailey, or to the Defendant, *is qualis*, and that the account of your Petitioner had been paid, compensated and discharged by the said sum so alleged to have been received by your Petitioner from the said Nelson and Butters.

To this plea of the Defendant in the Court below, your Petitioner answered that in all his transactions with the said Nelson and Butters in relation to the moneys of the said late Joseph Bailey, your Petitioner merely acted as the friend and agent of the said late Joseph Bailey, and always accounted to him for all moneys received by him, said Plaintiff, from said Nelson and Butters on account of the said late Joseph Bailey to his entire satisfaction, and never received any moneys belonging to the said late Joseph Bailey for the use and benefit of him the said Plaintiff, to wit, your Petitioner.

That heretofore, to wit, on the thirtieth day of June now last past, final judgment was rendered in the said cause by the Honorable Edward Short, one of the Judges of the Superior Court in the Circuit Court for the District of Saint Francis, having jurisdiction over the said cause, by which said final judgment the amount claimed by your Petitioner, to wit, the sum of twenty-six pounds and one shilling currency, was and is declared to have been and to be paid and compensated by the said sum of eighty-six pounds, one shilling and four pence currency, and the action of your Petitioner was dismissed with costs against your Petitioner.

That the said final judgment is erroneous, illegal and unjust and your Petitioner is aggrieved thereby, as well as by a certain interlocutory judgment rendered in the said cause, and hereinafter referred to, and the said judgments ought to be reversed, for the following, amongst other reasons, to wit:—

First—Because the said final judgment was rendered contrary to law and evidence, and the action of your Petitioner was dismissed whereas judgment ought to have been rendered against the said Hannah Belknap in her said quality for the said sum of twenty-six pounds and one shilling, currency, with interest and costs.

Secondly—Because the Defendant failed to establish that your Petitioner ever received for his own use and benefit from the said Nelson and Butters of the moneys of the said late Joseph Bailey, the said sum of eighty-six pounds, one shilling and four pence, or any other sum, but on the contrary, your Petitioner established that the same was merely received by him as the friendly agent of the said late Joseph Bailey to be brought from Montreal to Sherbrooke.

Thirdly—Because the said Nelson and Butters during the lifetime of the said late Joseph Bailey, rendered divers statements of account to him, the said late Joseph Bailey, in which the said sum was charged as money paid to him by them, and the said late Joseph Bailey never disputed the fact that he had received the same and never made complaint that the money had been retained by your Petitioner.

Fourthly—Because in the Books of account of the said late Joseph Bailey, which were kept with regularity and correctness, there was no entry or charge made against your Petitioner of the said sum, nor did the said late Joseph Bailey ever take any note or acknowledgment in writing for the same from your Petitioner.

Fifthly—Because your Petitioner established in evidence that the said late Joseph Bailey, a short time before his death, admitted (as was in fact true) that he, the said late Joseph Bailey, was deeply indebted to your Petitioner.

Sixthly—Because your Petitioner established in evidence that at the time the largest part of the said sum of money was brought from Montreal, by your Petitioner, the said late Joseph Bailey was only indebted to your Petitioner in a sum of about twenty pounds, and was in want of all the money which was due to him to meet his business engagements, that the principal amount of the receipts of his business as a manufacturer came from the said Nelson and Butters, and that a few days after the time when the Defendant alleges your Petitioner received a sum of seventy-nine pounds sixteen shillings and four pence (being part of the said sum of eighty-six pounds one shilling and four pence) of the moneys of the said late Joseph Bailey from the said Nelson and Butters, the said late Joseph Bailey paid to one William Brooks, a sum of about sixty pounds, the possession of which last mentioned sum by the said Joseph Bailey can only be accounted for upon the supposition that the said sum of seventy-nine pounds sixteen shillings and four pence had been received by him the said late Joseph Bailey.

Seventhly—Because the said Defendant fraudulently caused the said sum of eighty-six pounds, one shilling and four pence to be entered and charged after the death of her husband, in his books of account against your Petitioner, and when called upon by your Petitioner for payment of his account, did not deny that the same was correct and the amount

thereof due, but merely wished "to look the accounts over" and afterwards, and also since the death of her said husband, delivered to your Petitioner effects to the amount of twenty-eight pounds and fifteen shillings, in part payment of your Petitioner's said account.

Eighthly—Because by an interlocutory judgment rendered in the said case on the twenty-second day of April last, the petition of your Petitioner to be permitted to examine one Alexander D. Burns, a second time, as a witness on his behalf was improperly rejected, and your Petitioner was thereby prevented from adducing material evidence in the said cause, whereas the said petition ought to have been granted.

Ninthly—Because your Petitioner established in evidence the material allegations of his said declaration, and special answers, and the Defendant failed to prove the allegations of her said plea or any of them.

That the security required by law has been duly given by your Petitioner as will appear by certified copies of the Appeal Bond and Affidavits of Justification hereunto annexed.

All which your Petitioner avers to be true, and the same will verify when and as this Honorable Court may direct.

Wherefore your Petitioner humbly prays that by the judgment of this Honorable Court, the said final judgment of the Court below now appealed from be reversed and that this Honorable Court will render such judgment as the Court below ought to have rendered and will adjudge and condemn the said Hannah Beiknap to her said quality in pay to your Petitioner, the said sum of Twenty-six pounds and one shilling currency, with interest, from the *demande judiciaire* in the Court below, and costs, as well in the Court below, as in this Court, of which costs the under-signed attorney prays *distriction*.

THOMAS W. RITCHIE,
Attorney for Petitioner.

Dated, 22d July, 1853.

DEPOSITION OF HORATIO A. NELSON, of MONTREAL, MERCHANT; taken 3rd April, 1853.

I am a partner with Isaac Butters a witness in this cause, and do business under the name of Nelson and Butters. I know the plaintiff in this cause, and knew Joseph Bailey the late husband of the Defendant in this cause, and had frequent business transactions with him in his lifetime and also with the defendant in this cause, since said Bailey's death.

On the 25th day of May 1853, our firm balanced accounts with the said Bailey, and also on the 16th of August and 17th of September of same year, and on the 18th of January and 10th of April of next year, to wit, 1854, and also with the defendant in this cause on the 29th of June same year. On or about the 19th of May 1853, the said Joseph Bailey requested us to ascertain how accounts stood between him and us, and to send whatever balance there might be coming to him, to him at Sherbrooke, by the plaintiff in this cause. We accordingly sent him the sum of seventy-nine pounds sixteen shillings and four pence, currency, by the plaintiff, taking his receipt for the amount which receipt we hold, and of which receipt Defendant's Exhibit No. 7, is a true Copy.

In subsequent settlements had by our firm with the said Joseph Bailey in his lifetime, and with the Defendant in this cause, since his death, our firm never had any intimation that the said sum had not been received by the said Joseph Bailey. In fact no reference was made to it, though the said amount was charged in our books, and in statements of account, which were doubtless rendered, as cash paid to him. In the balancing our accounts on the said 20th May, the said amount of seventy-nine pounds sixteen shillings and four pence, appears as an item of cash paid to the said Bailey, said sum was by Witness sent to said Bailey through the plaintiff in this cause on his Bailey's order to do so. On one other occasion we had sent monies to said Bailey by a party residing in the Townships, and which were charged in the same way as the item of seventy-nine pounds sixteen shillings and four pence, currency, from which our firm as witness recollects had not any direct word from, but were always allowed us by said Bailey in subsequent settlements.

CROSS EXAMINED.—The promissory note filed in this cause as Defendants Exhibit No. 4, was by the firm of Nelson and Butters paid at the City Bank in Montreal, on the 13th of September, 1853, at the request and of aid for the said late Joseph Bailey, and the sum of £31 0s 11d., currency, mentioned in said note and so paid, was charged against the said Bailey in our books. The letter, Defendant's Exhibit No. 9, in this cause, is in my hand-writing, is signed by me in the name of our firm, and was by us sent to the Defendant in this cause, on the 13th of September 1853. The sum of six pounds five shillings was paid by our said firm to the Plaintiff in this cause, on the written order of the said Joseph Bailey.

RE-EXAMINED.—The said Exhibit No. 10., was accepted by the said Bailey as a settlement of our accounts with him, as far as witness knows.

DEPOSITION OF ISAAC BUTTERS, of MONTREAL, MERCHANT; taken 3rd April, 1853.

He knows the Plaintiff in this cause, but does not know the Defendant personally. He knew Joseph Bailey her late husband mentioned in this cause, and had frequent business transactions with him, in his lifetime.

The firm of Nelson and Butters, of which witness is a partner, have also had business transactions with the Defendant in this cause, since the said Bailey's death. On the twenty-fifth of May 1853, the said firm of Nelson and Butters had a settlement of accounts with the said Joseph Bailey. We also had settlements on the 10th of August and 17th of September in the same year, also upon the 18th of January and the 10th of April of the next year, that is 1854. The said firm also had a settlement of accounts with the said Defendant after the said Bailey's death on the 29th of June 1854. On or about the 19th of May, 1853, the said Mr. Bailey informed our firm, that he was in need of money, and requested us to ascertain how accounts stood between us, and to send any balance that might be coming to him at Sherbrooke by the plaintiff in this cause who was then in Montreal.

We found that there was due to said Bailey the sum of seventy-nine pounds sixteen shillings and four pence, currency, which sum we sent out to him by the hands of the Plaintiff in this cause, taking Plaintiff's receipt for the amount, which receipt we now hold and of which receipt the Defendant's Exhibit No. 7, is a true Copy.

The said amount of seventy-nine pounds sixteen shillings and four pence, currency, was merely sent to Mr. Bailey by Mr. Woodward, but was not a payment to the Plaintiff on account of Bailey. That is the money was sent by Mr. Woodward through Mr. Bailey's order.

In subsequent settlements had after the 24th of May, 1853, by Nelson and Butters, with the said Joseph Bailey and with the said Defendant in this cause, no intimation was ever given to our firm either by said Bailey, or by Defendant that the said sum so sent by the Plaintiff had not been received by the said Joseph Bailey. The said amount was charged by our firm to the said Bailey, and our settlements with him were made on accounts rendered shewing the said sum of seventy-nine pounds sixteen shillings and four pence currency, as so much money paid by our firm to the said Joseph Bailey. He settled with us on that ground, and never to my knowledge intimated that the amount had not been received by him. Our firm had on other occasions sent out monies, to the said Bailey by the Plaintiff, before the 24th of May, 1853, which were charged to Bailey in the same way as the said sum of seventy-nine pounds sixteen shillings and four pence, currency, and were included in settlements in precisely the same manner, and which were considered as money paid to Bailey. In some cases, the said Bailey sent us an order to pay monies to Plaintiff, but on the occasion of the 24th of May, 1853, it was an order to send any balance that might be due, by the Plaintiff.

CROSS EXAMINED. The account filed in this cause as Defendant's Exhibit No. 10, is a statement of account rendered by the firm of Nelson and Butters to the said late Joseph Bailey. The item charged in said account as cash paid, to A. G. Woodward, 13th September, 1853. £6 5s. 0d., was for the sum of six pounds five shillings, paid on that day by the said firm of Nelson and Butters to the Plaintiff in this cause, on the written order of the said Joseph Bailey. The letter, filed in this cause as the Defendant's Exhibit No. 9, now shown to me, is a letter from the said firm of Nelson and Butters, to the Defendant in this cause, and is in the hand-writing of Mr. Nelson, a member of our firm.

* Note. This is evidently an error. The letter referred to bears date 28th April, 1854.

handwriting of Andrew Bailey, Defendant's son. I have examined the said *Blotter or Day-Book* and find that there are no corresponding entries under the dates May 24th, and September 13th, as they appear in said *Ledger* at Page vi, and in the said account marked "N." From what I know of the business of the late Joseph Bailey, it seems to me extremely improbable that he should have allowed such a sum, as a sum of seventy-nine pounds sixteen shillings and four pence to remain in the Plaintiff's hands from the 24th day of May 1853, and the further sum of six pounds five shillings from the 13th September, up to the 12th day of March, the period of his death. I know that it had for years been the habit for men of business in Sherbrooke, to accommodate each other by carrying money into Montreal, and paying it to their creditors, and of bringing money from Montreal for others, and paying it immediately over. I do so myself different times when I was in business, and I never thought under such circumstances of taking a receipt on paying over the money. Such things were considered a neighborly act, and were never looked on as a matter of business.

Cross-Examined—It is impossible for me to state the precise conversation which took place between Mrs. Bailey and the Plaintiff, but my impression then was and still is, that these things were turned out by her in part payment of a debt due to the Plaintiff by her late husband. When I went into the Room, Plaintiff and Mrs. Bailey were together, and Mr. Woodward was anxious that she should pay the account, as he wished to go to Montreal, and she declined going so, saying that she wished to look the accounts over. Mrs. Bailey did not say anything either at the time when Mr. Woodward presented his account, or at the time when she sold the goods in part payment was there anything said by her about any money paid by "Nelson and Butters" to Plaintiff.

EXTRACT from the Deposition of ALEXANDER D. BURNS, of SHERBROOKE, CARPENTER; taken 16th December, 1856.

I remember a conversation that took place between Mr. Bailey and the Plaintiff shortly before Bailey's death. This was in Plaintiff's store, Mr. Woodward wished or asked Mr. Bailey to settle his account. Bailey said there was no hurry as he was expecting several hundred Dollars from Montreal, and also money from Stanstead, to whom he had sold pails, and then when he received that he would pay Mr. Woodward money. I do not remember what was said about the amount but I understood from what they both said, that the amount was considerable which Bailey then owed. I do not recollect now what was said about the amount, or whether anything was said about the amount but I got the impression then that it was quite large.

EXTRACT from the Deposition of WILLIAM RITCHIE, of SHERBROOKE, ESQUIRE; taken 20th April, 1858.

In 1853 I had business transactions with the Plaintiff, I should think that in May of that year the Plaintiff was of good standing in regard to money matters, and was not particularly pressed for money. The late Joseph Bailey, in that year carried on the manufacture of pails which was his only employment to my knowledge, and most of the pails made by him he was in the habit of sending to Nelson and Butters of Montreal, and I should suppose that the principal moneys received by him would come from them.

EXTRACT from 2nd Deposition of WILLIAM BROOKS; taken 20th April, 1858.

In January 1853, the late Joseph Bailey gave me a note for sixty pounds three shillings and six pence, currency, payable by him on the 2nd day of June following, at the City Bank of Montreal, on the first day of June of the same year I sent in the money to take up the note, I made no charge in my Books against the said late Joseph Bailey, on account of the said note which was due by him to me, and I have no doubt that he paid it to me about the time it became due. The said late Joseph Bailey was then manufacturing pails which was his principal business and the largest part of the pails were sent to Nelson and Butters, of Montreal.

EXTRACT from the Deposition of CARRY M. HYNDMAN, of SHERBROOKE, ESQUIRE; taken 21st April, 1858.

I remember at the time of the conversation of the boiler plate and the large tub of sugar not long before his death, hearing him (the late Mr. Bailey) say that the firm of Nelson and Butters, of Montreal, were owing him a large sum of money for pails he had sent them, and that he expected the money soon, and that when he got it, he would let him have some on account, as he was deeply in debt to them. I understood from the conversation of Bailey that he was a good deal in debt to Plaintiff at that time.

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