Shavings

A SEMI-LEGAL MEDLEY

PART I.

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PREFACE.

The author has no very definite object in inflicting another book or booklet on an already long-suffering profession, and no less suffering public. He does not assume that many of the Profession, limbs of the law, or public, will read it, but as he has no doubt some enemies, it may possibly have a very limited circulation, and he trusts they (i.e., the enemies), or some of them, may be brought to grace and discover a few grains of wheat in bushels of chaff. He does not apologize for his presumption, as no matter how bad his alleged book may be, he has no doubt that still worse ones have been written, and he dedicates it to all and sundry who may have courage enough to tackle it.

PREFACE TO PART I.

It was the intention of the author to write his yarns in full before rushing into print, but he is rather of opinion that a little of the stuff he is handing out may go a long way. He thinks, however, that if the Profession or public, like Oliver Twist, should desire to come back, and want more, he can at least treat them better than was Oliver treated. He does not flatter himself that he is providing a "bonne bouche," but in any event in the first instance, he desires to give his medicine in SMALL *mouthfuls, in fact, in homeopathic doses, and his patients are, of course, at liberty to get more of the same sort if they so desire. If there be no further call on his services he will feel that his treatment has had all the tribute it deserves.*

If the Bar, or public generally, desire more "Shavings," they probably know how to say so. Each "Shaving" rests on "its own completeness," or incompleteness, as the case may be.

The author is putting forth this portion as "Shavings: Part I." It remains for others to decide whether it shall be lonely or not.

SHAVINGS

Chapter I.

It is usual when building a house to start at the foundation. Of course, some houses have no foundation, but such structures are considered very un-English, and as I am a British subject, I shall not discuss them except to say that sometimes they are "chattels real," and sometimes very unreal chattels, and at this juncture I might, if my meaning is not obvious, advise my reader to take the well-known advice—"overhaul the dictionary," or try Wharton. In any event, I might say shortly, that I do not like edifices of this sort and let it go at that. Law, as most laymen, at least, would readily admit, is a very uncertain science :

(clients have occasionally told me so in a very emphatic way and have still thought so, notwithstanding the fact that I heartily maintained that the law was all right and there was only a slight difference of opinion between myself and the judge, and that that learned gentleman was as usual wrong), but still originally it was based on principles of justice and common sense, and I submit that in most cases involving a miscarriage of justice in the result. Such miscarriage is caused by a wrong judicial interpretation being given of such principles or in many instances, by judges confusing their minds by going through a vast superstructure of precedents, without settling first, so far as may be, the foundation or principle upon which that superstructure

is based. The point I desire to make and impress is that in every possible case, it should be the first endeavour of the Student, Barrister or Judge, to try and settle the principle of law on which an action or defence is based, *i.e.*, to find out at the bottom whether in his opinion, a ground of action or defence is brought within any known principle, and after that to ascertain from precedents which bind him, the final judicial interpretation of that principle, and whether it covers the action or defence as the case may be. The faculty of being able to differentiate accurately between the facts involved in the case before him and the facts as revealed in the authorities (in similar cases which are not exactly the same), is one of the greatest gifts of a

good lawyer. I do not go so far as to recommend one of the characters in Hudibras—

" He could distinguish and divide,
A hair 'twixt North and Nor' East side."

but a proper appreciation of nice differences and distinctions, is necessary in almost every arguable case in order to decide whether a case falls within a certain principle and what one might term the elaboration of that principle, *i.e.*, precedents built up on that principle, or not; but in any event begin at the bottom and build up.

I might refer to a well-known principle of law and a perhaps better known authority merely in passing, to show our point in starting. Deal with the principle first and apply the interpretation of authority afterwards. Injuria sine damno—Injuria, *i.e.*, legal injury

without loss or damage is actionable. What does this mean? There is a remedy at law for a wrong, though the plaintiff has suffered no loss or actual damage. Possibly one of the best known cases on the interpretation of this maxim or principle is Ashby v. White (Smith L. C. 9th Ed. 268). Ashby wanted to vote at an election, but the Returning Officer maliciously refused to let him do so. Ashby's candidate, however, was elected: notwithstanding this he succeeded in an action for damages against the Returning Officer. Both Lord Holt, C.J., and the House of Lords held that depriving him of his right of voting was actionable, although he suffered no loss, *i.e.*, they held that this deprivation of a right was "Injuria,"—Interference with

a right is actionable, but a loss sustained without "injuria" is not. (Dam-num sine injuria). To further illustrate my view that law is based on justice and common sense, and we might say the British sense of fair play, I might refer to the well known doctrine of lateral support—"Sic utere tuo ut alienum non laedas." You must deal with or use your own property in such a way as not to injure that of your neighbor, in fact you should do unto your neighbor as you want him to do unto you (David Harum, I think, says "Do him first," but as my friends know, I am not a Banker, and cannot understand such sentiments). Play the game! Don't make such a hole in your land as to make the land of us inoffensive neighbors fall into the hole. Have a

look at Rylands v. Fletcher L.R. 3, H. L. 330, and other similar cases (a very old tale), and you will see that some judges are not "so learned as to have lost their common sense" and understand some elementary principles of law. Now, I do not wish to multiply or add (whichever you like) "precedent on precedent." I do not wish in this my first chapter, in fact, I might say immediately upon the embarkation of my "timid ship," to give that "tired feeling" which I wot of myself and which I have on occasions felt when hearing eminent counsel citing 50 cases when one or two governing the job-lot would have done, or when enjoying ourselves entertaining some friends in our rooms over our pipes and other things, one particular man after every

story not told by himself states, "that reminds me of another story," tells it, and many others until the police are called in. Just a word about Statutes before I close the chapter. I think it is a good thing to read recent Statutes as well as ancient ones, they are great iconoclasts and very often take all the romance out of the law we have read, but judges occasionally read them, and it is well to have a look at them now and then. The Legislature in British Columbia is a very fair minded one and goes further in the way of fair play for man and beast, especially the latter, than any Legislature in the "Effete East," that I am aware of. It appears that a bill was brought in at the Sittings of that Body last March (1905), providing that a dog should have a right

of appeal when sentenced to be executed by a magistrate for biting improperly or other misconduct, under the Statutes in that case made and provided.

It was pointed out by the supporters of the bill that a magistrate might be affected by local prejudice and possibly by personal spite in such a way as to militate against the interest of the accused dog, and that therefore if the dog gave proper security he should have an appeal from such conviction and in the meantime should not be executed. Difficulties were suggested and argued by members of the opposition. It was pointed out that in some instances this would give a dog an advantage over a man. (The author deems this objection frivolous, as men are tried for life by a jury.)

It was further urged that pending appeal there would be difficulty about the custody and safe-keeping of the dog and other objections were raised, but the Government succeeded in passing the Act.

I am very fond of dogs, and although not often guilty of writing poetry or doggerel, my wandering muse impelled me to write in this fashion :

"THE DOGGED DOG."

The horse is the finest beast we see
  That ever lived on prog
But next to the horse we all agree
  Is the common or garden dog.

We should see that his rights we never rob,
  Or his slightest franchise steal
And insist that the common Mongrel Dog
  Has, at least, a right of appeal.

And if on the facts a Magistrate base
  Should ever go astray,
A Court of Appeal should review the case
  And fix the thing doggie's way.

For on an appeal it may be found
That bow-wow, bit where he should
And that the bite, take it all around,
Was for the general good.

And then until the appeal is heard
It's surely only right
That puppy should have his cold bottle and bird,
And bed and bath each night.

And I would suggest that Government House
Is where the Appellant should stay,
Till the Court of Appeal decides the case
And settles it any old way.

Chapter II.

" In divers tones I sing
And pray thee friend give ear."

I am, perhaps, " saddest when I sing," and no doubt my readers (if any), will discover falsetto in my utterances. I neither strive to emulate Albani in song or George Washington in truth. I am a doubter, too, and do not take much stock in the Cherry Tree Doctrine, nor do I invariably believe in the judgments of Courts of Final Appeal. However, I am, or strive to be, fair, and do not pretend for an instant that everything stated in these pages in regard to law, or what I have been pleased to regard

as law, is correct; in fact, often where judges of Courts of Final Appeal differ in their opinions from my pre-conceived views, I sometimes am quite sure they are wrong and other times not so sure. I believe, I stated Law was after all "justice," "common sense," "fair play," etc. I, however, forgot to add the words, "in spots." I am quite free to say that I regard it in other spots as the greatest tommy-rot I ever read.

In some parts of the British Empire, I believe, in part, in that portion commonly known as England, it is well for Municipal Corporations to let their roads, bridges and other public works go to rack and ruin, or in any event not to repair them when they give signs of decay, for if they do, and by any chance

make a mistake, they may find themselves in the position of the fair City of Victoria, British Columbia, whose case does not *augur* well for them.

The Corporation of the City of Victoria repaired a bridge and it broke and several people were killed and others hurt, and that Corporation when they got through with the Privy Council (*i.e.* the Judicial Committee thereof) were sorry, very sorry, in fact, sorry to the extent of many thousands of dollars of hard coin of the Realm, that they ever touched that bridge. (Victoria vs. Lang et al, 68 L. J. N. S. B.C., p. 128, British Columbia reports).

The doctrine being that a Municipal Corporation is responsible for mis-feasance and not for non-feasance. (Sydney Municipal Council vs. Burke, App.

Cases, P. C. 1895—433; Pictou Municipality vs. Geldert, L. R. App. C., 1893—524).

Don't do good lest evil may happen ! On no account put in barrel drains: (Bathurst vs. Macpherson L. R. 4 App. Cases, 1897—256.) Don't put down sidewalks at the side of streets, even if they are muddy, lest haply some one may fall over the end of them (Smith vs. The City of Vancouver, 5 British Columbia Reports—491).

They do things differently in the Province of Ontario and make you smart (by statute) for sins of omission as well as commission, but in that Province if a Municipal By-Law prohibits you from "beating" a drum on the public streets or "assisting in making any unusual noise, or noise calculated to

disturb the inhabitants of the City," you may still, however, " *play* " a drum with impunity on the said streets of London, Ontario (Regina vs. Nunn, 10 P. R. (Ontario)—359). This was the decision of a learned judge, too, but sitting in single court, and is a lonely decision on this point, so that if you happen to be strolling round the said City of London, perhaps you may " *play* " a drum, but I certainly as a careful advocate would advise you in no event to " play " it and " beat " it at the same time.

" The evidence does not state that there was beating of drums. It is ' playing a drum.' Am I judicially to know that *beating* a drum and *playing* a drum are the same ? The order must go for the prisoner's discharge." (Rose J. ibid P. 399.)

" Hinc Illae Lachrymae " sed " de mortuis nil nisi bonum," or words to that effect. Just a word as to the so-called Doctrine of " Pressure." Pressure brought to bear by a creditor on a debtor validates a security given by such a debtor by reason of such pressure in a case where a debtor is in insolvent circumstances, and such security is a preference *literally* in favor of one creditor over others.

It is somewhat interesting to note what " pressure " is, according to the interpretation of legal Solons, *i.e.* the legal interpretation of the word " preference." In the well known case of Stephens vs. McArthur (19 S. C. R. (Canada) 446), it was held, Patterson, J., dissenting, that the word " preference " imports a voluntary preference

and does not apply to a case where the transfer has been induced by the " pressure " of the creditor. It was further held that " a mere demand " by the creditor without even a threat of legal proceedings is sufficient pressure to rebut the presumption of a preference.

The circumstances, roughly, were as follows : Stephens, who dealt in a large way in paints and oils in Winnipeg, had large dealings with Madell and Robinson, and supplied them with a lot of goods, from time to time : other people did the same thing, whether to a smaller extent or a larger, I am not aware—Stephens may or may not have been a Scotchman, but in any event when Madell and Robinson (like Oliver) wanted more, he suggested that a chattel mortgage might be a good thing

to have. The evidence does not show clearly that he was rude enough to say he would issue a writ if he did not get security, and it would therefore be only fair to assume that he treated Madell and Robinson with all politeness, and the Court practically held, among other things, that no such rudeness as a threat of legal proceedings was necessary. McArthur and Worthington, other creditors, acted " fortiter in re," but unfortunately for them, apparently not " suaviter in modo," and they came up against the aforesaid suave mortgage with a rude execution and got left in the result and were very sorry that they had not been more polite.

Mr. Justice Patterson in his dissenting judgment says (ibid page 471), " The plaintiff Stephens obtained by his mort-

gage an advantage over the other creditors. He was made better off than any of them, for he got everything and left nothing for the rest. The mortgage had the effect of giving him a preference, and therefore by the plain words of the statute, it is void as against the other creditors." This seems reasonable, but apparently is not legally reasonable.

Let us take the wording of the section of the Statute in question. Manitoba —49 Victoria c. 45, S. 2.

"Every gift, conveyance, etc., of goods, chattels, or effects made by a person when he is in insolvent circumstances with intent to defeat, delay, or prejudice his creditors, or to give to any one or more of them a preference over his other creditors or over any one or more of them, *or which has such effect*, shall as against them be utterly void."

As to the words "or which has such effect" it was held in Stephens vs. McArthur (vide head note to case, page 446 of Report)

"the words 'or which has such effect' in the act apply to a case where that had been done indirectly which, if it had been done directly, would have been a preference within the statute. The preference mentioned in the act being a voluntary preference, the instruments to be avoided as having the effect of a preference are only those which are the spontaneous acts of debtor." (Molsons Bank vs. Halter (18 Can. S. C. R. 88) approved and followed.

Apart from the interpretation of the words "or which has such effect," Molsons Bank vs. Halter seems easily distinguishable from Stephens vs. Mc-

Arthur. In the Molsons Bank case, the security which was sought to be impeached was given by an executor to secure payment of money which he had misappropriated from a Trust Estate while acting as one of the Trustees thereof, and in fear of penal consequences, and the security was held not a preference. This is surely a little bit different from the Manitoba case mentioned, the gentlemen who gave the security in the Ontario Case, mentioned, if not "in vinculis," had a lively apprehension, at least, that he might be any moment, and this might very reasonably be called pressure—however, the Stephens decision is apparently " good Law," and is justified by several English authorities.

A perusal of the case will show everywhere authority on the point in ques-

tion, and whatever we think of it, it must go. Let us play on our imagination a little. C. is a large creditor of D. and begins to think that his whilom friend D. is getting in deep water, and that it is about time that something were done. He first sees his lawyer, and acting under his inspiration, rings up D. on the telephone, and makes an appointment for D. to call at his office. The dialogue would possibly be something like this.

C.: "My dear chap, I wanted to see you about our account with you; very sorry to bother you, but we want a little security, in fact demand it. My lawyer said to use the word 'demand' —no offence, you know, believe me, I would not put you "in vinculis." Don't know what he means by such

language anyway, but am sure it is something horrid. Perhaps you may have had it before, or heard of it. We just want you to sign a little mortgage, but don't do it spontaneously, remember I pressed you. Awfully funny fellows these lawyers; they use such fearful language. I just want you to fix me up as an old friend, old chap. Let the other fellows go to the Deuce."

D.: "Oh, certainly, old man, have your lawyer fellow fix up the papers and I will sign anything you want. Just let me know by 'phone when to call at his office. Well, I'm off. By the way, do you ever take anything?"—

The moral perhaps is,—"Ask and ye shall receive."

'Twixt law and love this difference lies,
By learned Courts expressed,
In law no preference can arise
Whenever you are pressed.

A lover surely would be dense,
When by his love caressed,
To hold there is no preference
When thus he's warmly pressed.

N.B.—In British Columbia the doctrine of Preference and Pressure are under certain conditions wiped out, vide "Fraudulent Preference Act, 1905" British Columbia Statutes, 1905, C. 14.

Chapter III.

PLEADINGS.

Tho' modern Solons strongly hold,
That there's more light and sense
In modern pleadings than the old,
I'm somewhat on the fence.

Exactitude we lose, I think,
By being too verbose
The modern pleading to the brink
Of evidence draws close.

The Ancient pleas tho' somewhat crude
Affording meagre light,
With greater care, were always viewed
Than those which meet our sight.

Your declaration you must mould,
Down to the smallest fraction
In such a method as to hold
A legal cause of action.

The modern rule, the same is found
But is the labour sweet,
In pleadings which in chaff abound
To pick that grain of wheat ?

Plead now the facts on which you trust
By rule and common sense—
The law, however, says you must
Not plead the evidence.

You need not—suing neighbor Pat
Or any other foes,
State colour of his coat or hat
" In trespass on your close."

Verbosity you should avoid
Or take chance on this fix ;
The Learned Judge may be annoyed
And say you're too prolix.

The taxing officer will frown
And low your pleadings rate,
And by your foliage cut down,
Your sin you'll expiate.

But still if you no 'mala' had,
And if your heart were pure,
One not so good as Galahad
Amendment may secure.

The Court may justly asservate
This favor only lies
When you can amply compensate
By costs or otherwise.*

A word in fine, I merely say,
To wise men—not to fools,
To learn the practice and to play.
According to the Rules.

*Tildesley v. Harper, 10 C. D., 396.

Chapter IV.

MAXIMS.

Maxims and dogmas are words synonymous, and I am therefore of opinion equally dangerous, but if we adopt a rule which like the Eleventh Commandment has not been handed down carved on a table of stone, (though equally cogent), but by oral tradition merely, viz., that there is "no rule without exceptions"—we may find maxims a good foundation to build on in dealing with the law's uncertainties. Some maxims appear as truisms on their face. "No man can be judge in his own cause." This appears reasonable. It might be,

hap'y, in isolated instances that a judge trying his own cause, as a matter of conscience might decide against himself, but I am inclined to think he would not take his action "in foro conscientiæ." It might be, indeed, that some judges would as a matter of policy and perchance to gain the reputation of the traditional wife of Cæsar, give themselves the worst of it, but in my limited experience I have only known one judge who I think could be trusted to go against himself on moral grounds only.

It hath been said and written that "equity imputes an intention to fulfil an obligation." Now this appears to me to be a maxim which should vary largely with the latitude and longitude of the country where equity happened to be imputing, as had she been on the

'prowl' in this country, she would know better. Good intentions, it hath been said, are used in certain tropical climes to serve for asphalt. There is a judicial maxim which is revered by the Bench, and to carry out which the Judges (especially those of Courts of Inferior Jurisdiction), certainly *strive* to do their duty and feel a pleasure in doing so, and one cannot help but admire their towering ambition.

"It is the duty of a Judge to extend his jurisdiction." ("Boni Judicis ampliare jurisdictionem.")

It hath been said, also, that "Equity looks to the intent rather than the form," still I would counsel not to sign a deed when you wish to execute a mortgage as judges and juries are so *queer* at times; they might not believe *even you*, and I

might add, though haply straying away from my sheep—Never execute any document unless under the advice of your own lawyer and take special care to show it to said lawyer when told by the person who wants it, that it is a mere matter of form. Bankers and money lenders are fond of the phrase, "Mere matter of form." A mine has been defined as "a hole in the ground and the owner a liar." Of course this has no application to Banks, as they are built on top of the ground and a banker never lies, although he may possibly at times *discount* the truth somewhat. I merely add this as above sentences are in juxtaposition. "Actus non facit reum nisi mens sit rea." The position occupied by a man and all the circumstances surrounding an act done by him

which causes the death of a fellow-being must be considered in arriving at a conclusion as to whether he had a guilty mind in doing such act. Thus, were a man to drop a heavy stone from a second story window of a house, under which window no one was wont or known to pass, and contrary to any human expectation, it happened to hit a man on the head and kill him, it might only be accidental homicide. But if the heavy object were dropped from such a window on a thoroughfare on which (to the knowledge of the dropper) the human kind were wont to crowd, and a man were killed thereby, it might be murder or manslaughter, depending among other things on the amount of the usual traffic on such a street at such time as the dropping were done. As

a man should be taken to know that such death might be a natural consequence of his act.

I am not aware as to whether the question has been considered in cases of localities populated by negroes only. I have read with some interest an account of an anvil being dropped from such a window and hitting a negro, who complained only of an injury to his *hat*.

It is said that an infant under the age of seven years is " Doli ineapax " absolutely, this to my mind should be a presumption prima facie only, as I have known instances of children under seven being capable of more malice than men seven times their age. This presumption should also depend largely on longitude and latitude. The precociousness of children varies in different

parts of the globe; education, associations and other things too numerous to mention, affect the question.

The question of the " mens rea " is a vexed one. I fancy most of us, although our thoughts may not have brought forth criminal acts " in esse," still contain, "In posse," magnificent germs of crime. Outside appearances are very deceptive. I have often seen a " ingenui vultus puer," but I fear he was not often " ingenuique pudoris."

" Quilibet potest renunciare juri pro se introducto." It is noticeable, however, that they do not generally do so in this country. A plea of the Statute of Limitations is a favorite one in bar of an action : it is " simple in its neatness," (" simplex nunc ditus.") " A man may release a debt which he might recover

by ordinary legal process." I have never personally had an experience of such a releasor. I have heard of Utopia and readily fancy it would be a pleasant country to live in. I fear, we are given more to denouncing than renouncing, and apparently do not care to be " more blessed," as are they who are wont to give rather than to receive.

" Rex non protest peccare." " The King, moreover, is incapable not only of doing wrong, but even of thinking wrong." I wonder !

" Ad questionem facti non respondent Judices ad questionem legis non respondent Juratores." I readily agree that a judge should instruct a jury on questions of law, *if he can*, otherwise it is better to leave the whole case, law and fact, to the jury. They sometimes

toss a copper on the head or tail principle as to the way their verdict should go, as "equality is equity," if the tossing be fair, neither party should complain of the verdict, as their chances were level.

"There is no wrong without a remedy." A man, no matter how poor, may still sue in "forma pauperis." May God help him if he do so. The Court is not likely to.

"Sunday is not a day for judicial or legal proceedings." Golf and Bridge while not illegal, are, I am advised, neither judicial or legal proceedings. You may also start a horse deal on the Sabbath day, and if the deal be not completed thereon, it is all right. (Bloxsome v. Williams 3 B. & C. 232).

I shall say nothing further about

maxims, at present, as their name is legion. I have read much more entertaining "ancient saws" and "modern instances." One of the chief merits of a maxim or dogma is that it is usually brief, and I feel that possibly brevity is the only merit of my writings.