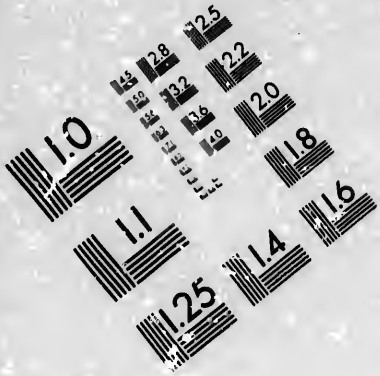

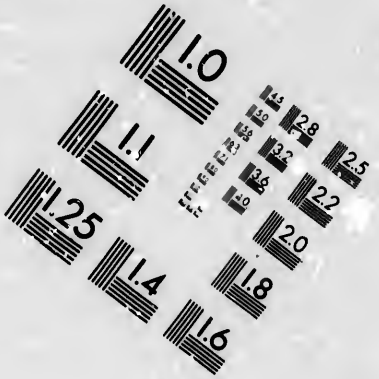

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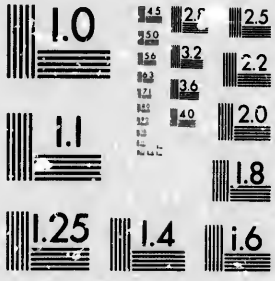

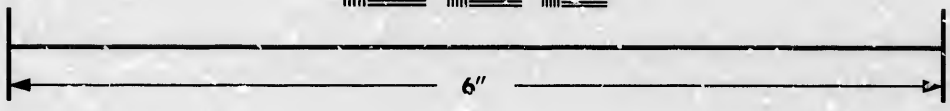

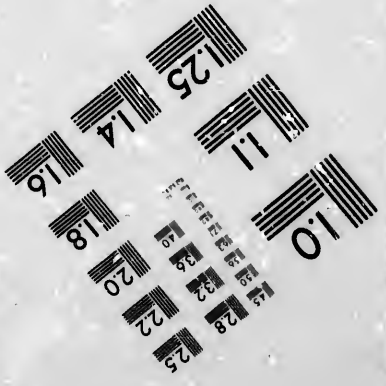

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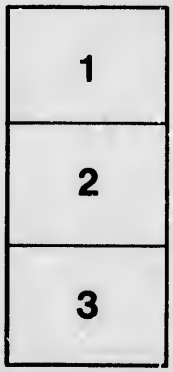

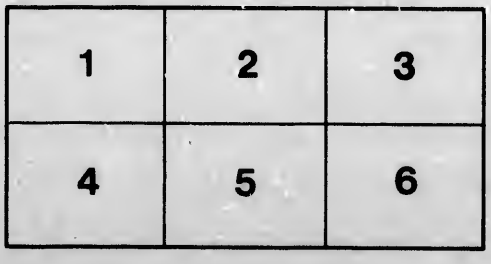

THE GREAT DEFECT

IN THE

LAW OF EVIDENCE

IN CIVIL SUITS IN CANADA;

WITH APPENDIX.

Suggested by a recent case of Rimmer vs. McGibbon.

BY

ALFRED RIMMER, J. P.

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1867.

THE GREAT WANT IN CIVIL CASES IN CANADA.

When any one publishes a pamphlet on a Law suit in which he has been unsuccessful, the common inference is, that he intends to prove that he should have won. This is, however, so far from my intention that if I am even remotely instrumental in procuring what I think would be a great boon for Canada, and one which is enjoyed in England, I shall greatly rejoice. There is one privilege which is denied to suitors in civil cases in Canada, namely, a hearing in Court. They are forbidden to state their cases in evidence, but must prove everything indirectly by such clues or presumptions as they can find, except they are subpœnæd by the opposite side to do so, on written questions. Lord Brougham was the first to see the inconvenience of this, and was instrumental in bringing in a Law that allowed all men to be heard on oath, their evidence of course being taken for what it was worth as to character and other concomitant circumstances, and it has often been considered that this was one of the greatest blessings that illustrious man ever conferred upon his country. I wish to guard myself particularly against it being supposed that I consider the Justices C. J. Duval, Caron, Badgely and Drum-

mond did not act fairly, and to the best of their ability, do right upon such evidence as the Law allowed them to have; all that I complain of is that the Judges were prohibited by Law from hearing evidence which I think would have materially assisted them in arriving at a correct decision. And I should be equally sorry to impute any intention on the part of any one concerned to state what at the time he did not honestly believe. The case I allude to was about an agreement entered into concerning the sharing untaxed costs in the prosecution of a law suit, and the version I was prevented by the present Law from giving would have been as follows:—A man named Morgan owed myself, Wm. Dow & Co., and Alexander McGibbon, money. He put a large amount of property out of our way by simulated sales, and declined to pay us our claims. I had not long returned from England, where such cases had recently been severely reflected on, as money had there been lost through them to a considerable amount, and with the Atlantic Ocean between the creditors, a hope of recovery was nearly vain. I offered on our three joint accounts to test the case, and win or lose, divide expenses, charging for my own time and trouble nothing at all. This was cheerfully accepted, and after having for three years patiently followed up all clues I could find, I succeeded, on the 23rd of January, 1863, in obtaining a judgment for us. Morgan at once (who was reputed wealthy) asked for a little delay to sell some lands,) and deposited the amount of our claims in money and securities at John H. Isaacson's, the Notary, and on *April the 24th*, 1863, Mr. McGibbon,

Mr. Dow, and I, went to J. H. Isaacson's office and received all our money in full. They had at my suggestion obtained judgments, and registered their claims against Morgan's lands, to be available for them if I succeeded. Mr. McGibbon's was registered in December, 1862, the month before I was successful. I sent a memorandum of the third part of the costs I had been put to, to Mr. Dow and Mr. McGibbon; the former gentleman immediately paid, and said I had rendered a service to Canada, and the latter promised to pay shortly, and told me also every one in business should be obliged to me.

After twelve months, circumstances connected with other causes unhappily arose that induced him to recede from this, and hence the difference. Now this story is intelligible, its truth is a separate question, but my point is, that there was no means open to me of stating it on oath to a Judge, subject to a rigid examination; a respectful petition to the Judge who first tried the case to be put on my oath was unsuccessful, and probably it was impossible. "But you have your plea," any one would say—to which I add—true, but a plea has no legal value, and indeed those I have much knowledge of, have set forth the facts of a case with variations that have rather astonished me; and as for a Lawyer being able to present your case "*viva voce*," his statements are of no value to a Judge; all he can do is turn up points of law and criticise the credibility of evidence. He speaks with no *personal* knowledge of your case, but is at liberty, while addressing a Court, to make any possible statement on any given subject, a privilege which I should think is not entirely un-

appreciated in the profession, and here the real difficulty arises. Our present Law provides ineffectual means of a hearing by closing the mouths of those who can often best assist the Judges—as for example: Mr. McGibbon being brought up by me on oath, as I could not state my own case, recollected the circumstances differently from me. He is also quite intelligible. He says that I never tested the case for him at all; he thinks I did so for myself, though with what result he cannot say, and as for my pretending to have asked him to get any judgment registered to be ready for the decision in my case, the absurdity of such a pretence is shown by the fact that he never entered any suit till a decision was come to in mine. But to do him justice, I must quote his version of our agreement in his own words, now in the Court-house: "Defendant never tested the validity of such "transfer for me; whether he did so for Dow & Co. I "don't know. I believe he tested them for himself. I "cannot say positively what the result of such pro-"ceedings was, only that his Attorney, J. A. Perkins, "Esq., told me he had collected Rimmers' claim from "Morgan, when I immediately gave him my account "to collect, which he did, and for which I paid Mr. "Perkins.* I have received the amount of my claim "from Morgan, amounting to $154 37, on a suit of "my own, without any reference to Rimmer, and "which I had to pay costs to the amount of $78.30. "I did not enter my case till a decision was come to "in Defendant's, and the only bargain I made was

* It may prevent confusion, though it does not at all affect the case, to remark that my case was conducted, not by Mr. Perkins, but by Messrs. Laframboise & Papineau, of St. Hyacinthe.

"this: Mr. Rimmer was to take the lead in testing "Morgan's estate, and if unsuccessful in recovering "his amount, I was willing to share the expenses, but "if successful, of course we each pushed our own "claims, and had each to pay our own expenses."

Here is an intelligible statement, and the Judge is able to see at once the issues between us; now, he would say, produce your evidence, and then I should have been able to produce a Notarial deed I saw Mr. McGibbon sign; it is numbered 12,650, and is in Mr. J. H. Isaacson's office; its date is *April 24th*, 1863, and acknowledges a settlement of Mr. McGibbon's claim against Morgan there in full. This deed also specifies that it is in "discharge of a judgment "obtained by Alexander McGibbon against R. J. "Morgan on the twenty-second day of December last "past," and he never after, as the records of the Court show, engaged in a suit with him. The amount too, as set forth in the deed, is important; $238 is accepted by him in full of all demands, which, as will be seen, is more than the whole sum he says he sued for, together with his law expenses; and finally the coincidences, as set forth in the documents at Mr. Isaacson's, are astonishing; for example Mr. Dow's discharge and mine were made out the day before we signed them, and there they now are in Mr. Isaacson's safe—*ours dated April 23*, and his dated the following day, April 24. Mr. McGibbon accepted as his settlement an undertaking from Mr. Thomas Watson, an extremely wealthy citizen, to pay this sum of money—Mr. Watson having purchased a considerable quantity of Morgan's land, and this was paid, Mr. McGibbon discharging his claims on these lands.

This deed is of course open to any one to see who may desire to understand how singularly, for want of a principal being able to appear in Court, he cannot explain his case. A Lawyer of great capacity may be able to identify himself with the changing aspects of his client's cases, but such gifts are very rare, and in England, where I have often heard the greatest intellects of the age pleading causes and astonishing the world by their acuteness, the Lawyers themselves hail the change as a great boon.

Now all this does not prove an agreement on his part to share the costs I did not recover; it might or might not with other things, but that is not the question; all I complain of is, that according to our present law, this deed would not have availed, though with our two statements before the Court, it would have much assisted the Judge.

To illustrate further how necessary personal evidence might be to prove even a simple thing—Let any one try to remember what he did last Sunday, and explain it to any other person. If when he got up and commenced to give his recollections, he were stopped and told to prove everything by witnesses, what kind of an account would he be able to give of himself? Why, even when I have sat on the Bench and heard a circumstantial accusation sworn to, and asked the prisoner, not on oath, and possibly not in all respects an estimable character, what he could say for himself, his statement has given me much information I was wanting. A plea, if it is to avail, must entirely change in character; it must descend from the regions of poetry, and be sworn to. It seems almost incredible that I find myself pleading for what

would appear to be a vested right in every human being namely, if he wants to say anything, to let him say it. The objection that it would induce perjury does not require serious refutation, for the immediate corrolary to such a proposition would invalidate fully half the evidence now given in Court.

I have just shown this to a gentleman whose judgment every one respects, and handed him the documents alluded to for him to examine. He says I have quoted them perfectly accurately—the $238 paid Mr. McGibbon, he points out, carries interest by the deed, and he says that, notwithstanding my natural desire to avoid further allusion to my own particular case than would explain the great principle I am contending for, I might legitimately have pointed out the inevitable position Mr. McGibbon's own statements land him in, from which no human logic can extricate him. If I had been unsuccessful, my untaxed costs, consisting of travelling on eight occasions to St. Hyacinthe, and fees to Lawyers other than those on the record, would have been swelled by my taxed costs of about $150, and Morgan's costs also of probably as much; but all this he says he would have shared. As however through my suit he received his claim in full at the same hour that I received my own, with all expenses he himself even pretends he was ever put to, indeed a simple sum in addition would indicate a trifle more, he considers that this releases him from sharing in the costs of the suit!

ALFRED RIMMER.

APPENDIX.

Probably no one who has read the above, and does not believe that the documents alluded to as bearing Mr. McGibbon's signature are forgeries, will consider that justice was reached. Yet when I endeavor to detach myself from my case, and look at it as it must have presented itself to the Judges, forgetting for the time being all such circumstances as I so well know, and they did not, I do not think they could, have arrived at a different decision. Mr. McGibbons' own lawyer, who, till he took up the case against me, had acted also as mine, told me with perfect candor that if his client chose to deny the agreement, or even not to admit it, I should be unable to prove it, unless it were in writing, however well it might have been understood.

Since writing the above, I have met with some extracts from "Taylor on Evidence," a standard English work, and although I never saw these extracts before, they read like an emphatic commentary on what I have just written; indeed, as will be seen, the tendency of allowing principals to appear, so far from tempting to perjury, is more apt to make yea yea and nay nay mean yea yea and nay nay.

TAYLOR *on Evidence*, vol. 2, p. 1079.—If the rules of exclusion, recognised till lately by the English Law, had been really founded, as they purported to be, on public experience, they would have furnished a most revolting picture of the ignorance and depravity of human nature. In rejecting the evidence of parties to the record and other interested witnesses, the law acted on the pre-

sumption, not only that such persons, sooner than make a statement which might prejudice themselves, would commit deliberate perjury, but that, if they did so, juries would be incapable of detecting the falsehood. A more unfounded calumny upon the veracity of witnesses, and the intelligence of juries, cannot be well imagined.

TAYLOR *on Evidence*, vol. 2, p. 1087.—Although at the time when these sections first came into operation, learned Judges might have been found, who, taking a cautious view of the subject, were inclined to regard the examination of the parties as a questionable, if not a very dangerous, experiment; it is believed that, at present, every eminent lawyer in Westminster Hall will most readily admit that this change in the law has been productive of highly beneficial results. In Courts of law, it has not only enabled very many honest persons to establish just claims, which, under the old system of exclusion, could never have been brought to trial with any hope of success; but it has deterred at least an equal number of dishonest men from attempting, on the one hand, to enforce a fraudulent demand; and, on the other, to set up a fictitious defence. The knowledge that a party might tell his own story to the Court and Jury has operated strongly as an encouragement to the suitor who was the witness of truth; while the dread of cross-examination, and consequent exposure, has had a corresponding tendency to check litigation, in cases where a verdict could only be obtained through the medium of perjury. In Courts of Equity the same advantages have arisen, so far as respects the power now first granted to parties of giving testimony in their own favor; while Defendants, who, under the former law would have been forced to file cross-bills for the purpose of "scraping the conscience" of Plaintiffs, have been enabled to effect that desirable object without having recourse to this dilatory and costly proceeding. The Common Law Commissioners have expressed an opinion

most favorable to the merits of the measure; and in their second Report have observed, that "according to the concurrent testimony of the Bench, the profession, and the public, the new law is found to work admirably, and to contribute in an eminent degree to the administration of justice."

In conclusion, I hail this long desired opportunity of placing on record a few details of a case that has a great public interest. I mean my own original suit against Morgan. I have no hesitation in saying that of all the many thousand pounds now fraudulently put out of the way of creditors, and guarded by every kind of legal hedge, every shilling is available, the only obstacles being a natural dislike to the tedious work of unearthing the fraud and the fears of failure.

Morgan, as before said, had put a large estate out of the way of his creditors, and complied outwardly with all forms of the Law. He lived in comfort in his property, and offered his creditors 2s. 6d. in the £. This property, consisting of many hundred acres of land, at Acton, he disposed of to his brother-in-law, Otave Lahaie, and then Morgan's wife sued him for a separation of property, as unfortunately for them they had not procured one before marriage. Now Lahaie had actually taken possession of the lands, cut wood, and sold it in Montreal, on his own account, and to all appearance the sale was valid. Morgan's wife being now able to hold property in her own rights, pretended to purchase the lands from Lahaie, and this gentleman retired from the scene, leaving Mrs. Morgan and her husband in full enjoyment of property purchased as is appeared with their creditors money. Now this tale may appear very clear and lucid, but even thus much of it was not arrived at in a hurry. It is true that, so far, we had not acquired any legal rights, but there was enough presumption of fraud to encourage further enquiry. I reported the case then to Mr. Dow and Mr. McGibbon,

after testing it for them for about a year, and I had just received an offer of 10s. in the £ from Mr. T. R. Johnson for us all (Mr. Johnson had some business transactions with Morgan.) We long considered the advantage of accepting this, or else risking a suit, and possibly losing, paying all costs of both sides, and confirming Morgan in comparatively secure possession of his estates. at last, as I had conducted the case so far, or as Mr. McGibbon expresses it "taken the lead in testing Morgan's "estate," they agreed to leave it to me, and then the idea occurred to me of endeavoring to find out the standing of Lahaie, the brother-in-law, at the time he purchased the property. He was in the dry-goods trade, and I went to the principal houses in St. Paul street, explaining my errand. These houses, one and all, gave me all the information they could, but at the time of the alleged sale of Morgan's land I could really find but little to indicate Lahaie's circumstances, and I dare not make him produce his books for fear the entry of the sale might be there, and so tell in his favor. Mr. Henry Thomas, however, pointed out a circumstance that showed how unlikely it was that the sale was genuine. Lahaie had been renewing notes for very small amounts, paying part cash, and then renewing again. From this the case became clear; books were demanded, the principals subpœnaed, and the fabric of deceit they had built around them, piece by piece, fell away. Now, though this takes little time to tell, it occupied in all thirty days of my life. I was met everywhere with a negative; their whole acts had been prepared to follow each other consecutively with consummate skill by a young Lawyer of whom I will say no more than that he has, I hear, been called away to answer for his own acts before a tribunal more just, and, therefore, more merciful than any which could judge him on earth.

When we had agreed to test the case, I collected

such scraps of information as I was at first in possession of, and laid them together, so as to make out a case to submit to Mr. Strachan Bethune. He said that without doubt there had been a fraud committed, and probably we should succeed if I could substantiate even a part of my suspicions. He recommended me to try the case at St. Hyacinthe, the district where Morgan's property was situated, and he gave me letters of introduction to Messrs. Laframboise & Papineau, who fully deserved the high character he gave them.

I may here mention that Mr. Monk, at the late trial, when addressing the Bench, was very severe on behalf of his client, Mr. McGibbon, upon Mr. Bethune's advice as entailing needless cost in going to St. Hyacinthe. I thought at the time he was unnecessarily severe, if as he had just been urging, his client had nothing to do with the disbursements. The soundness of Mr. Bethune's advice may, however, be gathered from the circumstance that if it had not been followed, we should probably not have been paid at the present hour, as Mr. Papineau being on the spot, happened accidentally, while in the registry office, to learn that another attempt of some kind was nearly completed, from an entirely different quarter, to sell the land at Sheriff's sale over all our heads. He telegraphed me to take immediate steps to frustrate this, and within a few hours of the land being placed out of our reach, I had presented a petition to the late Judge McCord, who stopped the sale till our suit was decided.

In endeavoring to condense my narrative I fear I have been somewhat obscure, but I should lay down the following rules for any one who believes he is wronged, as we thought we were:

No man can detach himself from the world and build fictitious circumstances round himself and his property.

Any such attempt, if carefully examined, will disclose some flaw somewhere.

Such flaw will surely discover many more.

Do not fear demanding any man's books; if he is not honest, and if time is taken to study them, I do not think that, with the assistance of all the accountants in the world, he could effectually shield himself from detection by any fraudulent entries he could make.

It is safe policy always to subpœna all such persons, and make them answer questions, and cross-examine them on these questions.

The whole of the suit against Morgan, which would be quite too voluminous to publish in this pamphlet, will readily be shewn, together with correspondence, to any one who may have a similar claim, and, without doubt, all such claims run in very parallel lines.