notices, provided the publication of these notices be such as will lead to the inference that the customer acted on the faith of them. What amount and kind of publication is sufficient to raise this inference is a jury question, and may vary with the circumstances, and with the nature of the subject-matter of the contract, and with the rules or conditions which it is desired to enforce. That rules so published may affect contracts made in an auction-room was expressly decided in the case of *Hain*, 15 D. 667, and the same law was laid down in the case of *Mesnard* v. *Aldridge* in the English Courts, cited by Mr Bell in his Illustrations, vol. i. p. 121 (*supra cit.*), also Bell's Prin. sec. 132.

The present case, however, is clearer, for the existence of other conditions was brought home to the knowledge of the buyer by the terms printed in the catalogue to which I have already referred. The customer was thus put on his inquiry, and cannot allege ignorance; and as his defence is wholly founded on the warranty contained in the catalogue, he cannot deny that he was cognisant of its terms.

I have shown that the condition now in question is in no respect repugnant to the nature of the contract, but, on the contrary, is quite in harmony with it. In that respect the case is illustrated by contrast, not by analogy, by the case of *Henderson* v. *The Steam Packet Co.* In that case *The Steam Packet Co.* being common carriers, had endeavoured, by a memorandum printed in very small letters on the back of a ticket delivered to a passenger in return for the payment of the fare, to engraft a stipulation on the contract of carriage that the carriers should not be liable for neglect. It was held in this Court and in the House of Lords that this ticket was not evidence of a contract, but was only a voucher for the payment of the fare; that the tender of the fare being unconditional, the voucher for it was equally so, unless it could be shown that the passenger was aware of and assented to these conditions; and that the conditions themselves were at variance with the nature of the contract of carriage.

Without, therefore, entering on the question whether the horse when sold was sound or unsound, I am of opinion that the pursuers must prevail. The right of the defender to recover the money may be tried with the owner who warranted the soundness of the horse, but it forms no defence to this action.

Lords Young, Craighill, and Rutherfurd Clark concurred.

The Court recalled the Sheriff's judgment, and decerned against the defender in terms of the conclusions of the petition.

Counsel for Pursuer (Appellant)—Mackintosh—C. N. Johnston. Agents—Duncan, Archibald, & Cuningham, W.S.

Counsel for Defender (Respondent)—Campbell Smith—G. Burnet. Agents—Boyd, Macdonald, & Jameson, W.S.

Friday, November 3.

SECOND DIVISON.

[Sheriff of Lanarkshire.

CLYDESDALE BANK *v.* BEATSON.

Master and Servant—Negligence—"Spondet peritiam artis"—*Diligence Prestable by One who accepts Office of Trust and Remuneration therefor.*

A bank-teller who by mistake gave away to a person who presented a £100 note of another bank for change into £20 notes, a parcel of ten £100 notes instead of a parcel of five £20 notes, *held* liable to the bank for the amount of the loss of £900 so caused, on the ground that he had been wanting in the reasonable care and skill which by the acceptance of the duties of his post he undertook to exhibit.

William Addison Beatson, the defender in this action, entered the service of the Clydesdale Banking Company as an apprentice in the year 1874, and from October 1878 till the circumstances occurred which led to the present action had been employed as teller in a branch office, first in Ingram Street, and thereafter in George Street, Glasgow. Shortly after entering into the service of the bank he addressed the following letter, as usual with those entering the service of the bank, to the manager:—"I, William Beatson, presently apprentice to the Clydesdale Banking Company at Anderston, Glasgow, have received copies of the rules and regulations of the Officers' Guarantee Fund of the Clydesdale Banking Company, and which are engrossed in the minutes of the directors of the 16th day of June 1854 and 15th day of June 1870; I hereby, with the special advice and consent of my father, Andrew Beatson, Hope Street, Lanark, as my curator and administrator-in-law, agree to become a contributor to the said fund, and to be rated on the sum of £500 sterling, and express my approval and adoption of these rules and regulations, and agree to abide by and implement the same in every particular,"—along with a separate letter from his father, in which as his curator and administrator-in-law he expressly consented to and concurred in his son's obligation. His salary when he entered the branch office was £40 a-year, afterwards raised to £50, and ultimately from January 1881 to £60.

It was part of the defender's duty to give to Mr William Dickson White, the agent of the branch, on each Saturday, at the close of business, a statement of his transactions for the past week. On Monday the 27th February 1882 he began work as usual for the week with his accounts clear, and with the proper number and amount of notes and cash in his possession. He acted as teller during the whole of that week, and at the end of it, on Saturday 4th March, when his accounts were checked by the agent of the branch, they were found to show a deficiency of £901. Amongst his notes was one of the Commercial Bank for £100. The explanation he gave of this deficiency, according to the subsequent deposition of the agent, as well as in his own evidence, was substantially that contained in Statement VI. of his defences in this action, as follows:

—"On the said deficiency being discovered, the said Mr William Dickson White suggested that the defender must have by mistake given to some-one notes of the bank to a larger amount than was intended, and the defender then recollected that amongst the many transactions of the forenoon of that day was one with a person who was a stranger to him, who came into the bank and asked the defender to oblige him with notes of £20 for a note representing £100, and that he, the defender, had drawn a folded up file of notes from a parcel which he had beside him, and gave them to the person in exchange for a £100 note of the Commercial Bank of Scotland. It turned out that the said notes which he gave away in exchange were a file or small parcel of ten, each note representing £100, instead of five representing £20 each. This was not intended by the defender, but was simply and purely an innocent mistake, arising chiefly from the hurry and multiplicity of the business which he had to transact. In that way notes representing £900 were accounted for. The remaining £1 was also accounted for by the following circumstance. A person to whom the defender had, in the course of business on the said 4th day of March current, given £15 in silver, returned to the bank and represented that he had only received £14 in the parcel of silver change he had got instead of £15. The defender at the time when this happened told the circumstances to Mr H. B. Douglas, accountant in the said branch office of the pursuers' bank. Whether the silver so given away by the defender was short or not he had no means of knowing, as when silver is given away in large quantities it is not generally, and was not on this occasion, checked at the bank counter. The defender, however, took the person's word for the deficiency, and gave him an additional £1, trusting that some of the other parcels of silver in his possession, of which he had a number prepared for the business of the day, might contain an extra £1."

On the following Tuesday, the 7th March, the defender wrote to the bank resigning his situation, and enclosing a declaration to the following effect:—"I declare that I cashed a £100 Commercial Bank note to a stranger on Saturday, 4th March 1882, between the hours of 11 and 12 o'clock A.M.; he asked for £20 notes, and in error I declare I gave £100 pound notes in mistake; after I served the *first customer* I had at no time £100 in £20 notes, consequently the error £900 short, as I gave a £1000 in lieu of £100. He was a man between 28 and 30 years of age; he was dressed in dark coat, sandy or brown mutton-chops side-whiskers and moustache, shaved on chin, wanted an upper tooth, had brown hat. The above description is to the best of my recollection. And in conclusion I maintain I checked said cash previous to business on Saturday morning, and found it to be correct."

The bank then raised this action in the Sheriff Court of Lanarkshire for payment of the £901, on the ground that it had been lost by gross carelessness, culpable negligence, or fraud on the part of the defender.

The defence, as above stated, was that the defender had paid away the money which was amissing by an innocent mistake in the hurry of business. The defender averred that he had never been formally appointed a teller, and did not receive a salary such as is usually paid to a teller; that the mistake occurred on the 4th of the month, an unusually busy day at banks, especially when as on the 4th of March 1882 it fell on a Saturday, owing to the compression of business into a short period on that day. He attributed the mistake to the amount of work thrown upon him on that day, and averred that it was his duty, according to his instructions, to be obliging to strangers as well as to customers of the bank in giving change and otherwise He averred that the pursuers had not been called upon, and might never be called upon, to pay the sums represented by the notes he had accidentally given away, and that their business arrangements were defective in so far as not including a means of identifying the notes given out to the public. Lastly, he averred—"The defender, who obtained no benefit of any kind by or through said mistake, is not liable therefor, and it was not mentioned to him when he was put to the performance of the duties of a teller that he was to be liable for mistakes, and he did not receive a salary which would imply or infer liability."

He pleaded, *inter alia*—"(8) The defender not having been employed by the pursuers as a teller, nor paid a sufficient salary for the performance of the duties of a teller, but being the subordinate servant of the said Mr William Dickson White, who alone called upon him to perform the duties of a teller, is not responsible for the duties of that office, and is not liable for the sum sued for."

The Sheriff-Substitute (ERSKINE MURRAY) allowed a proof.

The defender appealed to the Court of Session for jury trial.

After hearing counsel the Court of consent allowed a proof, which was taken by LORD RUTHERFURD CLARK. In the course of his evidence, William Dickson White, the agent of the branch, deponed that on the loss being discovered he asked defender "if he did not remember any transaction that had taken place in the course of the day whereby he could have put away any of these large notes. He said at first that he did not know, but afterwards he said that a man had come in and asked change for a £100 note. I asked what kind of notes the man inquired for, and he said twenties. I said, 'You have given away £1000 in £100 notes instead of £100 in twenties.' He said, 'No, I could not have done that.' I glanced down his book, and I saw he had only four £20 notes to start with in the morning, and I said, 'I do not see how you could do that; you had not twenties to give.' He thought for a moment, and then said, 'Oh yes; that is how it has taken place!' From the state of his cash that morning he had not change for £100 in £20 notes. If he counted his cash that morning, he must have been perfectly well aware of that. He told me it was a Commercial Bank note that change had been asked for. When a stranger comes to the bank with a £100 note for change, especially a note of another bank, we require a little care to be exercised. We do not change them to strangers as a rule. I do not think it is possible for a teller accustomed to his work to pass away ten £100 notes for five £20 notes. The feel of the bulk of the notes would tell him his mistake. They are double weight. (Q) The £100 notes are larger and heavier?—(A) Yes. (Q) And in that case he was giving twice

as many in number as he would give of twenties? —(A) Yes. (Q) Which again would have called his attention to it if he had been attentive?— (A) Yes."

John Harvie, secretary of the bank, gave on this point similar evidence, as quoted in Lord Craighill's opinion below. Mr Bouglas, who acted as accountant and teller in the same branch office in which defender had been employed deponed —"It was unusual for a stranger to come into the bank and ask a large note like that to be changed. I think it is likely I would have noticed if such a thing had happened. When I was acting as teller I knew to be very careful in changing a large note like that to any stranger. (Q) Would you have made some inquiry before you took from a stranger a note of that value belonging to another bank?—(A) I would have hesitated before changing it. I never heard defender complain of having too much to do. He was quite well able for all the work he had to do. I am now doing that work and superintending the accounting besides."

The proof also showed that there had been various complaints of minor errors and irregularities by the defender, but it also appeared that such irregularities and mistakes occasionally happened with the other tellers in the pursuers' service, and that tellers are in the habit of making up small sums which go amissing in the course of their duties through accidental overpayments, short creditings, and the like causes.

The defender in his evidence repeated the account of the manner in which the money had been lost which is above explained. Other evidence was led for him, to the effect that such mistakes had occurred in the course of the conduct of business by tellers of much greater experience than he had. He also led evidence to show that the error would have been avoided if he had been provided with a drawer in his desk containing a sufficient number of compartments to enable him to keep separately the notes of various denominations of which he had charge.

Argued for pursuers—The defender's carelessness was a breach of his bargain at common law, according to the wording of his own and his father's agreement with the bank. If not bound at common law, he was at least by the special contract contained in the letter to the bank above quoted. Having voluntarily accepted the duties of teller, he was liable in the due amount of diligence which the law requires from one in that position.

Authority—*Melville* v. *Doidge*, 6 Com. Bench, 450.

In the course of the discussion the pursuers departed from the ground of criminality or fraud. On the remaining ground of negligence urged against him the defender argued that the deficiency was not attributable to want of ordinary diligence, but was justified by the *vis major* arising from the unusual press of business on the day in question. The bank did not pay him the usual salary of a teller, and could not demand from him the higher degree of diligence which would be prestable from one duly remunerated for the responsible duties of that position.

Authorities—Story on Bailments, 186 *et seq.*; 1 Bell's Comm. 488; *Walker* v. *British Guarantee Association*, 18 Ad. & Ell. 277; *Gunn* v. *Ramsay*, Hume's Dec. 384.

At advising—

Lord Craighill—In this action the Clydesdale Banking Company ask decree against Mr Beatson, the defender, for the sum of £901, on the ground that being a teller entrusted with moneys to be used for them in the business of the bank, he had failed to account to that extent for moneys with which he was entrusted. The defence is that the deficiency was paid away in the hurry of business by mistake, and that the defender is not liable for the loss, inasmuch as not only criminality or fraud, but the want of ordinary prudence or reasonablecare or diligence, has not been established. The case is important; but the legal principles, as well as the facts on which the result depends, appear to me to be clear.

The defender was a teller employed to do the work of the bank, and was paid a salary for his labour. The rule of responsibility in these circumstances is that explained by Mr Bell in his Principles, sec. 234, where it is said—"In contracts reciprocally beneficial the care of a man of ordinary prudence is required, and *culpa levis* will ground responsibility." The defender, no doubt, has contended that he ought to be excused even should it be thought there was on his part a want of ordinary prudence, or of reasonable care or diligence, because he was young and inexperienced, because his salary was less than that of many, if not of most bank tellers, and because there was a pressure of business on the day in question, by which, though he was not conscious of this at the time, needful attention to every transaction was prevented. But these considerations neither separately nor collectively displace, as I think, the ordinary rule of responsibility. The defender had been bred to the business with which he was entrusted; he held himself out as fit for its transaction; he was remunerated upon terms which had been agreed upon; and the pressure of business to be done was not greater on 4th March than was usual on the fourth of every month. In these circumstances, as the defender was content to keep his place, and as there was no dispensation from or limitation of the liability implied in his contract with the pursuers, the common rule is that by which his case must be held to be governed.

The pursuers do not now insist upon criminality or fraud as a ground of action, and I think that in this they are right. On such an issue my verdict would have been for the defender. The question therefore is, whether the loss of £901 has been shown to be an accident occurring where ordinary prudence or reasonable care or diligence was exercised, or to be a result which must be ascribed to the absence of these necessary conditions on the occasion when smaller notes were to be given for the £100 note offered to be exchanged? In the argument on this question something was said upon both sides about the *onus* of proof; but in the present case it is not necessary to lay down any rule upon that matter. Be it that there is an *onus* on the pursuers to prove more than the defender's possession of the money, and his failure to account for all that was received—have they not done that by the proof which has been adduced? I think that they have, and that what has been established connects the loss with the defender's neglect of ordinary prudence, or with the want of reasonable care or diligence in the transaction of the business which he undertook to perform.

My ground of judgment can be very shortly explained. In the declaration sent in by the defender to the bank on the 7th March he declared —"I cashed a £100 bank-note to a stranger on Saturday, March 4, 1882, between the hours of 11 and 12 a.m. He asked for £20 notes, and in error I declare I gave £100 notes in mistake; after I served the first customer I had at no time £100 in £20 notes; consequently the error of £900 short, as I gave £1000 in lieu of £100." This account of the matter appears to me to be conclusive against the defender. There is the giving of notes, not merely without counting the number of notes given, but there is also the giving without looking at their denomination. These things could not have happened if there had been ordinary prudence or reasonable care or diligence in the transaction of the business of the bank. In the first place, what is called by the witnesses, the "feel of the fold" was unobserved or disregarded. Mr Harvie, the secretary of the bank, tells us:— "I think it a most improbable thing that any man should have handed away ten £100 notes in a parcel instead of five £20 notes in a parcel, without feeling the difference. A £100 note is the same size as a £20 note, but the notes are put up in different quantities or 'folds.' When a parcel of £20 notes is made up there are five notes in the 'fold,' but as regards the £100 note there are ten in the 'fold.' The paper is the same; the difference is that there are double the number of sheets of paper." Had there been reasonable attention to the work in hand, the difference between the "feel of the fold" of the ten £100 notes given, and what would have been the "feel of the fold" of the £20 notes asked for, must have attracted attention and prevented the mistake which was committed. And in the second place, what was done was done in the knowledge that at the time the smaller notes were asked in exchange for a £100 note the defender had not five £20 notes in his till. He had begun in the morning with four; he had got two more; he had paid away three; and thus three were all that remained. Had the defender given any, even the smallest, consideration to the business on which he was engaged—much more so, if he had counted or looked at the denomination of the notes he gave away—the error which occurred could not possibly have been committed. But it was committed; and therefore there is no escape from the conclusion that there was on the defender's part want of ordinary prudence—of reasonable care or diligence in the transaction of the business of the bank. Several cases were cited at the bar, but neither these decisions nor any of the *dicta* of the Judges by whom they were decided, affect, as I think, the grounds of judgment on the present occasion. The result is that, in my opinion, the bank must prevail. We may be sorry for the defender, but the law must have its course in his case as in others; and accordingly, as I think, judgment must pass against him for the sum which the bank lost through his carelessness in the transaction of their business.

Lord Rutherfurd Clark—I am of the same opinion. I think it fair to the defender to say that I acquit him of dishonesty, but not of gross negligence. That is the ground of my judgment.

The Lord Justice-Clerk concurred.

Lord Young was absent.

The Court granted decree in terms of the conclusions of the action.

Counsel for Pursuers (Respondents)—Trayner—Readman. Agents—Ronald & Ritchie, S.S.C.

Counsel for Defender (Appellant)—Mackintosh—Lang—M'Kechnie. Agents—Smith & Mason, S.S.C.

Friday, November 3.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

EARL OF NORTHESK, PETITIONER.

Entail—Succession—Testamentary Deed — Heirs Whatsoever—Heirs Whatsoever of the Body—Flexibility of term "Heirs Whatsoever"—Necessary Implication.

Terms of deeds of entail on a construction of which *held* that the term "heirs whatsoever" was intended to mean, and must be read as meaning, "heirs whatsoever of the body."

An entailer executed on the same date two deeds of entail of properties named E. and L. belonging to him. The deeds of entail reserved the granter's liferent, and were recorded on the same date after his death. In both deeds the granter destined the estates conveyed by each to himself in liferent, and his eldest son and the heirs-male of his body in fee, whom failing to his second son and the heirs-male of his body, whom failing to his other sons born and to be born in their order of seniority and their heirs-male respectively, whom failing to the heirs whatsoever of the body of his eldest son. Thereafter, in the entail of E., occurred the words "whom failing to the heirs whatsoever of the said J. J. C. (the entailer's second son), whom failing to the heirs whatsoever of the body of the said S. T. C. (the entailer's third son)." Then followed a series of further substitutions in favour of the heirs whatsoever of the bodies of the entailer's other sons born and to be born, whom failing to his daughters in their order of seniority and the heirs whatsoever of their bodies, whom failing to other substitutes named or to be named. The destination in the entail of L. was to the entailer's sons and their heirs-male and the heirs whatsoever of the body of the eldest son as in the entail of E., after which the destination was to "the heirs whatsoever of the body of the said J. J. C., whom failing to the heirs whatsoever of the said S. T. C." The entail then proceeded in terms similar to those used in the entail of E.

Part of the estate of L. was acquired by a railway company under parliamentary powers, and the compensation consigned under the Lands Clauses Consolidation (Scotland) Act 1845. The heir in possession of the two estates having executed permanent improvements on both E. and L., applied to the Court for authority to uplift the consigned money in repayment of his expenditure on both estates. *Held*, on a construc-