Technical and Bibliographic Notes / Notes techniques et bibliographiques

The Institute has attempted to obtain the best original copy available for filming. Features of this copy which may be bibliographically unique, which may alter any of the images in the reproduction, or which may significantly change the usual method of filming, are checked below.

L'Institut a microfilmé le meilleur exemplaire qu'il lui a été possible de se procurer. Les détails de cet exemplaire qui sont peut-être uniques du point de vue bibliographique, qui peuvent modifier une image reproduite, ou qui peuvent exiger une modification dans la méthode normale de filmage sont indiqués ci-dessous.

- ☐ Coloured covers/ Couverture de couleur
- ☐ Covers damaged/ Couverture endommagée
- ☐ Covers restored and/or laminated/ Couverture restaurée et/ou pelliculée
- ☐ Cover title missing/ Le titre de couverture manque
- ☐ Coloured maps/ Cartes géographiques en couleur
- ☐ Coloured ink (i.e. other than blue or black)/ Encre de couleur (i.e. autre que bleue ou noire)
- ☐ Coloured plates and/or illustrations/ Planches et/ou illustrations en couleur
- ☑ Bound with other material/ Relié avec d'autres documents
- ☑ Tight binding may cause shadows or distortion along interior margin/ La reliure serrée peut causer de l'ombre ou de la distorsion le long de la marge intérieure
- ☐ Blank leaves added during restoration may appear within the text. Whenever possible, these have been omitted from filming/ Il se peut que certaines pages blanches ajoutées lors d'une restauration apparaissent dans le texte, mais, lorsque cela était possible, ces pages n'ont pas été filmées.

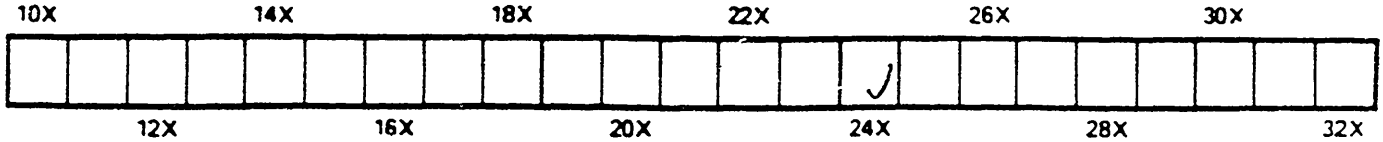
- ☐ Coloured pages/ Pages de couleur
- ☐ Pages damaged/ Pages endommagées
- ☐ Pages restored and/or laminated/ Pages restaurées et/ou pelliculées
- ☑ Pages discoloured, stained or foxed/ Pages décolorées, tachetées ou piquées
- ☐ Pages detached/ Pages détachées
- ☑ Showthrough/ Transparence
- ☑ Quality of print varies/ Qualité inégale de l'impression
- ☑ Continuous pagination/ Pagination continue
- ☐ Includes index(es)/ Comprend un (des) index

Title on header taken from:/ Le titre de l'en-tête provient:

- ☐ Title page of issue/ Page de titre de la livraison
- ☐ Caption of issue/ Titre de départ de la livraison
- ☐ Masthead/ Générique (périodiques) de la livraison

☐ Additional comments:/ Commentaires supplémentaires:

This item is filmed at the reduction ratio checked below/
Ce document est filmé au taux de réduction indiqué ci-dessous.



DIARY FOR NOVEMBER.

1. Wed.... *All Saints.*
4. Sat. ... Articles, &c., to be left with Sec Law S.
5. SUN ... 21st *Sunday after Trinity.*
12. SUN ... 22nd *Sunday after Trinity.*
15. Wed ... Last day for service for County Court.
19. SUN ... 23rd *Sunday after Trinity.*
20. Mon ... Michaelmas Term begins.
24. Frid.... Paper Day Q. B. New Trial Day C. P.
15. Sat .... Paper Day C. P. N. T. Day Q. B. Declare for
26. SUN... 24th *Sunday after Trinity.* [Co. Ct.
27. Mon ... Paper Day Q. B. New Trial Day C. P.
28. Tues... Paper Day C. P. New Trial Day Q. B.
29. Wed ... Paper Day Q. B. New Trial Day C. P.
30. Thurs. *St. Andrew.* Paper Day C. P.

NOTICE.

Owing to the very large demand for the Law Journal *and* Local Courts' Gazette, *subscribers not desiring to take* both *publications are particularly requested at once to return the back numbers of that one for which they do not wish to subscribe.*

THE

Upper Canada Law Journal.

NOVEMBER, 1865.

THE HON. ARCHIBALD McLEAN.

More than two years and a half ago it was our melancholy duty to chronicle the death of one whose name will ever be remembered with respect and affection by all true hearted Canadians, Sir John Beverley Robinson. Second only to his memory will be that of his tried friend, his brother in arms and his brother judge, the Hon. Archibald McLean who expired at his residence in Toronto on Tuesday, the 24th day of October last, at the advanced age of seventy-five.

The father of Archibald McLean was the Hon. Neil McLean, a member of the Legislative Council for Upper Canada before the Union: his mother was a daughter of Colonel Macdonald. He was born at St. Andrews, near Cornwall, in April, 1791. Like Sir John Robinson and many others who have attained a conspicuous position in Canadian history, he was a pupil of Dr. Strachan, the present venerable Bishop of Toronto, at the town of Cornwall. He left this to study law, which he did in Toronto, then York, in the office of Attorney General Firth. As to his success or application in these early studies we know but little; whatever they were they were cut short by the breaking out of the war of 1812. The son of an officer in the 84th Highlanders, and the grandson on his mother's side of a U. E. Loyalist, it needed no persuasion to induce him to take up arms in defence of his country.

He was identified with the struggles of that eventful period. He was a lieutenant in Captain Cameron's No. 1 flank company of York Militia at the battle of Queenston Heights. No. 2 flank company being on that day commanded by Lieut. John Beverley Robinson. He was severely wounded early in the engagement, during the temporary repulse that preceded the victory, whilst aiding Captain Dennis of the 49th in his endeavours to stop the retreat, but was helped off the field by Lieut. Stanton, the present Clerk of the Process, and other comrades, shortly after Sir Isaac Brock received his mortal wound.

He also behaved very gallantly at the engagement at York, saving the colors of the York Militia. He was present at the battle of Lundy's Lane, where he was taken prisoner, and so remained till the termination of the war.

On the breaking out of the Rebellion of 1837, the old military fire of the then lawyer, but former soldier revived, and on the morning of the day when the attack of the rebels on Toronto was expected, he might have been seen drilling a company of men hastily got together in front of the old City Hall, with the ardour of a quarter of a century before—the then Chief Justice of Upper Canada being in the ranks, shouldering his musket like any private.

He was called to the Bar and admitted as an attorney on 9th April, 1813, and was engaged in the successful practice of his profession until the year 1837, when he was appointed one of the judges of the Court of King's Bench along with the late Mr. Justice Jones, when the number of judges was increased from three to five, under the 7 Wm. IV. cap. 1.

Before his appointment to the Bench he represented his native county for several years in the Legislative Assembly for Upper Canada, and was for some time Speaker of the House, a position for which his dignified bearing and and courteous manners well fitted him.

He was throughout his parliamentary career a consistent advocate for the rights of the Presbyterian Church, of which he was an elder, during the struggle brought about by the proposed secularization of the clergy reserves. And this was the more creditable

to him, as he had to act in opposition to his own personal and political friends. He was violently assailed in the House of Assembly by Mr. Hagerman, then a member of the Government, for his conduct in this matter; but neither the withering language of the eloquent and impassioned speaker, nor the persuasions of his friends could prevent him taking the course which he considered right.

When the Court of Common Pleas was constituted in 1849, the late Sir James Macaulay was made Chief Justice, and Judge McLean and Judge Sullivan puisne judges of that court, by commission dated 15th December, 1849. He continued in this court until the resignation of Chief Justice Macaulay and the appointment of Judge Draper to the vacant office.

This appointment of his junior, which he looked upon as a slight, was a blow to the old judge which he felt acutely, and the consequence was, that in Hilary Term, 1856, he took his seat in the Queen's Bench. The step, however, was considered a judicious one by the profession as well as by the Attorney General, J. A. McDonald, though he, as well as others, expressed and felt much regret at the pain caused by the course which it was considered advisable to take, and all were well pleased to see Mr. McLean made Chief Justice of Upper Canada in the place of Sir John Robinson, who resigned his seat in the Queen's Bench and accepted the Presidency of the Court of Error and Appeal. Upon the death of the latter in January, 1863, Chief Justice McLean, then in failing health, again took his place, which he held till his death.

As a judge, though not perhaps possessing the brilliancy or application of some of his brethren, his opinions were always received with the respect and attention which his experience, and his character for unblemished impartiality and integrity claimed. His views generally coincided with those of his old friend Sir John, in whose judgment he placed the most unbounded confidence, and for whose character he had the greatest admiration. He joined with him when these two dissented from the rest of the Court of Appeal in the well known case of the *The City of Toronto* v. *Bowes*, — the decision, however, of the majority was upheld on an appeal to England.

The judgment of Judge McLean, in opposition to the opinion of Sir John Robinson and Judge Burns, in the celebrated *Anderson* case, is the most prominent feature in his judicial career, and deserves more than a passing notice. The facts of this case are familiar doubtless to most of our readers; they will be found reported in full in 20 U. C. Q. B. 124. Judge McLean took the broad ground, that in administering the laws of a British Province he was not bound "to recognize as law any enactment which could convert into chattels a very large number of the human race," and that a man endeavouring to effect his escape from slavery was entitled to use any means necessary for that purpose, even to taking the life of his pursuer, and that the crime with which Anderson was charged, even if it had been clearly made out, did not come within the Ashburton Treaty. Nor could he "recognise the law of slavery in Missouri to such an extent as to make it murder in Missouri, while it is justifiable in this Province to do precisely the same act."

Whatever may be the strict law of the case, and there are many even amongst lawyers who think that Judge McLean was right, one cannot help admiring the free British spirit so characteristic of the man, whose feelings doubtless were shared by his brethren, but by them kept subject to the rigid dictates of severe and calm judgment.

The manner of the late President of the Court of Appeal upon the Bench was dignified and courteous. Unsuspicious and utterly devoid of anything mean or petty in his own character, his conduct to others was always that which he expected from them.

The profession generally, the young student as well as the old practitioner, will long remember with affection his courtesy and forbearance in Chambers and on the Bench. Others will think of him as an entertaining and agreeable companion and a true friend; whilst others still will call to mind the stately form of the old judge, as he approached and entered St. Andrew's Church, where he was a constant and devout attendant, rain or sunshine, until his last illness, which terminated in death.

Archibald McLean was a man of remarkably handsome and commanding presence; tall, straight, and well formed in person, with a pleasant, handsome face, and a kind and courteous manner, he looked and was, every inch, a man and a gentleman. He belonged

The Hon. Archibald McLean.

to a race, most of whom have now passed away—the "giants" of Canada's early history. He was one of those honest, brave, enduring, steadfast men sent by Providence to lay the foundation of a country's greatness.

For the last few years Mr. McLean had been afflicted with partial paralysis, which, whilst it impaired his physical powers, left his intellect unclouded. For a long time however his iron frame resisted the attack of man's "last enemy," until having passed the span of life allotted to humanity, a general break up of the system took place, which, combined with his malady, at length carried him off. As he had lived, so did he die; calmly, courageously, and peacefully he went to stand before the Judge of all mankind, in the sure and certain hope of an eternity of joy and peace.

On the second day after his decease a meeting of the Benchers of the Law Society of Upper Canada took place in the Convocation Room at Osgoode Hall, for the purpose of taking such steps as were fitting under the circumstances. The Hon. John Ross was appointed chairman, when the following resolution was passed on the motion of Mr. John Crawford, seconded by Mr. Vankoughnet:

"That this meeting has heard with unfeigned regret of the death of the Honorable Archibald McLean, late President of the Court of Appeal, and as a mark of the high estimation in which he was held by the members of this society—be it resolved therefore, that a deputation do wait upon the family of the late President and request that the funeral do take place from Osgoode Hall and be conducted by this Society, and that the Hon. John Ross, and the mover and seconder compose such deputation."

A committee was also appointed to draft resolutions expressive of the feelings of respect and affection of the profession to the late President, and the mode of testifying the same.

On Saturday before the funeral a meeting of the Society was held to take into consideration the resolutions which had been accordingly prepared by the committee. The Hon. John Ross being again called to the chair, the following resolutions were passed:

Moved by Mr. Kenneth McKenzie, Q. C., seconded by Mr. Duggan, Q. C., and

"*Resolved*, That the members of the Law Society now assembled, desire to record their feeling of profound regret at the death of the Honorable Archibald McLean, President of the Court of Error and Appeal, and their sincere sympathy with his family in the great bereavement they have sustained. In paying this humble tribute to his virtues as a Judge, and his worth as a man, they are but giving feeble utterance to the sentiments of the whole profession. His great public services, extending over nearly half a century of our country's history, and embracing offices of the highest trust, will cause his loss to be widely mourned, but by no part of the community as much as by the members of the bar, with whom he was so long and so intimately associated. By the upright and conscientious discharge of his judicial duties, he gained the confidence and secured the esteem of his fellow citizens; by a happy union of courtesy with dignity, he inspired affection, as well as respect, in those who practised before him, and thus helped to foster the spirit of mutual regard and cordial coöperation between the bench and the bar, which distinguishes the administration of justice in Upper Canada."

Moved by Mr. Gamble, seconded by Mr. Brough, Q. C., and *resolved*,—

"2 That the members of the Law Society shall wear crape on their left arm for a month, as a testimonial of respect and affection for his memory."

Moved by Mr. Crawford, seconded by Mr. Alexander Cameron, and *resolved*,—

"3. That the treasurer be requested to transmit a copy of the first resolution to Mrs. McLean."

Moved by Mr. Roaf, Q. C., seconded by Mr. Crooks, Q. C., and *resolved*,—

"That the Treasurer do lay these resolutions before the Convocation, and on behalf of this meeting request their insertion in the minutes of the proceedings of the Society."

The corpse, attended by personal friends, was taken from his residence on Peter Street to Osgoode Hall, where the funeral was arranged under the direction of the Law Society. Shortly after two o'clock the burial service of the Presbyterian Church was performed by the Rev. Dr. Barclay, when the coffin was placed in the hearse and the procession moved off. The pall-bearers were: The Chancellor of Upper Canada, Ex-Chancellor Blake, Mr. Justice Morrison, Mr. Justice Adam Wilson, and Mr. Vice-Chancellor Mowat. The procession was composed of the Bishop of Toronto, such of the Judges of the Superior Court as their duties on circuit permitted to attend, the Hon. S. B. Harrison, and others holding

public positions, the Mayor and Corporation, the members of St. Andrew's Society, of which the deceased had been President for several years, and the members of the bar, in their robes, besides a large number of citizens generally. The funeral was a very large one, and would have been much larger but for the inclemency of the weather, and from the fact that a number of the profession were out of town on circuit, and many from the country were for the same reason prevented from attending.

The funeral cortege proceeded to the Necropolis, where, amidst the sorrow of all who knew him, were deposited the mortal remains of the Honorable Archibald McLean, the brave soldier, the upright judge, and the Christian gentleman.

JUDICIAL CHANGES.

The death of the late lamented President of the Court of Appeal, will probably cause some changes on the Bench. Rumour has it that the present Chief Justice of Upper Canada will take the vacant office and obtain that repose, partial though it be, which he so well merits. His place, it is also said, may then be filled by the Chancellor. Both these appointments would be unexceptionable, provided the right man be found for the then vacant Chancellorship, should its present able occupant care to leave the Equity Bench. A short time will however probably solve the question, as the event that has just taken place has long been expected, and those in authority have had plenty of time to make up their minds.

Should any vacancy occur in the present Bench of Judges, either of Law or Equity, the following gentlemen, amongst others, have been spoken of as likely men for the place: John W. Gwynne, Q.C., Thomas Galt, Q.C., Stephen Richards, Q.C., and S. B. Freeman, Q.C. It is very possible, however, that the learned Chief Justice may, at least for a year or two, still give the country the benefit of his services in his present position. We heartily hope he may.

ACTS OF LAST SESSION.

It seems probable that the Acts of last Session will not be printed and distributed for some little time yet, owing to the removal of the Government offices and their pharaphranalia, from Quebec to Ottawa. With this in view, we published in our last number several Acts of interest to our professional brethren, and to the public generally. We called attention amongst others, to the Act amending the law of property and trusts in Upper Canada, but had no space then to insert it. It has been suggested to us, to publish it in this impression, which, as it contains many important alterations in the law, and as many are anxious to see it, we now do.

An Act to amend the Law of Property and Trusts in Upper Canada.

[Assented to 18th September, 1865.]

Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

LEASES.

1.—Where any license to do any act which, without such license, would create a forfeiture, or give a right to re-enter, under a condition or power reserved in any lease heretofore granted, or to be hereafter granted, shall at any time after the passing of this Act, be given to any lessee or his assigns, every such license shall, unless otherwise expressed, extend only to the permission actually given, or to any specific breach of any proviso or covenant made or to be made, or to the actual assignment, under lease, or other matter thereby specifically authorized to be done, but not so as to prevent any proceeding for any subsequent breach (unless otherwise specified in such license); and all rights under covenants and powers of forfeiture and re-entry in the lease contained, shall remain in full force and virtue, and shall be available as against any subsequent breach of covenant or condition, assignment, underlease, or other matter not specifically authorized or made dispunishable by such license, in the same manner as if no such license had been given and the condition or right of re-entry shall be and remain in all respects as if such license had not been given, except in respect of the particular matter authorized to be done.

2.—Where in any lease heretofore granted or to be hereafter granted, there is or shall be a power or condition of re-entry on assigning or underletting or doing any other specified act without license, and a license at any time after the passing of this Act shall be given to one of several lessees or co-owners to assign or underlet his share or interest, or to do any other act prohibited to be done without license, or shall be given to any lessee or owner, or any one of several lessees or owners to assign or underlet part only of the property, or to do any other such act as aforesaid in respect of part only of such property such license shall not operate to destroy or extinguish the right of re-entry in case of any breach of the covenant or condition by the co-lessee or co-lessees

or owner or owners of the other shares or interests in the property, or by the lessee or owner of the rest of the property, (as the case may be), over or in respect of such shares or interests or remaining property, but such right of re entry shall remain in full force over or in respect of the shares or interests or property not the subject of such license.

3.—Where any actual waiver of the benefit of any covenant or condition in any lease, on the part of any lessor, or his heirs, executors, administrators, or assigns, shall be proved to have taken place after the passing of this Act in any one particular instance, such actual waiver shall not be assumed or deemed to extend to any instance or any breach of covenant or condition other than that to which such waiver shall specially relate, nor to be a general waiver of the benefit of any such covenant or condition, unless an intention to that effect shall appear.

4.—Where the reversion upon a lease is severed, and the rent or other reservation is legally apportioned, the assignee of each part of the reversion shall, in respect of the apportioned rent or other reservation allotted or belonging to him, have and be entitled to the benefit of all conditions or powers of re-entry for non-payment of the original rent or other reservation, in like manner as if such conditions or powers had been reserved to him as incident to his part of the reservation in respect of the apportioned rent or other reservation allotted or belonging to him.

POLICIES OF INSURANCE.

5.—The Court of Chancery shall have power to relieve against a forfeiture for breach of a covenant or condition to insure against loss or damage by fire, where no loss or damage by fire has happened, and the breach has, in the opinion of the Court, been committed through accident or mistake, or otherwise without fraud or gross negligence, and there is an insurance on foot at the time of the application to the Court, in conformity with the covenant to insure, upon such terms as to the Court may seem fit.

6.—The Court, where relief shall be granted, shall direct a record of such relief having been granted to be made by endorsement on the lease or otherwise.

7.—The person entitled to the benefit of a covenant on the part of a lessee or mortgagor to insure against loss or damage by fire, shall, on loss or damage by fire happening, have the same advantage from any then subsisting insurance relative to the building or other property covenanted to be insured, effected by the lessee or mortgagor in respect of his interest under the lease or in the property, or by any person claiming under him, but not effected in conformity with the covenant, as he would have from an insurance effected in conformity with the covenant.

8.—Where on the *bona fide* purchase after the passing of this Act, of a leasehold interest under a lease containing a covenant on the part of the lessee to insure against loss or damage by fire, the purchaser is furnished with the written receipt of the person entitled to receive the rent, or his agent, for the last payment of the rent accrued due before the completion of the purchase, and there is subsisting at the time of the completion of the purchase, an insurance in conformity with the covenant, the purchaser or any person claiming under him, shall not be subject to any liability by way of forfeiture or damage or otherwise, in respect of any breach of the covenant committed at any time before the completion of the purchase, of which the purchaser had not notice before the completion of the purcease; but this provision is not to take away any remedy which the lessor or his legal representatives may have against the lessee or his legal representatives for breach of covenant.

9.—The preceding provisions shall be applicable to leases for a term of years absolute, or determinable on a life or lives, or otherwise, and also to a lease for the life of the lessee or the life or lives of any other person or persons.

RENT CHARGES.

10.—The release from a rent-charge, of part of the hereditaments charged therewith shall not extinguish the whole rent-charge, but shall operate only to bar the right to recover any part of the rent-charge out of the hereditaments released, without prejudice, nevertheless, to the rights of all persons interested in the hereditaments remaining unreleased, and not concurring in or confirming the releases.

POWERS.

11.—A deed hereafter executed in the presence of, and attested by two or more witnesses in the manner in which deeds are ordinarily executed and attested, shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by deed or by any instrument in writing, not testamentary, notwithstanding it shall have been especially required that a deed or instrument in writing, made in exercise of such power, should be executed or attested with some additional or other form of execution or attestation or solemnity; Provided always, that this provision shall not operate to defeat any direction in the instrument creating the power, that the consent of any particular person shall be necessary to a valid execution, or that any act shall be performed in order to give validity to any appointment, having no relation to the mode of executing and attesting the instrument; and nothing herein contained shall prevent the donor of a power from executing it conformably to the power, by writing or otherwise, than by an instrument executed and attested as an ordinary deed, and to any such execution of a power, this provision shall not extend.

12.—Where, under a power of sale, a *bona fide* sale shall be made of an estate, with the timber thereon, or any other articles attached thereto, and the tenant for life, or any other party to the transaction shall, by mistake, be allowed to receive for his own benefit a portion of the purchase money or value of the timber or other articles, it shall be lawful for the Court of Chancery, upon any bill or claim or application in a summary way, as the case may require or permit, to declare that upon payment by the purchaser or the claimant under him, of the full value of the timber and articles at the time of sale, with such interest thereon as the Court shall direct, and the settlement of the said principal moneys and interest under the direction of the Court, upon such parties, as in the opinion of the Court shall be entitled thereto, the said sale ought to be established; and upon such payment and settlement being made accordingly, the Court may declare that the said sale is valid, and thereupon the legal estate shall vest and go in like manner as if the power had been duly executed, and the costs of the said application, as between solicitor and client, shall be paid by the purchaser or the claimant under him.

13.—Where, by any will which shall come into operation after the passing of this Act, the testator shall have charged his real estate or any specific portion thereof, with the payment of his debts, or with the payment of any legacy or other specific sum of money, and shall have devised the estate so charged to any trustee or trustees for the whole of his estate or interest therein, and shall not have made any express provision for the raising of such debt, legacy, or sum of money out of such estate, it shall be lawful for the said devisee or devisees in trust, notwithstanding any trusts actually declared by the testator, to raise such debt, legacy or money as aforesaid by a sale and absolute disposition, by public auction or private contract, of the said hereditaments or any part thereof, or by a mortgage of the same, or partly in one mode and partly in the other, and any deed or deeds of mortgage so executed, may reserve such rate of interest, and fix such period or periods of repayment as the person or persons executing the same shall think proper.

14.—The powers conferred by the last section shall extend to all and every person or persons in whom the estate devised shall for the time being be vested by survivorship, descent or devise, or to any person or persons who may be appointed under any power in the will, or by the Court of Chancery, to succeed to the trusteeship vested in such devisee or devisees in trust as aforesaid.

15.—If any testator who shall have created such a charge as is described in the thirteenth section, shall not have devised the hereditaments charged as aforesaid, in such terms as that his whole estate and interest therein shall become vested in any trustee or trustees, the executor or executors for the time being, named in the will, if any, shall have the same or the like power of raising the said moneys as is hereinbefore vested in the devisee or devisees in trust of the said hereditaments, and such power shall from time to time devolve to and become vested in the person or persons (if any) in whom the executorship shall, for the time being, be vested; but any sale or mortgage under this Act shall operate only on the estate and interest, whether legal or equitable, of the testator, and shall not render it unnecessary to get in any outstanding subsisting legal estate.

16.—Purchasers or mortgagees shall not be bound to inquire whether the powers conferred by sections thirteen, fourteen and fifteen of this Act, or either of them, shall have been duly and correctly exercised by the person or persons acting in virtue thereof.

17.—The provisions contained in sections thirteen, fourteen, fifteen and sixteen, shall not in any way prejudice or affect any sale or mortgage already made or hereafter to be made, under or in pursuance of any will coming into operation before the passing of this Act, but the validity of any such sale or mortgage shall be ascertained and determined in all respects as if this Act had not passed; and the said several sections shall not extend to a devise to any person or persons in fee or in tail, or for the testator's whole estate and interest charged with debts or legacies; nor shall they affect the power of any such devisee or devisees to sell or mortgage as he or they may by law now do.

PROVISIONS FOR CASES OF FUTURE AND CONTINGENT USES.

18.—Where by any instrument any hereditaments have been or shall be limited to uses, all uses thereunder, whether expressed or implied by law, and whether immediate or future, or contingent or executory, or to be declared under any power therein contained, shall take effect when and as they arise by force of and by relation to the estate and seizin originally vested in the person seized to the uses, and the continued existence in him or elsewhere of any seizin to uses or *scintilla juris*, shall not be deemed necessary for the support of, or to give effect to future or contingent or executory uses; nor shall any such seizin to uses or *scintilla juris* be deemed to be suspended, or to remain or to subsist in him or elsewhere.

ASSIGNMENT OF PERSONALTY.

19.—Any person shall have power to assign personal property, now by law assignable, including chattels real, directly to himself and another person or other persons or corporation, by the like means as he might assign the same to another.

FRAUDS ON SALES AND MORTGAGES.

20.—Any seller or mortgagor of land, or of any chattels, real or personal, or choses in ac-

tion, conveyed or assigned to a purchaser or mortgagee, or the solicitor or agent of any such seller or mortgagor, who shall, after the passing of this Act, conceal any settlement, deed, will or other instrument material to the title, or any incumbrance, from the purchaser or mortgagee, or falsify any pedigree upon which the title does or may depend, in order to induce him to accept the title offered or produced to him, with intent in any of such cases to defraud, shall be guilty of a misdemeanor, and being found guilty, shall be liable, at the discretion of the court, to suffer such punishment, by fine or by imprisonment for any time not exceeding two years, with or without hard labor, or by both, as the court shall award, and shall also be liable to an action for damages at the suit of the purchaser or mortgagee, or those claiming under the purchaser or mortgagee, for any loss sustained by them or either or any of them, in consequence of the settlement, deed, will or other instrument or incumbrance so concealed, or of any claim made by any person under such pedigree, but whose right was concealed by the falsification of such pedigree; and in estimating such damages where the estate shall be recovered from such purchaser or mortgagee, or from those claiming under the purchaser or mortgagee, regard shall be had to any expenditure by them, or either or any of them, in improvements on the land; but no prosecution for any offence included in this section, against any seller or mortgagor, or any solicitor or agent, shall be commenced without the sanction of Her Majesty's Attorney General for Upper Canada, or in case that office be vacant, of Her Majesty's Solicitor General for Upper Canada; and no such sanction shall be given without such previous notice of the application for leave to prosecute, to the person intended to be prosecuted, as the Attorney General or the Solicitor General (as the case may be) shall direct; and no prosecution for concealment shall be sustained unless a written demand of an abstract of title was served by or on behalf of the purchaser or mortgagee before the completion of the purchase or mortgage.

INTERPRETATION CLAUSE.

21.—In the construction of the previous provisions in this Act, the term "land" shall be taken to include all tenements and hereditaments, and any part or share of or estate or interest in any tenements or hereditaments, of what tenure or kind soever; and

The term "mortgage" shall be taken to include every instrument by virtue whereof land is in any manner conveyed, assigned, pledged or charged as security for the repayment of money or money's worth lent, and to be reconveyed, re-assigned or re-leased on satisfaction of the debt; and

The term "mortgagor" shall be taken to include every person by whom any such conveyance, assignment, pledge or charge as aforesaid shall be made; and

The term "mortgagee" shall be taken to include every person to whom or in whose favour any such conveyance, assignment, pledge or charge as aforesaid is made or transferred.

POWERS OF ATTORNEY.

22.—A power of attorney executed by a married woman for the sale or conveyance of any real estate of or to which she is seized or entitled in Upper Canada, or authorizing the attorney to execute a deed barring or releasing her dower in any lands or hereditaments in Upper Canada, shall be valid both at law and in equity; provided, (1) that she be examined and a certificate indorsed on the power of attorney, as required in regard to deeds and conveyances by a married woman under the Consolidated Statutes for Upper Canada respectively intituled, "An Act respecting Dower," and "An Act respecting the conveyance of real estate by married women;" and provided (2) that her husband is a party to and executes such power of attorney or the deed or other instrument executed in pursuance thereof, where the power is for the sale or conveyance of her real estate.

23.—In case a power of attorney for the sale or management of real or personal estate, or for any other purpose, provides that the same may be exercised in the name and on the behalf of the heirs or devisees, executors or administrators of the person executing the same, or provides by any form of words, that the same shall not be revoked by the death of the person executing the same, such provision shall be valid and effectual to all intents and purposes both at law and in equity, according to the tenor and effect thereof, and subject to such conditions and restrictions, if any, as may be therein contained.

24.—Independently of any such special provision in a power of attorney, every payment made and every act done under and in pursuance of any power of attorney, or any power, whether in writing or verbal, and whether expressly or impliedly given, or an agency expressly or impliedly created after the death of such person who gave such power or created such agency, or after he has done some act to avoid the power or agency, shall, notwithstanding such death or act last aforesaid, be valid as respects every person party to such payment or act, to whom the fact of the death, or of the doing of such act as last aforesaid was not known at the time of such payment or act *boná fide* done as aforesaid, and as respects all claiming under such last mentioned person.

DISTRIBUTION OF ASSETS.

25.—Where an executor or administrator, liable as such to the rents, covenants or agreements contained in any lease or agreement for a lease granted or assigned to the testator or

intestate whose estate is being administered, shall have satisfied all such liabilities under the said lease or agreement for a lease, as may have accrued due and been claimed up to the time of the assignment hereinafter mentioned, and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the lessee to be laid out on the property demised, or agreed to be demised, although the period for laying out the same may not have arrived, and shall have assigned the lease or agreement for a lease to a purchaser thereof, he shall be at liberty to distribute the residuary personal estate of the deceased to and amongst the parties entitled thereto respectively without appropriating any part, or any further part (as the case may be) of the personal estate of the deceased, to meet any future liability under the said lease or agreement for a lease; and the executor or administrator so distributing the residuary estate shall not, after having assigned the said lease or agreement for a lease, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said lease or agreement for a lease; but nothing herein contained shall prejudice the right of the lessor or those claiming under him, to follow the assets of the deceased into the hands of the person or persons to or amongst whom the said assets may have been distributed.

26.—In like manner, where an executor or administrator, liable as such, to the rent, covenants or agreements contained in any conveyance on chief rent or rent-charge (whether any such rent be by limitation of use, grant, or reservation), or agreement for such conveyance, granted or assigned to or made and entered into with the testator or intestate whose estate is being administered, shall have satisfied all such liabilities under the said conveyance, or agreement for a conveyance, as may have accrued due and been claimed up to the time of the conveyance hereinafter mentioned, and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the grantee to be laid out on the property conveyed, or agreed to be conveyed, although the period for laying out the same may not have arrived, and shall have conveyed such property, or assigned the said agreement for such conveyance as aforesaid, to a purchaser thereof, he shall be at liberty to distribute the residuary personal estate of the deceased to and amongst the parties entitled thereto respectively, without appropriating any part or any further part (as the case may be), of the personal estate of the deceased to meet any future liability under the said conveyance or agreement for a conveyance; and the executor or administrator so distributing the residuary estate shall not, after having made or executed such conveyance or assignment, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said conveyance or agreement for conveyance; but nothing herein contained shall prejudice the right of the grantor, or those claiming under him, to follow the assets of the deceased into the hands of the person or persons to or among whom the said assets may have been distributed.

27.—Where an executor or administrator shall have given such or the like notices as, in the opinion of the Court in which such executor or administrator is sought to be charged, would have been given by the Court of Chancery in an administration suit, for creditors and others to send in to the executor or administrator their claims against the estate of the testator or intestate, such executor or administrator shall, at the expiration of the time named in the said notices, or the last of the said notices, for sending in such claims, be at liberty to distribute the assets of the testator or intestate, or any part thereof, amongst the parties entitled thereto, having regard to the claims of which such executor or administrator has then notice, and shall not be liable for the assets or any part thereof so distributed to any person of whose claim such executor or administrator shall not have had notice of the time of distribution of the said assets, or a part thereof, as the case may be; but nothing in the present Act contained shall prejudice the right of any creditor or claimant to follow the assets, or any part thereof, into the hands of the person or persons who may have received the same respectively.

28.—On the administration of the estate of any person dying after the passing of this Act, in case of a deficiency of assets,—debts due to the Crown, and to the executor or administrator of the deceased person, and debts due to others, including therein respectively debts by judgment, decree or order, and other debts of record, debts by specialty, simple contract debts, and such claims for damages as by statute are payable in like order of administration as simple contract debts,—shall be paid *pari passu* and without any preference or priority of debts of one rank or nature over those of another. But nothing herein contained shall prejudice any lien existing during the lifetime of the debtor on any of his real or personal estate.

29.—In case the executor or administrator gives notice in writing to any creditor or other person of whose claims against the estate such executor or administrator has notice, or to the attorney or agent of such creditor or other person, that the said executor or administrator rejects or disputes such claim, it shall be the duty of the claimant to commence his suit in respect of such claim within six months after such written notice was given, in case the debt, or some part thereof, was due at the time of the notice, or within six months from the time the debt, or some part thereof, falls

due, if no part thereof was due at the time of the said notice; and in default the said suit shall be for ever barred.

LIMITATION IN INTESTACY.

30.—After the first day of January, one thousand eight hundred and sixty-six, no suit or other proceeding shall be brought to recover the personal estate, or any share of the personal estate of any person dying intestate, possessed by the legal personal representative of such intestate, but within the time within which the same might be brought to recover a legacy, that is to say, within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of such estate or share, or some interest in respect thereof, shall have been accounted for or paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person accountable for the same, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit shall be brought but within twenty years after such accounting, payment or acknowledgment, or the last of such accountings, payments or acknowledgments, if more than one was made or given.

SUMMARY APPLICATIONS TO CHANCERY.

31.—Any trustee, executor or administrator shall be at liberty, without the institution of a suit, to apply by petition to any Judge of the Court of Chancery, or by summons upon a written statement to any such Judge in Chambers, for the opinion, advice, or direction of such Judge on any question respecting the management or administration of the trust property or the assets of any testator or intestate; such petition or statement to be accompanied by a certificate of counsel, to the effect that in his judgment the case stated is a proper one for the opinion, advice, or direction of the Judge under this Act, and such application to be served upon, or the hearing thereof to be attended by, all persons interested in such application or such of them as the said Judge shall think expedient; and the trustee, executor or administrator acting upon the opinion, advice or direction given by the said Judge, shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee, executor or administrator, in the subject matter of the said application; Provided, nevertheless, that this Act shall not extend to indemnify any trustee, executor or administrator in respect of any act done in accordance with such opinion, advice or direction as aforesaid, if such trustee, executor or administrator shall have been guilty of any fraud or wilful concealment or misrepresentation in obtaining such opinion, advice, or direction; and the costs of such application as aforesaid shall be in the discretion of the Judge to whom the said application shall be made.

LIABILITY OF TRUSTEES.

32.—Every deed, will, or other document creating a trust, either expressly or by implication, shall, without prejudice to the clauses actually contained therein, be deemed to contain a clause in the words or to the effect following, that is to say:—"That the trustees "or trustee, for the time being, of the said "deed, will, or other instrument, shall be re-"spectively chargeable only for such moneys, "stocks, funds and securities as they shall "respectively actually receive, notwithstand-"ing their respectively signing any receipt for "*the sake of conformity, and shall be answer-*"able and accountable only for their own acts, "receipts, neglects, or defaults, and not for "those of each other, nor for any banker, "broker, or other person with whom any "trust moneys or securities may be deposited; "nor for the insufficiency or deficiency of any "stocks, funds, or securities; nor for any "other loss, unless the same shall happen "through their own wilful default respective-"ly; and also that it shall be lawful for the "trustees or trustee for the time being, of the "said deed, will, or other instrument, to reim-"burse themselves or himself, or pay or dis-"charge out of the trust premises all expenses "incurred in or about the execution of the "trusts or powers of the said deed, will or "other instrument."

33.—When any person shall, after the thirty-first of December, one thousand eight hundred and sixty-five, die seized of or entitled to any estate or interest in any land or other hereditaments, which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not, by his will or deed, or other document have signified any contrary or other intention, the heir or devisee to whom such land or hereditaments shall descend or be devised, shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate, or any other real estate of such person, but the land or *hereditaments* so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof; Provided always, that nothing herein contained shall affect or diminish any right of the mortgagee on such lands or hereditements to obtain full payment or satisfaction of his mortgage debts, either out of the personal estate of the person so dying as aforesaid or otherwise; Provided also, that nothing herein contained shall affect the rights of any person claiming under or by virtue of any will, deed, or document already made or to be made before the first day of January, one thousand eight hundred and sixty-six.

SELECTIONS.

THE IRISH BENCH.

The visitor going the round of "the Hall" first enters the Court of Chancery. There he beholds the Lord Chancellor, Maziere Brady, in his place, hale and vigorous, strongly built, and looking earnest and determined. He may be observed daily during Term walking home with his umbrella under his arm, evidently caring more about his health than his dignity. Yet it is forty-six years since he was called to the bar. He has filled his present office since 1856, having previously been Chief Baron of the Exchequer from 1840, so that it is twenty-five years since he was elevated to the bench.

Associated with the Chancellor in the Court of Appeal is the Lord Justice Blackburne, who was called to the bar in 1805, and has been consequently sixty years in the profession, of which period nineteen years have been spent on the bench. He was Chief Justice of the Court of Queen's Bench from Jan., 1846, to March, 1852, and was appointed Justice of Appeal—a new office—in 1856, having been Lord Chancellor, about nine months in 1852. He had also been Master of the Rolls from 1842 to 1846, when he was succeeded by the present Master, the Right Hon. T. B. C. Smith. This gentleman was called to the bar in 1819, forty-six years ago.

We next enter the Court of Queen's Bench. Justices O'Brien, Hayes, and J. D. Fitzgerald are all comparatively young. In their midst sits their chief, one of the most remarkable instances on record of judicial longevity. The Lord Chief Justice of the Queen's Bench is said to be now in his ninetieth year, but he has yet given no signs of his intention to retire. It is affirmed by his numerous friends and admirers that his perception is still quick and keen, and his judgment clear. This is admitted to be wonderfully true even by those who are not his friends; but they say, it is true, only for two or three hours after his coming into court in the morning, and that in the afternoon his intellectual powers visibly fail, and he does not seem so capable of grasping a subject or of following a chain of argument, and this is said to be a matter of frequent and anxious observation by barristers who practise in his court He was called to the bar in 1797, and has been incessantly engaged in his profession for the long period of sixty-eight years. He has occupied his present post since 1852, having previously been a puisne judge.

The next judge in the order of seniority is the Chief Baron Pigot, who was called in 1826, and has been on the bench since 1846. He has been thirty-nine years working at his profession, and he may be said to be the most painstaking of all the judges. The only fault with him is that he takes too much pains with minor matters, and too often wears out the patience of jurors and suitors, entailing upon the latter heavy extra expenses in the shape of "refreshers." Like all our judges, he is strictly upright and impartial, but it seems to be generally felt that his scrupulosity is excessive, almost morbid, and that it is sometimes a heinous inconvenience to the public. Associated with him are Barons Fitzgerald, Hughes, and Deasy, all able and efficient judges.

Chief Justice Monahan, is the youngest of the Chiefs. He was called to the bar in 1828, the year before Emancipation, and has been Chief Justice since 1850. He was Attorney-General during the State trials of 1848, when he distinguished himself by his zeal and ability in conducting the prosecutions of the political prisoners. No one has complained of any failure on his part, It is in his court the vacancy has been left by the retirement of Mr. Justice Ball, The other judges in it are Mr. Justice Keogh and Mr. Justice Christian, both highly esteemed by the public.

All these gentlemen acted prudently, and went on the bench when they had an opportunity. The name of Judge Keogh suggests another name—the most eminent of our equity lawyers—Mr. Brewster, who is still toiling at the bar, though he was Attorney-General under Lord Aberdeen's Government, Mr. Keogh being Solicitor-General. When that administration was broken up, and the Peel section retired from office, Mr. Brewster, who was one of the party, felt that he was bound in honour to retire with them. Mr. Keogh did not see matters exactly in the same light, and so he remained in office under the Whigs, and became a very young judge. It has been generally regretted that the exigencies of party, and the legitimate claims of others, have so long kept Mr. Brewster from receiving the just rewards of his pre-eminent professional merit. He was called to the bar so long ago as 1819, and for years his energies have been taxed to the utmost by the accumulating business that presses upon him.—*Law Times.*

MEDICAL EVIDENCE.

The assizes now drawing to a close have been unusually fertile in cases where medical evidence has been required, and in many there has been a failure, or partial failure of justice from the causes to which we are about to refer. We do not wish, however, to throw the slightest discredit by our observations on the medical profession. As a rule doctors are able and humane men, and discharge difficult and painful duties with singular discretion and often with much self-abnegation. Still they differ, of course, in mental power, and if a distinction is to be drawn between them, we should say that most of the really first-rate men among their ranks are to be found in the metropolis and one or two other great cities. The hard life and poor pay of the country practitioner are not attractive. The "blue ribbon" of the science of medicine is not

likely to be won in agricultural districts. Hence it often happens that a medical man in a county town has neither the brains nor the knowledge to be a competent scientific witness. Very frequently, especially in cases of murder and manslaughter, he is called on to speak to facts and circumstances quite as new to him as to the counsel who examine and cross-examine him. Such a state of things, we need hardly say, is prejudicial to the proper administration of justice.

Take, for example, a case of infanticide. The body of a new born child is found, and the nearest surgeon is immediately sent for to examine it. It matters not that he has never performed a similar duty before. He must do so now, and from whatever conclusion his inexperience will allow. Probably, if he is a sensible man, he will be able to make out a tolerably straightforward account of his *post mortem* examination, to be laid before the counsel for the prosecution. We will suppose, for the sake of an illustration, that he forms an opinion that the infant was born alive, and that it met its death by drowning. These two points he will insist on in his examination in chief, and so far all will go well. But it is almost impossible that he can come unscathed out of the crucible of cross-examination. The counsel for the prisoner will probable begin by asking "whether he has had much experience in these cases," and at the answer in the negative, the jury may be observed interchanging significant glances. Then Taylor's "Medical Jurisprudence," or some work of equal reputation will be produced, and long extracts read to the witness. After each extract he will be asked whether he agrees or disagrees with the writer. Of course he can only agree. He no more dare differ from Dr. Taylor on Dr. Taylor's own subject than a humble junior, upon a point of practice, from the Attorney-General or Mr. Lush. The extracts, if cautiously selected, will probably go to show that death *might* have happened from some other cause than drowning, such as accidental suffocation, or else that the child never had an independent existence. The unpractised surgeon, whose original opinion was very likely correct, is soon floundering hopelessly out of his depth in a sea of physiological difficulties. He cannot well retract his evidence in chief, and he is afraid to question the worth of the suggestions put to him by his cross-examiner. The result is that he leaves the witness-box with the value of his testimony seriously injured, if not entirely destroyed.

We put it confidently to those of our readers who have had any experience in circuit courts, if we have at all exaggerated the scene which over and over again takes place. The fault lies in our present system of calling in doctors in criminal cases at hap hazard, and not in the ignorance of this or that particular doctor. A man may be a very fair physician, yet wholly incompetent to conduct the simplest *post mortem* examination. The only remedy is to be found in fresh legislation, and we trust that when the question of child-murder and other kindred crimes is brought before Parliament (as, after the horrid revelations the other day at Exeter, they surely must be), some method of getting reliable medical evidence may be devised. A plan has been suggested which we submit to the impartial consideration of our readers. It is that in every county in England there should be a sufficient staff of competent surgeons appointed to assist the coroner in his duties. Very few, or even one, in each county of ordinary size, would be sufficient. The telegraph could summon the "surgeon to the coroner," to the place where his presence was needed, with the loss of scarcely an hour, and the small delay would be well repaid by the trustworthy report such a man would be sure to give. It would be the fruit of years of labour instead of the hesitating result of a few hours "cram" at a text book, and would bear a searching investigation at the hands of the ablest counsel at the bar, without losing any of its value. Indeed, the practice of trying to pose the surgeon, which, in cases where his evidence is essential, is now the almost invariable resource of an experienced defender of prisoners, would soon die out, and from its extinction both the medical and legal professions, as well as the public, would reap a substantial benefit. Neither counsel nor witness cut a very dignified figure in the contests we have described.

Many objections, no doubt, can be fairly raised to the proposed scheme, which, we may observe, is already in operation on the other side of the Tweed. We do not intend, at present, to do more than present it to our readers. It is certain that the futility of medical evidence in criminal cases "has been increasing, is increasing, and ought to be diminished;" and our purpose in writing these remarks is to draw attention to that indisputable fact. The subject is one of great importance, and has not, as yet, received the attention which it deserves from law reformers and legislators.—*Solicitors' Journal.*

LIBERAL LAW PRACTICE.

The undersigned, after having vainly endeavored, for some years, to practice law for his own convenience and profit, has, in view of the expected brisk season next fall, concluded to pursue his profession for the convenience and profit of other people.

Experience has shown that in this city, especially among wealthy and influential citizens, many impediments have checked their litigious propensities. It is a fact, the notoriety of which is indisputable, that with all the vaunted ability and courtesy of our Bar, the most influential client has never been able to secure professional counsel or assistance for *nothing*. This certainly is an error in practice, which

saps the very foundations of public convenience.

Whether in the shape of the sugar-coated *retainer*, or the *vi et armis* fee, the evil scowls like a horrid spectre at every victim whom fraud forces into a lawyer's office. Poverty cannot beguile it, friendship cannot escape it, flattery cannot soften it, impudence cannot terrify it: there it stands, the inexorable tyrant of a liberal hearted community.

In the various transactions of every day business, all are aware that exigencies will arise, in which a few words of written or spoken legal advice, may, in preventing or correcting serious financial losses, be of incalculable service. Yet with full cognizance of such facts, what, in such exigencies, has been the practice of our Bar. Has it comported with the duty of a generous, dignified, and public-spirited profession? Has there ever been a time when the wealthiest merchant, the dearest friend, the most distant relation could solicit legal advice or service, even in the most urgent necessity, without a *fee*, the magnitude of which seemed only limited by the patience of the victim?

Nor is this all, clients must advance costs, must deposit *retainers*, and not unfrequently, enter security for the attorney's expected charges. Papers, of vast account to their owners, have more than once been withheld as hostages for fees, and commissions are actually deducted before the proceeds of collections are remitted.

To correct these heavy wrongs, to redeem, if possible, the selfish and ungenerous character of his profession, the subscriber, having every reason to believe that it will be acceptable to clients, proposes to establish, for the coming fall, a *gratuitous* system of legal practice.

In making this announcement, he hopes he may be permitted to say in all humility, that, to him, such a system is not *entirely* new. During his professional career, he has had abundant opportunity to see more or less, (especially more) of its practical workings. After such extended observation, he feels constrained to admit, somewhat against his private choice, it is true, that in this progressive age and city, he knows not the reform, which must more perfectly accord with the popular taste, or enlist a larger measure of the popular patronage, than the *gratuitous practice of the law*.

Far be it from the subscriber's aim, to blot a line from the epitaphs of the honored dead, or to wrest a laurel from the brows of the distinguished living members of the Philadelphia Bar. They have pursued, and pursue their professions with the sordid intuitions of a ruder era. Now, to the subscriber, humble though he may be, it may remain to elevate a loftier standard of professional ethics, to plant in the rich soil of legal intellect, a germ of professional philanthropy, which nurtured by genial public patronage, may bloom and fructify without money and without price, for the healing of the fortunes of clients not a few.

With approaching fall, the subscriber will secure at least two commodious and communicating offices, the locality of which will be in every way attractive and accessible to the business gentlemen of Philadelphia. No pains or expense will be spared to have said offices so lighted, heated, and ventilated, that they will at once be marts of business or halls of pleasure, as clients choose to regard them.

In the selection of furniture the subscriber will be greatly influenced by what he believes to be peculiar ideas of comfort on the part of most people, chairs will be especially adapted to tilting back, and in no case will a client be expected to use less than *two* at any single sitting, while the carpeting will be of rare pattern and texture, under no circumstances will the patrons of the offices be annoyed by the antiquated presence of mats and spittoons, when in connection with this, it is remembered that there will be no tyrannical restrictions as to the use of tobacco, the public must at once appreciate the rare facilities here offered for business enjoyment. All tables and book-cases will be of exquisite design, and admirably suited to clients who invariably select a graceful and luxurious posture. It is by no means unlikely that capacious lounges will be interspersed for the benefit of those who, having no particular business, often need a little rest in business hours from the natural *ennui* of the preceding night's entertainment. After adequate trial, if his business prove not *too* expensive, the subscriber may occasionally supply some of those creature comforts, which clients not unfrequently expect.

Notwithstanding these inducements, the subscriber desires it to be distinctly understood, that no avarice or greed of gain shall ever mar his business recreations. He takes pleasure in advising his prospective patrons (if any such he may expect), that all the ancient dodges for getting gratuitous advice or service, will, under this new and liberal regime, be totally unnecessary. *In no case will a fee be received.* Advice, at all times and upon all matters, will be freely given, and trivial matters brought to his extended notice at meal-times will receive special attention. He will invariably advance *costs*, and in some cases, allow six per cent. on the same, to regular clients.

Parties desiring advice will never be limited in their explanations to the matter under consideration, but any digression, whether as to family history or personal misfortune, "no matter of how long standing," or how irrelevant, will not only be listened to and excused, but will be absolutely encouraged (this feature must command the attention of old ladies).

Whenever parties entertain a remote idea of prosecuting a claim, they will be patiently advised, and in event of their subsequently abandoning the case, a liberal commission will be paid for their intention.

UPPER CANADA REPORTS.

QUEEN'S BENCH.

Reported by C. ROBINSON, Esq., Q.C., *Reporter to the Court.*)

CRAIG v. THE GREAT WESTERN RAILWAY CO.

R. R. ticket "good for twenty days"—Right to stop at intermediate stations.

The plaintiff purchased from defendants a ticket from Buffalo to Detroit, marked "good only for twenty days from date." He took defendants' afternoon accommodation train at the Suspension Bridge, which ran only as far as London, but he left it at St. Catharines, an intermediate station, and defendants refused to let him go on from thence by the night express.

Held, that they were justified in so doing: that defendants' contract bound them to convey the plaintiff in one continuous journey from the Suspension Bridge to Detroit, giving him the option of taking any passenger train from the point of commencement, and if that train did not go the whole distance, to be conveyed the residue in some other train,—the whole journey to be completed within twenty days: but that it did not give a right to stop at any or every intermediate station.

Quære, whether if he had gone on to London by the accommodation train, he would have been bound to take the next through train from thence.

[Q. B., T. T., 1865.]

Appeal from the County Court of Brant.

Declaration, that the defendants were and are common carriers of passengers from the City of Buffalo, in the State of New York, one of the United States of America, to the City of Detroit, in the State of Michigan, one of the said United States, through the Province of Canada: and as such carriers the defendants, for reward to them in that behalf paid by the plaintiff, received and took the plaintiff at Buffalo aforesaid as a passenger, to be by the defendants carried on certain railway trains and cars from Buffalo aforesaid to Detroit aforesaid; and although the defendants did carry the plaintiff a part of the distance from Buffalo aforesaid to Detroit aforesaid, to wit to the St. Catharines station on their railway, yet the defendants refused to carry the plaintiff the rest of the distance from St. Catharines aforesaid to Detroit aforesaid, or any part thereof; and violently and with force and arms, and without any lawful cause for so doing, prevented the plaintiff at St. Catharines aforesaid from further riding on their said cars, and from getting on or remaining on said cars, or further proceeding on their said cars to or towards Detroit aforesaid,—by means whereof the plaintiff was forced to return to the said City of Buffalo, and by means of other modes of transportation procure and pay again for his passage, and lost much time, and was put to great expense and inconvenience.

Pleas 1. Not guilty, by statute, 16 Vic. ch. 99, secs. 10 and 12, Public Act.

2. That the plaintiff was not received by the defendants as a passenger, to be carried by them for reward, as in the declaration alleged.

At the trial in the court below it appeared that the plaintiff purchased from the agent of the defendants in Buffalo, in the State of New York, a ticket as follows:

"New York Central Railroad Co.
Buffalo to Detroit.

Good for one first class passage only, upon presentation of this ticket with checks attached, and good only for twenty days from date. Not good unless dated and endorsed by the receiver."

"Via N. Y. C. and Gt. W. Railroads.

Conductors are required to detach from this ticket and take up the checks over their respective lines. The conductor upon the road at the end of the route will take up the ticket as well as the check over his road. If the checks belonging to this ticket are detached, it will not be received for passage."

(Signed) EDWARD F FOLLER,
Chief Clerk.

1462.	"1462. Issued by N. Y. Central R. R. Co Great Western Railway. Suspension Bridge to Detroit. First Class. 4 This check is forfeited if detached." 1	Detroit.

It was surmised, and the fact most probably was, that there had been another check or coupon attached to this ticket, authorizing the holder to pass from Buffalo to the Suspension Bridge by the N. Y. Central Railroad. It was not shewn when the ticket was sold, and it might have been sold within twenty days before the committing of the grievance complained of: on the other hand, it might have been sold in May, 1864. It was not dated and indorsed, so far as the evidence shewed. The agent swore that he was sure this ticket, numbered 1462, was not sold by him in July or August, 1864.

It was proved that about the 24th of August, 1864, the plaintiff came to St Catharines by the afternoon accommodation train of the defendants This train was due at St. Catharines at 4.05 p.m., and it ran only as far as London St. Catharines is the second station from the Suspension Bridge. The plaintiff left the train there and went into the town. It was stated that a passenger for

Detroit by the accommodation train would be delayed six or seven hours at London, and must take the night express to go to Detroit. He would arrive at Detroit at the same time as if he had waited at the Suspension Bridge and entered the night express there. The plaintiff went that night back to the station at St. Catharines, apparently in order to go on to Detroit by the next train. On his arrival at St. Catharines he shewed his ticket (like the one set out) to the defendants' agent at St. Catharines, and asked if that ticket was good by that train; the agent said, No. It appeared also, that the plaintiff was told by the defendants' ticket examiners at St. Catharines that he could not enter the night express train on that ticket at St. Catharines, as it was a local station, and the agent said that if after that notice the plaintiff had offered to get upon that train he would have been forcibly prevented. Evidence was given that it was cheaper to take a ticket like the one produced, for a passage from Buffalo to Detroit, than to take a ticket first to the Suspension Bridge, next from thence to St. Catharines, and lastly from St. Catharines to Detroit. The plaintiff, being thus prevented from going to Detroit, returned to Buffalo.

This was the plaintiff's case, to which it was objected, *first*, that there was no proof that the plaintiff was ejected from the cars or forcibly prevented from riding thereon; *second*, that the ticket was marked good for only twenty days, and the evidence shewed that it was bought in May; *third*, that the ticket did not authorize any stoppage over at St. Catharines.

It was agreed the case should go to the jury, and if they found for the plaintiff that the defendants might move in term to enter a nonsuit.

The defendants then gave evidence, from which it appeared that the plaintiff came in an accommodation train of the defendants from the Suspension Bridge on the ticket produced; that the conductor of this accommodation train recognized the right of the plaintiff to travel by that train, and punched the ticket; that the plaintiff might have gone on by that train to London, beyond which station it did not go, and that he might have taken the night express train, that night at London, and have gone on to Detroit. The defendants' witnesses put it beyond doubt that the plaintiff, having left the accommodation train at St. Catharines, was told by the company's officers that he would not be allowed to enter the night express train that evening for Detroit on the ticket which he had, and consequently he did not attempt it.

The jury were asked, first, whether the defendants, after undertaking to carry the plaintiff from Buffalo to Detroit, refused to allow him to travel on their train from St. Catharines for the rest of the journey; secondly, whether the plaintiff was so prevented from travelling within the time that they contracted to carry him.

They found for the plaintiff, and a rule *nisi* afterwards granted to enter a nonsuit on the leave reserved was discharged. The defendants appealed from this decision.

M. C. Cameron, Q. C, for the appellants.

E. B. Wood, contra.

Draper, C. J., delivered the judgment of the court.

We agree in the view of the learned judge, that the evidence substantially supports the allegation, that the plaintiff was prevented from continuing his journey by the refusal of defendants to allow him so to do.

The question in dispute seems to me to be confined to this—whether the defendants were justified in their refusal. What did the plaintiff require? What did the defendants refuse.

The plaintiff's contention, pushed to its full extent, involves the assertion of a right to stay over at any and every station between the Suspension Bridge and Detroit, at which the train in which he was travelling should stop, provided he was travelling within twenty days from the date when he received his ticket. On the other hand, the defendants' contention would limit the plaintiff to one continuous journey within the twenty days, not allowing him to stay over at any station.

The plaintiff had an unquestionable right, if he had remained at the Suspension Bridge till the night express train started, to have been carried in that train to Detroit, and this the defendants admit; and they admit further, as the evidence shews, that he had a right to commence his journey from the Suspension Bridge in an accommodation train running towards but not so far as Detroit, and to complete it by another train to that city.

If the plaintiff is right, it can make no difference in what train of the defendants he began his journey, whether a train going the whole distance or a part only. In either case he can stop at any intermediate station he pleases, and remain over as long as he chooses, within the limit of twenty days.

This right of stopping is not in terms contained in the contract, for there is not a word in it referring to intermediate stations from which such right can be inferred. It rests solely on the statement that the ticket is good for twenty days from date. The argument is, that the extension of time is given for the purpose of affording the holder of the ticket the privilege of stopping at intermediate stations, because the continuous journey would occupy less than twenty-four hours.

But if this were intended, the simpler and more obvious course would have been to have expressed the permission or condition as relating to *place* rather than to *time*, whereas time only is mentioned.

It is further apparent that the railway fares from station to station between the Suspension Bridge and Detroit amount to a larger sum than the single fare for the whole distance on a through ticket.

It may no doubt be the policy of the defendants to attract through travel, and there may be competition with other companies inducing them to place their fares for through journeys at lower rates than the aggregate of the fares from station to station would amount to. But these considerations are adverse to an inference that an extension of time, within which the traveller would have a right to make the through journey, was given to enable him to stop at every intermediate station.

The practice which the defendants have sanctioned is not consistent with a strict application

of the principle for which they contend, for to be rigidly consistent they should not admit a through passenger into a train which will not convey him to the end of his journey. They do however allow such a passenger to travel in a mode which makes a break in point of time in the journey—that is, to commence in a train going only part of the way, and which will reach its destination some hours before the through train will arrive by which he can complete his journey; and they might find difficulty in maintaining that such traveller was bound to go on by the first through train, provided the twenty days were still current. That question however does not arise here, and it does not, in our opinion, follow that because they are willing he may use an accommodation train as far as it will convey him on his journey, and may complete that journey by another train, he may stop at as many intermediate stations as suits his convenience, with no other restraint than that of completing his route within the twenty days.

No authorities have been referred to, and we have not seen any which govern this question. Our conclusion is, that the defendants' contract bound them to convey the plaintiff in one continuous journey from the Suspension Bridge to Detroit, giving him the option of taking any passenger train of the defendants from the point of commencement, and entitling him, if the train in which he started did not go the whole distance mentioned in his ticket, to be conveyed the residue of that distance in some other train of the defendants—the whole journey to be completed within twenty days from the date of the ticket; and that the contract did not confer on the plaintiff a right to stop at every or any intermediate station, though within the limited twenty days. As a consequence, the defendants were not guilty of a breach of duty arising from their contract, by refusing to carry the plaintiff from St. Catharines to Detroit under the circumstances shewn in evidence.

We think therefore the appeal should be allowed, and that judgment of nonsuit should be entered against the plaintiff in the court below.

Appeal allowed.

COMMON PLEAS.

Reported by S. J. Vankoughnet, Esq., M.A., *Barrister-at-Law, Reporter to the Court.*)

Stephens v. Berry.

*Unstamped bill of exchange—Time for affixing double stamp—Evidence—Bill payable in American currency—Damages—Account Stated—*White v. Baker, 15 U.C.C.P. 292, *followed.*

When a party becomes the holder of an unstamped bill of exchange he must, in order to make it valid in his hands, affix the double stamp to it *before* commencing an action upon it.

Per Richards, C.J., that the holder of such a bill can only be considered safe by affixing the proper stamp at the time when in law he would be considered as having taken and accepted the bill as his own, or within a reasonable time thereafter.

The view expressed in *Baxter* v. *Baynes*, 15 U.C.C.P. 237, as to the most convenient mode of raising the question of the invalidity of a bill for want of a stamp, (i. e. by a special plea) adhered to. In this case, however, as no objection had been taken at the trial to the absence of a special plea, and express leave had been given to enter a nonsuit, if the court should be of opinion that plaintiff was not entitled to recover on account of the bill not having been properly stamped in due time, and the case having been argued on that ground, the court did not consider it necessary to discuss the question as to the propriety of such ground of defence being set up under the plea of non-acceptance.

Held, also, that the bill of exchange was no evidence of an account stated between the plaintiff and defendant (indorsee and acceptor) as there was no privity between them; nor were certain letters which referred only to the bill, for if the latter was void, an acknowledgment of it and promise to pay in a particular way could raise no promise to pay on the account stated, because there would in any event be no legal or valid consideration for the promise.

White v. *Baker*, 15 U.C.C.P. 292, followed as to the damages in the shape of exchange, to which the holder of a bill is entitled against the acceptor.

Quære, whether an instrument, purporting to be a bill of exchange, payable in New York "with current funds," if it mean other than lawful money of the United States, is a bill of exchange.

[C. P., T. T., 1865.]

The first count of the declaration alleged that one William Young, on 11th January, 1865, by his bill of exchange, then overdue, directed to the defendant under the name and firm of E. Berry & Co., required the defendant to pay to his order the sum of fifteen thousand dollars in New York, with current funds, sixty days after date thereof; and defendant, under the name and style of E. Berry & Co., accepted the bill payable at the Bank of America, in New York, and the said William Young then endorsed and delivered the said bill to the Metropolitan Bank, or order, for account of the said plaintiff; and the said Metropolitan Bank then endorsed the same to the plaintiff; and the said bill was duly presented for payment thereof at the said Bank of America, in New York, and was dishonoured.

The declaration also contained the common counts for money payable by the defendant to the plaintiff for goods bargained and sold by plaintiff to defendant; for goods sold and delivered; work, labour, and materials; for money paid, money received by defendant to the use of plaintiff, for interest, and for money due on an account stated.

The defendant pleaded on 18th April, 1865,

1. That he did not accept the bill.
2. Plea to second count, never indebted.

On these pleas issued was joined.

The cause was taken down to trial at the last spring assizes for the county of Victoria, before Mr. Justice Adam Wilson.

The bill sued on was given in evidence. It was dated at Milwaukee, 11th January, 1856, drawn by William Young on Messrs. E. Berry & Co., Kingston, C.W., payable to the order of the drawer, sixty days after date, for fifteen thousand dollars, in New York, with current funds. It was endorsed by the drawer, "Pay Metropolitan Bank, or order, for account of R. H. Stephens, Esq., or order," and by Romeo H. Stephens. On the face of the bill, it was accepted payable at Bank of America, New York, by E. Berry.

A letter from E. Berry & Co. to the plaintiff, dated 24th March, 1865, was also put in, stating they would substitute their draft on Jacques Tracy & Co., at three months date, to mature $\frac{1}{3}$. $\frac{5}{18}$ June and $\frac{1}{3}$ July, for $15,000 and interest on the whole, to be in place of Young's draft on them, held by the plaintiff. The notes were to carry interest at 7 per cent: from 15th March, to be made in three equal amounts. Mr. Young's note was to be returned to him on the above notes being handed over to plaintiff. There was also another letter from E. Berry & Co. to plaintiff, dated, Kingston, 28th March, 1865, in which

they acknowledged the receipt of plaintiff's letter of the 25th March, and said they had written Mr. Jacques that their proposal of the 24th March had not been accepted, and that they should not have occasion to trouble them. The letter proceeded, "We think we can make you a substantial payment as soon as navigation opens in May, and the remainder early in June, if that will suit you. We have at the moment no one whom we should like to ask to endorse for us; we never endorse ourselves for any one." The plaintiff contended that these letters were evidence of an account stated between the parties, of a debt of $15,000.

For defendant it was contended that the bill was drawn at Milwaukee, in the United States, upon defendant at Kingston, in Canada, payable in the city of New York; that at the time of the acceptance there were no stamps on the bill under our Prov. Stat. of 1864, and no stamps were placed on it until after the commencement of this action; that after the commencement of this suit, Canadian stamps to the amount of $9, being double the amount required at the time of the acceptance, were placed on the bill when the plaintiff put his name on it as endorser, and *Sproule* v. *Legge*, 1 B. & C. 161, was referred to.

It was also urged that the money in the declaration must be presumed to be Canadian currency; but it was not so in fact, because when the bill was produced, it was shown to be currency of the United States.

It was admitted that at the time the bill became due, on the 15th of March, 1865, if payable in current funds of the United States [as distinct from a gold value] the Canadian value of the bill was $8,510 64; while if current funds were valued, as of the 6th of May, 1865, the day of the trial, the value of the bill in Canada funds would be $10,628 88. The three following modes of stating the value and damages, if plaintiff was entitled to recover, were made up:

1. Considering the value.....		$15,000 00
Interest, $160; Protest, $1 10...		161 10
		$15,161 10
2. Value of American funds as Canada funds, on 15th of March, 1865...	$8,510 64	
Interest, $90 72; Protest, $1 10.	91 82	
		$8,602 82
3. Value in American funds as Canada funds, on the 6th of May, the day of trial	$10,628 88	
Interest, $113 36; Protest, $1 10.	114 46	
		$10,743 34

For the defendant it was contended that there was no evidence of an account stated.

It was agreed that a verdict should be entered for the plaintiff for $3,602 46, with leave to move to increase it, on either or both of the counts of the declaration, to either of the other two sums above noted, if the court should think him entitled to a larger sum than that for which the verdict had been entered.

Leave was also given to the defendant to move to enter a non-suit, if the court should be of opinion that the plaintiff was not entitled to recover, because the bill was not stamped with Canadian stamps in due time to enable him to do so.

Defendant also had leave to move to enter a verdict for him on the account stated, and on the common counts, if the plaintiff retained his verdict on the first count. It was also admitted that the firm of Jacques, Tracey & Co., mentioned in the letters, resided and did business in Montreal.

In Easter Term last the defendant obtained a rule *nisi* to enter a nonsuit, pursuant to leave reserved, on the ground that the bill of exchange offered in evidence, and the acceptance thereof, were invalid and of no effect for want of the necessary revenue stamps being affixed thereto; or because such stamps were not affixed at such time, or by such person or persons, as would give validity to such bill or acceptance, or entitle the plaintiff to maintain his suit.

Or why, pursuant to such leave, a verdict should not be entered for the defendant upon the second issue joined, there having been no evidence to warrant a verdict for the plaintiff thereon. Or, why the verdict should not be set aside and a new trial had, because the same was contrary to the evidence, the declaration being upon a bill of exchange payable in lawful money of Canada, and the evidence being of a bill payable in money of a foreign country.

During the same Term the plaintiff also obtained a rule *nisi* to increase the verdict, pursuant to leave reserved, 1st to the sum of $15,161 10, on the ground that the plaintiff was entitled to the full amount, in lawful money of Canada, of the face of the bill in the declaration mentioned, being $15,000 with interest, or the equivalent, in lawful money of Canada, of the sum of $15,000 in American money, having regard to the relative value of the Canadian and American dollar respectively; or, 2nd, to the sum of $10,743 34, on the ground that the plaintiff was entitled to a verdict for an amount which would, on the day of the trial, have purchased a draft on New York for $15,000 and interest and such sum of $10,743 34, being the requisite sum for such purpose.

Both these rules were enlarged until the present Term, and came on to be argued together.

Anderson for the plaintiff.

The bill was drawn and is payable in the United States, though accepted in this Province.

The 9th section of the Stamp Act provides, that any person in the Province who makes, draws, accepts, indorses, signs, or becomes a party to any bill or note chargeable with duty, before the duty or double duty has been paid by affixing the proper stamp, such person shall incur a penalty of $100, and the instrument shall be invalid and of no effect in law or equity, and the acceptance shall be of no effect, except only in case of the payment of double duty; but that any subsequent party to such instrument may, *at the time of his becoming a party thereto*, pay such double duty by affixing to such instrument a stamp to the amount thereof, and by writing his signature or initials on such stamp, and the instrument shall thereby become valid. Here the plaintiff has affixed the double stamp to the bill, and the only question is, has he done

so in the proper time? That depends on the time when he became a party to the bill. This he did when he endorsed it. The holder of a bill is not necessarily a party to it, and until he puts his name on it, or in some way signifies that he is a party to the bill, he ought not to be brought within the highly penal terms of the statute.

There is a letter admitting defendant's liability, and the verdict is on the common counts as well, and may stand for the plaintiff on these counts.

The face of the bill with interest is the proper measure of damages. It is payable in dollars, and we know of no difference between the American dollar and our own; it is very trifling if there be any difference; and, therefore, the amount of the bill in our own country is what it really represents. We cannot take notice of the fact, that in the United States something else than gold is receivable in payment of debts, which in fact reduces the standard of their currency, though the coinage is precisely the same as it was before. The action is against the acceptor, and the case of *Suse* v. *Pompe*, 8 C. B. N. S. 538, is only authority to shew that, as against the drawer or endorser of a bill, the damages are limited to exchange and expenses: Chitty on Bills, 412; *Dawson* v. *Morgan*, 9 B. & C. 618. But in an action by indorsee against acceptor, the liability is to pay the money mentioned in the bill with legal interest, according to the rate of the country where it is due.

As to the variance in not describing the bill as payable in lawful money of the United States, he applied to amend if necessary.

McLennan, contra.—The venue is laid in the County of Victoria in this Province, and the bill according to the declaration, will be considered as made there, and the money mentioned in it will be considered as lawful money of Canada. *Kearney* v. *King*, 2 B. & Ald. 301, was an action against the defendant as acceptor of a bill of exchange. The declaration stated that a bill of exchange was drawn and accepted at Dublin, to wit, at Westminster, for certain sums therein mentioned, without alleging it to be Dublin in Ireland; and it was held, that, on this declaration, the bill must be taken to have been drawn in England for English money, and, therefore, proof of a bill drawn at Dublin in Ireland for the same sum in Irish money, which differs in value from English money, did not support the declaration, and was a fatal variance. In *Sproule* v. *Legge*, 1 B. & C. 16, the declaration stated the plaintiff, at Dublin, made a promissory note, and promised to pay the same at Dublin, without alleging it to be Dublin in Ireland, where also it was held that the promissory note must be taken to have been drawn in England for English money, and proof of a note made in Ireland for the same sum in Irish money did not support the declaration. Reference is also directed to Chitty on Bills, 397.

The stamps not having been put on the bill until after the commencement of the action, plaintiff must fail; the plaintiff's rights have reference to the time of bringing the action, and if the bill was not a good bill then, it cannot be now. If the plaintiff was not a party to the bill, he could not bring an action on it; and if, having brought his action, he then became a party to the bill, he did not even then stamp it, and it is therefore void. According to defendant's argument, the holder of a bill, who has never endorsed it away, can always avoid the forfeiture by putting on the double stamp and writing his name on it, even at the trial. This would in fact render the act of Parliament of little use; for frauds would constantly be practiced to avoid it. *Baxter* v. *Baynes*, 15 U. C. C. P. 245, is referred to as to the effect of the stamp act.

As to the account stated, the contract arising from the account stated is a contract to pay on request or demand, whilst the agreement to pay by defendant's letters is in a particular way.

No contract arises on the account stated from plaintiff being the holder of the bill, as there is no privity between him and the acceptor; *Early* v. *Bowman*, 1 B. & Ad. 889. *Calvert* v. *Baker*, 4 M. & W. 417; *Burmester et al.* v. *Hogarth*, 11 M. & W. 97; *White* v. *Baker*, 15 U. C. C. P. 292; Story on Conflict of Laws, secs. 286, 309; *Wood* v. *Young*, 14 U. C. C. P. 250; Chitty on Bills, 9 ed. 582, 583, 685, 686.

If the plaintiff can sustain the action, all he is entitled to recover is the value of the American money the day the contract was to be performed, with interest. He referred also to *Suse* v. *Pompe*.

Richards, C. J., delivered the judgment of the court.

The first question to be considered is whether the plaintiff is a party to the bill sued on, and when he became such party. As a general rule, no person can sue on a bill of exchange or promissory note unless he is a party to it. The expressions run constantly through the cases, "He cannot sue on the bill; he is no party to it."

In Chitty on Bills, 9 ed. p. 27, it is stated, "The drawer, acceptor, endorser, and *holder*, are the principal and intermediate parties to the instrument." In the declaration the plaintiff avers that Young endorsed and delivered the bill to the Metropolitan Bank, who endorsed the same to plaintiff. Now all this must have been done before the plaintiff could sue on the bill. It is true some of the authorities shew that if the bill, when the action was commenced, was in the hands of a third person, as agent or trustee for the plaintiff, he might sue, though the bill was not then in his actual possession. In all these cases, I apprehend, the person suing has been a party to the bill at some time before the bringing of the action. For the purposes of our stamp act, I think we are certainly bound to decide, that when a person becomes the holder of an unstamped bill, so as to sue and does sue on it, he must, to make it valid in his hands, have put the double stamp on it before commencing the action. Indeed I personally take a much stronger view of the necessity of a holder protecting himself by the double stamp, when the bill without it would be void. The holder, in my judgment, can only be considered safe when he puts on the proper stamp at the time he would in law be considered as having taken and accepted the bill as his own, or within a reasonable time thereafter. We are, therefore, of opinion that, on the first ground of nonsuit, our judgment must be in favour of the defendant.

In coming to this conclusion, I may observe that I still retain the view expressed in *Baxter* v.

Baynes, that the most convenient way to raise the question as to the invalidity of a bill for want of a stamp is by a special plea; but as no objection was taken at the trial to the want of a special plea, and express leave was given to enter a nonsuit, if the court should be of opinion that the plaintiff was not entitled to recover for want of the bill being properly stamped in due time, and the case was argued before us on that ground, we do not think it necessary in this case further to discuss the question as to this ground of defence being set up under the plea, that the defendant did not accept the bill.

The bill is not evidence of an account stated as between these parties, for there is no privity between the acceptor and the endorsee. The only evidence is the letters produced at the trial, and these only refer to the bill which is the subject of the action. If that bill is void and of no effect, an acknowledgment of it, and a promise to pay in a particular way, can raise no promise to pay on the account stated, for there would in any event be no legal or valid consideration for the promise stated. The doctrine is laid down in some of the older cases, though not expressly in relation to the particular point now under discussion, "the accompt doth not alter the nature of the debt, but only reduceth it to certainty;" *Drue* v. *Thorn* Aleyn. 73.

As to the question of damages, *Suse* v. *Pompe* is an authority that the amount for which the jury assessed damages, is the amount which could be recovered against the drawer or endorser of the bill; and some of the authorities seem to sanction the view, that larger damages may be recovered by the holder against drawer and endorser, than against the acceptor; the acceptor not being considered liable for re-exchange, as his contract is only to pay the sum specified in the bill and legal interest, according to the rate of the country where it is due. The amoumt found for the plaintiff accords with the views expressed in *White* v. *Baker*, decided in this court, and is quite as favourable to the plaintiff as the authorities would seem to warrant.

In argument it was suggested, that the value of the American currency, as compared with our own, at the time of the trial, was the true measure of damages for the plaintiff, or that the plaintiff might select any day between the breach of defendant's contract to pay and the assessing of the damages, as the one on which the rate of exchange should be fixed. Independent of the invariable doctrine in England, that interest is the only damages that can be given for the detaining of money after the day on which it is due, the authorities, particularly in England, in the case of an ordinary breach of contract, when the party suing has paid all the money, decide that the damages are to be considered by placing the plaintiff in the position he would have been in, if the defendant had carried out his contract; and the value of the commodity to be delivered is to be estimated at what it was worth at that time. There seems to be one exception to this rule; when stocks are borrowed to be returned by a certain day, the jury should give such damages as will indemnify the plaintiff, and, when the stock has risen since the time appointed for the transfer, it will be taken at its price on or before the day of trial; (*Owen* v. *Routh*, 14 C. B. 327, and American notes to that case.)

There was nothing said in the argument as to this bill being payable in New York with current funds. If that means any thing different from lawful money of the United States, then it may be a question if the instrument is a bill of exchange at all; and if it is not legally a bill of exchange, plaintiff can have no property in it.

The rule to increase the damages will be discharged, and the defendant's rule to enter a nonsuit made absolute.

Rule absolute to enter a nonsuit, rule to increase damages discharged.

PRACTICE COURT.

(*Reported by* Robt. A. Harrison, Esq., *Barrister-at-Law.*)

Lister v. Ham.

Arbitration and award—Power of referee to examine parties in their own behalf—Discretion to reject such evidence.

Where an order of reference made by consent of parties provided that the arbitrator "shall have power to examine the parties and their witnesses upon oath or affirmation" it was held that the arbitrator had no discretion to reject the evidence of one of the parties, who tendered himself as a witness on his own behalf.

[Easter Term, 1865.]

The defendant during Easter term obtained a rule calling on the plaintiff to shew cause why the award made herein should not be set aside on the following grounds:

1. That the arbitrator refused to examine the defendant on oath though requested by him so to do and refused to receive the evidence of the defendant at the reference though tendered by him.

2. That the arbitrator exceeded his authority in ordering the defendant to pay the costs of the action.

3. That the award was made after the authority of the arbitrator to make an award had expired.

Sir H. Smith, Q. C., shewed cause.—An enlargement of the time for making the award was duly made and both parties attended at the reference after and upon such enlargement, and no objection can now be taken as to the mere alleged irregularity of it.

The costs awarded are the costs of the suit, but the arbitrator has only expressed how they should be paid as the submission itself had declared he has directed them to be paid to the plaintiff and as the event of the award is in his favour it is just what the submission says, that they shall abide the event of the award. His finding as to the costs was wholly unnecessary and inoperative and does not in the least affect the award; and as to the rejection by the arbitrator of the defendant as a witness the arbitrator had a discretion so to act, and it is not contended by the defendant that his evidence was material or that it was corruptly rejected.

J. V. Ham, defendant in person, supported his rule.—The defendant was entitled to have his evidence taken and the arbitrator had no discretion to receive or reject it as he pleased. The evidence was not to be taken only if the arbitrator

saw fit. It was to be taken by the arbitrator if the defendant desired it and tendered it. And there has been a miscarriage of justice by the rejection of evidence, and more particularly in this case, where so much of the matters in dispute rest only in the knowledge of the defendant. It was that his evidence might be taken, that the reference was directed, and the whole purpose of the arbitration will be defeated if such evidence is to be excluded: *Keene* v. *Deeble*, 3 B. & C. 491; *Warne* v. *Bryant*, 3 B. & C. 590; *Morgan* v. *Morgan*, 1 Dowl. 611; *Smith* v. *Sparrow*, 4 D. & L 604; S. C., 11 Jur. 126; Russell on Arbitration, 1 Ed. 176, 182-3.

Adam Wilson, J., I will consider this case only on the special grounds taken for the rejection of the defendant as a witness.

The reference was by and under an order of Mr. Justice Morrison, dated the 4th of June, 1864. The order provides, "and I further order that the parties shall produce to the said arbitrator all such books, deeds, papers and writings, in their or either of their custody or power as the said arbitrator shall require, who shall have power to examine the parties and their witnesses upon oath or affirmation."

The amount awarded against the defendant is $807 90, which sum, and also the costs of the cause and of the reference, the defendant is directed to pay.

In *Lloyd* v. *Archbowle*, 2 Taunt. 323, Mansfield, C. J., held it was no objection that the arbitrators had examined a witness who was so interested that he ought to have been a plaintiff "because they had by the terms of the reference power to examine the parties themselves," and he added "in many cases justice cannot be obtained without it."

In *Smith* v. *Sparrow*, 4 D. & L. 604, the decision was that an arbitrator could not without express authority conferred by the submission examine one of the parties against the consent of the other party.

In *Wells* v. *Benskin*, 9 M. & W. 45, the submission provided that the parties respectively were to be examined on oath, to be sworn, if thought necessary, by the arbitrator. The arbitrator examined each party in support of his own case and it was argued that the one party could be called only for the other and not be produced by himself on his own behalf. The court said the arbitrator had the discretion to examine the parties when and to which of the matters he thought fit and they refused to overrule his decision.

In *Scales* v. *The East London Water Works*, Hodges 91, the arbitrator had the discretion to examine either of the parties and "he might not," as the court said, "have thought it quite right to examine the plaintiff."

In *Keene* v. *Deeble ubi supra*, the arbitrator had power to examine the parties. Littledale, J., said, "in relation to this power a different mode of proceeding was allowed and different *media* of proof were rendered admissible by such an agreement. At the trial the defendant's evidence could not have been received—before the arbitrator it was admissible,"

In *Warne* v. *Bryant, ubi supra*, the arbitrator was at liberty to examine the parties if he should think fit. He examined the plaintiff on behalf of his own claim. The court held the arbitrator might examine the parties for any purpose and in any stage of the enquiry. He is to exercise his discretion in all cases whether he will allow a party to be examined at all. In practice many cases are referred for the express purpose of having the parties examined and the arbitrator may under this order examine a party to the suit even in support of his own case.

In *Morgan* v. *Williams*, 2 Dowl. P. C. 123, the arbitrator had power to examine the parties, and it was held that the arbitrator did right in not examining the plaintiff to prove his own case.

In this last case the court considered that the arbitrator having power to examine the parties only enabled the one party to call the other as a witness; and in *Wells* v. *Benskin* this was said to have been the course and practice which had been pursued under references of this nature as well as when the arbitrator had the liberty to examine the parties if he should think fit. But the court in the latter case approving of the practice laid down in *Warne* v. *Bryant* determined that where the parties might be examined by the terms of the reference the arbitrator might examine each party in support of his own case.

It is singular there should have been no decision that I can find which settles whether or not the party has the right, even against the will of the arbitrator to tender himself as a witness and to be examined in support of his own case, and, since the late change in the law of evidence in England, permitting parties to be witnesses on their own behalf, no such question can have arisen, so that I am left to deal with this point by the light of such authorities as I have referred to.

The question is not whether the parties may or may not be witnesses even for themselves, for, from the authorities mentioned, it is clear that they may be, under the terms of its submission, if the arbitrator permit them to be called. But the question is this, can the arbitrator determine absolutely whether the parties may or may not be witnesses or whether the parties themselves have not the right and power and the exclusive right and power of producing themselves as witnesses when and how they please.

By this submission it is provided that the arbitrator "shall have power to examine the parties and their witnesses upon oath or affirmation."

Now it appears to me that the meaning and object of this provision were and are that the parties and their witnesses should be examined and that the arbitrator should have power to administer to them the oath or affirmation and that it never was intended that the arbitrator should determine who should and who should not be examined as witnesses. If he could reject one of the parties he might equally reject some of his witnesses. This condition is not against any positive provision of the law although it is true the practice of the law excluded the parties to this cause as witnesses. But it excluded also many others upon no better ground, whom it now permits to be sufficient witnesses and although our law in this respect is far behind the liberality and wisdom of the English enactments, I am not disposed to cramp

this agreement of the parties, for the mere purpose of giving effect to a rule of exclusion which is not at all creditable to our legislation.

As the parties therefore have agreed that their interest shall be no hindrance to their examination, and as they have agreed that they may be examined, I think the discretion as to the exercise of this power should, as in reason it ought to rest with the parties themselves and not be subject to the control or dictation of the arbitrator.

In the Division Courts Act, section 101-102, where the judge has clearly the discretion to examine the parties or not as he pleases, there is nothing uncertain or equivocal in the language which confers his powers.

In the present case I have no doubt the learned arbitrator acted entirely in perfect good faith, and with great discretion according to his own impartial view of the facts and of the situation of the parties. But I must lay down a rule which shall be applicable in every case where the caprices and prejudices of the arbitrator may require to be as much provided against as any other part of his conduct, or any other part of the power of his position, and I think it was the discretion of the parties on this point by which he should have been influenced, and not his own.

As I think there has been a serious failure of justice, I must set aside the award, but under the circumstances without costs.

Per Cur.—Rule absolute without costs.

J. & J. Taylor v. A. & B.

Attorneys—Agents—Collection of money by clerk of latter—Right of Attorneys to apply directly against the agents.

Where J. & J. T. having a claim within the jurisdiction of a Division Court against a resident of Belleville sent it to McM., an attorney, resident in Toronto, for collection, who sent it to A. & B., attorneys in Belleville, and the clerk of the latter collected $20 on account and sued for the remainder in the Division Court, and afterwards B., one of the attorneys, arranged with a third party for the payment of the balance, it was held that J. & J. T. were not in a position to make a summary application against A. & B. for the payment of the money, but that the same should have been made by and at the instance of McM.

[Easter Term, 1865.]

D. McMichael obtained a rule calling upon A & B. to shew cause why they should not pay over to Messrs. J. & J. Taylor or their attorney $71 50, with interest from 1st December, 1863, or such other amount as the said attorneys have received from Wm. Kelly, or why they should not render a bill of their costs and charges and have the same taxed and why they should not pay the amount found due on taxation and why such further or other order should not be made as should be considered proper, and why they should not pay the costs of the application on grounds disclosed in affidavits and papers filed.

The affidavits and papers filed for and against the application shewed the following facts: That a promissory note which J. & J. Taylor had against Kelly amounting to $101 50 was delivered by J. & J. Taylor to J. S. McMurray, an attorney practising in Toronto, to collect. That as Kelly lived at Belleville, McMurray in December, 1863, sent the note, on which $30 had been paid to Taylor, to a firm formerly consisting of C. & A. but then composed of A. & B. to collect as Mr. McMurray says as his agents, his letter enclosing the note after describing it says he wishes C. & A. to collect it for him and he added "agency fee, &c." That one O., a clerk in the office of A. & B., by letter of the 15th of January, 1864, to Mr. McMurray stated that the note was then in suit in the Division Court. And by another letter of the 4th of April from the same to the same it was said the note had been put in suit and execution issued and no doubt the money would be soon made. Mr. McMurray further stated that he had frequently by letter and otherwise applied to the said A. & B. for a settlement of the said claim, that they or some or one of them had, as deponent was informed and believed, for their or on their account or behalf received the said monies or a portion thereof, but they refused and still do refuse and have failed to pay the said monies to deponent or to any one on his account, and they had not paid the same to the said J. & J. Taylor as deponent believed. That B. on the 7th of December, 1864, wrote to Mr. McMurray that a person who had promised to pay the money had not yet done so. That A. on the 6th of February, 1865, wrote to Mr. McMurray that he, A., had had nothing to do with the matter and knew nothing of it and would take no trouble about it.

Mr. Parker, the clerk of the Division Court, stated that about the 25th of January, 1864, O., a clerk in the office of A. & B., brought this note to the Division Court office to be sued; that judgment on the 26th of March, 1864, was given against Kelly for $44 debt and $4 25 for costs; that on the 10th of August, 1864, an execution was issued to R. H. Jones, bailiff of that court; that Jones on the 15th of September, 1864, obtained a document from B. of which the following is a copy:

"*Taylor* v. *Kelly*.

"Sir,—Mr. Kelly has settled with me for the amount of the debt. He has to settle with you for your costs. (Signed) B.

"15th September, 1864."

A. filed several affidavits from which it appeared his partnership with B. ended in April, 1864, that B. after the partnership still kept this claim in his hands and personally attended to it as a private matter of his own and that it never had been entered as a matter of business in the books of the firm.

B. filed the following affidavits: Mr. O., who swore that he received $20 from Kelly on the 23rd of January, 1864; that he then sued the note and had the management of the suit, that he did not pay over this sum as he was waiting till he should get the remainder, and that he had not yet paid it over to any one and that he never received the balance.

B. himself stated he handed the note when he got it to one of the clerks to attend to; that he did not know that $20 had been paid to O. until quite lately; that in September, 1864, when an execution was issued, Kelly brought him a letter from Mr. Frank, requesting that the execution should be withdrawn and stating that he would see it was all right, and being satisfied that Frank, who was in his opinion a responsible person would do so, B. gave the bailiff the memorandum produced. That four days after this arrangement he met with a serious accident and was unable to attend to business

for eight months; that after that time Frank became insolvent and had not paid the amount and is now living in Montreal; and that he, deponent, never intended to release Kelly, but simply to withdraw the execution to afford an opportunity for the assessment.

Crombie, for B., shewed cause.—The $20 received by O., the clerk, is not a sum for which the attorneys can be attached or be ordered summarily to pay over. They may be sued for it and as to the residue such a remedy as now pursued is quite inapplicable because the attorneys have not in fact by presumption or otherwise ever received the money. They acted in good faith on the arrangement they made, and if that has not turned out well they may be sued for what they did but they cannot be charged as with the receipt of the money. Such a proceeding as this can never be taken unless the attorneys have been guilty of fraud or a wrong. Now here has been no wrong, but if any one can apply at all it is Mr. McMurray, who, it is said, employed the attornies and not the present applicants who never retained them.

Lauder, for A., shewed cause, and contended that A. had never anything to do with the matter at all; that the $20 were received by O., who was B.'s clerk; that the partnership ended in April, 1864, and B. took this case as his own. That he was corresponded with after this date by Mr. McMurray as the only person having charge of the case, and the arrangement with Frank which is complained of was not made till nearly six months after the dissolution of the partnership and was made by B. alone, and that however B. was liable, A. was not. He also contended that this course of proceeding could not be taken against the attorneys, even as to the $20, because there had been nothing done by them which could properly be called wrong, and it was not pretended there was anything like fraud; *Ex parte Bodenham*, 8 A. & E. 959; *In re Aitkin*, 4 B. & Al. 47; *Collins* v. *Brooke*, 5 H. & N. 700; *Re Lord*, 2 Scott, 131; *Re Fenton*, 3 A. & E. 404; *Collins* v. *Griffith*, Barnes, 37; *Dicas* v. *Stockly*, 7 C. & P. 587; *De Woolfe* v. ——, 2 Chit 68.

D. McMichael contra.—As to the $20 the receipt of O., the clerk, was the receipt of the attorneys, his employers; and as to the remainder the arrangement made with Frank had the effect of making the debt the debt of the attorneys, but he was not disposed nor instructed to press the latter claim, for if his client could yet sue out an execution against Kelly it was all that was wanted; but his client's chief complaint was that he never could find out anything about the claim and it was only now for the first time that the facts had come to the knowledge of the client. He contended that the attorneys were directly responsible to his client having acted as his attorneys.

Adam Wilson, J., In Arch. Pr. 11 Ed. 152-3 it is said that when a town agent is employed the agent's name is usually inserted in the proceedings and record as the attorney in the cause. This, however, does not constitute any privity between him and the client when in fact he is acting only as agent.

The opposite party may, however, treat the agent so acting as attorney on the record as the actual attorney, but the party for whom the agent seems to be the attorney cannot sue such agent or treat him as his attorney when he is not attorney in fact.

In *Cobb* v. *Becke*, 6 Q. B 930, it was held that where the attorney of A., sent a sum of money to his town agents to pay over to a third person on account of A that on the refusal afterwards of the town agents so to apply the money, A. could not sue them, as he had no privity with them.

The case of *Moody* v. *Spencer*, 2 D. & R. 6, shows this to be approved of where the action was by the client, the plaintiff in the original cause, against the agent for money had and received to the client's use by their agent, from the opposite party the defendant in the original suit. The court saying when the agent got the money from the opposite party he did not get it to his own use nor did he get it to the use of the actual attorney of the client, it must, therefore, be treated as received to the use of the client. This case, however, does not seem to be supported in the latter case of *Robbins* v. *Fennell*, 11 Q. B. 248, nor is it necessary to the general principles applicable to such cases.

In the case last mentioned it was expressly determined that such an action would not lie under these very facts; but it was also held that a summary application lay against the agent at the instance of the client, because it afterwards turned out that the money did not come to the agents' hands in their character of agents for the attorney, "but was sent to them by the under sheriff out of the regular course of business;" and Lord Denman added, "I do not say that an action for money had and received might not upon the facts now disclosed be maintained, although there be no privity on the ground that the agents had improperly received the money of the plaintiff."

It was determined in the Exchequer Chamber in *Collins* v. *Brooke*, 5 H. & N. 700 affirming the decision of the Court of Exchequer in 4 H. & N. 270, that an action lay at the instance of an infant against the attorney in the cause for money had and received to his use by the attorney, although the attorney was appointed by the *prochein ami*, and such a case was distinguished for the case of client, attorney and agent. Crompton, J., said, "The London agent is the mere servant of the attorney, and the client has a right to treat everything which he does as the act of the attorney." Blackburn, J., said, "In many cases a person employed receives the money as agent for the middleman, and not for the principal..... In all those cases when the receipt is such that the loss of the money would be the loss of the middleman, there is I conceive no privity between the recipient or third person and the principal; and generally an action would not lie by the latter against the middleman, as in the cases which have been referred to, the receipt of the third person has been the receipt of his upon report. Thus in *Stephens* v. *Badcock* the receipt of the attorney's clerk instantly gave Stephens the plaintiff an action against the attorney. In *Robbins* v. *Fennell* the receipt of the town agent instantly made the attorney responsible."

The whole of this language is against the right of the Messrs. Taylor, the clients, to call upon these gentlemen, who were practising as attorneys, to render any account to them as such clients; because although these attorneys sued Kelly as attorneys for the Messrs. Taylor in the proceedings in the Division Court, yet they were not in fact his attorneys; and the English practice shows it is the usual course for the town agent to enter his own name in the suit as the attorney, yet he is not in truth the attorney of the client, but the agent only of the clients own direct attorney. The client in such a case has no claim upon him in any way, and there is no difference in this respect, according to the case of *Robbins* v. *Fennell*, between an action and a summary application. In neither case can the client sustain it against the agent. But if the agent have wrongly and improperly, and without authority received the money, he may be held directly liable to the clients, but such is not the present case.

I am therefore led to the conclusion that the Messrs. Taylor cannot support this application against these gentlemen, although it would seem they could do so against Mr. McMurray himself, by reason of his liability for the conduct of the sub-agents he employed (see in addition to previous cases *In re Ward*, 31 Beav. 1) and that Mr. McMurray in his own name could sustain an application against those gentlemen as immediately accountable to himself.

The whole case seems to have been loosely managed, and although no charge whatever has been made against these gentlemen but such as it was contended arose from their strictly legal liability, the same cannot be said of their clerk. He got the $20 in July, 1864. He never entered the receipt of it in his employers' books, nor did he ever inform them that he had got it, nor did he ever pay it to them; and he now makes affidavit of all these facts, and of the other fact that he has it yet in his own possession. Now he must know that this is the money of his employers, and not his own; and perhaps he may know also that he has confessed what may also be a criminal offence, or at all events very nearly approaching it.

In all these proceedings the Messrs. Taylor and Mr. McMurray are the persons really aggrieved, and yet I cannot help them in this application.

I am obliged to discharge the rule, but I shall discharge it without costs.

Rule discharged without costs.

COMMON LAW CHAMBERS.

(*Reported by* R. A. Harrison, Esq., *Barrister-at-Law.*)

In the matter of Wellington Crow.

Habeas corpus—Conviction by one magistrate when two required—Effect of erroneous recital in warrant of commitment—Necessity to show before whom convicted—Several warrants—Periods of imprisonment running contemporaneously or consecutively.

Where a statute empowers two justices of the peace to convict, a conviction by one only is not sufficient.

It lies on a party alleging that there is a good and valid conviction to sustain the commitment, to produce the conviction.

The warrant of conviction should show before whom the conviction was had.

An adjudication mentioned in the margin of the warrant of commitment, where there are several warrants of commitment, each for a distinct period of imprisonment, that the term of imprisonment mentioned in the second and third warrants shall commence at the expiration of the time mentioned in the warrant immediately preceding, is valid.

If the portions in the margin of the second and third warrants could not be read as portions of the warrants, the periods of imprisonment would nevertheless be quite sufficient, the only difference being that all the warrants would be running at the same time instead of counting consecutively.

[Chambers, 1865.]

This was a summons calling upon the Attorney-general or his agent to show cause why a writ of *habeas corpus* should not be issued in this matter.

The prisoner had been committed by the police magistrate of the city of Hamilton, on three several convictions for enticing, persuading and procuring soldiers to desert her Majesty's service.

There were several warrants of commitment. Each warrant recited a conviction "before me, James Cahill," the police magistrate, and concluded "Given under my hand and seal," &c., and each one was subscribed as follows: — "J. Cahill, police magistrate of the city of Hamilton; Robert Chisholm, aid.; P. Crawford, ald."

Each warrant was dated 11th March, 1863, and each numbered. One was numbered 1, another was numbered 2, and the third was numbered 3.

The first warrant directed imprisonment for six months at hard labor; the second six months at hard labor, and it had this memorandum in the margin, "The time mentioned in this committal to commence at the expiration of the time mentioned in another committal which is numbered number 1;" and the third warrant directed imprisonment for six months at hard labour, and had the like memorandum which was upon number 2, but stated that the time in number 3 was to commence from the expiration of the time mentioned in number 2.

James Paterson argued, for the prisoner, that the warrant was defective, because it showed the conviction to have been made by one magistrate, and that the terms of imprisonment in the warrants numbers 2 and 3 were defective and uncertain.

R. A. Harrison, for the Crown, argued that the conviction itself should be before the judge in Chambers, because the presumption was the conviction was correct, and it should be assumed that the warrant contained a misrecital of the conviction having been had only before the one magistrate; and it rested on the prisoner to complete his case by procuring the conviction; and that the periods of imprisonment in the warrants 2 and 3 were quite certain.

Adam Wilson, J.—The Mutiny Act in force when these convictions took place, was the 27th Victoria, chapter 3, section 81, which provides that the conviction shall be before two justices.

The conviction, therefore, if it be really in the form in which the warrant recites it to be, is erroneous and void.

Am I to assume that the conviction is in this defective form, or can the warrant containing a misrecital be considered as not void, or may it be amended, or can a new warrant be issued?

By the Consolidated Statutes for Canada, cap. 103, sec. 71, one justice may issue his warrant

of commitment after the case has been heard and determined, although the case required more than one justice to adjudicate upon it, and by sec. 72 it is not necessary that the justice who so issues his warrant shall be one of the justices by whom the case was heard or determined. It would seem, therefore, to be immaterial as a fact, whether or not that part of the warrant is true, that the prisoner was convicted before Mr. Cahill.

Is it necessary, however, that it should appear before whom he was convicted? In all the forms which are given of warrants of this nature in the schedules to the statute, it is prescribed that the fact shall be recited. In *Rex* v. *York* 5 Burr. 2684, the warrant of commitment stated that the prisoner had been brought "before me and convicted;" and Lord Mansfield, C. J., said, "This was upon conviction, and it ought to be shown that the person convicting had authority to convict. It is a commitment in execution. Here it does not appear by whom they were convicted. It is only said in the warrant, 'brought before me and convicted.' The not showing before whom they were convicted is a gross defect. Let them be discharged." In *the matter of Addis*, 2 D. & R. 167; 1 B. & C. 687, it appears if the warrant of commitment be bad, and the party be discharged from it, that a new warrant of commitment may be issued upon the conviction, if that be sufficient to justify a warrant. See also *Eyginton* v. *The Mayor of Lichfield* 1 Jur. N. S. 908. In *The King* v. *Rhodes* 4 T. R. 220, the warrant of commitment recited that the party had been charged—it did not say convicted—before the magistrate, and the warrant was held bad for that cause. Buller, J., said, "The only question is, whether the warrant, on the face of it, be a good commitment in execution; and that it is not cannot be doubted, first, because the party was not previously convicted," &c. And Grose, J., said, "Therefore this warrant is bad, because it only states that the party had been charged with, not that he had been convicted of, the offence." See also 12 East. 78, note (*a*); and *The King* v. *Casterton*, 6 Q. B. 509. In *The matter of Peerless* 1 Q. B. 154, Coleridge, J., said, "Of the conviction we know nothing, except through the warrant." See *Reg.* v *Lordoft* 5 Q B 940; *Reg.* v. *Cavanagh* 1 Dowl. N S. 552; *Reg.* v. *King*, 1 D. & L. 723. It lies on the party alleging there is a good and valid conviction to sustain the commitment, to produce the conviction (1 D. & L. 846). In this cause the conviction has not been brought before me. All I have seen is the warrant, and that recites a conviction before one magistrate only. I cannot infer from this, that the prisoner was convicted by two magistrates, and the warrant does not show jurisdiction in one magistrate to commit.

I think the adjudication that the imprisonment in the second and third warrants shall commence at the expiration of the time mentioned in the warrant immediately preceding it, is valid (see sec. 63 of cap. 103); and I think it is so stated as properly to form part of the warrant.

I may add, as to the imprisonment, if the portions in the margin of the second and third warrants could not be read as parts of these warrants, the periods of imprisonment would nevertheless be quite sufficient. The only thing would be that all the warrants mentioned would be running at the same time, instead of counting consecutively.

The order must go for the issue of a writ of *habeas corpus* to bring up the body of the prisoner.

Order accordingly.*

CHANCERY.

(*Reported by* Alex. Grant Esq., *Barrister at Law, Reporter to the Court.*)

Hagarty v. Hagarty.

Alimony.

The purpose of allotting alimony to a wife is to afford her the means of supporting herself whilst living apart from her husband; but as the law does not contemplate the parties living apart for life, but looks forward to a reconciliation between them, the court will not sanction the payment by the husband of a sum in gross, in lieu of an annual sum by way of such alimony,

This was a suit for alimony in which a decree had been made declaring the plaintiff entitled to an allowance by way of alimony, and referring it to the Master to settle what sum should be paid by the defendant to his wife (the plaintiff). In proceeding under the decree, the Master, with the assent of both parties, found that a sum in gross should be paid by defendant to the plaintiff, and which was to be accepted by her in full of all future claims under the decree.

The cause afterwards came on to be heard for further directions.

J. McLennan for plaintiff.

Bull for defendant.

Spragge, V. C.—In this case the Master, with the assent of the parties, fixed the alimony to be allowed to his wife at a gross sum, instead of at so much per annum, to be paid monthly, or quarterly, as is usual: and counsel for both parties ask the sanction of the court to this allowance.

If the parties choose to make any arrangement out of court, the court has nothing to say to it, but, when the sanction of the court is asked, it is incumbent on the court to see that it sanctions nothing that is not in accordance with the law of the court.

When this matter was before me on further directions, I said, it struck me that the arrangement sanctioned by the Master was objectionable, as against public policy; and after further consideration that is still my opinion. In the books I find no instance of any such order; but I find alimony treated as due to the wife for her daily support. In Mr. Pitchard's book it is stated to be the ordinary rule of the court to decree it to be paid quarterly, and in *Wilson* v. *Wilson* Eccl. R. 329, where the application was to enforce the payment of the same for several years, the court said "Alimony is allotted for the maintenance of a wife from year to year."

In favour of the arrangement it is said that it makes the wife secure for so much money, whereas if payable from year to year the husband might evade payment: that is a reason of convenience; against which it may be said that if a sum be paid in gross to the wife she would be apt to live

* Before the writ of *habeas corpus* was given to the gaoler, valid warrants of commitment had been placed in his hands, so that the prisoner was not discharged.—Eds. L. J.

upon her capital; and at no very distant period probably be left destitute.

But the reasons against this arrangement, on grounds of public policy, appear to me to be very strong. The law does not contemplate that the husband and wife will live apart for life; but looks forward to their reconciliation; and so the sentence of divorce *a mensa et thoro* by the ecclesiastical courts was only "until they shall be reconciled to each other," and the sentence of judicial separation under the present law is doubtless in similar terms. The arrangement in question buys off the wife for life; it takes away one inducement on the part of the husband for reconciliation; its tendency is perpetual separation.

It is open to this further serious objection. The wife is entitled to her alimony only so long as she leads a chaste life. A wife separated from her husband is exposed to great temptations, every provision that tends to keep her from falling is valuable; this arrangement would remove one safeguard.

Under the Imperial Divorce and Matrimonial Causes Act, the court when decreeing a *dissolution* of marriage, which can only be by reason of adultery, may order the husband to secure to the wife a gross sum of money or an annual sum; but in those clauses of the statute which relate to *judicial separation* there is no such provision; but the enactment is simply this, that the court may order the payment of alimony; which I understand to mean alimony according to the ordinary course of the ecclesiastical courts, and not a gross sum.

The distinction is marked—where the woman ceases to be a wife a gross sum may be paid to her; but where she remains a wife there is no authority for such a payment. I must add that the reasons against it appear to me so weighty, that in my judgment the court ought not to approve of the arrangement proposed. There must be a reference back to the Master to allow alimony in the usual way.

UNITED STATES REPORTS.

SUPERIOR COURT.

Before Robertson, C. J., Garvin and McCunn, J.J.

Wilkins v. Earle et al.

Liability of innkeepers for money lost from safe.

Continued from p. 279.

The common law creates the contract between the traveller and his host. The statute of 1855 defines more clearly the duties of the parties, and if the guest neglects to comply with his part of the statutes, by placing his money in the safe and it is stolen, it is his loss alone. But if the innkeeper assumes the risk, by taking the money in his safe keeping, his liability to such guest is rendered positive and certain, and the consideration is the large sum demanded for the guest's keep, together with the lien the innkeeper has on such money and goods until such keep is paid.

It is contended for, in the opinion of the court, that it would be unjust for a traveller to bring in any amount of money or valuables to an inn, and, without notice, make the innkeeper liable. The simple answer to that proposition is this: That this is not a case of that kind. Here the innkeeper had the money placed in his safe-keeping, and had sufficient notice of the contents of the package—such a notice as satisfied him, and he thereupon entered into the obligation of taking care of the money for the consideration of the guest stopping at his inn, and the common law says, the defendant shall be responsible for the loss, especially if that loss takes place from the negligence of servants of the defendant. If this rule was not the proper one, how easily an innkeeper could conspire with his servants and rob his guests; whereas, the innkeeper at all times has a perfect security against his guests by simply asking the guest what are the contents of your package, and if he finds it too large, by refusing to receive it. The guest, however, has no such safeguard against the dishonesty of innkeepers and their servants, if this grand old rule of common law is to be abolished.

As to the question of notice, I hold that it is not necessary at common law that the guest should notify the innkeeper of the amount of money. The question of negligence cannot come up, for the innkeeper is liable without reference to any degree of care or negligence on his part. Chancellor Kent holds that is not necessary to prove negligence in an innkeeper—the innkeeper is liable as an insurer of the property and money of his guest, and this liability is founded on the principle of public utility, to which all private considerations ought to yield: 2 Kent's Com. 760, 7th ed., and cases there cited.

It is, therefore, at common law, unnecessary that the guest should notify the innkeeper of the particular amount of property or money left with him, and it is no argument against the innkeeper's liability to say that, if the guest had notified him of the particular amount of money he was leaving with him, in such a case the innkeeper would have exercised greater care, as the innkeeper is liable without reference to any degree of care or negligence on his part.

The statute of 1855 requires that a safe must be kept in which a guest may deposit his money. This increases public confidence and security to guests, and it must be presumed therefore that the Legislature intended that guests would be influenced by this increased confidence and avail themselves of the additional security. It cannot be justly said, that $3 per day is not adequate to the risk, because if not adequate they must make the contract with the guest for a larger consideration; and second, by analogy to the risk that insurance companies take are the very small premiums they receive and the enormous losses they frequently sustain, it may be said that the consideration of $3 per day is large. But to return to the question of notice on the part of the guest. The learned Chief Justice, in his able opinion, denies the sufficiency of the notice given by the plaintiff to the defendants of the contents of the package, when it was entrusted to the defendant for deposit in his safe, and says that "a notice, to be sufficient to release the plaintiff from the imputation of negligence, should be not only of the kind of property, but its value." When the package containing the money was handed to the defendant's agent at

the office, to be deposited in the safe, the defendant, by his agent, asked the plaintiff "what it contained?" the plaintiff answered "money." This description and notice were then satisfactory to the defendant, and the package was so marked.

The description satisfied defendant then—he asked for no other, but with that description took charge of the "money." I think he should now be estopped from saying the notice was not sufficient; the contrary doctrine would lead to great frauds.

If the notice was insufficient and was not a satisfactory compliance with the statute on the part of the plaintiff, and did "impute negligence to the plaintiff," then, I am unable to see on what theory the plaintiff could recover anything at all. I am unable to see why the notice should be insufficient to allow the plaintiff to recover all the money received by the defendant on the notice, but sufficient to allow him to recover a part. If the notice was insufficient under the statute (and if the question of notice is in any way controlling), then the plaintiff should not have recovered anything; but it being conceded that he should recover at least one thousand dollars and costs, I think from that concession alone it follows he should recover the whole of his loss. I am clear that the notice to the defendants, of the contents of the package entrusted to and received by him, was, under the circumstances of this case, sufficient.

It has been urged by the counsel for the defence, and a conclusion to that effect has been drawn in the leading opinion of the court, that the cause is analogous to that of the common carrier. I do not entertain any such conclusion of the similarity.

Formerly it was held that a carrier of passengers was not answerable for baggage at all, unless a distinct price was paid for it. This never was the rule with inkeepers, and the reasoning both of the statute and common law, by which the doctrine of the liability of innkeepers, without proof of fraud or negligence, is maintained, is, that travellers are obliged to rely almost entirely on the good faith of innkeepers, that it would be almost impossible for them, in any case, to make out any proof of fraud or negligence in the innkeepers, and that therefore the public good and the safety of our large travelling community require that innkeepers should be held entirely responsible for the safe keeping of the goods of guests, and the same reasoning would hold them alike responsible for money. Another reason why common carriers are sometimes excused for the loss of large sums of money, when packed in trunks, and so lost, is, that it is not presumed that a traveller would carry large sums of money in trunks, with his clothing, but would rather be presumed to carry such large and valuable sums of money about his person, while travelling, which latter presumption ceases when the traveller arrives at an inn, where the law provides a place of safety for such money, and where the innkeeper is held liable for any loss arising through his neglect.

This much have I reasoned, and said why this defendant should be held responsible for the loss of the money. Now, let us examine the decisions from the time of the earliest cases to the present on the subject.

One of the earliest decisions we find reported is that of Caly's case, tried in the Queen's Bench, during the reign of Elizabeth (8 Coke, 33), and there it is clearly annunciated as law, that the "innkeeper is responsible if the guest is robbed in his house," and I find on a careful examination of the English authorities that such is held to be the invariable rule of law in the courts of that country to this day. In the case of *Kent* v. *Shukland*, 21 Barn. & Adolph. 803, Lord Tenterden, it was held (all the other judges concurring), that innkeepers were liable for all moneys as well as goods of a guest, and that there was no distinction between money and goods. In the case of *Coggs* v. *Barnard*, 1 Smith's Leading Cases, 309, it is expressly held that the innkeeper's liability is not restricted to such sums as are required for travelling expenses, and the same rule was held by Holt, Chief Justice, in the case of *Lane* v. *Cotton*, 12 Mod. 487; and the very learned and able Judge Cowan, in the case of *Cole* v. *Goodwin*, 19 Wend., holds a similar doctrine, so that it cannot be said that we are at sea as to the extent of the liability of innkeepers. Since these leading cases, both English and American, adjudicated upon by the most learned of men, all fix the liability of the innkeeper to any sum of money the traveller may have within his possession and entrusted to the innkeeper in manner before specified.

Indeed, in the case of *Piper* v. *Manny*, 21 Wend. 282, Chief Justice Nelson carried this doctrine so far as to hold that an innkeeper was liable for the safe keeping of a load of goods belonging to a traveller who stops at the inn, even if the servant of the inn designates an open space near the highway for the goods to be placed.

In the case of *Ivanson* v. *Havre de Grace Bank*, 6 Har. & Johns. 47, 63, the court after stating the position that if A sends his money by his friend, who is robbed at the inn at which he is a guest, asy A. shall have the right of action. Now, certainly, this money of a friend was not for travelling expenses, it was simply a part of the money and goods of the guest, whom the innkeeper had undertaken to entertain as his guest, and around whom the great common law of our land throws its ample protection against the frauds of innkeepers; and this safe doctrine is also promulgated in the case of *Mason* v. *Thompson*, 9 Peck, 280.

The case of *Bennett* v. *Mellor*, herein cited, is a case where a guest left a sleigh-load of wheat in an outer-house belonging to the inn. The wheat was stolen, and the innkeeper was held liable. Certainly the wheat was not traveling expenses? And the like rule was held in case of *Hallenbeck* v *Fish* (8 Wend. 547). There the innkeeper was held responsible for the loss of a set of harness placed in a barn by the innkeeper's man, and in the case of *Jones* v. *Taylor* (1 Adolph. & Ellis, 522), the innkeeper was held responsible for a gig that was placed in front of the inn on the common highway.

Mr. Justice Fletcher remarks that the principle contended for, that innkeepers are liable for such sums only as are necessary and designed for travelling expenses by the guest, is un-

supported by any authority whatever, and wholly inconsistent with the principle upon which the liability of innkeepers rests. And the same rule was held good by Chief Justice Bronson in the case of *Mall* v. *Cook* (3 Hill, 485), and reiterated in the case of *Macdonald* v. *Egerton* (5 Barb., 506), and *Bennett* v. *Mellor* (5 Term R., 273), and this safe doctrine was re-announciated in the late case of *Gile* v. *Libby* (36 Barb., 741). In the case of *The Woollen Company* v. *Proctor* (7 Bushing, 417), where an agent of the Company was robbed at the inn of a large amount of money belonging to the Company, it was held that a recovery was not limited to travelling expenses, and certainly the case at bar is a much stronger case in favor of the plaintiff than the one last cited, for there the agent was robbed by some outside party, of money not his own, but here the plaintiff was robbed of his own money, by one of the servants of the innkeeper. In North Carolina, it was held, in the case of *Treaton* v. *Hay*, that a traveller alighting at an inn, and delivering his saddle bags, containing a large amount of money, to a servant, but did not inform the innkeeper that there was money in the bags; the money was stolen, and the tavernkeeper was held liable. See also the case of *Dwight* v. *Brewster* (1 Peck, 50), and *Taylor* v. *Monnot* (4 Duer [in this Court], 116), where a similar doctrine is maintained, and Mr. Justice Story lays down as an elementary principle a doctrine that completely meets this case. He says, at chapter 6, section 481, page 456, of his Commentaries: "So the innkeeper will be liable for the loss of the money of his guest, stolen from his room, as well as for his goods and chattels, and that this liability extends to all the movable goods and money of the guest, placed within the inn, and is not confined to such articles and sums only as are necessary and designed for ordinary travelling expenses of the guest."

But why enumerate cases; the doctrine is as old as our common law. Indeed, to hold a contrary rule, without authority or precedent, is to cast loose from the safe moorings of the old common law, rendered dear to us by the adjudications of the most learned men of the Bench, for centuries past, both in the old and new worlds, and I am satisfied that a contrary doctrine would be terrible in its effects in this great commercial community of ours, where our business men necessarily spend a large portion of their time at inns, in the pursuit of their calling.

This much I have said on the clearly adjudicated cases. Now, let us see what the ablest elementary writers say on the subject, and for that purpose I shall only cite a few of the most eminent of English and American writers. Sir William Blackstone, from whom every willing student draws the true maxims of sound law, says (1 Black. Com., 430): "If an innkeeper's servant robs his guest, the master is bound to restitution, for as there is confidence reposed in him that he will provide honest servants, his negligence is an implied consent to the robbery." This elementary principle completely covers the case under consideration.

Our great commentator, Chancellor Kent, in speaking of the liability of innkeepers, lays down this clear and undisputed principle, that the innkeeper is bound absolutely to keep safe the property of his guest deposited within the inn, whether the guest acquaints the innkeeper that the goods were there or not. Moreover, he says the responsibility of the innkeeper extends to all his servants, and to all goods and chattles, and all moneys of the guest placed within the inn, and he adds that the safe custody of the goods and money of the guest is a part of the contract to feed and lodge for a suitable reward, and then it is not necessary to prove negligence in the innkeeper, for, says he, "it is his duty to provide honest servants." What can be plainer than this, and what can be more in consonance with common sense, as well as clear common law, and I am satisfied this doctrine will put to violence the theories that there is no consideration for the extra risk entered into by the innkeeper for keeping the money; the consideration is the enormous charge of the innkeeper for the entertaining and caring for his guest.

To the lawyer and scholar, the names of Sir Wm. Blackstone and Sir Wm. Jones on the one side of the ocean, and Chancellor Kent and Justice Story on this, will be sufficient for my purposes in this case until some author or some case is cited, showing clearly that a contrary doctrine should obtain. It must follow, therefore, and I am satisfied from all my research that the rule of law, to wit, that the innkeeper is responsible for all moneys deposited with him, is the correct and standard rule.

This is not the first instance this vague question of travelling expenses has been interposed by innkeepers and urged by their counsel, in order to avoid their responsibility, but it has always been repelled, and it will be seen that, in many of the cases I have cited, the question has been treated and disposed of by a flat denial of such a dangerous doctrine.

The rights of parties, and such important rights as these under consideration, affecting, as they do, in their results, our whole travelling community, must be determined by sound law, handed down to us by the most eminent men, and not by any vague, undeterminate and partial usage or *dicta* of persons or places. A strict adherence to this principle is particularly essential, in this day, to sound and consistent administration of justice, and a departure from such a course works great injustice—for no man could know what were his rights or his duties, unless they are clearly defined by the precedents of the earlier times, declared by those great living lights and champions of just and wholesome law.

The judgment should be affirmed with costs. —*N. Y. Transcript.*

Supreme Court of Errors of Connecticut.

William Morris *v.* Delos Platt and Another.

A man who is assaulted under such circumstances as to authorize a reasonable belief that the assault is made with a design to take his life, or inflict extreme bodily injury, will be justified, in both the civil and criminal law, if he kill or attempt to kill his assailant.

The question whether the belief was reasonable or not must be passed upon by a jury, but a person does not act in such a case at the peril of making that guilt, if appearances prove false, which would be innocence if they proved true.

It is well settled that a man is not liable in an action of trespass on the case, for an unintentional consequential injury resulting from a lawful act, where neither negligence nor folly can be imputed to him; and there is no reason for a different rule where the injury is immediate and direct, and the action trespass.

Where a person in lawful self-defence fires a pistol at an assailant, and, missing him, wounds an innocent by-stander, he is not liable for the injury, if guilty of no negligence.

While this is the result of the application of well settled legal principles, it is questionable whether, in view of the too general practice of carrying firearms, and the danger to innocent persons from their use, there should not be some legislation changing the rule of law in such a case, or otherwise protecting the public.

It is not the proper course for a judge to lay down the general principles applicable to a case, and leave the jury to apply them, but it is his duty to inform the jury what the law is as applicable to the facts of the case.

The facts of a case are to be found by the jury, unless admitted, and the judge can only regard them as claimed, for the purpose of applying the law to them contingently, if found; and he cannot properly refuse to charge upon the facts claimed on the ground that in his opinion they are not proved.

Trespass for an assault. Verdict for plaintiff, and motion for a new trial.

Kellogg, for the motion.

H. B. Munson and *Doolittle*, contra.

The opinion of the court was delivered by

Butler, J.—Upon a careful examination of the important questions presented upon this record, I do not see how the omission of the court to charge as requested on the first point, or the charge actually given on the second, can be vindicated, and the verdict sustained.

1. It appears from the evidence offered on the trial that the defendant wounded the plaintiff in two places by two shots fired from a pistol; and from the nature of the weapon, and the other concealed circumstances, the jury were authorized to find, and doubtless did find, that the wounds were inflicted with a design to take the life of the plaintiff. It was incumbent on the defendant to justify or excuse their infliction. He in the first place attempted to justify them, and the obvious attempt to take life which aggravated them, by offering evidence to prove that he was assailed by the plaintiff and others in a manner which indicated a design to take his life, and "that he was in great bodily peril and in danger of losing his life by means of the attack," and that he fired the pistol "to protect his life and his body from extreme bodily injury." If these facts were proved and found true, they fully justified the attempt of the defendant to take the life of the plaintiff as matter of law, and entitled the defendant to a verdict in his favor. And so the court were bound to tell the jury, if properly requested to do so by the defendant.

The motion further shows that the defendant did in substance request the court to charge, that if they found the fact proved as claimed, he would be justified in self-defence in using the pistol as he did—that the rule of law is "that a man may lawfully take the life of another who is unlawfully assailing him, if in imminent peril of losing his life or suffering extreme bodily harm, &c." What a man may lawfully do, he may lawfully attempt to do; and that request embodied in substance, and with sufficient distinctness, a well settled specific rule of law, applicable alike in criminal prosecutions and civil suits, and to the facts of the case as claimed.

The court did not conform to the request. The charge as given informed the jury what "the great principle" of the law of self-defence is, and correctly; but that was not all to which the defendant was entitled. It is not for juries to apply "great principles" to the particular state of facts claimed and found, and thus make the law of the case. When the facts are admitted, or proved and found, it is for the court to say what the law as applicable to them is, and whether or not they furnish a defence to the action, or a justification for the injury, if that be the issue. And so where evidence is offered by either party to prove a certain state of facts, and the claim is made that they are proved, and the court is requested to charge the jury what the law is as applicable to them, and what verdict to render if they find them proved, the court must comply. This is not only the common law rule, but it is carefully and explicitly declared in this State by statute, that "it shall be the duty of the court to decide all questions of law arising in the trial of a cause, and in committing the cause to the jury to direct them to find accordingly." Rev. Stat. tit. 1, sec. 144. Here the rule of law applicable to the facts claimed is as well-settled and specific as any rule of law in the books, and it was the duty of the court to give it to the jury as requested, and direct them if they found the facts as claimed to find a verdict accordingly. And if it were otherwise, and a specific rule settled by authoritative adjudications, in which the great principle had been applied to a similar state of facts, did not exist, it would still have been the duty of the court to apply the principle to the facts, and to tell the jury whether or not they furnished a justification in law to the defendant, for that, in the language of the statute, was "a question of law arising in the case."

The first request of the defendant which we are considering involved the finding of two principal facts, viz., first, whether the plaintiff was one of the assailants, and, second, whether the assault was made with the design to take the life of the defendant or inflict upon him extreme bodily harm. But the jury might find upon the evidence that the plaintiff was one of the assailants, and fail to find the design to take life imputed to him. To meet such a contingency the defendant added to his request, that the court should charge the jury, "that when, from the nature of the attack, there is a reasonable ground to believe that there is a design to destroy his life or commit any felony upon his person, the killing of his assailant will be excusable homicide, though it should afterwards appear that no felony was intended;" but the court did not so charge, because, as the motion states, the court did not consider that the facts of the case required such instructions.

The facts of a case are to be found by the jury unless admitted, and the court can only regard them as claimed for the purpose of applying the law to them contingently if found. When, therefore, the motion states that the court did not think the facts of the case required the instruction claimed, as the material facts were in dispute, it must be intended that the court was of opinion that there was not any such law as claimed, applicable to the facts as claimed.

(*To be continued.*)

GENERAL CORRESPONDENCE.

To the Editors of the Law Journal.

Gentlemen,—Among the many questions you have kindly answered through the medium of your valuable journal for the law students of Upper Canada, with reference to articles of clerkship, I trust you will be kind enough to answer this:

An articled clerk serves an attorney for a period of one year under an assignment of his articles, when a second assignment takes place. The attorney refuses to certify to his service at the date of the last mentioned assignment, saying he would leave it a matter for his future consideration. Should the clerk apply for an order now, to compel the attorney to certify to his articles, or wait until the expiration of his original articles?

Yours truly, Law Student.

[We know of no law by which the student can *compel* his master to give this certificate, until such time as he requires it for the purposes of admission. When that time arrives, he can, if necessary, apply to the court for a mandamus, or *may* obtain relief from the Society, within the scope of their powers, upon making out a very clear case. And if any damage should arise to the student from refusal of the master to give a certificate when called upon at the proper time to do so, without his being able to give a sufficient reason, an action on the case would accrue to the student.—Eds. L. J.]

REVIEWS.

An Act to amend the Insolvent Act of 1864, with Annotations, Notes of Decisions, and a full Index. By J. D. Edgar, Esq., of Osgoode Hall, Barrister-at-Law. Rollo & Adam, Law Publishers, Toronto. 1865.

The above, from the industrious pen of Mr. Edgar, the annotator of the Insolvent Act of 1864, will be found a useful postscript to his former book. The act of 1864 was found defective in many respects, and it became necessary to amend it, which was done by the act of last session, which Mr. Edgar gives in full, with notes explanatory of the defects intended to be remedied, and of decisions which tend to interpret the enactments. It is only necessary to say that these notes seem to have been prepared with the same care as those to the act of 1864.

He gives also a collection of "notes of decisions," which he prefaces with the following observations:

"Since the first of September, 1864, when the Insolvent Act came into force, a great many questions have arisen as to its interpretation, and a number of valuable decisions on doubtful points have been made. These cases, unfortunately, have rarely been reported, from the fact that they came only before our County Court Judges. The Editors of the *Upper Canada Law Journal* have made commendable efforts, however, to preserve these decisions, and most of the following are taken from their reports. Very few appeals have been made to the Superior Courts, considering the number of insolvency cases. It is thought advisable to put the cases below upon record as useful, although they may not all be found to be unimpeachable decisions."

We may mention here that *all* these cases will be found in the *Law Journal*, *Willson* v. *Cramp* (the note of which case is taken by Mr. Edgar from 11 Grant) having been reported expressly for the *Law Journal*, and is on page 217 of the current volume.

With respect to the above remarks of Mr. Edgar, we are only sorry that we have been unable, owing to the want of thought (we shall not call it *apathy*) of some of those who might well have helped us, to give more reports of cases decided under the Insolvency Act than have already appeared in our columns. We trust that this hint may not be in vain.

The pamphlet winds up with a full and most useful index.

APPOINTMENTS TO OFFICE.

NOTARIES PUBLIC.

JAMES HOSSACK, of the town of Cobourg, Esquire, Barrister-at-Law, to be a Notary Public for Upper Canada. (Gazetted October 7, 1865.)

CORONERS.

WILLIAM BURR TERRY, of the township of North Gwillimbury, Esquire, to be an Associate Coroner for the United Counties of York and Peel. (Gazetted Oct. 7, 1865.)

PETER DAVY DAVIS, of Adolphustown, Esquire, to be an Associate Coroner for the County of Lennox and Addington. (Gazetted October 7, 1865.)

TO CORRESPONDENTS.

"Sheer Hulk."—Time and space do not permit the insertion of your interesting communication in this issue, but it will appear in our next.

"Lex"—In current number of *Local Courts Gazette*.

"Utile Dulci"—Too late; will appear in next number of *Local Courts Gazette*.

"Law Student."—Under "General Correspondence."