The Local Courts'
AND
MUNICIPAL GAZETTE.

DECEMBER, 1868.

## PRESENTATION TO JUDGE GOWAN.

It is with feelings of no ordinary pleasure that we record a very interesting ceremony that took place in Barrie, the County Town of Simcoe, immediately after the opening of the Courts on Tuesday, the 10th instant. We allude to the presentation to His Honor Judge Gowan of an address, by the united Bar and practitioners of the County, as a mark of their respect and esteem for his many eminent and kindly qualities. The address was beautifully engrossed on vellum, and was accompanied by a life-sized portrait in oil of the learned Judge. The words of the address speak for themselves:—

"*To His Honour* JAMES ROBERT GOWAN, *Judge of the County Court of the County of Simcoe.*

"YOUR HONOUR—The members of the Legal Profession in the County of Simcoe beg leave to congratulate you on the completion of your quarter of a century on the Bench, and render thanks to the Almighty disposer of events that you are still spared in the full strength and vigor of body and mind to continue, we earnestly hope for many years, to fill the office you have so long adorned.

"We feel that to your wise counsels and example are mainly due the existence of a Bar in this County, which will compare favourably with any in the Dominion, and that this result has been obtained without, in the smallest degree, fostering it at the expense of the public interests.

"As the head of the Legal Profession in the County, we have been gratified at hearing your name mentioned far and wide as occupying the foremost rank among County Judges, feeling that to earn such a position was alike honorable to yourself and creditable to the County and its Bar.

"We believe that to your firm and dignified administration of the Laws is mainly to be attributed the comparative freedom from crime, which we rejoice to know, distinguishes the County of Simcoe, and the respect for law and order which prevades all classes of our community.

"The profession have long felt that some public recognition of your extended and valuable services on the Bench, and your kindly spirit towards themselves, was due to you; and we now beg your acceptance, at our hands, of this life-sized painting of yourself, in your official chair and robes, as a mark of the respect and esteem in which you are held by us; and while making it, as we do, your own private property, we ask the favor that it may for a time be permitted to hang in the Court Room, so that all may have an opportunity of seeing it, and learning that the profession have paid tribute to your worth.

"Dated at Chambers, 8th December, A. D. 1868."

With the sentiments expressed in the above we most heartily concur, and congratulate the practitioners of the County of Simcoe that they have such an excellent Judge at their head, and that they know how to appreciate his worth.

We are the more pleased, as this gives us a legitimate opportunity of expressing our own sense of the very many obligations we are under to Judge Gowan for the valuable advice and assistance he has never failed to give us, when appealed to for the purpose, in the conduct of this Journal, advice especially valuable in that department with which he is so peculiarly conversant, and of which (we hope he will excuse our mentioning it,) we have largely availed ourselves. There are others, too, who will not easily forget the sound counsel and kind aid which, in numerous ways, has encouraged them to persevere to the attainment of a certain measure of success in their professional career.

The high stand Judge Gowan has always taken with reference to the dignity of the Bench, and his strict and regular administration of the law, has been remarked beyond the precincts of his own Courts, and would serve as an example for others to imitate.

The local bar, those who are best capable of forming an opinion of the learned Judge, have in this instance expressed not only their own feelings, but that of the whole County, and of his friends at large, for none that have been brought into contact with him but will echo the words of the address. Those who know him best, the most appreciate him. The officers of his local Courts, who are remarkable for their efficiency (and none others would be allowed to hold office under him), though they know, and if occasion requires, are made to feel the strictness of his rule, love and respect him. At the same time they may well, and doubtless do, feel a pride in the way the business of his Division Courts is conducted,

and that the Judge of their County holds the position he does in the estimation of the public.

The services of Mr. Gowan have not been confined only to his own County, but are very generally known and appreciated outside its limits. The active part he took in the Consolidation of the Statutes, and for which he was publicly thanked by Sir James Macaulay in most marked and complimentary language, will be familiar to many of our readers; he was also one of the judges appointed to prepare the rules for the Division Courts and County Courts, &c. In these and other matters, about which we must refrain from speaking more at length, the public are indebted to his labour, learning and experience.

The subject is one of interest and pleasure to us, and is by no means exhausted by these few remarks of ours. We may say in conclusion, that nothing has ever given us greater pleasure in the conduct of this Journal than that of being able to chronicle this tribute of respect, so spontaneously offered and so worthily bestowed.

The learned Judge, in an impressive and eloquent manner, replied to the address, and concluded thus:—

"It was right that I should endeavor to discharge every duty faithfully and fearlessly: to create confidence in and to secure to suitors the full benefit of the several Courts over which I preside, and to impress the public with the feeling of respect, never withheld from a Court of Justice, however limited its sphere, where order and decorum obtain.

"From the first I felt that this could be best done with the aid of an educated and honorable Bar, who would feel with me that we were all ministers of justice—all equally striving for the same great end. From the profession in this County I have always received the greatest aid in the discharge of my judicial duties, and it is to your cordial co-operation and support I am indebted for a measure of success that, unassisted and unsupported, I could scarcely have obtained.

"In gladly according to the Bar every privilege they could fairly claim: in fostering a right feeling in their intercourse with each other: in publicly combating prejudices against them, I have ever felt I was strictly within the line of duty; but I think you will acquit me of the weakness which fails to look for the inherent merits of a case in admiration for the skill and zeal of counsel.

It is most gratifying to me that you rightly possess the respect of the whole community, and I can with great truth say that honor, learning and ability, are characteristics of the legal profession in this district.

"At the age of twenty-five I entered with ardor on a work I liked, and though this judicial District was then, as now, the largest in Upper Canada, I felt equal to the labor, and I am able to say, through God's goodness to me, that during a period of nearly twenty-six years I have never been absent from the Superior Courts over which I preside, and, as to the Division Courts (except when on other duties at the instance of the Government) fifty days would cover all the occasions when a deputy acted for me. I have, I may be pardoned for saying, undergone labors and exposure of the most trying kind, as most of you know; but few are aware that those labors have left me with a seriously impaired constitution; yet I trust there is still in me some years of work, and nowhere could I be so happy in living and acting as amongst those whom I have known and valued so long.

"And now gentlemen need I say that I will preserve as a precious posssession the address with which you have honored me. Your valuable gift will long after I have passed away, show the first Judge of this District as he looked after a quarter of a century of work. I would that it could portray with equal fidelity how deeply he was touched by this generous mark of your regard: how much invigorated for fresh exertion to try to deserve all that your kindness has associated with his name."

After the rising of the Court, the members of the profession present, which included, we believe, every practitioner in the County, together with some of the County officials and others, were sumptuously entertained at the hospitable residence of the learned Judge.

## TAX SALES.

We will conclude our synopsis of the cases bearing on the question of sales for taxes by giving the leading points that were decided in the cases of *Cotter* v. *Sutherland*, and *Stephens et al.* v. *Jacques et al.*, in 18 C. P. 357, in which all the previous decisions were reviewed. These points were shortly as follows:—

Under the Statute 59 Geo. III. c. 7, 4th Sess., it was the duty of the Court of Quarter Sessions to assess the amount of taxes to be paid upon lands, not exceeding the sum of one penny in the pound of the statutable value, and where the Treasurer of his own motion charged every wild lot

one penny in the pound of such value, the sale of land for such taxes was held invalid.

*Quære*, as to the manner in which wild lands of non-residents, not included in the assessment rolls, were to be rated under such Act, and *Semble*, such lands not assessable at all.

Tax Statutes should not be construed as Statutes creating a forfeiture, but rather in the same manner as Statutes by which lands are sold under execution for debt, and the same rules which apply to sales under execution should govern tax sales.—*Per A. Wilson, J.*

Strict proof should be given as to the legality of the tax and its actual imposition, but in matters concerning its collection unnecessary or unreasonable rigour in carrying out the clause of the Statutes should not be exacted from the officials entrusted therewith.—*Per A. Wilson, J.*

Where land has been sold for a larger amount of taxes than has been or can be lawfully imposed such sale is void.

It is necessary that the Treasurer should keep his accounts of taxes due according to the Statute, in order to validate the sale.

In this case it was held, following *Doe d. Mountcashel* v. *Green*, 4 U. C. R. 23, no objection to the sale, that part of the taxes for which the sale was made, accrued to the former Home District, while the sale was made by the Sheriff of the Simcoe District, to which district the residue of the taxes was owing.

The omission of the Treasurer to advertise the list returned by him to the Court of Q. S., within one month thereafter, and the omission to advertise such lot in the Official *Gazette*, and imperfections in the advertising, are irregularities cured by 6 Geo. IV. c. 7, s. 22, and by analogy to the holding of the Courts in cases of sales under execution. The Court also considered what requirements of the Tax Acts are imperative and what are merely directory.

It is competent to sell the whole of a lot for taxes, and the Court will not presume against a sale on the supposition too much land was sold for a small amount.

When, before conveyance, the Acts under which the sale is made are repealed without any saving clause, the Sheriff's deed subsequently given will be void (following *Bryant* v. *Hill* 23, U. C. R. 96); but it is competent for the purchaser to set up a defence under the Sheriff's certificate given at the time of sale, notwithstanding he has given it up on receiving the invalid conveyance.

Sales for taxes made after return day of the writ to sell are valid.

When taxes are in fact imposed on patented lands, and no return of the Surveyor General of the land having been granted can be found or proved, such return may be presumed.

When, owing to land being patented in July, taxes are charged thereon only for half a year, yet that is in effect a taxation for the whole of the fiscal year, and so long as the patent issues before the assessment is completed, taxes for the whole of the year wherein such patent issues may be properly imposed, and the lands sold therefor if unpaid.

Under the Sheriff's certificate the purchaser is entitled to possession of the land sold, and being in part possession he can avail himself of such certificate as a defence to an action of ejectment by the owner of the land, even though he has not received a deed or a valid deed from the Sheriff; and *semble*, he could maintain ejectment on such certificate against any one in possession under the former owner.

No one subject has caused, probably, more litigation in this Province than questions affecting the validity or invalidity of tax titles. Some persons complain of their lands being sold for sums bearing no proportion to their value, others again complain that having bought under a tax title and supposing everything to be perfect, they are afterwards dispossessed and lose their money, owing to some defects in the mode of sale, &c., with which they had nothing to do. Both are right and both are wrong. There are hardships on both sides. With those who from want of care or desire to pay their taxes lose their lands we have little sympathy, nor on the other hand are we concerned for those who attend sales for the purpose making money out of the poverty or forgetfulness of others, and come to grief over their purchases.

It is most important, however, that the subject should be taken up and dealt with in a complete and statesmanlike manner, but whilst hoping for this we notice a bill that has been introduced this session, professing to remedy the evils by declaring all past and future sales for taxes valid, except in cases of fraud, &c. This is a pretty sweeping measure and one which in its present shape would be most objectionable. It makes no provision for existing rights or pending suits, and is in many ways likely to do more harm than good, and will, it is to be hoped, unless considerably altered both in the principle involved and in its details, share the fate of a similar bill introduced last session. This act might suit the personal ends of numbers of persons, but is not such as is desirable to meet the difficulties of the case. Pro-

tection is required on both sides, and this is not sufficiently provided for by the proviso that fraud will vitiate sales in any case. For example, suppose a case where a tenant of a whole lot procures the cleared land to be assessed to himself on the resident roll, and the remainder of the lot (wild land) assessed on the non-resident roll to the owner in fee, who imagines that his tenant is paying the taxes, or suppose the case where lands held under mortgages have been sold without the knowledge of the mortgagees, who, if the sale were valid, would thereby lose their security and probably their money.

A cotemporary, usually very conversant with municipal matters, makes some pertinent observations on this subject, which we subjoin:—

"The enactment which renders all sales valid after a certain period does not affect all that is required, and is, moreover, likely to do great injustice in some cases. It often happens that assessors, through carelessness, place the same land on the resident and non-resident rolls at the same time, in which case a lot for which the owner had paid the taxes might be sold, without his knowing anything about it, and this sale would in time become indefeasible.

"This would be manifestly unjust, as a person who had his receipt for the taxes on his fyles would not think of making enquiry, or watching the advertised sales, and could not be charged with neglect for not doing so.

"It is a different matter with those who have in fact not paid. Every man who owns land knows that he has to pay taxes if he wishes to keep it, and if he neglects that duty for a certain period, and the property is sold, the sale should be valid, notwithstanding any merely formal error or defect in carrying out the law. Whenever it could be shown that the owner of land had not paid his taxes for five years, the sale ought to be declared good as against all other objections.

"If the legislature is not prepared to go this length, it should at least protect parties making improvements—a thing which can be easily done.

"The original owner of a lot sold for taxes, claiming to recover it back, should at least be obliged to pay a valuation for any improvements which have been made upon it by the occupant; and if unable or unwilling to do so, he should be compelled, as the alternative, to accept what the property was worth at the time of sale, with interest.

"The law, as it stands at present, offers a premium to dishonesty, and gives its protection to those who least deserve it."

## EXTRADITION.

We publish in another place the report of the decision, *The Queen* v. *Frank Reno and Charles Anderson.* This case, important in itself, has been impressed with additional interest and significance owing to the frightful end that has befallen these men, in common with the two brothers of Frank Reno. We read in the public papers these four men were murdered, for such is the only word that describes the act, in the gaol in which they were confined, in the State of Indiana, by a number of men calling themselves members of a "Vigilance Committee."

There is no reason to suppose, that we are aware of, that the authorities were in collusion with the men who committed this lawless act, except so far as they took no sufficient measures to protect their prisoners, though well aware of the existence of this "Vigilance Committee." The very thing that calls into existence bands of men who think it necessary to take the administration of criminal law into their own hands, is the incompetence or unwillingness of the authorities to carry out the laws they are appointed to maintain and administer.

It is no business of ours whether a neighbouring power permits, or, which is much the same thing, allows its citizens to hang suspected criminals before trial or after, except so far as it concerns our relations with that nation. The present case, unfortunately, concerns us in various ways, and not the least in this, that it will in a great measure cause a re-action in the feeling in favour of greater free trade in criminals, so to speak, between ourselves and the United States, which has been growing of late years. And it does concern us that persons extradited should receive a fair trial for the offence alleged upon this side of the line, otherwise there is no knowing to what improper and scandalous ends this treaty, so necessary for the well-being of both countries, might be prostituted, and how far the citizens of our country might be sacrificed to the occasional and unfortunately frequent lawlessness of our neighbours.

The act of the would-be conservers of the peace for the State of Indiana will of course be repudiated by the American government, and there we presume the matter will end. But the bloody stain upon the faith of that government will be no reason why we should not for the future do as we hitherto have

done—obey the law of extradition as we find it. If a similar case were to arise to-morrow, with similar results to follow, our judges would be bound to and would without hesitation, though it might be with great reluctance, act without reference to the consequences; and the Governor General might possibly feel bound, in the exercise of his duty in carrying out the treaty, order the prisoners to be handed over to the United States authorities, to be dealt with according to the law of the land, or Judge Lynch, as circumstances, or the popularity or unpopularity of the crime or criminal might dictate. With reference to this part of the subject, we beg to call attention, to the words of the Chief Justice in the close of his judgment. These frightful excesses are also to be deplored, as they tend to beget a feeling of mistrust in the good faith of our neighbours, most destructive of good feeling, and likely to lead to the unfortunate result of limiting, instead of extending, the law affecting the interchange of criminals, as at present existing.

## SELECTIONS.

### THE NEGLIGENCE OF FELLOW-WORKMEN.

The House of Lords has recently somewhat extended the doctrine concerning the non-liability of a master for an injury inflicted upon one of his servants by the negligence of another, they both being engaged in a common employment. The ordinary principle, as our readers well know, is that the master is not liable because there is no implied promise on his part not to expose his servant to extraordinary risk. The common employment is taken to embrace all cases where the risk of injury from the negligence of the one is so much a natural and necessary consequence of the employment which the other accepts, that it must be included in the risks which are considered in his wages: (*Morgan* v. *Vale of Neath Railway Company*, 33 L. J. 260, Q. B.) The necessary conditions accompanying this exemption from liability are that the master should employ servants of competent skill (*Tarrant* v. *Webb*, 18 C. B. 787); and if they are competent, inadequacy in their numbers does not affect the question: (*Skipp* v. *Eastern Counties Railway Company*, 9 Ex. 223.) And further, the master must not be aware of habitual neglect or violation of duty by any of his servants: (*Senior* v. *Ward*, 28 L. J. 139, Q. B.)

The recent case to which we referred as having been decided by the House of Lords is that of *Wilson* v. *Merry*, 19 L. T. Rep. N. S. 30; and there the Lord Chancellor grasped the principle instead of the application—the principle, that is, that a master stands in the position which any ordinary person stands towards another with whom he does not contract in person to do an act. But we will take the cases in their order, and in *Reid* v. *The Bartonshill Coal Company*, 3 Macq. 296, 420, all the previous cases were reviewed, and Lord Cranworth laid down some very clear definitions, which we will here cite. The liability of a master to the general public was thus defined:—"Where an injury is occasioned to anyone by the negligence of another, if the person injured seeks to charge with its consequences any person other than him who actually caused the damage, it lies on the person injured to show that the circumstances were such as to make some other person responsible. In general it is sufficient for this purpose to show that the person whose neglect caused the injury, was, at the time when it was occasioned, acting not on his own account, but in the course of his employment as a servant in the business of a master, and that the damage resulted from the servant so employed not having conducted his master's business with due care. In such a case the maxim *respondent superior* prevails, and the master is responsible. Thus, if a servant driving his master's carriage along the highway carelessly runs over a by-stander; or if a game-keeper employed to kill game carelessly fires at a hare so as to shoot a person passing on the road; or if a workman employed by a builder in building a house, negligently throws a stone or brick from a scaffold and so hurts a passer by: in all these cases (and instances might be multiplied indefinitely) the person injured has a right to treat the wrongful or careless act as the act of the master. *Qui facit per alium facit per se.* If the master himself had driven his carriage improperly, or fired carelessly, or negligently thrown the stone or brick, he would have been directly responsible, and the law does not permit him to escape liability, because the act complained of was not done with his own hand. He *is* considered as bound to guarantee third persons against all hurt arising from the carelessness of himself or those acting under his orders in the course of his business. Third persons cannot, or at all events may not know whether the particular injury complained of was the act of the master of the act of his servant. A person sustaining injury in any of the modes I have suggested has a right to say, "I was no party to your carriage being driven along the road; to your shooting near the public highway; or to your being engaged in building a house. If you choose to do, or cause to be done, any of these acts, it is to you, and not to your servants, I must look for redress, if mischief happens to me as their consequence." A large portion of the ordinary acts of life are attended with some risk to third persons, and no one has a right to involve others in risks without their consent. This consideration is alone sufficient to justify the wisdom of the rule which makes a person by whom, or by whose orders, these risks are

incurred, responsible to third persons for any ill consequences resulting from want of due skill or caution. And as to the liability of the master to his workman, his Lordship said: "When the workman contracts to do work of any particular sort, he knows, or ought to know, to what risks he is exposing himself; he knows that if such be the nature of the risk, that want of care on the part of a fellow workman may be injurious or fatal to him, and that against such want of care his employer cannot by possibility protect him. If such a want of care should occur, and evil is the result, he cannot say that he does not know whether the master or the servant was to blame. He knows that the blame was wholly that of the servant. He cannot say the master need not have engaged in the work at all, for he was party to its being undertaken. Principle, therefore, seems to me opposed to the doctrine that the responsibility of a master for the ill consequences of his servant's carelessness is applicable to the demand made by a fellow workman in respect of evil resulting from the carelessness of a fellow workman when engaged in a common work."

Lord Cairns, as we have said, raised the question higher. He stated that he did not think the liability or non-liability of the master to his workmen can depend upon the question whether the author of the accident is not, or is in any technical sense, the fellow-workman or collaborateur of the sufferer. Although the cases are usually cases arising out of the negligence of fellow servants, Lord Cairns considers that such cases are examples of the rule, and do not constitute the rule itself. "The master," he continues, "is not and cannot be, liable to his servant, unless there be negligence on the part of the master in that which he (the master) has contracted or undertaken with his servant to do. The master has not contracted or undertaken to execute in person the work connected with his business. The result of an obligation on the master, personally to execute the work connected with his business, in place of being beneficial, might be disastrous to his servants; for the master might be incompetent personally to perform the work. At all events, a servant may choose for himself, between serving a master who does, and a master who does not, attend in person to his business. But what the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this, he has, in my opinion, done all that he is bound to do. And if the persons so selected are guilty of negligence, this is not the negligence of the master, and if an accident occurs to a workman to-day, in consequence of the negligence of another workman, skilful and competent, who was formerly, but is no longer, in the employment of the master, the master is, in my opinion, not liable, although the two workmen cannot technically be described as fellow-workmen."

This last passage is important, because very many cases have been decided upon the technicality itself, as in *Hutchinson* v. *The York, Newcastle and Berwick Railway Company*, 5 Ex. 343; and *Wiggett* v. *Fox*, 25 L. J. 188, Ex. The extension of the application of the rule, as well as the elevation of the principle, is clear. A servant is to be taken as running all the risks attending the employment of *former* servants of his master, and we think the position taken by Lord Cairns goes a long way towards taking the sting out of the difficulty of the question of "common employment," referred by Lord Chelmsford in the *Bartonshill* case, who said, "There may be some nicety and difficulty in deciding whether a common employment exists, but in general, by keeping in view what the servant must have known or expected to have been involved in the service which he undertakes, a satisfactory conclusion may be arrived at."

Another point was dealt with by Lord Cranworth in the present case, which, however, is of less importance when viewed by the light of Lord Cairns' judgment. "Workmen," he said, "do not cease to be fellow-workmen because they are not all equal in point of station or authority. A gang of labourers, employed in making an excavation, and their captain, whose directions the labourers are bound to follow, are all fellow-labourers under a common master." Then in Lord Chelmsford's judgment, a further suggestion shews itself. The accident here had arisen from the ill-ventilation of a pit, the arrangements for ventilating having been finished before the injured person entered the service. He was held to be in a common employment with the person who had carried out these arrangements. How far back is the relationship to extend. We apprehend every case must depend upon its own circumstances. Clearly, if work be completed before a particular plaintiff is employed as a servant, it will depend very much on the length of time which elapses between the completion of the work and the employment of the plaintiff whether the rule is to apply or not. New elements would be imported into these cases if much time elapsed between the completion of the work and the accident. For the accident, as an instance, might be the result of a former servant's negligence and yet might have been discovered and remembered by a vigilant master. This is a point which may be raised at a not distant day.

To sum up the matter, it is only to be observed that *Wilson* v. *Merry* does this: It invites the courts to deal with these cases of negligence among workman upon principle rather than by the light of technicalities, and it shows that the limit of time has yet to be fixed beyond which the negligence of one workman, who has left the common employment, cannot affect the liability of the master to a servant hired subsequently.

## SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

### NOTES OF NEW DECISIONS AND LEADING CASES.

VOLUNTARY GIFTS SUPPORTED BY DEEDS.—The doctrine of the Court of Equity, that in all cases of voluntary gifts, by ward to guardian, client to attorney, &c., the *onus* of proving the gift to be one of "a rational consideration, and pure volition, uninfluenced," lies upon the guardian, attorney, &c., applies to all cases where the intended donee is shown to have acquired an ascendancy over the mind of the intending donor.

Hence, where a spiritual medium, whose presence was attended with manifestations from the alleged spirit of a deceased person, was shown to have acquired, as a consequence of such manifestations, an ascendancy over the mind of the widow of the supposed manifesting spirit; the *onus* of proving that certain large gifts made to him by the widow, and fortified by irrevocable deeds, were made to him by her after a rational consideration, and of her own pure volition, uninfluenced, was cast upon the medium.

Under the circumstances of the case the court held that the medium had not proved what it so held him bound to prove as aforesaid, and the gifts were set aside.—*Lyon* v. *Home*, 16 W. R., 824.

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SEAMEN — FOREIGNER — JURISDICTION. — The prisoner was an American citizen, and was convicted at the Central Criminal Court of manslaughter on board of a vessel belonging to the port of Yarmouth in Nova Scotia, but registered in London, and sailing under the British flag. The vessel at the time was in the river Garonne, within the boundaries of France, on her way up to Bordeaux, and was about forty-five miles from the sea, and about half way up to that city. The tide flowed and ebbed there. It was objected at the trial that the Court had no jurisdiction to try the prisoner.

*Held*, that the conviction was right, inasmuch as the Admiralty of England would have had jurisdiction to try the prisoner, and by statute the trial might equally be had at the Central Criminal Court.—*Conviction affirmed.*—*Regina* v. *Anderson*, L. J. Notes of Cases, 248.

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RAPE—CONSENT.— The prosecutrix and her husband had retired to rest about 12 o'clock at night. They were in bed together in a room on the first floor of the house where they lodged, and the prosecutrix had her baby in her arms in bed with her. At about 2 A.M. the husband was asleep, and the prosecutrix was between waking and sleeping, when the latter was completely awakened by a man having connection with her, and pushing the baby aside out of her arms. She thought the embraces were those of her husband; but her dress being over her face when she awoke, it was not until too late that she found it was not her husband.

*Held*, that there was consent to the connection, but that the consent had been obtained by fraud, and therefore that conviction must be quashed. *Conviction quashed.*— *Regina* v. *Barrow*, L J. Notes of Cases, 248.

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SALE OF OBSCENE BOOKS.—Copies of a pamphlet of an obscene nature were seized under Lord Campbell's Act (20 & 21 Vict. c. 83). The publisher did not keep or sell the pamphlet for the sake of gain, nor to prejudice good morals, but for a purpose which he considered to be good.

*Held*, that the object of the publisher did not alter the character of his act, the natural consequence of which he must be taken to have intended, and the natural consequence being one which would make the publication of the pamphlet a misdemeanor, and in the opinion of the justices who ordered the seizure proper to be prosecuted as such, the seizure was right.—*R.* v. *Hicklin*, 16 W. R., 801.

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## MAGISTRATES, MUNICIPAL, INSOLVENCY, & SCHOOL LAW.

### NOTES OF NEW DECISIONS AND LEADING CASES.

RECEIVING PROPERTY KNOWING IT TO BE STOLEN —FALSE PRETENCES.—The prisoner was convicted of receiving £100, the property of the London and Westerminster Bank, knowing it to be stolen. It appeared that the sum of £100 was part of a larger sum of £900 which was standing on a deposit account of the bank in the name of Henry Allen. On April 27 last, the wife of Henry Allen presented a forged order, purporting to be made by Allen, for the withdrawal of the money, to the cashier of the bank, who believing the order to be genuine, paid out to her the amount of the deposit and interest in notes of £100 each. In July last, Mrs. Allen eloped with the prisoner, but they were overtaken together on board a steamboat at Queenstown bound for New York. One of the notes was proved to have been paid away by the prisoner in May, 1858. On behalf of the prisoner, it was argued that there was not any larceny of the note by the wife from the bank, but rather an obtaining of the note by false pretences or a forged order, which would not support a conviction for receiving the note, knowing the note to have been stolen.

*Held*, that the cashier of the bank had authority to pass the property and possession of the note to Mrs. Allen; that he had done so, though under a mistake; that therefore there was no larceny by Mrs. Allen; and that the conviction must be quashed.—*Conviction quashed.*—*Regina* v. *Prince*, L. J. Notes of Cases, 248.

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LARCENY.—The prisoner was convicted of stealing eleven tame patridges. The birds had been reared from eggs placed under a common hen. They were about three weeks old and could fly a little. The coop under which the hen had been originally confined had been removed, but the young birds remained about the place as her brood, and slept under her wings at night, and were practically in the power and dominion of the prosecutor. The question was, whether such birds could be the subject of larceny.

*Held*, that they might be, and therefore the conviction was affirmed.—*Conviction affirmed.*—*Regina* v. *Shickle*, L. J. Notes of Cases, 248.

## ONTARIO REPORTS.

### COMMON PLEAS.

*(Reported by* S. J. VAN KOUGHNET, Esq., *Reporter to the Court.)*

#### HAYMAN v. HEWARD.

*Parent and child—Liability of parent for child's indebtedness.*

Plaintiff, upon their order, furnished to several of defendant's sons, who were at the time living with their father, certain articles of wearing apparel, charging the same to defendant, and delivering them at his house. Previously to this defendaut had caused to be once, in one of the daily papers published in the place and taken in by the person by whom plaintiff was employed, a notice to the effect that he wou.d not be responsible for any debt contracted in his name from that date without his written order, but after the goods in question had been furnished to his sons he wrote to the plaintiff, stating that he would not in any way be responsible for any debt incurred by any of his sons *from and after that date* unless under his written order;

*Held*, that in the absence of evidence repelling the presumption of defendant's authority to his sons to contract the liability in his name, the fact of the delivery of the articles at defendant's house for his sons and the language of his letter to plaintiff were quite sufficient to justify the jury in finding the defendant liable, and that it was not necessary to go further and prove the infancy of the sons.

[Common Pleas, Easter Term, 1868.]

This was an appeal from the County Court of the County of York.

The declaration was on the common counts for goods bargained and sold, goods sold and delivered, work and materials, &c.

The defendant pleaded never indebted, upon which issue was joined.

It appeared from the evidence that the defendant's three sons, who were at the time residing with him, went to the shop of the plaintiff on several different occasions and ordered articles of clothing there on the defendant's account, and that the articles in question were sent to the defendant's house for his sons. Before this, it was proved, the defendant had notified the public through the columns of a daily paper published in the place where he resided that he would not be responsible for any debt contracted in his name from and after that date without his written order, and that two copies of the paper containing this notice had been taken to the establishment in which plaintiff at the time of this action carried on business, and one of them handed to the then proprietor, who was also a subscriber to the paper, and another to some one else there. There was no evidence that a copy of the paper had been sent to the plaintiff, but he was then in the establishment and subsequently succeeded to the business. Some months after the goods in question had been ordered, the defendant wrote to the plaintiff informing him that he would not in any way be responsible for any debt incurred by any of his sons from and after that date, unless under his written order, stating that he wished him to consider the communication confidental. There was also evidence that the defendant had been called upon by some one in plaintiff's name for a settlement of the accounts rendered for the goods, and that defendant had told him he was then too busy to see him, and that no objection was then made to the accounts. At the close of this evidence defendant's counsel moved for a nonsuit, on the ground that there was no evidence to go to the jury; that the goods had been supplied to the sons and the contract was with them; that there was no evidence under the Statute of Frauds that he undertook to pay the debt, and that orders given by the sons were not his, they not being his agents.

The motion for a nonsuit was overruled, and the case went to the jury, who returned a verdict for the plaintiff for the full amount claimed.

In the following County Court Term the defendant moved and obtained a rule *nisi* for a new trial, which the learned Judge made absolute, on the ground that there should have been evidence of the sons of defendant being infants, and that there was non-direction in omitting to mention to the jury the absence of such evidence.

From this judgment the plaintiff appealed.

*McBride*, for the appeal, cited *Shelton* v. *Springett*, 11 C. B 452; *Mortimore* v. *Wright*, 6 M. & W. 482.

*Anderson*, contra, cited *Baker* v. *Keene*, 2 Starkie, 501; *Blackburn* v. *Mackey*, 1 C. & P. 1; *Fluck* v. *Tollmache*, ib. 5; *Camen* v. *Baker*, ib. 268; *Nichle* v. *Allen*, 3 C. & P. 36; *Rolfe* v. *Abbot*, 6 C. & P. 286; *Clements* v. *Williams*, 8 C. & P. 58; *Seabourne* v. *Neaddy*, 9 C. & P. 497; *Urmston* v. *Newcomen*, 4. A. & E. 899; *Law* v. *Wilkin*, 6 A. & E.718; *Mortimore* v. *Wright*, 6 M & W. 482.

RICHARDS, C. J., delivered the judgment of the Court.

The doctrine laid down in *Chitty* on Contracts, 8th edition, p. 146, to which we have been referred by the defendant's counsel is, "that a father is not under any legal obligation to educate his child, and that he cannot be made liable if the circumstances absolutely negative his assent to any contract with the party who instructed the child; and when a parent gives no authority, and enters into no contract, he is no more liable to pay a debt contracted by his child, even for

necessaries, than a mere stranger would be. But if it were shewn that the child lived under the father's roof, and that the goods were necessaries and were delivered at the residence of the father, this might be *prima facie* sufficient to raise a presumption of the father's liability; whilst on the other hand, if it appeared that the father supplied his child with money for the purpose of procuring the articles in question, or that he ordered those articles to be furnished elsewhere, either of those circumstances would rebut the presumption that he had authority from the father to order them; and it would seem that the mere fact of the articles themselves being necessary for the child and suitable to that station, in which the father has placed him, will not warrant the jury in finding that such authority was actually given."

In *Mortimore* v. *Wright*, 6 M. & W. 482, followed and supported by *Shelton* v. *Springett*, 11 C. B. 462, the judgment of the Court of Queen's Bench in *Law* v. *Wilkins*, 6 A. & E. 718, is disapproved of. Lord Abinger, after referring to that case, says, "It appears to me to sanction the idea that a father, as regards his liabitity for debts incurred by his son, is in a different situation from any other relative; which is a doctrine I must altogether dissent from. If a father does any specific act, from which it may be reasonably inferred that he has authorized his son to contract a debt, he may be liable in respect of the debt so contracted; but the mere moral obligation on the part of the father to maintain his child affords no inference of a legal promise to pay his debts, and we ought not to put upon his acts an interpretation which, abstractedly, by and without reference to that moral obligation, they will not reasonably warrant."

He then concludes that, to bind the father in point of law for a debt incurred by the son, he must contract to be bound just in the same way as you would prove a contract against any other person.

The near relationship between the parties, father and son, with knowledge on the father's part of the liability being incurred, furnishes presumption of approbation, unless the contrary be shewn; *Story* on Agency, 256-7.

We think the facts shewn at the trial, particularly the delivery of the articles of clothing at defendant's house for his sons, and the language of the letter of the defendant to the plaintiff, quite sufficient, in the absence of any evidence repelling the presumption of his authority to his sons to contract the liability in his name, to justify the finding of the jury.

We do not quite agree with the learned Judge of the County Court that the infancy of the defendant's sons was necessary to be shewn to make him liable, though it no doubt would be a circumstance to go to the jury. I do not think the learned Judge was guilty of non-direction in not referring to the infancy of defendant's sons in charging the jury.

We think this appeal should be allowed without costs, and the rule *nisi* in the Court below to set aside the verdict should be discharged with costs.

*Appeal allowed, without costs.*

## COMMON LAW CHAMBERS.

(*Reported by* HENRY O'BRIEN, Esq., *Barrister-at-Law, Reporter to the Court.*)

### THE QUEEN v. FRANK RENO AND CHARLES ANDERSON.

*Extradition—Ashburton Treaty—31 Vic. cap. 94—Police Magistrates—28 Vic. cap. 20—Habeas Corpus—Return to.*

The express car of a railway train on one of the roads in one of the United States of America was broken into and plundered by five or more men, two or three of whom fired at the conductor, who was endeavouring to stop them as they were moving off with the engine, &c. The conductor was at the time about eight feet from the person who fired the first shot, and the ball passed through his coat. This person was sworn to be a brother of the prisoner Reno. The express messenger swore to the identity of the prisoners, and as to the identity of the person who fired the first shot. The prisoners were arrested in Canada, at the instance of the express company, and demanded for extradition by the United States authorities. They were arrested and detained by two warrants of commitment, the second being intended to cover defects in the first. The prisoners offered evidence on their examination to prove an *alibi*. They were afterwards brought before the Chief Justice on a writ of *habeas corpus*.

*Held*, 1. That the words in the first warrant, "did feloniously shoot at, &c., with intent to kill and murder, &c.," are included in the words used in the Extradition Treaty and Act, which speaks of an "assault with an intent to commit murder," and therefore the warrant was not bad on that ground.

2. That a statement by the gaoler, as a return to a writ of *habeas corpus*, that no funds had been provided to pay the expense of bringing the prisoner before the judge, was in fact no return to the writ.

3. That the return must be produced and read before the judge previous to its being filed.

4. That it is not indispensable that the authority of the magistrate should be shown on the face of a warrant of commitment; and where the crime has been committed in a foreign country, and the committing magistrate has (as Mr. McMicken had in this case) jurisdiction in every county in Ontario, the warrant is not bad, though dated at Toronto, the county mentioned in the margin being York, but directed to the constables, &c., of the county of Essex, and being signed by the police magistrate as such for the county of Essex.

5. That 28 Vic. c. 20, authorizing the Governor to appoint police magistrates relates to the administration of justice, and is within the powers of the Legislature of Ontario, and is still in force.

6. That under 31 Vic. cap. 94, the last Extradition Act, all that the committing magistrate or the court or a judge has to do is to determine whether the evidence of criminality would, according to the laws of Ontario, justify the apprehension and committal for trial of the accused if the crime had been committed therein, and that such decision, if adverse to the prisoner, does not conclude him, as the question of extradition itself or discharge exclusively rests with the Governor-General.

7. That under the circumstances of this case, there was sufficient *prima facie* evidence of the criminality of the prisoners to warrant a refusal to discharge them, and that there was evidence to go to a jury to lead to the conclusion that the intent of the prisoners was, at the time of the shooting, to commit murder.

8. That evidence offered to a magistrate by a prisoner, on an examination of this kind, by way of answer to a strong *prima facie* case, may perhaps properly be taken, but would not justify the magistrate in discharging the prisoner. And *quære*, whether it was not the intention of 31 Vic. to transfer to the Governor exclusively the consideration of all the evidence, that he might determine whether the prisoner should be delivered up. The magistrate cannot weigh conflicting evidence to try whether the prisoner is guilty of the crime charged.

9. The duty of the court or a judge on a *habias corpus* in such cases, is to determine on the legal sufficiency of the commitment, and to review the magistrate's decision as to there being sufficient evidence of criminality.

[Chambers, October 4, 1868.]

**A writ of *habeas corpus ad subjiciendum*, under the statute of Car. II., was issued to the gaoler of the county of Essex.**

**The writ was issued and tested in vacation, returnable immediately before the Chief Justice of the Court of Queen's Bench, or of the Common**

Pleas, or any Judge of either of those Courts, presiding in Chambers at Toronto.

To this writ the gaoler made the following return:

"I, (&c.) do hereby certify that I hold and detain the said Charles Anderson and Frank Reno, in the within writ named, under the warrant of commitment of Gilbert McMicken, Esq., police magistrate in and for the said county of Essex, and issued by him on the 14th day of September, 1868, and now annexed to the within writ, and under no other warrant or writ, and for no other cause or matter whatsoever; and I am ready to produce the bodies of the said Chas. Anderson and Frank Reno, as I am within commanded, but I am unable to convey them to the city of Toronto, as within commanded, because I have no means whereby to pay the expense of such conveyance; and having applied to the said prisoners and their counsel, they refuse to furnish me with such means; and having applied to the Treasurer of the said county of Essex, I am informed that there are no funds applicable to the said service; and therefore I most respectfully submit to this honorable Court that I am unable to obey the command of the said writ."

The writ, with this return attached to it, together with the original warrant therein mentioned, were sent by post to the Clerk of the Crown and Pleas of the Court of Queen's Bench at Toronto, who wrote on the back of the return, "Received and filed the 26th September, 1868," and signed his name thereto It was then handed to the Clerk in Chambers.

After this, Mr. Justice John Wilson, sitting in Chambers, made an order, allowing all the foregoing papers to be withdrawn, and that the gaoler might make such a return as the papers in his possession warranted.

On Thursday, October 1st, the gaoler brought the two prisoners before the Chief Justice of Ontario, in Chambers at Osgoode Hall, and on his behalf the writ of *habeas corpus* was put in, with the foregoing return annexed, and another return as follows:

"I, (&c.,) do certify and return to our Sovereign Lady the Queen, that before the coming to me of the said writ, that is to say, on the 14th day of September, 1868, Charles Anderson and Frank Reno, in the said writ also named, were severally committed to my custody by virtue of a certain warrant of commitment, the tenor of which is as follows:—

"PROVINCE OF ONTARIO, COUNTY OF ESSEX, *to wit:*

"To all or any of the constables or other peace officers in the said county, at Sandwich, in the said County of Essex, and to the keeper of the Common Gaol of the County of Essex, at Sandwich, in the said County of Essex:

"Whereas Frank Reno and Charles Anderson, late of the town of Marshfield, in the County of Scott, and State of Indiana, one of the United States of America, were this day charged before me, Police Magistrate in and for the County of Essex, amongst other Counties, appointed under and by virtue of the Act of the Parliament of Canada, 28th Victoria, ch. 20, intituled 'An Act respecting Police Magistrates,' on the oath of Lee C. Weir and others, for that they, the said Frank Reno and Charles Anderson, on the 22nd day of May, 1868, within the jurisdiction of the United States of America, to wit, at the town of Marshfield, in the County of Scott, and State of Indiana, one of the United States of America, did feloniously shoot at Americus Whedon, with intent in so doing, him the said Americus Whedon, to feloniously, wilfully, and of their malice aforethought to kill and murder, and that in consequence of the said offence, the said Frank Reno and Charles Anderson have fled from the said State of Indiana, and are now residing in the town of Windsor, in the County of Essex aforesaid. And whereas such evidence as, according to the laws of this Province, would justify the apprehension and committal for trial of the said Frank Reno and Charles Anderson, if the crime of which they are accused had been committed in this Province, has been adduced before me:

"These are, therefore, to command you, the said constables or peace officers, or any of you, to take the said Frank Reno and Charles Anderson, and them safely convey to the common gaol at Sandwich, in the County of Essex aforesaid, and there deliver them to the keeper thereof, together with this precept.

"And I do hereby command you, the said keeper of the said Common Gaol, to receive the said Frank Reno and Charles Anderson into your custody in the said Common Gaol, and there safely to keep them, until they shall be thence delivered by a warrant under the hand and seal of His Excellency the Governor General, ordering the said Frank Reno and Charles Anderson, committed as aforesaid, to be delivered to the person or persons authorized to receive the said Frank Reno and Charles Anderson, on behalf of the United States, or until discharged according to law.

"Given," &c., "this 14th September, at the town of Sandwich, in the county aforesaid.

[L. S.] "Signed, G. MCMICKEN,
"*Police Magistrate for the County of Essex.*"

"And that afterwards, and whilst the said Frank Reno and Charles Anderson were respectively so in my custody, that is to say, on the twenty-eighth day of September, 1868, the said G. McMicken caused to be delivered to me a certain other warrant of commitment, the tenor of which is as follows:

"PROVINCE OF ONTARIO, COUNTY OF YORK, *to wit:*

"To all or any of the constables or other peace officers in the County of Essex and Province aforesaid, at Sandwich, in the said County of Essex, and to the keeper of the common gaol of the County of Essex, at Sandwich, in the said County of Essex:

"Whereas Frank Reno and Charles Anderson, late of the town of Marshfield, in the County of Scott and State of Indiana, one of the United States of America, were charged before me on the 14th day of September, 1868, being Police Magistrate in and for the said County of Essex, appointed under an Act of the Parliament of Canada, 28th Victoria, ch. 20, intituled 'An Act respecting Police Magistrates,' on the oath of Lee C. Weir and others, for that they, the said Frank Reno and Charles Anderson, on the 22nd day of May, in the year of our Lord one thousand eight hundred and sixty-eight, within the jurisdiction of the United States of America, to wit, at the town of Marshfield, in the County of

Scott and State of Indiana, one of the said United States of America, did feloniously assault Americus Whedon, with intent, in so doing, him, the said Americus Whedon, feloniously, wilfully, and of their malice aforethought, to kill and murder; and that in consequence of the said offence, the said Frank Reno and Charles Anderson have fled from the said State of Indiana, and are now residing at the town of Windsor, in the County of Essex aforesaid.

"And whereas such evidence as, according to the law of this Province, would justify the apprehension and committal for trial of the said Frank Reno and Charles Anderson, if the crime of which they are accused had been committed in this Province, has been adduced before me:

"These are, therefore, to command you, the said Constables or Peace Officers, or any of you, to take the said Frank Reno and Charles Anderson, and them safely convey to the Common Gaol at Sandwich, in the County of Essex aforesaid, and there deliver them to the Keeper thereof, together with this precept.

"And I do hereby command you, the said Keeper of the said Common Gaol, to receive the said Frank Reno and Charles Anderson into your custody in the said Common Gaol, and there safely to keep them, until they shall be delivered by a warrant under the hand and seal of His Excellency the Governor General, ordering the said Frank Reno and Charles Anderson to be delivered to the person or persons authorized to receive the said Frank Reno and Charles Anderson, on behalf of the United States, or until discharged according to law.

"Given," &c., [concluding as the former warrant, but dated 28th September, 1868] "at the City of Toronto, in the County of York."

"And that they, the said Frank Reno and Charles Anderson, in the first warrant mentioned, are the same Frank Reno and Charles Anderson as in the second warrant mentioned.

"And these are the causes of detaining the said Frank Reno and Charles Anderson, whose bodies I have here ready, as by the said writ I am commanded."

The original warrant, a copy of which is the first of the two annexed to this second return, was annexed to the writ and the first return set out above.

A writ of *certiorari* was also issued, dated the 26th September, 1868, and directed to Gilbert McMicken, Esq., Police Magistrate, the committing Justice, by whose authority Charles Anderson and Frank Reno were confined, to certify and return forthwith "the evidence, depositions, and other proceedings had or taken, touching or concerning such confinement."

This writ was duly returned with "the evidence," &c., as required.

The information was laid against the two prisoners on the 19th August, 1868, stating that the informant, Lee C. Weir, had reason to believe, and did verily believe, that Frank Reno and Charles Anderson, on the 22nd May, 1868, at the town of Marshfield, in the County of Scott, in the State of Indiana, one of the United States of America, "did feloniously shoot at Americus Whedon, with intent in so doing, him, the said Americus Whedon, feloniously, wilfully and of their malice aforethought, to kill and murder," and in consequence of that offence had fled, and then were residing at the town of Windsor, in the County of Essex.

It appeared that upon this information the prisoners were brought before the Police Magistrate, and the depositions of Lee C. Weir, Americus Whedon, Thomas Griffin Harkins, George W. Fletcher and Samuel A. Jones, against the prisoners were taken.

It was sworn that, on the 22nd May last, an express train, made up of engine, tender, express car, baggage car, and two coaches, was run on the Jeffersonville, Madison and Indianapolis railway, in the State of Indiana, leaving Jeffersonville at 9½ p.m. The express car carried boxes of goods and packages of money, which latter were in a safe. The train, on reaching Marshfield water-station, stopped to take in water. There is a switch there. There is also an old abandoned saw-mill, about thirty yards from the water tank, and three or four houses within about two hundred yards, but not all inhabited. The train stopped there about eleven o'clock, and almost immediately several men (six or seven) were seen going to the express car. One disconnected the bell-rope, another uncoupled the baggage and express cars. Whedon, the conductor, shouted to them, and the man who disconnected the bell-rope fired at him, the ball passing through the conductor's coat, and the engine, with the express car, moved off, leaving the other part of the train on the track. Two other shots were fired from the end of the express car, one by the man who pulled out the coupling pin, the other by the man who had fired the first shot. Some of these shots were from a revolver. The conductor was, as he thought, about eight feet distant when the first shot was fired, fifteen feet at the second, and thirty feet at the last. He fired three shots in return. He recognized the first man who fired as one Simeon Reno, a brother of the prisoner Frank, whom he pointed out at this examination. The family residence of the Renos was near the village of Seymour, which is about eighteen miles north of Marshfield. Shortly after the engine and the express car had moved off the door at the rear of the latter was burst open. Harkins, the express messenger, states that three men entered at once, and immediately afterwards he lost consciousness—the last he could remember was the flash of a pistol, or ball of fire, before his eyes. He gave no other explanation, and added that on the Sunday following (the 22nd of May was on Friday) he recovered consciousness. By other testimony it appears that both front and rear doors of the express car were burst open, and pieces of paper and broken packages were scattered round in the car. The conductor telegraphed to various places, and an engine was sent to him, with which he took on the residue of his train to Seymour, where he found the express car and the engine which had been taken away.

Harkins was found about 250 yards from where the engine and express car had been taken, lying between two trucks, "doubled up." He was insensible, and had a cut on the back of his head. From the place where he seemed to have first struck the ground he appeared to have slipped about ten feet. In the opinion of the conductor, the engine taken away must, at the place where Harkins was found, have been going at the rate of thirty miles an hour.

Harkins states that he did not know either of the three men who burst into the car, but that the two prisoners are two of them: that he recognized them in the Dominion Saloon at Windsor, and there pointed them out to Mr. Weir. On cross-examination he gave a description of the light on the car, viz.: a lamp placed about five feet high on the left hand side, entering from the rear, and behind him as he looked towards the men entering. He stated that he has since seen Simeon Reno, and had recognized him also.

*McMichael* and *O'Connor* for the prisoners, contended:

1. As to the matters of fact that there are inconsistencies, and strong improbabilities in the depositions (particularly in those of the express messenger), which render it unjust, or at least indiscreet to rely and act upon them; and that they are proved to be untrue by the mass of testimony adduced to prove, and which does prove an *alibi*.

2. As to the matters of law, they insisted that as there is no direct proof that either of these prisoners actually did shoot at the conductor, although they went in company with the man who did shoot, and with others to steal, there is no reason whatever for inferring that they went intending to commit murder: that the act of shooting at the conductor with intent to murder, being no part of the original design, and being a distinct felony according to our law, was an act for which only the actual agent or agents were responsible, and that there was no proof that the prisoners concurred in that act, or in the intent with which it is charged to have been done; that the intent may just as well have been to maim, disable, or do grevious bodily harm to the conductor as to murder him, and therefore would not sustain the charge stated in the committal, *i. e.*, shooting at, with intent to murder, which is the only intent contained in the treaty: that the first warrant does not contain a description of an offence as designated in the treaty, by the words, "Assault with intent to commit murder:" that the second return made by the gaoler was null, as he had made one return already to which the first commitment was annexed; that the second warrant of commitment was void, being made after the writ of *habeas corpus* was issued, and this first return had been made and had been received and marked filed by Mr. Dalton, the Clerk of the Crown and Pleas for the Court of Queen's Bench (the Court under whose seal the *habeas corpus* issued), to whom the gaoler had transmitted the writ and return by post: that this second warrant was also informal—the venue in the margin being in the County of York—and at the end, the commitment being stated to be "Given," &c., at the City of Toronto, in the County of York," where, for all that is shewn, this Police Magistrate had no jurisdiction.

DRAPER, C. J.—The case for the prosecution may be thus condensed. The express car of a railway train which was passing through the county of Scott, in the State of Indiana, one of the United States of America, was broken into and plundered by a party of five or six and probably more men; two or three of whom fired at the conductor of the train, who endeavoured to stop them as they were moving off with the engine and this car. The first shot was fired when the conductor was about eight feet from the man who fired, and the ball passed through the conductor's coat near his body. The conductor knew the man who fired it, he being a brother of the prisoner Reno The two prisoners are positively sworn to by the express messenger as having broken into the express car, with a third, whom he afterwards saw in custody and identified, and who was the man that fired the first shot at the conductor.

It is better in the first place to dispose of the merely formal objections. First, as to the first (so-called) return. It is in truth no return, but contains matter of excuse only for not obeying the writ. The second section of the Habeas Corpus Act (31 Car. II.) provides how the charges for bringing up the body are to be paid or secured, and a return which amounts to no more than a statement that such charges were not provided for, and that therefore the writ was not executed, is useless and nugatory. Further, I apprehend that on a writ of *habeas corpus* returnable before a judge in Chambers, the return must have been brought to and read before him, before any officer of the Court could file it I do not think that what was done in this case amounted to filing of the return. If it had, I should have had no difficulty in ordering it to be taken off the files in order that a proper return might be made; and in some mode (not made the subject of enquiry or objected to), this has been done, for when the writ was first brought before me at Chambers, it had a full and formal return to it. Leonard Watson's case, 9 A. & E. 734, is an authority for amending a return to a *habeas corpus*, which would have abundantly sustained the application to amend had amendment been necessary. In my opinion there has only one return been made to this writ which I can notice or act upon, and that is the return stating two commitments of these prisoners, and this having been openly read has been duly filed.

As to the form of the second warrant the objection was not taken by the prisoners' counsel, but after hearing the case argued at length, I examined the papers and noticed the matter, and subsequently called the attention of the prisoners' counsel to it.

Hawkin's Pleas of the Crown, Bk. 2, ch. 13. sec. 22, says that a warrant ought to set forth the day and year wherein it is made, and (sec. 23) that it is safe, but perhaps not necessary in the body of the warrant to shew the place where it is made, yet "it seems necessary to set forth the county in the margin at least, if it be not set forth in the body."

In strictness it is not indispensable that the authority of the magistrate should be shown on the face of the warrant, for the omission may be supplied by averment and parol evidence: 2 Hale 122. In Hawk. P. C. bk. 2 ch. 16. sec. 13, it is laid down that a commitment must be in writing, under the hand and seal of the person by whom it is made, expressing his office or authority, and the time and place at which it is made, and must be directed to the gaoler or keeper of the prison. In this warrant, the Police Magistrate, in the recital states his authority thus: "being Police Magistrate in and for the said County of Essex, appointed under 28 Vict., ch. 20." The committal is adressed to the constables as well as to the gaoler of the County of Essex, and the committal is to the gaol of that

county. It further appears that Mr. McMicken, the Police Magistrate, held then—and still holds—his commissions under the Great Seal of the Province, issued under the statute of that Province (28 Vict. chap. 20), appointing him to be a Police Magistrate, and to be and act as such Police Magistrate in all the counties and unions of Counties in Upper Canada, including the County of the City of Toronto. It must also be borne in mind that the offence charged against the prisoners does not fall within the established rule and practice that every offence against our law must be inquired of, tried and determined, within the county, &c., wherein it was committed. This offence was, as is charged as having been committed in a foreign country, and the authority to take any proceedings with respect to it is founded on the treaty of Washington (August, 1842) and on the statute of the Dominion of Canada 31 Vict. ch. 94. Under this statute and the Statute of 28 Vict., and his commissions, there can be no doubt that Mr. McMicken had authority in every county in Ontario to exercise jurisdiction over cases of this kind.

The pressure of other business (as I was the only Judge in town) compelled me to defer giving judgment until yesterday evening, when I was a little startled to hear for the first time an objection raised by the prisoner's counsel, that the Act 28 Vict. ch. 20 had expired, and with it the authority of the Police Magistrates; and as there was then no time to examine into the enactments bearing on the point, the case stood over until this morning.

I have no doubt now that there is nothing whatever in the question raised.

The statute of Canada (28 Vict. ch. 20) authorizes the Governor to appoint fit and proper persons to act as Police Magistrates within any one or more counties in Upper Canada. Section 3 defines their powers, and they clearly relate to the administration of Justice.

This statute received the Royal Assent on the 18th March, 1865, and was to continue in force for two years, and thence until the end of the next ensuing session of Parliament.

On the 29th March, 1867, the Act erecting the Dominion of Canada was passed, and it was brought into operation (by proclamation) on the 1st July following. Among the powers which this statute assigns exclusively to the respective Legislatures of the Provinces is the administration of Justice therein.

By section 65, all powers, authorities and functions, which before and at the Union were vested in or exercisable by the respective Governors or Lieutenant Governors of Upper Canada, Lower Canada or Canada, shall, so far as the same are capable of being exercised after the Union, in relation to the Government of Ontario and Quebec respectively, be vested in, or may be exercised by, the Lieutenant-Governors of Ontario and Quebec respectively, &c. See also section 66.

By section 137, the words "and from thence to the end of the then next ensuing session of the Legislature, or words to that effect, used in any temporary Act of the Province of Canada, not expired before the Union, shall be construed to extend to and apply to the next session of the Parliament of Canada, if the subject matter of the Act is within the powers of the same, as defined by this Act, or to the next sessions of the Legislatures of Ontario and Quebec respectively, if the subject matter of the Act is within the powers of the same, as defined by the Act."

By 31 Vict. ch. 17 the Legislature of Ontario continued this statute until the first day of January, 1869.

I have no difficulty in holding that the statute 28 Vict. relates to the administration of Justice, and is within the powers of the Legislature of Ontario; and if I were not free from doubt I could not, while not clear in an opposite conclusion, refuse to adopt the evident construction which the Legislature of this Province have put on section 137 in relation to this particular statute, by continuing it, as already stated.

I do not think the Statute of Canada, 31 Vic. ch. 83, at all affects this conclusion.

Coming to the remaining question of law arising on the facts of this case, it must be observed that the proceeding against the prisoners is founded on the Statute of Canada, 31 Vic. ch. 94. The recital of that act states the treaty of 9th August, 1842, between Her Majesty and the United States of America, providing for the mutual delivery of all persons, who, being charged with the crime of murder, or assault with intent to commit murder, or piracy (and some other offences), should seek an asylum, or should be found within either territory, "provided that this should only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged should be found, would justify his apprehension and commitment for trial, if the crime or offence had been there committed." Under the first section, the magistrate in this case had clear authority to initiate proceedings against the prisoners, and upon their apprehension on a warrant issued by him, to examine upon oath any person or persons touching the truth of such charge, and upon such evidence as, according to the law of this Province (Ontario), would justify their apprehension and committal for trial if they had committed the crime charged therein, to issue a warrant for their commitment to the proper gaol, which in the present case is the gaol of the county of Essex.

The statute gives no authority, except to commit for the purposes specified in the act. If the evidence does not justify this step the accused must be discharged—there can be no bail required as a condition of discharge.

There is some language of Lord Tenterden in the case of *Rex* v. *Gourlay*, 7 B. & C. 669, not inapplicable to such a case. I may quote it *verbatim*: "The commitment authorized by the Act of Parliament is very peculiar. It is not a commitment for safe custody, in order that the party may afterwards be brought to trial within our jurisdiction; nor is it a commitment in execution." It is a commitment for safe custody only until the Governor, on a requisition made by the United States, shall, by his warrant, order the persons committed to be delivered to the person authorized by the United States to receive them, to be tried for the crime charged; or the Governor may order their discharge, as a copy of all the testimony taken before the committing magistrate is to be transmitted for his (the Governor's) information. This provision was not contained in the two former statutes The

question of extradition or discharge is therefore vested exclusively in the Governor General, whose decision may possibly be influenced by considerations which a court could not entertain; and, as appears to me, all that the committing magistrate—or the judge or court before whom the accused is brought upon *habeas corpus*—has to do, is to determine whether the evidence of criminality would, according to the laws of this Province, justify the apprehension and committal for trial of the accused, if the crime charged had been committed (or alleged to have been committed) therein.

Following this as the rule, there appears to me no doubt that there was evidence to sustain a charge of assault with intent to commit murder. But it is objected that this is not the charge laid in the first information, which, on the contrary, is in these words: that the prisoners "did feloniously shoot at Americus Whedon, with intent in so doing, him, the said Americus Whedon, feloniously, wilfully and of their malice aforethought to kill and murder." It certainly would have been the more prudent course to have followed the precise description of the offence given by the statute; but if the charge, as laid in the information, involves an assault with intent to commit murder, and the evidence sustains the charge of assault with that intent, and after the evidence taken the accused are committed on a charge following the very words of the treaty and statute, I think it would be discreditable to the administration of the law if the verbal variance between the information and the statute were allowed to prevail. That shooting at a man with intent to murder him involves an assault, cannot be denied. An assault with intent to murder may be proved in various ways, when by an act of violence it is the intention of the assailant to murder. Here, the particular mode in which it was endeavoured to execute that intent—a mode which includes an assault is expressed—it limits the charge to one particular mode of assaulting, but it is not the less a charge of assault with the felonious intent; and unless the precise words of the statute must be followed, it expresses the same charge which the statute expresses. If the words of the statute were exactly followed, the charge would be well laid; but the converse is not true, viz, that the charge is insufficiently made unless the very words are followed. I think, therefore, that the first warrant might be upheld.

As to the second warrant, there is no such difficulty, but it is objected that the facts proved are as much evidence of other felonious intent as of the intent to murder, and therefore the intent to murder is left uncertain on the evidence, and so there is not sufficient evidence of the offence of an assault with intent to murder. The question of intent is for the jury. I apprehend that if on such evidence before one of our Courts a jury found a prisoner guilty of an assault with intent to murder, it could not be denied that the evidence fully warranted the finding. If so, this objection fails.

It has also been urged, and very strongly, that the evidence shews that the intent of the parties in the first instance was to steal—not to murder: that the shooting at, with intent to murder the conductor, was no part of the original intent: that a new intention to commit a different felony—though coupled with an act to commit it—can only be fastened on those who actually shared in both the new intent and the act, and that the evidence does not establish this against the prisoners. After carefully examining the evidence, I am not prepared to say that it may not and ought not to satisfy a jury that these two prisoners and Simon Reno were all three together when the shots were fired, and that two of the prisoners, possibly each of them, shot at the conductor. They were, according to Harkin's deposition, the three who entered the express car almost directly after the shots were fired. There were others of the party at the same time on the engine, managing it. I do not perceive the bearing of the case of *Rex.* v. *Cruse* 8 C. & P. 541; 2 Mod. C. C. R. 53. It establishes that the jury must be satisfied that the prisoners must have had in their minds, at the time of the shooting, an intent to murder. I think there is evidence to go to a jury to lead to that conclusion, as I think, if the conductor had been killed, there was evidence against them all of murder.

As to the effect to be given to the evidence put in on behalf of the prisoners before the committing Magistrate, I consider, for the purposes of this case, that it was properly received. Some portion of it was given by persons on whose character and respectability the prisoners' counsel appeared to place little reliance, and there was some important evidence by way of rebuttal. But that such evidence, when offered by way of answer to a strong *prima facie* case, would have justified the Magistrate in discharging the prisoners, I cannot for a moment admit. Indeed I have not been free from doubt whether it was not the intention of the Legislature by the last Act (31 Vict) to transfer to the Governor General exclusively the consideration of all the evidence, that he may determine whether the accused should be delivered up. If there is not sufficient evidence of criminality the Magistrate ought not to commit; if there is, I think he ought, notwithstanding there is evidence sufficient, if true, to sustain an *alibi*. On *habeas corpus*, the Court or a Judge would determine upon the legal sufficiency of the commitment to hold the accused in confinement, and would further review the Magistrate's decision as to there being sufficient evidence of criminality. As at present advised, I think they would leave any other considerations presented by the evidence brought forward by the accused to the Governor. I do not venture to say there would be no exception to this course. But it is very easy to point out the danger that contrasting conflictin gevidence—considering the credibility of witnesses and similar matters—might lead to. It would for many purposes be assuming the functions of a jury, and trying the whole merits of a case upon an enquiry instituted only to ascertain if there is such evidence of criminality as would justify the apprehension and committal—not the conviction—of the accused. The treaty would be waste paper if a Magistrate, appointed to conduct only a preliminary investigation, should, after hearing sufficient evidence of criminality, take upon himself to decide that the incriminating evidence was worthless, or was displaced, because witnesses on the prisoner's behalf swore to a state of facts inconsistent with the incriminating evidence—for example, as in the present case, swearing to an *alibi*. If the Magistrate dis

charges the accused because he thinks their witnesses are entitled to more credit than those for the prosecution, he goes not only beyond the letter, but also, as I think, beyond the true meaning of the Act, which only confers authority on him to enquire whether the evidence of criminality is, according to the laws in force here, sufficient to sustain the charge. If he discharges because the evidence *pro* and *con.* is equally strong, and he cannot tell which side is telling the truth, he is, in my humble judgment, equally in error, because he is assuming the functions of the tribunal to which belongs the trial of the prisoner's guilt, instead of limiting himself to the question directed by the statute.

I have heard an intimation that a contrary course has been adopted in a case in this Province—that after positive testimony had been given to establish the offence charged, a witness for the accused was admitted, who swore that he, the parties accused and the witness who swore positively against them, had confederated to get possession of the money, not by an act of robbery with violence, but by the willing connivance of the person in charge of it, and who was the principal witness against the accused: in effect, that he was a *particeps criminis* in embezzling or stealing the money, which was not, therefore, obtained by robbery, and therefore the crime actually committed did not come within the treaty, and that this conclusion was arrived at, and the accused was discharged. The facts may not have been accurately stated to me, but, assuming such a case, I could not have brought myself to such a conclusion. I do not enquire what effect such evidence would or ought to have before a tribunal sitting to try the accused on a charge of robbery; but I repeat what has often been said, that we must assume that courts in other countries will be governed by the same general principles of justice which prevail in our courts; that they will give the proper weight to the evidence for the defence, as our courts would give, and that to them should be left—so far as the merits are concerned at least—the trial of those questions which would be tried in similar cases by our own tribunals. The object of the treaty is to subject parties, against whom a charge coming within the statute is sustained by sufficient evidence of criminality, to be put upon trial before the proper tribunal. It would be defeated if, on making the preliminary enquiry, the case on both sides were heard, and, in effect, so far as the execution of the treaty is concerned, were disposed of.

I decline to discharge these prisoners.

1. Because I am of opinion, that the committing magistrate had lawful authority to deal with the case.

2. Because I think there was sufficient evidence of criminality.

3. Because I think there was a sufficient warrant of commitment.

4. Because my refusal to discharge does not conclude the prisoners, for the statute confers upon a higher functionary the power to grant or to withhold the warrant for extradition.

*Order accordingly.*

## GENERAL CORRESPONDENCE.

*Can an Attorney collect a bill for professional business done in a Division Court?*

To the Editors of the Canada Law Journal.

Gentlemen,—This seems at first sight, as asking a strange question of you, or any legal minds. One would suppose that the common sense of the thing—that the self-evident right of a lawyer to collect for work done in any court, or in any capacity professionally—under a responsibility as he is for his acts—would be so plain that none (much less a judge in a court) would question it. I had the misfortune, may I say? to have this question come up before a County Judge in an out county, near Toronto, lately, in trying to collect bills in two of his Division Courts, and of having the rule laid down, that he could not give me, as an attorney, the proved items of my bills, which in any other court would have been allowed. This happened in two different courts in two different suits. In both instances I produced to him and proved, at considerable expense and trouble, *written* retainers, *employing me to do the business charged as an* attorney, and agreeing to pay for it. Yet I was told that attornies have no right to collect bills in Division Courts for business done therein. It struck me as strange that any man, especially a person placed in the responsible position of a judge, could have a mind so constituted, as not to be able to see that he was not only trampling on a well-known principle of law, *but much more on every principle of* natural *equity.* Any one who knows what equity is, knows that no client has a right to employ a man as a lawyer to do work, which he could not do—to do what is strictly professional business, such as writing a lawyer's letter, attending to examine judgments, papers, affidavits, and drawing affidavits of a special kind, and giving special directions how to serve and the time to serve—and after the work is done turn round and say, "You did the work but not in a court of record, and you shall get no pay!" Any one sitting as a judge, who ought to know what law is, ought to know that the common law of England distinguishes between professional work, skilled work, and mere manual labor. The artist is not paid, the doctor is not paid, the lawyer is not paid, nor the skilled artizan, as a mere laborer is. Why? because in all such cases the person doing the work is supposed, is

legally bound, to bring to his work *professional, skilled knowledge*, under legal responsibilities.

So any man employing a lawyer *as such* in a Division Court, is bound to pay him for his work as such. A case just decided by ex-Chief Justice Draper in Chambers goes the extent of saying the bill of costs of attorneys for any business done by them as such may be taxed,—see *In re O'Donohoe and Warmoll*, 4 Prac. Rep. 266. I recollect a case distinctly that was argued some ten years ago before the late Chief Justice Robinson sitting in full court, in which counsel propounded the doctrine, that a lawyer could not charge for business *attendances, affidavits*, &c., made or written in the Division Courts, and that learned man at once said, "I cannot assent to that doctrine. I think that any one employing a lawyer to do business in such courts impliedly undertakes to pay him his reasonable charges." This point was not directly in issue, and only came up incidentally, but I noted it at the time. Now suppose a man comes to a lawyer and says, "Mr. A., I have been sued in the Division Court, and had a snap judgment given against me. I wish you to examine it, set it aside, get me a new trial, and advise me on it." The lawyer does as requested, makes a dozen attendances and examinations, draws notices and affidavits, argues matters before a judge, &c., and then makes out his bill and sues it, but is told by a judge, "Sir I cannot give you your bill," and turns the attorney out of court, in one case with $1, and in the other with one-third of his bill. That was my case. But it puzzled me to see how, or on what principle, I got in one case $1 (it cost me about $8 to get it), and in the other $6 (just my travelling expenses and a little over), to a country town. The judge had (upon his way of reasoning) no right to give even this small pittance—it would have been a mercy to say I will give nothing, and make each party pay his own costs!

I think it is high time a little more thought should be exercised in the selection of County Judges. Now I happen to know that many of our older County Court Judges do not act as the judge here alluded to. They take a more rational view of law and equity. I assert with confidence that the law will not turn a lawyer out of court, where he has done work *as such* in any Court in Canada upon the retainer of a client.

Why should not a reasonable fee be allowed a lawyer for drawing affidavits, writing letters, notices, &c., as well as for drawing deeds? Why should not a lawyer have a fee of 25 cts. or 50 cts. for making attendances for hours together to see books and argue cases before a judge? Why should he not be paid for his time as a professional man? Do doctors not construct a tariff? Does not the architect charge his $4 or $10 a day?

Is the lawyer not liable for his ignorance and neglect? If so, why is he not entitled to collect for any professional work? I am sure I have only to state the case to show the legality and reasonableness of my view.

AN ATTORNEY.

Toronto, 8th Dec., 1868.

[We cannot pretend to give any answer to this letter without knowing the facts as the judge may have understood them. We must, therefore, refrain from saying anything on the subject at present. In fact it would not be fair to do so, when the position of a judge prevents his upholding his views in print. If the judgment were a written one reciting the facts it would be a different matter, as the subject could be discussed on the materials before the judge. But in cases like these there may have been some (perhaps to the attorney unimportant) circumstance which may have influenced, and possibly properly so, the decision arrived at.—EDS. L. J.]

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A few days since a wag wrote and placed the following pretended rule of court in the court-room of one of our courts of record, where the rules of practice were wont to be posted: "Whenever any attorney shall frequent saloons as a habit, and cannot be found at his office, if he has any office, it shall be necessary for such attorney to file with the clerk of the court a list of the saloons so frequented by him; and notice, of any motion left at such saloon or saloons shall be considered as sufficient notice to such attorney of any motion in a case pending in this court." A certain attorney who loved a social glass, and was in the habit of frequenting a certain saloon in the city more than his office, seeing this notice and supposing it to be genuine, left word with the clerk that he could be found at the saloon of ——. Judge of the surprise of the aforesaid attorney on the following day, when he moved the court, under the above rule, to reinstate an important case of his that had been dismissed in his absence, on the ground that no notice had been left at the saloon where he had been waiting the whole of the day before, and was informed by the good-natured judge, with a smile, and amid roars of laughter from the entire Bar, that the rule was a *hoax.—Chicago Legal News.*

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