The Legal News.

Vol. IV. JULY 9, 1881. No. 28.

THE ATTEMPT TO MURDER THE PRESIDENT.

The attempt to murder the President of the United States will create an unmixed feeling of reprobation. It may perhaps have the effect of opening the eyes of people to some extent to the real nature of the anti-social ideas so rife in the world just now. They are by no means new, and although for the last few centuries civilization has had the best of the battle, it would be a sad mistake to believe that the enemy is extirpated. It has a ceaseless hold in the savage tendencies of man. Nor is it wanting in the most highly advanced countries. There it frequently assumes elegant and polished forms. It is served by learning, eloquence and literary ability, so that the superficial are almost deluded into the belief that it is a new phase of civilization on which we are entering. The most dangerous means these cultivated apostles of disorder employ is their pretended philanthropy. They affect enthusiasm for the individual, as a blind for their dislike to social order. The doctrine of equality flatters the vanity and jealousy of mankind, and slander, working on the mean vice of suspicion, affords a plausible justification for every crime. About a year ago a popular lecturer alluded to Lord Leitrim's murder, and in justification of the murderer, related a sensational story, which, if not a lie, showed that the narrator was a participator in the murderer's guilt. This story was received with applause, and the whole was reported in the newspapers, without comment. It is only fair to the lecturer to say, that, either from some remains of moral sense, or the fear that his audience might have what he lacked, he failed to relate that Lord Leitrim's servant, who, it seems, was not guilty of the provocation which was supposed to justify his master's murder, was also assassinated at the same time. Two lives were thus sacrificed to satisfy the revengeful feelings of the barbarian brother of an unvirtuous woman, for that is the true moral of the narrative referred to. We have lately heard much of the sympathy existing for the Nihilists; and the British House of Commons, by repeated votes, has testified to its sympathy with spoliation. It is idle to draw distinctions between murder and robbery, so as to condemn one, and applaud the other. The difference is only one of degree. It is more odious to murder than to rob, that is all; but an Act of Parliament does not efface the guilt of either, and history will condemn the Irish land bill just as it does the legalized murder of Strafford and the confiscations of Cromwell. The same authority which commands us to do no murder, has also forbidden us to steal, or even to covet what is another's. To tell us that a Czar may be murdered, because the Government of which he is the head is autocratic, and that a President may not, because his Government is democratic, is silly in the extreme. Sound sense condemns all such fallacies, and the laws of social order are as inexorable in protecting the life of the Emperor of Russia, of President Garfield and of the Queen, as they are in protecting the rights of Irish landlords. It cannot enter into our consideration whether the Czar should establish a Parliament at St. Petersburgh or not, or whether a landlord should live in one place rather than in another, and if we allow such considerations to guide us, or even to sway our sympathies, we are working against true civilization. At first sight this will appear a heresy to those who are in the habit of looking at material progress as the equivalent of civilization; but it is quite easy to conceive a perfect barbarian swinging in the pivot chair of a drawing-room car, corresponding by telegraph and conversing by telephone. Progress is the general accompaniment of civilization, and it may safely be assumed that without the latter the former will not be enduring, but they are not synonymous. We shall probably hear that Guiteau is insane. The same plea might have been urged for Russakoff and for the virago who shared his crime and his fate. It has often been used on behalf of Mr. Gladstone, whose political changes at convenient seasons, appear to require some special apology. Wide as the definitions of insanity are, there is none that can be made to cover the acts of those social bandits who, ignoring the moral law, seek to shield themselves from responsibility by avowing a political motive for their crimes.

R.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, June 30, 1881.

DORION, C.J., MONK, RAMSAY, CROSS & BABY, JJ.

MUNN et al. v. LEWIS BERGER & SONS (a corporate body).

Sale—Acceptance—Evidence—Parol.

Proof of acceptance (without delivery), under 1235 *C. C., cannot be made by parol testimony.*

RAMSAY, J. The action is brought by Wm. Runton Munn and Robert Stewart Munn, doing business in Newfoundland under the name and style of John Munn & Co. The declaration sets forth the transaction as being carried out by Lord & Munn, as agents of John Munn & Co., with the defendants acting by their agent Wm. Johnson; that Johnson knew that Lord, Munn & Co. were acting as agents of John Munn & Co., and that Johnson purchased the goods in question, barrels of steamed oil. The declaration sets forth further that Johnson wrote to Lord, Munn & Co. withdrawing his offer, as though it had not been accepted; that Lord, Munn & Co. demurred to this, and that then Johnson authorized Lord, Munn & Co. to sell the oil for account of defendants. The defendants deny in the most ample manner that they ever purchased the oil, or had any negotiation with the plaintiffs concerning the oil, or that they had contracted with plaintiffs as alleged in plaintiffs' declaration. By a second plea defendants specially deny that Johnson was ever authorized by them, or that he had any authority to enter into the alleged contract on their behalf.

On the issues so raised the parties went to proof, and plaintiffs produced James Lord, a partner of Lord, Munn & Co., as a witness. Without objection Lord proved that Johnson was the agent of the defendants. He was then asked to state "what occurred on the occasion of the visit of Mr. Johnson to your office (*i.e.* office of witness), the 26th of May, 1878." Witness then related the propositions of Johnson, that Lord, Munn & Co. telegraphed to plaintiffs their answer accepting, and that Lord, Munn & Co. then offered the oil as stated. Here defendants' counsel interposed an objection "to the witness proceeding to detail the conversation if any which occurred between him and Mr. Johnson on this occasion, inasmuch as it is an attempt to prove by mere verbal conversation a contract for the sale of goods exceeding in value the sum of $50, without having first produced any memorandum in writing, or made any proof within the requirements of Article 1235, C. C." This objection was maintained, and the ruling was excepted to.

On behalf of plaintiffs, witness was then asked: "Had you in store on account of Lewis Berger & Sons, a quantity of seal oil during the course of the summer of 1880?" Objection was taken to this on similar grounds, and particularly that there was no evidence that the defendants ever had delivery of any part or portion thereof, or that the said goods had ever passed out of the possession of Lord, Munn & Co., I suppose as agents of plaintiffs. This objection was maintained.

Witness was then asked: "Did you or did the plaintiffs in this case deliver any oil that you had in your possession for themselves; did they employ you to act as agent for them to sell it?" The defendants made a very lengthy objection to this question. They contended it was irrelevant unless it was intended to get witness to say that his firm held the oil for defendants. Other questions all seeking to elicit from witness answers to show that he had received verbal instructions to deal with the oil as if it were the property of defendants stored with Lord, Munn & Co., were put; but they were all objected to and the objections maintained by the Court unless some writing could be produced. The witness said there was no such writing. The plaintiffs then asked the following question: "Did the defendants by their agent, Mr. Johnson, exercise any acts of ownership over the said oil so in store during the months of July and August and September of the year 1880, and if so, state what the said acts of ownership were?" Objection was taken to this question, and the Court instructed the witness that "if there is any writing to establish the said acts of ownership he may answer." The witness says "there is no exercise of acts of ownership in writing." The Court thereupon maintained the objection.

The ruling of the Court then amounts to this: that without a memorandum in writing being

produced, no dealing with the goods by mere words could be proved.

From these decisions plaintiffs seek to appeal, and as the point has been fully argued it becomes the duty of the Court to deal with the full merits of the application. The grounds urged by plaintiffs were, firstly, that it was not necessary under Art. 1233, C. C., to prove the memorandum in the first place. Secondly, that proof of an acceptance without a delivery sufficed to take the case out of the rule of our article, and that acceptance could be proved by parol.

The first of these objections appears to me only to raise a question of order of proceedings. It would probably be competent for a judge to admit parol evidence before the production of the memorandum in writing, if it were understood that the memorandum existed and would be produced, but when it is not contended that any such memorandum exists it would be absurd to admit evidence which could not possibly maintain the action. The form of the declaration leaves no doubt as to the position of the plaintiffs in the present case. It is obvious that the person who drew the declaration was perfectly aware of the difficulty before him, and that he purposely set up the dealing with the goods in order to get round it by proving a verbal dealing with the goods, if it may be so described. When the art. (1235) says no action shall be maintained without a writing, it clearly means that where there is no writing no such evidence shall be received, else we should have evidence adduced in support of that which cannot be maintained. I am therefore of opinion that the first reason is unfounded.

The argument in support of the second reason was this: Our code differing from the Statute of Frauds enacts that acceptance *or* delivery takes the case out of the rule, that acceptance may be verbal and may be without delivery, and consequently it can be proved by parol, just as delivery may be proved by parol. If we were to give the article this interpretation the whole rule would disappear, and proof by parol of a ratification would bind the buyer although he would not be bound by a similar proof of the contract. It must be clear that the only true interpretation of acceptance is to consider it as an acceptance in writing, or acceptance accompanied by some act, not mere words, or that acceptance is the synonym of delivery. Our attention has been directed to some authorities, but I do not think they tend to maintain the pretentions of the plaintiffs. The acceptance was in England, where, under the statute of frauds, there must be acceptance *and* receipt, and not as with us, *or*; and the acceptance must be an actual acceptance the intention of which is to be gathered from the outward acts of the buyer. (Agnew, p. 193.) No case has been brought under our notice where mere words spoken made an acceptance. The case of *Barnes & Jevons* (7 C. & P. 288) seems to be the nearest to this; but even in that case there was a taking of a person to see the engine besides the words, and the question was left to the jury whether the defendant had treated the engine as his. In summing up, Baron Alderson specially notices the taking the person to see the engine.

Motion for leave to appeal rejected.

Kerr, Carter & McGibbon, for plaintiffs.

Abbott, Tait & Abbotts, for defendants.

COURT OF REVIEW.

MONTREAL, June 30, 1881.

SICOTTE, TORRANCE, RAINVILLE, JJ.

[From S. C., St. Francis.

BECKET v. TOBIN.

Sale—Credit.

Where A. ordered goods to be delivered to H. & T., and credit was given by the vendor to A., held, that A. might be sued by the vendor for the value of the goods.

TORRANCE, J. The action here is for goods sold and delivered to John Tobin, who denies the indebtedness and says the sale was to Ham & Tobin, different persons. I am of opinion that there is quite enough to sustain the judgment which condemned the defendant. I refer to the evidence of Chapman, Becket and Kemp. Ham & Tobin were building a hotel and could get no credit. They had a promise of sale of land from one Hamilton, they transferred the promise to John Tobin, and he registered the transfer. He then ordered Becket, the plaintiff, to deliver the goods to Ham & Tobin, the last being his brother, Dennis Tobin. Becket treated John Tobin as his debtor from the first The account was presented to him, as debtor, by Kemp, and he promised to give a note jointly

and severally with Ham, but wished Ham to certify to the correctness of the account. Credit was given to him, and the goods were supplied for the benefit of the property held by him. Parsons, Mercantile Law, cap. 7, section 2, p. * 73, says "It is often difficult to say whether the promise of one to pay for goods delivered to another is an *original* promise, as to pay for goods delivered to another, or a promise to pay the debt, or guarantee the promise of him to whom the goods are delivered. The question may always be said to be: To whom did the seller give and was authorized to give credit? This question the jury will decide, upon consideration of all the facts, under the direction of the Court. If, on examination of the books of the seller, it appear that he charged the goods to the party wh received them, it will be difficult, if not impossible, for him to maintain that he sold them to the other party. But if he charged them to this other, such an entry would be good evidence, and if confirmed by circumstances, strong evidence that this party was the purchaser." Vide note (2). Here the land was transferred to John Tobin, and the delivery was for his benefit. Judgment confirmed.

Hall, White & Panneton, for plaintiff.

Ives, Brown & Merry, for defendant.

SUPERIOR COURT.

MONTREAL, June 6, 1881.

Before MACKAY, J.

THE MUTUAL FIRE INSURANCE CO. of Joliette v. DESROUSELLES.

Declinatory Exception—Cause of action.

The cause of action in a suit brought by a Mutual Insurance Company against a member, arises where the policy is dated and where the application is accepted, and at the place where the head office of the Company is situated, and not where the deposit note and application are made.

MACKAY, J. This action is brought by the Company plaintiff, against the defendant, as a member, for the amount due by her for assessments.

In August, 1878, the defendant, who resides in Beauport, in the District of Quebec, made an application to the Company,—whose head office is in the City and District of Montreal,—to be admitted a member. Accompanying this application, defendant sent to the Company her deposit note, dated at Beauport, and undertaking to pay such assessments as might in due course be made.

The application was accepted,—as is proved by the Secretary of the Company,—at Montreal, and a policy of insurance issued, which refers to the deposit note, and makes the defendant subject to all the rules of the Company.

The defendant having afterwards failed to meet the assessments made on her, action is brought at Montreal and served on the defendant in Beauport, whereupon she pleaded by *exception déclinatoire*, that the whole cause of action did not arise here, and that consequently action could not be brought in this district.

It appears, however, that there is but one contract between the parties, and that that was made and completed in Montreal. The judgment is as follows:—

"Considering that female defendant has become a member of plaintiffs' company, and that from the time of said company issuing to her the policy, and her taking it, and not before, she became such member, and that plaintiffs' right of action has accrued from such policy and membership, and the obligations on defendant flowing therefrom;

"Considering that only in Montreal did the consent of plaintiffs and defendant first meet, and was the *marché conclu* upon which defendant is sued:

"Doth dismiss the said exception with costs."

Church, Hall & Atwater, for plaintiff.

Lacoste, Globensky & Bisaillon, for defendant.

SUPERIOR COURT.

MONTREAL, July 4, 1881.

Before MACKAY, J.

MONETTE v. CHARRETTE.

Mandamus—Writ will not issue if result fruitless.

PER CURIAM. This case came up on the merits of a mandamus. Monette took a mandamus against Charrette, a magistrate at St. Martin, because (it was said) he had refused to take the information of Monette against one Nadon. Monette complained against Nadon for deserting his service. Monette alleged that he had his affidavit ready, and asked Charrette to take his

information, but Charrette would not do so. But it happened that at the very time, or soon after, Monette got another magistrate to issue his warrant, and Nadon was convicted. On the day of the return of the mandamus, it would have been perfectly vain to order Charrette to take the complaint against Nadon. Yet Monette asked for a mandamus. He did not say that the case had resolved itself into a miserable small one of costs or anything of the kind. Both parties embarked in an *enquête* of great length, all to no purpose. Under the circumstances the Court is of opinion, considering that the chief object of the mandamus was to compel defendant to receive plaintiff's complaint against Nadon; and that plaintiff did not absolutely refuse to do so; and that on the 6th September plaintiff prosecuted the said Nadon, and had him convicted on the same charge for which he wanted defendant to allow him to proceed against Nadon; that defendant cannot be ordered to take or allow prosecution of Nadon now before him for the same offence, and peremptory mandamus had no reason to be, and would lead to illegality; that this was ascertained seven days before the day for return of the original mandamus summons in this cause or matter; and so the prosecution was unwarranted, and the mandamus must be dismissed with costs.

Leblanc, for plaintiff.
Duhamel & Co., for defendant.

SUPERIOR COURT.

MONTREAL, July 4, 1881.

Before MACKAY, J.

BAXTER v. SILLS.

Capias—Petition to quash.

PER CURIAM. The defendant, who has been capiased, petitions to quash the capias, and to be liberated. A motion is made by the plaintiff that the motion be rejected as illegal, null and void. It is said that the petitioner urged matters of law and fact mixedly. There is nothing in this motion, and it must be rejected. Under 819 C. C. P., the defendant is allowed to show that the allegations of the affidavit are false *or* insufficient. Petitioner says that the affidavit allegations are false *and* that they are insufficient. Motion of plaintiff dismissed with costs.

Greenshields & Busteed, for plaintiff.
Ritchie & Ritchie, for defendant.

SUPERIOR COURT.

MONTREAL, July 4, 1881.

Before MACKAY, J.

LEWIS v. SENECAL.

Sale—Deficiency in quantity.

PER CURIAM. This is an action for the price of liquors sold. The goods were sold and delivered in Montreal and removed in bond by defendant to Sorel. The defendant objected to the quantities charged. The Court is of opinion that there is conflict of evidence as to the quantities, and room to question whether the defendant has received the full amount of gallons charged for. But he ought, upon getting the liquors into possession, to have claimed a verification and had one actually effected, after notice to the plaintiff. He has not taken such course, he has never offered back the goods, and has used five-sixths of them. He must now pay as charged. Judgment for the plaintiff.

Abbott, Tait & Abbotts, for plaintiff.
Roy & Boutillier, for defendant.

SUPERIOR COURT.

MONTREAL, July 4, 1881.

Before MACKAY, J.

LECLERE et vir v. JOLIETTE MUTUAL FIRE INSURANCE CO.

Procedure—Revision of rulings of Commissioner.

PER CURIAM. The female plaintiff was insured for $400 on a house destroyed by fire, and sued on the policy. There are several pleas—that the proofs required after the loss were not furnished; that there were gross misrepresentations; that the wife said it was her house, whereas it was her husband's. The enquête has been taken under a commission, and the Commissioner has made illegal rulings. But no proceedings were taken on that. The defendant might have moved to have the rulings revised. But instead of doing that, he objected generally, and now moves, without notice, and at the final argument on the merits, that the

enquête be re-opened. There was also a petition to me in Chambers to discharge the *délibéré*. This petition must be dismissed, and so the motion to reopen the enquête. On the merits, judgment for plaintiff for debt, interest and costs.

Ouimet, Ouimet & Nantel, for plaintiff.
F. O. Wood, for defendant.

THE SALE OF THE GOOD WILL OF A BUSINESS.

The decisions of the Master of the Rolls in the recent cases of *Ginesi* v. *Cooper*, 42 L. T. Rep. N. S. 751; L. Rep. 14 Ch. Div. 596, and *Leggott* v. *Barrett*, certainly carried the law as to the duty of the vendor of a business who afterwards commences another business similar to the one sold, considerably beyond what it previously had been, and the judgments of the Lords Justices in *Leggott* v. *Barrett*, 43 L. T. Rep. N. S. 641, dissolving that part of the injunction granted by the Master of the Rolls which restrained the defendant from "dealing with any customer or customers of the firm," in addition to the ordinary words restraining solicitation merely, usefully indicate the proper limits within which, in their opinion, a vendor is, under such circumstances, free to carry on business again, and how far the fact of the prior sale curtails his right of free trading.

In this case the defendant, who had for some years carried on, with the plaintiff, the business of furnishing ironmongers in Bradford, dissolved partnership in July, 1879, and by a deed dated in November of the same year, for the consideration therein mentioned, assigned to the plaintiff all his share in the stock in trade, fixtures and partnership assets generally of the firm. He further covenanted that he would not, "within the space of ten years from the date of the said dissolution of partnership, commence business, either on his own account or in copartnership with any other firm or firms, or take any situation in the trade or business of an ironmonger in Bradford, or within ten miles thereof, except in Leeds, and soon afterwards the plaintiff, alleging that the defendant had sent circulars to and was doing business with some of the old customers of the firm, applied to the court for an injunction restraining the defendant not only from soliciting but also from dealing with such customers. This order the Master of the Rolls, in accordance with his previous decision in *Ginesi* v. *Cooper*, made, but the Court of Appeal have held that, while it would be obviously unfair for the defendant to attempt to decoy the old customers from the partner to whom the business had been sold, yet that no rule of justice requires, in the event of those customers, without solicitation, choosing to call at the defendant's shop, that he ought to be restrained from dealing with them.

Although no mention of the word "goodwill" may be made in the assignment of a business, it has long been held that the sale of a business carries with it both the good-will and the trade-marks that have been used in connection with it, and in all cases arising out of the resumption of business by a person who has previously sold a similar one, the only important question to be decided is whether or not there has been fraud upon a contract, express or implied, entered into by the vendor at the time of the sale—in the words of Lord Justice Brett—"that he will not immediately afterwards do away with that for which he has been paid, by soliciting the customers, and so practically destroy the good-will which he has agreed to transfer to or leave with another."

Notwithstanding that the nature of the goodwill must of necessity vary very much according to the character of the business to which it belongs—as, for example, the good-will of a public house, which is almost entirely local, in contrast with that of a newspaper or patent medicine, which mainly depends upon the name—there are yet in all cases certain common and easily recognizable attributes which it has been found convenient to classify under this name. No better definition has ever been given than the broadly comprehensive and masterly one furnished by Vice Chancellor Wood in *Churton* v. *Douglas*, Johns. 174, when he says: "'Goodwill,' I apprehend, must mean every advantage, if I may so express it, as contrasted with the negative advantage of the late partner not carrying on the business himself that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on, or with the name of the late firm, or with any other matter carrying with it the benefit of the

business." Attempts have been frequently made from time to time to restrict the advantages comprised in this term to the use of the actual premises where the business has been carried on, and such dicta as those of Lord Eldon in *Cruttwell* v. *Lye*, 17 Vesey, 335, "The good-will, which was the subject of the sale, is nothing more than the probability that the customers will resort to the old place," and of Lord Langdale in *England* v. *Down*, 6 Beav. 269, "The good-will is the chance or probability that custom will be had at a certain place of business in consequence of the way in which that business has been previously carried on," have been quoted in support of this view; but there is no doubt that at the present time the wider interpretation of the term as given by Vice Chancellor Wood is the accepted one.

It has been questioned whether, strictly speaking, there can be such a thing as the good-will of the business of a professional man apart from the mere recommendation or good word which he may personally address to his clients in favor of his successor, and that therefore the value of such a business on the death of the practitioner, need not be taken into account by his executors. The fact, however, remains that on the death of a medical or legal practitioner, there are always persons willing enough to pay money for the "practice," and, illogical as it may sound, there is yet such a thing as the transferable good-will of a business, such as that of a surgeon or solicitor, which depends almost entirely on individual skill, and has little to do with the local reputation of an establishment to make it valuable. But, although in the case of *Smale* v. *Graves*, 15 L. T. Rep. 179; 3 De G. & Sm. 706, where a widow and acting executrix of a surgeon dentist had sold the good-will of the practice for an annuity of £100, it was held by Vice Chancellor Knight Bruce that, if not the whole, at any rate some part of the annuity belonged to the estate, there are other conflicting cases, and the point does not at present appear to be quite free from doubt. In the case of an ordinary trading partnership it is now clearly settled that the good-will is a partnership asset, and must, on dissolution, be realized, together with the other assets, for the benefit of all the partners. On dissolution by the death of a partner, however, it has been said that the good-will survived, and there is an old decision to that effect. But the modern authorities are opposed to this view; the good-will is clearly a saleable asset of the old firm, although it must be borne in mind that the surviving partner is under no obligation to give up business, and, by choosing to continue it, may be able to deprive the good-will of the late firm of nearly all its value.

The right to use the trade name identified with the business purchased, has been held to pass as part of the good-will. Thus, in *Levy* v. *Walker*, 39 L. T. Rep. N. S. 656; L. Rep. 10 Ch. Div. 436, it was decided by the Court of Appeal reversing the judgment of Vice-Chancellor Hall, that the assignment of the good-will and business of C. and W. did convey the right to use the name of C. and W., and the exclusive right to use that name as between the vendor and purchaser of that business. The use of the business trade-mark is also sometimes a very important part of the good-will, and by the Registration of Trade Marks Act, 1875, sec. 2, it is provided that, "when registered, the trade-mark shall be assigned and transmitted only in connection with the good-will of the business concerned in such particular goods or class of goods, and shall be determinable with such good-will.

Although the vendor of a business has a perfect right, in the absence of special provision, to set up in an exactly similar business in the immediate vicinity of the place where the old one was carried on, yet he must abstain from any representation, even from the use of his own name, in a manner likely to induce the belief that his business is the same as, or a successor of, the old one; for this would simply be a false and fraudulent proceeding, and an infringement of the right of property in another person. And as the solicitation of customers of the old firm cannot, in this case, be made without some reference, express or implied, to the relations once subsisting between them and the firm as previously constituted, it would not be fair or reasonable that the person who has sold the good-will should thus set to work to destroy the business that he has sold to another. But to enjoin a man, or to prevent him by means of damages, from even dealing with persons who under the old conditions had been his customers, carries the equitable doctrine much farther, and, if adopted, would, as Lord Justice Brett says, in

Leggott v. *Barrett*, "prevent the customers from having the liberty which anybody in the country might have, of dealing with whom they liked." The rule, as to the proper mode of carrying on business by one who has previously sold a similar business, being now restored to what it was before the recent decisions of the Master of the Rolls, will doubtless be always in practice found sufficiently stringent to prevent any fraudulent use being made of those business advantages, which the very purpose of the previous sale had been to part with, and make the property of another.—London *Law Times*.

RECENT U. S. DECISIONS.

Mandamus—Will not issue if result fruitless.—Mandamus will not issue, even if the facts would warrant its issue otherwise, if the result will be fruitless. Says Brown: "It is a maxim of our legal authors, as well as a dictate of common sense, that the law will not itself attempt to do an act which would be vain; *lex nil frustra facit*, nor to enforce one which would be frivolous—*lex neminem cogit ad vana seu inutilia*." The law will not, in the language of the old reports, enforce any one to do a thing which will be vain and fruitless.—*Clark* v. *Crane*, California Supreme Court.

Malicious Prosecution—What necessary to sustain action—Probable cause.—In order to maintain the action for malicious prosecution, it is incumbent on the plaintiff to show that he had been prosecuted by or at the instigation of the defendant, and that such prosecution was instituted maliciously and without probable cause. These ingredients are essential to the right of action, and if they are not found to co-exist, the action is not maintainable. While the malice necessary to the right of recovery may not be deduced as a necessary legal conclusion from a mere act, irrespective of the motive with which the act was done, yet any motive other than that of instituting the prosecution for the purpose of bringing the party to justice is a malicious motive on the part of the person who acts under the influence of it. Mitchell v. Jenkins, 5 B. & Ad. 594; Add. on Torts, 594, 613; 2 Greenl. on Ev., § 453; Boyd v. Cross, 35 Md. 194; Cooper v. Utterbach, 37 id. 283; Stansbury v. Fogle, id. 386; 1 Tayl. on Ev. 40. Probable cause is made to depend upon knowledge of facts and circumstances which were sufficient to induce the defendant or any reasonable person to believe the truth of the accusation made against the plaintiff, and that such knowledge and belief existed in the mind of the defendant at the time the charge was made or being prosecuted, and were in good faith the reason and inducement for his putting the law in motion. Mere belief that cause existed, however sincere that belief may have been, is not sufficient. Delegal v. Highley, 3 Bing. N. C. 950; McWilliams v. Hoban, 42 Md. 57; 2 Greenl. on Ev., § 455; Perryman v. Lister, L. R., 3 Exch. 197; S. C., L. R., 4 H. L. 521; Merriam v. Mitchell, 13 Me. 439.—*Johns* v. *Marsh*.—Maryland Court of Appeals, 52 Maryland Rep.

PROFESSIONAL ETHICS.

To the Editor of the LEGAL NEWS:

SIR,—The delicacy which prevents an advocate from pleading in the court of a near relative is doubtless "honorable" in a sense; but it also indicates a certain moral timidity. It is hardly possible to conceive that a judge should be swayed one way or other by the person who urges the argument. In the multitude of affairs that comes before a judge it generally happens that the judge does not recollect who the pleader was. In England where the habit of suspicion has not yet become a national vice, such instances as those mentioned in the Albany *Law Journal* would be regarded as affectations. The rule in England goes no further than this, that a barrister shall not select his father's circuit for practice. To lay it down as a rule that a lawyer is not to practice in the court in which his father is a judge would be to decree that the son of a judge shall not be a lawyer.

R.

GENERAL NOTES.

It is stated that Sophie Perofskaja, who was one of the recently executed Nihilists, was the first woman who has been executed in the Czar's dominions since 1791, in which year a governess named Mary Hamilton had her head publicly cut off at St. Petersburg, for having made away with her three illegitimate children. Twenty-five years after that event, Elizabeth, daughter of Peter the Great, abolished the punishment of death, and it has never been reintroduced into the Russian criminal code. Hence, when anyone commits a crime of extraordinary atrocity in Russia, in order that the death punishment may be awarded, the criminal must be tried by a military tribunal or by a special high court of justice.