KELLY FREE.

(Continued from first page.)

has since had care of me. My head was badly cut, my right arm broken, a bone in the other arm splintered, some ribs broken and my back and hips badly bruised. I can only remember being struck three times.

To Mr. Carvell Mr. Burns said that on the evening of the assault, before he met Mr. Kelly he had called at the house of A. W. Nevers, arrested him and seized his team, sending them into Houlton by his son. He did not produce the revolver when arresting Mr. Nevers. When I fired the first shot Mr. Kelly was 10 or 12 feet away from me, in the act of jumping toward me. I fired right into his body.

Mr. Carvell—You intended to kill him?

Mr. Burns—I intended to prevent him from killing me. I think he struck me before I shot him the second time, but I am not sure. I had to climb up several steps to get to Mr. Turrell's door, I was not able to get to my feet.

Mr. Turrell in his testimony said that when he opened the door Mr. Burns was standing on his feet.

Dr. Putnam and Dr. Sawyer gave evidence as to the nature of Mr. Burns' injuries.

Mr. Currie asked that the information be dismissed on the ground that the charge was not proven. There was no doubt about the assault but the intent to murder had not been shown. The evidence showed that Kelly was there with the intent, possibly, to smuggle, though there was no evidence that he was committing an offence. Burns put a couple of bullets in him before Kelly touched him. Evidently Burns intended to murder Kelly. He would admit that Kelly struck one or two blows more than he should have, but some allowance must be made for a man who had been fired into. Kelly had Burns' revolver in his possession and there was a fair inference that he picked it up on the spot. With the revolver in his possession and two bullets in the chamber it would have been an easy matter to dispatch Burns. That he did not do so is clear evidence that he had no intention to do so. When Kelly struck Burns he did so in self defence, to prevent Burns shooting him to death, and the mere fact that he struck him a couple of times after he put him *hors de combat* did not prove an intention to murder.

Mr. Connell argued that this was no trial of the cause but a mere examination to see whether or not Kelly should be sent into United States territory for trial. Perhaps Mr. Currie would be able to persuade a jury that Kelly acted only in self defence, but that was no question to be taken into consideration at this time. A *prima facie* case had been made out, such as would warrant a magistrate in sending Kelly up for trial. Instead of Kelly it was Burns who had acted in self defence. Burns is a small man and Kelly a very large man. Kelly was on the load with a club in his hand, called out "I will kill you" and was in the act of jumping on him when Burns fired first shot and the second shot was fired after Kelly struck him. Burns had stated that he fired to keep Kelly from killing him. The question of self defence must be tried out in a court in the United States.

Time was given the prosecution to put in evidence as to the fact that Burns was an officer in discharge of his duty at the tmie when the assault was committed and that Kelly was engaged in violating the law.

On Friday afternoon His Honor Judge Gregory read his decision which was as follows:—

The prisoner is in custody under a warrant of His Honor the Chief Justice, issued under the Extradition Act, upon an information laid before him on the 22nd of April, A. D., 1902, by Wm. F. Jenks, of Houlton, in the State of Maine, against the prisoner, charging him with having in the State of Maine assaulted one Frank W. Burns, with intent him the said Frank W. Burns then and there feloniously to kill and murder, the said Frank W. Burns then being a Deputy Collector of Customs of the United States of America and in discharge of his official duties.

One of the crimes mentioned in the Extradition Treaty between Great Britain and the United States is "Assaulting with Intent to Murder." The right to have the prisoner extradited, then, depends upon the establishment by the prosecution of the prisoner's intent to murder. The words "feloniously to kill" in the information are surplusage, and no matter how serious the assault may be unless it be accompanied with intention to murder the accused is not liable to extradition.

By the 9th section of the Extradition Act the judge or commissioner before whom the fugitive is brought is directed to hear the case in the same manner, as nearly as may be, as if the fugitive was brought before a justice of the peace charged with an indictable offence committed in Canada.

By section 594 of the Criminal Code, after all the witnesses on the part of the prosecution and the accused have been heard the justice of the peace is directed if upon the whole of the evidence he is of the opinion that no sufficient case is made out to put the accused upon his trial to discharge him; and by section 596, if he thinks that the evidence is sufficient to put the accused on his trial, he is to commit him for trial.

Doubtless if the prisoner in this case was being examined before a justice of the peace on the offence laid against him, but committed in Canada, he would with propriety be committed for trial for some offence, but I do not think for the offence of assaulting with intent to murder, for the reason that I can see no evidence upon which any court or jury could hold that the assault, if any unjustifiable assault were committed, was so committed with intent to murder.

I take it that by section 594 C. C, the justice of the peace is directed to discharge the prisoner in case of accusation of offence committed within Canada only where in his opinion no sufficient case of any offence, the offence charged or a lesser one, is made out sufficient to put the accused upon his trial; but by the 11th section of the Extradition Act it is provided, if in the case of a fugitive accused of an extradition crime such evidence is produced as would, according to the law of Canada, subject to the provisions of the Act, justify the committal of the accused for trial, if the crime had been committed in Canada, the judge shall issue his warrant for the committal of the fugitive to the nearest convenient prison, there to remain until surrendered to the foreign state, or discharged according to law; but otherwise the judge shall order him to be discharged.

Under this section I think before a judge would be warranted in committing a fugitive it would be necessary that such evidence should be produced as would, according to the law of Canada, justify the committal of the accused for trial for an extradition crime. In this case, the part of the accusation which makes it cognizable at all under the Extradition Act is the intention on the part of the accused to commit murder.

It was urged upon me by counsel for the prosecution that it was beyond my duty to consider the evidence of intention on the part of the accused; that I am not authorized to consider any matter of defence that the accused may set up, nor to enter into the question of his intention. That, it was said, was a matter for the trial court. I think it is properly contended by the prosecution that I am not to try the case or consider matters of defence; but if upon the evidence produced by the prosecutor in support of the charge there is no sufficient evidence to establish an intention, such intention as is necessary to make an extradition crime, I am bound under the section to discharge the prisoner. If the matter was before me as a trial judge I do not think I would be justified in charging a grand jury, under the evidence that has been adduced in this case, in instructing them that they might find a true bill against the accused for assault with intent to murder; neither do I think if the case was upon trial and the evidence that has been given here was all the evidence, I could otherwise instruct a petit jury than to say that there was no evidence upon which they could convict the prisoner of the crime charged.

In addition to there being no evidence of intention to murder, there is lack of evidence of authority of Mr. Burns either to seize the prisoner's property, or to arrest the prisoner. The evidence of Mr. Lewin, the attorney from Maine, shows that Mr. Phair, the Collector of Customs for Aroostook County, alone has authority to appoint Mr. Burns to the duty he undertook. Mr. Phair did not appoint him or in any way authorize his act; he undertook the work at the request of Mr. Jenks, a special Deputy Collector of Customs, of the district of Aroostook. If Mr. Burns had authority by virtue of his own position as Deputy Collector of Customs at Fort Fairfield to do what he undertook there is not evidence to show it.

Mr. Connell contended that I should not concern myself with the laws of Maine under which the prisoner would be tried, either as to what would be a good answer to the charge nor the laws of evidence or procedure applicable to the trial. In this I think he is over the provisions of section 24 of the Extradition Act, which provides that the crimes there mentioned shall be construed according to the law existing in Canada at the date of the alleged crime. The crime of attempting to murder is named as one of the crimes so to be construed and that crime, I think, is synonymous with assault with intent to murder.

For want of evidence sufficient, according to the law of Canada, to justify the committal of the prisoner for trial on an extradition crime, if the crime had been committed in Canada, I do order that the prisoner be discharged.

The decision was received with shouts of approval by the crowd. Order was promptly restored and His Honor gave Mr. Kelly some advise. There were many features of the case unfavourable to the defendant. The severe treatment he gave Burns was very discreditable. The decision in this case did not justify his conduct, nor acquit him of the crime. He had been discharged, on the strength of a strict interpretation of the Extradition Treaty. He would be sorry if the release of Kelly would induce others to violate the customs laws of the United States. If a case arose in which the terms of the treaty demanded that a prisoner in such a case be handed over to the United States authorities, any judge would make an order without sorrow, and have no sympathy for such a prisoner. Any man ought to be ashamed of himself, who, for the few paltry dollars involved in the loss of a load of potatoes, would inflict such a beating on another as Kelly did on Burns. He had no right to read a lecture to the United States Customs authorities, but he must express his opinion that Burns was too ready with his revolver. Human life should not be regarded so lightly as Burns had regarded it, when, for the sake of a few paltry dollars of customs revenue, he had fired with so little hesitation.

As the crowd poured out of the hall, Charles L. Smith stood on the sidewalk, and took up a collection for Kelly, who has a large, young family, and whose confinement in jail has been a severe loss to him. Mr. Smith received the sum of $72.00, and other sums have been promised.

Hospital Fund.

There has been paid Dr. D. Sprague for the Hospital Fund the following sums:—

W. C. T. U., Woodstock	$100.00
Daniel Thompson	5.00
Presbyterian Church, Richmond	28.25
Mr. and Mrs. E. Briggs, Red Bridge	2.00

"Do you keep matches?" asked a wag of one of our grocers.

"Oh, yes, all kinds!" said the grocer.

"Well, I'll take a trotting match," said the boy.

Whereupon the grocer seized him by the nape of the neck and applied his right trotter vigorously. He found his match. and trotted.

BORN.

BRITTAIN.—At Bristol, on June 11th, to the wife of C. W. Brittain, a son.

ROGERS.—At Bristol, on June 8th, to the wife of Theodore Rogers, a daughter.

MARRIED.

BROWN-TRACEY.—At the parsonage, Andover, June 13th, by Rev. D. W. Demmings, Cleveland Brown and Laura Tracey, both of Presque Isle, Me.

DIED.

TAPLEY.—Barrach Tapley, formerly of Shiefield, Sunbury Co., and brother of David Tapley, Customs Officer at McAdam, died of paralysis at Perth Centre, June 10th, in his 61st, year. He was ill only a few hours.

Property For Sale.

That desirable property on the corner of Chapel and Cedar streets, known as the James Baker property, is offered for sale. Apply to DR. T. D. SPRAGUE, Secretary Board of Directors Carleton County Hospital, Woodstock, N. B.

May 21st, 4i.

NOTICE.

All persons indebted to Dr. E. H. Saunders are requested to pay the amount of their indebtedness to D. McLeod Vince. All persons having claims against Dr. E. H. Saunders will be kind enough to present the same to Mr. Vince. Dated 3 June, 1902.