SUPPLEMENT TO THE SENTINEL.

OL. III. FREDERICTON, WEDNESDAY, MARCH 4, 1840. No. 9.

Provincial Legislature.

HOUSE OF ASSEMBLY.

TUESDAY, FEB. 25.

The House resolved itself into a Committee for the consideration of a Bill granting to prisoners on trial the benefit of counsel.—Mr. Hanington in the Chair.

Mr. STREET explained the nature of the Bill before the Committee. He said formerly it was not permitted by the law of England, that prisoners should be defended by counsel, in criminal cases. But in England and all the other colonies he believed a more humane and liberal principle had of late prevailed. The subject at one time created much discussion in England, but ultimately it passed into a law; and prisoners were allowed the same advantages in that respect, to which they were entitled on trials of less importance, and which did not go to affect their lives. In Nova Scotia he said a law had passed for the relief of persons so situated, and it appeared extraordinary that a similar one should not exist in New Brunswick, where prisoners who might be placed on trial for the same offence, were deprived of the same indulgence which was granted to them in the sister province; which was evidently an injustice, as British subjects when on trial for offences, with which they were charged, should every where be placed on an equal footing. All text writers, he said, had made the denial of counsel to criminals a subject of animadversion; and Blackstone had commented on the severity, which deprived persons on their trial, which involved life and death, of those advantages of which they partook in criminal actions.—As prejudice had given way in other countries, it should be extended to this Province. A Bill of a similar nature he said had passed the House during the session before the last, and had been subsequently thrown out up stairs; but he hoped if it passed again, that it would meet with concurrence there; as he considered it an inconsistency in the system of jurisprudence to deny to the people of New Brunswick, those advantages in a case of so much importance, which were enjoyed in the mother country, and particularly in the neighbouring Province of Nova Scotia.

WEDNESDAY, FEBY. 26.

The House resolved itself into a Committee for the consideration of the Bill introduced by Mr. Street, further in amendment of the law and for the advancement of justice; who made a few brief remarks, recapitulating what he had stated on a former day.

Mr. END after a few introductory remarks complimentary to the zeal and intellectual capabilities of the learned gentleman who had brought in the Bill, and calling for the serious consideration of the Committee to the Bill before the Committee, stated that it was one which was not called for by the interests or wishes of the public, and showed a desire for innovation and change; which he should not have expected in the learned mover of the Bill; and which he considered as uncalled for and unnecessary. Whenever the people of the Province, or even the humblest individual, felt themselves aggrieved, he for one would be most ready to afford them redress; but he would not indulge in change for the purpose of change. If the public and the expences attending the courts of justice are too heavy, he would agree to reduce them. He hoped the committee would lend their serious attention to the subject under discussion; and in considering of which he was sorry to be placed in a situation so ludicrous as not to be listened to. Once for all he would say, that he was opposed to a Bill which went to change the practice of the Supreme Court. The Committee knew very well that it was a difficult matter to fall in at once with the dictum and decisions that a new system would require, and which must be settled down like a new road before it could be useful to those who might have occasion to travel it; and it would require expensive vehicles at first to pass over it, before it could come into general use. If there were already a good road, with its houses of entertainment, altho' it might be a little more round about, still he would prefer it for its certainty, and because it was well known. For the same reason he would not open a new road in law, because he was averse to doing that which was unnecessary and might produce more harm than good.—The introduction of another system he concluded would be cruelty to the profession, as there was not one of them but must recommence his reading, and whose books of practice must henceforward be useless.—His learned friend however from having turned his attention to the subject knew it all. The learned member for York had procured the books of practice, and which contained the new rules, which occupy 288 pages, and that during a period of less than three years. For what purpose he would ask, was this change sought to be introduced, and which implied an imputation upon the remedial justice of the land. If the gentlemen of the legal profession, had any spare time, let them plant potatoes, cultivate their gardens, or form agricultural societies; and not engage in a new pursuit, by which the public would not be benefited. He said it was now seventeen years, since he had been admitted at the bar of this Province, and if the present Bill became a law, he would be just as ignorant of the practice of the courts, as if he had never been born or come into the world; and at the age at which he had arrived, his brain was rather tough, and was not so susceptible of impressions, as when in early life. How was this new practice therefore to be infused into his mind? It might do very well for the young brood, just coming up, and he was willing they should have the benefit of it; but first would wish to become rich enough himself. Yet why should the Legislature demolish the present edifice, and seek for new materials to erect another. He gave his learned friend credit for his zeal and industry; but as he considered the Bill was an entire innovation, he should oppose it.

Hon. Mr. WELDON did not expect that those improvements, which had been introduced into the courts of law in England, would be termed innovations in this Province; and it was admitted by all persons having a knowledge of law that the present pleadings in its courts are a mass of confusion. The Imperial Parliament about ten years since passed a similar Act, which gave power to the Judges to make rules and regulations, in accordance with the principles of the present enlightened age; and it had a tendency to shorten the pleadings in courts. The learned member for Gloucester had referred to a book which had subsequently been compiled on the subject, which contains only about fifty pages on the practice of courts. The remainder of the book was filled up with decisions and forms; which if hon. members compare with those in Chitty on Pleadings, they would find the pleadings would be materially shortened; thus producing benefit to a country and not an injury. His learned friend had said if the Bill were passed, the Legislature would be pulling down a system with which they were acquainted, to substitute another which it would be difficult to understand. But professional men should be acquainted with the alterations in law proceedings which are going on in the mother country, and they must be aware that improvements are taking place in those usages, which are suitable to the present age.—This was one of them, and should be introduced into this Province. It would not be necessary to throw aside books of practice; although it would lead to the perusal of those which lay down the rules, that are adopted by courts under the authority of law; and which form a guide to those in the colonies, who are thus enabled to render the practice of such courts consonant with those of the mother country. If gentlemen find an improvement has been introduced in England, which removes a useless form, and which is suitable to the Province, why should it not be adopted; and as in this instance substitute a more simple and beneficial mode of proceedings. The object of the Bill he said, was not to introduce a new system of law, but merely a more improved system of practice in administering the law, which has already obtained in the mother country; and they should profit by her experience. It had been said the Bill would compel professional men, to resort to an unbeaten track; but this statement was not correct, because the operation of the system which is proposed, may be known by those who are disposed to study; and any gentleman who may have any doubts, by referring to books of practice, would find the decisions of the English courts. If the statute book was referred to, it would be found that within the last three or four years, several new laws have been introduced. Sir Robert Peel for instance had consolidated an immense number of laws upon criminal jurisprudence, and reduced them to two or three. There were other acts, which had been passed, introducing improvements in the statute law, and that were in accordance with the altered circumstance of the country. He was satisfied the Bill would be of advantage to the Province, it might give professional men a little more trouble, but they should read for the purpose of keeping up with the improvements of the age. The learned gentleman said that part of the Bill which was a copy of the imperial statute, which went to regulate the fees, would be productive of advantage, as the table of fees is at present very imperfect; several services being unprovided for, and in other cases, the fees charged being too large. The learned member for Gloucester had said he was willing to aid in revising that table, but it was a subject too difficult for the House to get through with, and he was quite willing to leave it to the Judges to frame a table of fees, provided it were laid on the table of the House before it went into operation; and if it contained any objectionable provisions, they could lay their hand on it and stop it. He considered the courts of England as affording a proper guide to those of this Province; and concluded by saying he hoped the Bill would pass, and which was one that he considered was loudly called for.

Mr. END said the hon. and learned member for Kent had stated that care was taken that the power of legislation should not be parted with by the Assembly, and as a measure of security, the rules and table of fees were not to have effect, until they had been laid upon the table of the House; but he would ask what gentleman would arrogate to himself to cut down or alter those rules which had been adopted after grave consideration by the Judges of the Supreme Court; and under the circumstances in which they were placed would the Assembly authorise those officers to make regulations, which ultimately were to have the force and effect of law. He begged them to look at the absurdity of the proposed measure. The House was exceedingly jealous as to its privileges, and would not allow a Money Bill to originate elsewhere, and yet by this Bill power would be given to the judges to do so, and their proceedings must come before that body to be amended. He had no objection to the opinion of the Judges being taken; but he objected to the mode, and to their exercising an irresponsible controlling power; and he was opposed to giving away a power which they had no right to depute. There as to the advantage of having a certain and well defined system of practice laid down and understood. He held in his hand a copy of the American Jurist for 1839, in which is a review of the Reports of cases tried in the Supreme Court of this Province; from which the learned gentleman read extracts, to show the importance which is there attached to a book of reports, as by that means a professional man may see what are the decisions of courts, and the rules which they may have established; and that until such a plan was adopted in this Province, the knowledge of these facts, must have been confined to those few who had taken notes. But were the present Bill to pass into a law, those reports must become entirely useless; and a client must leave to chance the decision of his cause. At present he said the judges are found to differ;—there are two judges on the bench very often differing from the third; and all those with tears in their eyes, differing from the Chief Justice; and this was not an imaginary case, as during the last term the Judges might be seen differing from His Honour. It was of importance therefore that the Legislature should not break down an established practice, and substitute another, with the working of which they were unacquainted, and of which it was impossible to say where it would end. Let gentlemen wait and see what will be the result in England, they knew that Providence in its wisdom had thought proper to visit that country with a mania for reform; and that in that way its institutions had been assailed. But the cloud seemed to be passing away; and he should like to know before he adopted the proposed alteration, whether it might not be found necessary to fall back upon the established usage. For his own part, the learned gentleman said, he was satisfied with the present system, and against which he had heard no complaint; then why adopt change for the sake of change? and because gentlemen of the profession had procured books which they did not possess before, and because they could not bring the books up to the practice of the court, were they to bring the practice down to the books. If he had some of his own which were then in leaves at the binder's, he would show the Committee that the alteration that had taken place in England, was condemned by nineteen twentieths of the profession. The course proposed might be very convenient for courts; but he saw no necessity for embarking without compass or chart on the wild sea of experiment.

Mr. BARBARIE thought there was much before the Committee to satisfy the House, that the Bill under consideration ought not to pass. The learned mover of the Bill had endeavoured to satisfy hon. members that the object of the Bill would be to do away with special pleading, and to obviate difficulties which grew out of the present system of administering the law; but he was satisfied that the effect would be to encrease special pleading, and a party would be precluded from pleading the general issue; and some one must pay for all the special pleading which would take place under the Bill. The learned gentleman here read several extracts from a book of practice to show that the proposed system would introduce a more complicated description of practice, instead of the present known and well understood system; and would not do away with the flummery as it had been termed by the learned member for Northumberland that morning, with which he said it was incumbered. He would ask every reasonable man if he should not pause, before he gave his assent to such a proposition, and authorise the Judges of their own mere motion to make rules which were to have the force of law; or substitute for the present system, one which would produce an interminable tissue of special pleading, rejoinders and non-rejoinders, and rebatters and non-rebutters without end; and instead of a professional man being allowed to plead the general issue, compelling him be repeated, to come in and plead specially. He said he did not care for himself—he could grope his way along; but if this new system were to be introduced, no man could know where he stood; every plea of defence must be pleaded specially, and the public must suffer. The learned gentleman said he approved of the commutation of fees, he considered that measure a good one; but it could be done by a Bill, distinct from one containing so much extraneous matter. The Committee should pause before they gave their sanction to a practice which left so much to the discretion of the Judges; and he must again allude to the doctrine of Lord Bacon to which he had referred on a former day, who said, that that system of laws was best, which left least to the discretion of the Judges, and that Judge was the wisest who trusted least to his own discretion. He concluded by repeating the hope that the Committee would pause before they passed a Bill, which would lead to the introduction of a system that would confine the practice of the courts to the expensive process of special pleading; and that the Bill would be so altered as to meet the commutation of fees, and the alteration of the present fee table, where it might be found necessary.

COL. ALLEN had listened attentively to the debate, and it remained for the Committee to decide what course should be pursued. It had been stated that the Bill under consideration went to give the Judges power to frame new rules; he believed they do so at present. The principle of the Bill seemed to be a good one, and he was decidedly in favor of the commutation of the fees taken in the Supreme Court, and would authorise the Judges to frame a fee table, which if he understood the Bill must be confirmed by the Legislature. The present one which had been originally established by the Governor and Council, was always considered an arbitrary measure; and attempts had been made to remodel it. If therefore an alteration could be effected, it would be a great thing for the country. He was therefore in favor of the Bill.

Mr. FISHER said the learned member for Gloucester invariably opposed all attempts at improvement; no matter to what they referred; and he had come to the conclusion that as he was surrounded by a population whose manners and customs had not altered since the time of Louis XIV. he had been inoculated with their notions; and carried that principles into legislation. But he was disposed to make improvement; and either the learned member must be wrong himself, or the Courts and Parliament of England were in error; but he considered that the member for Gloucester was wrong. The object of the present Bill, he said, was to change the practice and diminish the fees in the Supreme Court: to abolish the present practice altogether, and oblige the party to give notice of his grounds of defence, which would be a decided improvement. His learned friend had said the inducement to alter the practice, was caused by the circumstance of professional gentlemen having procured the late publications; but he was in possession of both, and the great difficulty at present is that decisions take place in England consonant with the more modern practice, and the cases to which they apply in this country are tried under that which has been exploded. He could not help interrupting his learned friend, when he stated that if the present Bill were to pass, the decisions in the Supreme Court would become a mere matter of chance. And he would ask if in ninety-nine cases out of a hundred, a lawyer could not give his client a correct opinion as to the result of his cause, if the facts were correctly stated: he had found this the case with reference to his limited practice; and he believed every professional gentleman would bear him out in the assertion.—Little therefore could be left to chance. The improvement which the Bill contemplated was not the only one which had recently been introduced in England; there was another with reference to real estate; and he thought Sir Robert Peel's Bills contained something more than consolidation, and went to simplify the criminal law of England. The present he confessed was an important measure, and was one in which the people were deeply interested, but it was too much the practice to allow subjects of that nature to be discussed by lawyers alone. If it were left to those gentlemen to draw up rules and frame a fee table in that House, would members generally be as well satisfied as if the subject were left to the Judges, operated upon as they were by a deep responsibility and the sanction of an oath. If it were necessary to legislate at all, he would leave it in the power of the judges to make such regulations as they might deem proper, as he was satisfied there would be more security if the subject were left to those officers, than if it were to be arranged by those who might be more or less interested. The Bill he considered a good one, and he thought it ought to pass.

Hon. Mr. JOHNSTON said that when Bills of the nature of that before the Committee came under discussion, he always waited to hear the opinions of the legal gentlemen in the House; and notwithstanding the opposition which it had met with, he was induced to believe this would meet the complaints that existed against the present practice in the Courts. Another object of the Bill he said, was to reduce the amount of fees to be paid, and to lessen the cost of litigation. The Committee had been entertained with an account of the various modes of pleadings; whether the introduction of a system which would give the judges power to form regulations would be an improvement of the practice he could not say; but he did not apprehend any evil from a course which had long since been pursued by the Imperial Parliament. Then with reference to authorising them to make such rules and regulations. It had been contended by the learned member for Gloucester, that the House would be delegating a power which they had no right to do. Still that was the course which had been pursued by Parliament, the Judges in England being authorised to frame a table of fees, which was afterwards submitted to the Legislature; and when he found that was the case, he thought the opposition of the learned member fell to the ground. Then it had been said, if the proposed system were introduced; that all the reading of professional men would go for nothing. He should regret that; but, in that case, they would only have to recommence, which could be no hardship, as in that way they would be improving their minds, and fitting themselves to fill the highest situations in their profession. With reference to the statement that there exists no complaint against the proceedings of the Supreme Court; he had heard the high fees complained of; and if the Bill were to pass he thought relief might be afforded to suitors. As to the nature and amount of those fees the Judges of the land, he said, knew better than the members of that House possibly could; and he thought a table which they might submit, would be more equitable than any that could be framed by that body. On the whole he had not heard any substantial objection urged against the Bill, and should give it his support.

Mr. END said he was about rising in reply to the learned member for York, Mr. Fisher, when the hon. member for Queen's addressed the Committee. He did not say the judges decided according to chance, he knew his duty too well; but he had stated that it was very often a matter of chance as regarded the suitor, which way his case would ultimately terminate. But he would call the attention of hon. gentlemen to the statement of his learned friend, that in nineteen cases out of twenty he was enabled to give a correct opinion, as to any case submitted to him, if the facts were stated correctly. This showed a great soundness and fixedness in the present administration of justice; and he would ask his learned friend if the present Bill passed into a law, whether he would be able to do so. On the contrary if the present step were taken, all would be involved in uncertainty; and the greatest libel that was adduced against the profession, was that which spoke of the uncertainty of the law; for where there was certainty in the proceedings of courts, there was purity. Because as the hon. member for Queen's had stated, a similar law was passed in England in 1833, would it follow that the practice of the courts here should be assimilated to those of that country; would he be willing to introduce into this Province, the laws regulating tenure of lands, those of primogeniture and feudal tenure. He was not opposed to improvement where it was required or could be introduced with advantage. The learned gentleman said he had observed before, that the object of the friends of the Bill was to assimilate the practice of the courts to those books which had been purchased, and this had been confirmed by the statement of the learned member for York.—Let him burn his books. The hon. member for Queen's had stated that he had heard complaints of excessive fees; but was that the tangible shape in which the subject should come before the House. Let the Bill be deferred for three months, and let it be known, as it would be, through the Reports in the public press, that such a measure had been introduced, and in another year, if any evil were felt, there would be petitions on the subject before the House; they would then see if any complaint exists against the remedial justice of the country. He looked upon the Bill as one coming from the Legislative Council; it contained some good things, but more bad than good; but whatever might be the benefits that would result, the country would pay too high for them, if they were purchased at the expence of the innovation that was proposed.

Hon. SPEAKER would not vote for a Bill which gave to the Judges the power to make a fee-table. It was true it provided that such table should be laid on the table of the House within the five first days of the session, and that it should remain there three weeks, when it would have the full force of law, unless enactments were made to the contrary. But it might not be in the power of the House to have those enactments passed, as the Legislative Council might not agree to them.—There was therefore no security in the Bill. He was not sufficiently well acquainted with the other provisions of the Bill, to decide as to their effects; but he should like to be assured that they would not encrease litigation. As to the fee-table he would insert a proviso that it should not go into effect, until confirmed by law.

Mr. STREET did not anticipate the slightest difficulty from the Bill; and did not think the proviso which his Honor the Speaker had proposed was necessary. From what he had heard he was satisfied the learned gentlemen who had opposed the Bill did not understand it; and if that were the case their arguments were fallacious. If he had any doubts upon the subject, he was convinced of that by the reply which the learned member for Gloucester had made to the learned member for the County of York, that in nineteen cases out of twenty he could give a correct opinion, as to the bearing of the law upon any case which might be presented; and who inferred that such certainty could not exist if the law were altered by the present Bill. Now the object of the Bill was not to alter the law, but merely to change the practice under the law, and to introduce an improved system in the administration of justice. Either he did not understand the law, or he was endeavoring to mislead the Committee. Then he said he would not have the Bill passed, until it had been ascertained what effects had been produced in England by a similar enactment. But he would ask were not seven years sufficient for that purpose; the system had been in operation in England during that time, and had been found to work well; and it had been a subject of regret in Nova Scotia that it had not been introduced there. By doing so in the Colonies the Legislature would be giving to the Province not only the decisions of the four Judges here, but whose decisions would be founded on others which from time to time might take place in England, by the most learned jurists in the world. The learned member for Gloucester he said, had caught at every thing, and at length had asserted that the Bill gave a power to the judges, in violation of those privileges by which the Assembly claims to itself the right to originate all money bills; whereas it was merely authorising them to remodel the fee-table, which must subsequently be submitted for the approval of the House; this was as fallacious as the other arguments which the learned gentleman had adduced. With respect to the Bill having originated with the Council, he was prepared to give that statement his unqualified contradiction.—It had been brought in by a Select Committee, by whom it had been prepared, and the members of the Legislative Council were only made acquainted with it, by oral communications which had taken place within the walls of the House. He trusted those remarks however would have no effect, but that the Committee would look at the merits of the Bill. The learned member for Gloucester had certainly stated that the decisions in courts were often the effect of chance, at least he so understood him; and he had gone on to describe in a ludicrous manner, the diversity of sentiment which sometimes prevails among the Judges. Nothing could be more fallacious, as the decisions in courts are not left to chance but are reduced to a certainty; and such also was the object of the Bill. The remarks of Lord Bacon which had been alluded to by the learned member for Gloucester applied to criminal justice and the awarding of punishment, where much would depend upon the temper of the Judge; and the only discretion which the Bill would give to the Judges, was connected with the making rules and regulations, that would not be acted upon, until they had received the sanction of law. The learned gentleman with a view to induce the Committee to believe that the effect of the proposed system would be to increase special pleading, had read from one or two books and had perverted the meaning of what he read; and had asserted that all who differed from him were destitute of common sense. He (Mr. S.) did not consider that he was devoid of understanding, and was satisfied that the effect of the Bill would be to diminish the expence of law suits, and to simplify the proceedings connected with them; and which had been tested and proved by the operations of the Act of Parliament of which it was a copy, and which would operate here with double force, and would compel defendants to state the nature of their defence, and would materially reduce the length of the record; and if parties put in wrong or unnecessary pleas they must pay for it. The learned gentleman concluded by saying that he would not take up more of the time of the Committee; the object of the Bill was a good one, and he was satisfied it would prove highly beneficial to the public at large by facilitating the administration of justice, and reducing the expence, as it would prevent the record from being incumbered with an unnecessary number of pleas, and the attendance of witnesses to substantiate a fact which might not be disputed.

Mr. BROWN said as his learned colleague was not then present he should be disposed to make one or two remarks, with reference to a subject upon which legal gentlemen were best qualified to decide. The object of the Bill he said, was to assimilate the practice of the Courts in this country, to that of those at home, and to simplify that practice; it also went to authorise the framing of a new fee-table, which he considered a very desirable object. He was in favour of assimilating the practice of the courts here to that of England, to which it ought to conform whenever it was practicable, as the Judges here would have the benefit of the decisions of those in the mother country. As the Bill would probably produce an improved fee-table, and the commutation of the Judges and Clerk's fees; he should be favourable to its passing.

The motion of Mr. Barbarie to postpone the farther consideration of the Bill for nine months, was then put and lost.