The Gleaner:

AND

NORTHUMBERLAND SCHEDIASMA.

VOLUME III.] *"Nec aranearum sane texus ideo melior, quia ex se fila gignunt nec noster vilior quia ex alienis libamus ut apes."* No. 24

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THE GLEANER.

NEW-BRUNSWICK LEGISLATURE.

HOUSE OF ASSEMBLY, JANUARY 30.

COMMON PLEAS BILL.

Mr. KINNEAR stated the objects of the bill, in a speech which occupied 50 minutes in delivery. The hon. member commenced by advocating the necessity and expediency of simplifying the law. It was well known that law in any shape must involve some degree of imperfection. But the great object of all legislation ought to be, to frame things so, that they might be generally understood; to make them so simple, as that the profession might not be subject to unfounded aspersions. In many cases, such observations really were not unfounded; but generally speaking, the science of the law was so intricate and perplexed, that very often two lawyers could not agree on the same points. This did not altogether arise from the intricacy of the law, but greatly from the state and fallibility of the human mind. All the affairs of this world were perplexing. There were reasons on both sides of most human questions. As to the object he had in view in bringing forward this bill. He had considered, that the inferior courts of pleas in this province were intended to bring justice as nearly home to every man's door as possible, and that as to these courts, they in the first instance required amendment. The first thing to be considered was, the small debt laws. He thought that better regulations might be made with respect to them. As to the superior courts, that subject was of such great importance, and involved so many serious questions, that he did not know in what way they could be remedied, except by the House appointing a Committee of three of its Members, to act in conjunction with three members of the other branch of the Legislature, who should be required to examine the whole system, and to point out how things could be altered and simplified, so that the people might be enabled to get justice easily.—This had been termed, 'the Common Pleas Bill,' the object of which he had now to state. The principal objects of this bill were, first, to issue to the Inferior courts of Common Pleas, SOLE jurisdiction in all causes of assumpsit, debt, covenant and trover, where the amount claimed did not exceed £20. Heretofore, the Acts of Assembly had intended to give this power; but the law was positive, that unless the jurisdiction of the Supreme Court was taken away by express words, the Justices of that court would be obliged so to decide, altho' it were even so invidious a task; because they had no other rule than the law as they found it, which they had sworn to execute.—Another object of this bills was, to induce Plaintiffs to bring actions in the Common Pleas, in all cases between £20 and £40; for which purpose the bill went to enable the judgments of the Justices to that extent to bind lands, and also to provide the appointment of barristers, properly qualified, as Justices of those courts, who would insure to plaintiffs the benefits of the bill and the due execution of the law of the land. The bill would define the jurisdiction of the respective courts so clearly, that the Justices of the inferior courts would never be asked how far thir jurisdiction extended, and lawyers would never be tempted to go beyond that jurisdiction, or to put actions for less than £20, into other courts. It was not only for this purpose that the bill was framed; but also to remedy the defects in he present summary form of proceeding; defects so numerous, and difficulties so great, that it was now almost impossible to know how to proceed. This bill would restrain a defendant from removing his cause into the Superior Court, unless he could swear that he had a just cause of defence; so that the poor man would not be delayed in his proceedings, if he wanted to recover the amount of a promissory note, between £20 and £40, from a rich man, by the latter removing the action into a higher court; and on the contrary, the rich man would be induced to sue his poorer neighbour in a court where the costs would be less heavy. The hon. member then detailed his plan, by which, in a summary jurisdiction, a party would be enabled to get the benefit of his judgment by the end of the second term, by enabling the Court to assess the damages at the return of the writ: and if the defendant did not appear to make his defence within two months, the Plaintiff would be enabled to sign final judgment and take out execution, returnable to the second term. This was very different from the present state of the summary law, by which execution can only be had after the second term, returnable to the third. Another object of the bill was to simplify the counts: The Common counts, such as for goods sold, for work and labour done, for money had and received, for money paid, lent, &c. &c. were all now inserted in the body of the writ. All those general counts, that defined nothing, which nobody understood, and which had afterwards to be explained, should not be inserted at all. The hon. member considered it better, that the true dature of the plaintiff's case should at once be stated in the writ, and, if an account, that it should be set forth at once as a bill of particulars, which, by the present system, was necessary to be demanded after the return of the writ, and that this should be sufficient proof to obtain the assessment, without the usual affidavits, as the defendant would thus have notice of the claim upon the serving of the writ. He would thus at once know whether the claim wer correct or not, and would either put in an appearance or endeavour to settle the matter. If he chose to defend, he must swear that he had a just defence; otherwise, he would not be permitted to delay the Plaintiff; and if he had a good defence, he must on his part state exactly what it was. But in these cases, by the present practice, the common counts, as they are called, furnish no information whatever to the Defendant, nor does his plea to the Plaintiff. As to the Costs—The present system had caused much perplexity. The costs were not so clear and well defined, as gentlemen of the bar could desire. There was nothing more desirable than that the powers and the costs of Attorneys should be well defined. The hon. member thought it best, that in all cases, whether in the summary form or not, instead of the usual long list of items, the costs should be simply divided into three stages, by which the amount of the whole would be about the same as they already were, but they would be so divided and defined, as to enable any man to ascertain, almost immediately, without reference to any Attorney, whether he was paying a correct bill of costs or not. The only thing that a Defendant would have to enquire when about to pay his bill of costs, would be, whether those three stages, or, if not all, which of them had been performed. If he should be dissatisfied with what the Attorney told him, he need only go to the clerk of the court, and ascertain from him satisfactorily what had been done; or knowing which, he could at once be aware of the amount of costs. These three stages were, 1st. on the commencement of the action; 2d. after the entry; 3d. before, and including final juogment. This arrangement would materially simplify the costs, so that there need be no difficulty in understanding them.—At present, the practice was so wretched, in these courts, and the fees so improperly distributed, that ought of a bill amounting to 4l. 5s. 0d, which is the extent of the costs on a judgment by default above 20l., the Attorney gets no more than 1l. 19s. 10d. The rest goes to the Judge the Clerk, the Sheriff and the crier! The Attorney, however, has to pay all these fees to the several officers out of his own pocket, and frequently in advance, whether he gets them again from his client, or the opposite party, or not; while, on making out his bills of costs, he bears the odium of receiving more fees than he ought.—The hon Member observed, that he had not had it in his power to apply these rules where there had been trials in the causes; because trials differed so much from each other; wherefore the rules could not be applied to any thing but where there was merely a simple judgment by the Court. And as most cases in these courts were of that nature, he hoped the Bill would be found useful. As to the appointment of Barristers as Justices of the Superior Courts of Common Pleas. Without intending the least reflection on the present Justices of those courts, he had no doubt that they would all admit, that not having been educated for the purpose, they were incompetent to decide in most of the cases which came before them. Men certainly ought to be legally competent to fill such offices, otherwise justice could not often be done. The present Justices no doubt do the best they can; but when it was found, that even Judges and counsel of the most eminent reputation sometimes differed in their opinion of what was law, and that human affairs so differed, that men could never unanimously agree, it was utterly impossible for the present Justices of the Inferior Courts to execute justice, according to the law of the land. It was well known, that they were often put to the utmost inconvenience, and much mortified, at the way in which matters were conducted in those courts. Evidence would be offered, and authorities insisted on, that never ought to have been produced It was impossible for those Justices to decide on what was evidence in law Even the common reputation of a neighbourhood, which was often founded on slander, on malice, and on envy, and which no Judge would ever admit, would be offered as evidence to Juries in these courts. Justices must feel annoyance and discomfort at the contradictory and perplexing way in which matters were thus conducted before them. In bringing forward this part of the bill, therefore, the hon. member stated his views to be, to clear them from the difficulty of their situation, and to advance the justice of the country. If this was a good bill in theory, it must be so in practice. But persons would be stationed in the Inferior Courts as Justices, whose business it would be to make it practically good. No doubt, any gentleman of the legal profession, bringing forward such a bill as this; as far as respects the last clause, (the appointment of Justices), would be reflected oc by others. But on the part of such gentlemen, he (the hon. member) would suggest some things. This bill was never known to any of the legal gentlemen in that House: they never knew it was to be brought forward, till they heard it read there by him, and they were therefore not participators with him in framing the measure. As to the profession in general, it must be apparent, that neither the clerk nor the profession would gain by it. On the contrary, they would be losers by it They would lose a great deal of practice, much more lucrative, in the Supreme Court,—much of which practice would be brought down to the inferior courts. The Committee, therefore, must see that the profession generally would be sufferers by this bill,—but, for one, he was willing to suffer, so that he could have the satisfaction of knowing that he had defined what was the law of the land. It was what he felt bound to do, and what he could do in the clearest manner. But one thing more. As to the provision for these Barristers who should be appointed Justices. He proposed that three barristers should be so appointed, who should take a district of three counties, excepting the city and county of Saint John, and who should each receive a salary of 300l. per annum, to enable them to do justice properly. Each circuit, in travelling and holding courts, would perhaps on an average occupy them about ten or twelve weeks. He proposed that they should receive this remuneretion, and that they should not be prevented from practising in the Supreme Court,—because, when the bill was understood, there could never be any difficulty in taking their advice as barristers. It had fallen from one hon. Member, the other day in debate on the bounty business, most likely in a playful way, that he (Mr. K.) had perhaps an eye to one of these situations in the Common Pleas.—He was happy that the remark had been made, because it gave him an opportunity of answering the insinuation. It was well known that he was Recorder of St. John, and as such, sat as judge of the Common Pleas and Sessions in that county. He therefore distinctly stated, that as long as he filled the station of Recorder of that city, he could not, and in fact would not become one of such justices. This was a pledge he had intended to give at some stage of the discussion, and he feit himself called on particularly to give it now. As he was the framer of this bill, and as it might be forgotten that he was at present Recorder of St. John and a Justice of the Common Pleas, he thought it necessary distinctly to bring forward this pledge. His present duties would not allow his accepting such an appointment; and besides that, in bringing forward this bill in the house, he should feel most uncomfortable if he thought it was supposed that he contemplated any professional benefit. He was happy therefore, to state plainly and unequivocally, that he intended no advancement for himself by this bill: it should be for other gentlemen, and he hoped, of such high standing in their profession, as to ensure the effects proposed by the bill.—Hon. members might say, as to providing for these barristers, that the funds of the country are low; and that part of this bill, tho' it might meet their views in other respects, might not meet the funds.—He would ask, what was it that the legislature of the country now did for the support of legal establishments? It might be answered, that it gives 250l. per annum, to enable the justices of the Supreme Court to hold their Circuit Courts; 200l. to the Clerk of the Crown, &c; in short, that, altogether it expends 750l. per annum. This was the utmost amount granted for the due administration of justice in the province. And was not that object as dear to the heart of any hon. member of that house, as any other object connected with his country? He (Mr. K) was sure it was. No man could be satisfied when injustice was done. They had only to make use of the grand precept, to see how well this bill closed with the judgements and consciences of men:—"Do unto all men as ye would they should do unto you."—He had often observed, that men seem satisfied with the administration of the law, till it came to touch their own feelings; and then they came to say, that they ought to have justice according to the law of the land; that they live under a constitution, and ought to enjoy its rights; and that the administration of justice ought to be so performed, that all might have the benefit of the laws. Was not this often seen, when parties became engaged in a suit at law? What did they ask an opinion for? Why, that they might get a legal opinion. Not that they wished to know the views of judges on the question; but be the party rich or poor, he would ask, how, under the law of the land, was his cause to be viewed!? The Attorney tells him so and so; and then, that under circumstances, and under the state of things, so and so would be very likely. What was the consequence of such a state of things? The party must ask another question. The Attorney says, that although this is his opinion, he cannot tell whether he will be able to carry his cause. There certainly does exist a court wherein to bring it; but neither the judge nor jury are competent to decide on the law. The evidence may go any way, not according to law. The poor client may thus be perplexed and not know what to do, and may probably give up his cause, rather then proceed to trial.—The hon. member then observed, that if, under these circumstances, the house could satisfy their minds that the bill should pass without the section respecting the appointment of barristers, then he should have very little to say; for, after that, as to the administration of the law, and the gentlemen of the law, they could hardly be induced to give up much more They could hardly be induced to ask any thing further, if