The Legal News.

Vol. XIV. JANUARY 24, 1891. No. 4.

The Act of last session, 54 Vict. ch. 45, does not appear to have attracted much attention among the members of the profession, but it makes a very important change in the law of evidence in this Province. The text of the Act (assented to 30th December last) is as follows:—

Her Majesty, by and with the advice and consent of the Legislature of Quebec, enacts as follows:

1. The following paragraph is added to article 1232 of the Civil Code of Lower Canada.

"Notwithstanding that which precedes, any party to a suit may give testimony on his own behalf in every matter of a commercial nature, but his credibility may be affected thereby."

2. The following clauses are added to article 251 of the Code of Civil Procedure:

"Any party to a suit may give testimony on his own behalf in every matter of a commercial nature, and in such case be examined, cross-examined, and treated as any other witness.

He may also be subpœnaed and treated as a witness by the opposite party, and, in such latter case, his answers may be used as a commencement of proof in writing.

The default by a party to tender his own evidence cannot be construed against him."

3. This Act shall not affect cases pending at the time of its sanction.

The newspapers seem to have fallen into error, says the *Harvard Law Review*, as to the ground of the decision of the United States Supreme Court in the *Kemmler* case, 136 U.S. 436. "The court is criticised for holding that execution by electricity is not a cruel and unusual punishment, prohibited by the eighth amendment to the Constitution of the United States,—that cruel and unusual punishments shall not be inflicted. But the counsel made no claim upon this ground, and in fact no lawyer would assert that the eighth amendment gave the United States courts any right to interfere in this case. The court expressly said: 'It is not contended, as it could not be, that the eighth amendment was intended to apply to the States.' Chief Justice Marshall had decided, in *Barron* v. *Baltimore*, 7 Pet. 243, that this provision was a limitation solely upon the Federal government. The ground which Kemmler's counsel took was that the law under which the prisoner was sentenced violated the fourteenth amendment,—first, because it abridged the rights and immunities of a citizen of the United States; and, second, because it was not due process of law. The Slaughter-House cases, 16 Wall. 36, annihilated the first point, and the second was untenable. The court seemed to intimate, however, at the close of the opinion, that a punishment might be so cruel as not to be 'due process of law.' Even this is very doubtful. A State could probably revive burning at the stake, as far as United States authority is concerned. Although the court of New York held that execution by electricity was not repugnant to its own constitution, that opinion might well be changed in the light of subsequent experiment. Apropos of this subject, the phrase 'cruel and unusual punishment' probably refers to quality and not quantity, or, as the Supreme Court of Kansas said, to 'kind and not duration.' The facts of that case bring out the distinction in a forcible and interesting manner. By an Act of the Legislature in 1887 the age of consent was raised to eighteen, and unlawful intercourse with any female under that age was made punishable by not less than five nor more than twenty-one years. In such a case, therefore, five years is the least possible punishment for fornication. Such a severe punishment, it was argued, was cruel and unusual; but the case was decided contrary on the distinction between amount and kind. The court remarked that the punishment was 'a severer one than had ever been provided for in any other State or country for such an offence.'"