The Legal News.

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THE SUPREME COURT.

A difficulty, as most of our readers are aware, interposed in the way of swearing in the newly appointed Judge of the Supreme Court, and of proceeding with business at the last session of the Court. The difficulty arose from the absence of the Chief Justice, who was in Europe. This, and Mr. Justice Taschereau's resignation, left the Court without a quorum, which according to section 3 of the Supreme Court Act, must consist of five Judges: "The Supreme Court shall be composed of a Chief Justice and five Puisné Judges, any *five* of whom, in the absence of the other of them, may lawfully hold the said Court in term." And Mr. Justice H. E. Taschereau could not be sworn in to supply the vacancy, because section 9 says: "The said oath shall be administered to the Chief Justice of the said Courts before the Governor General, or person administering the Government of the Dominion, in Council, *and to the Puisné Judges of the said Courts by the Chief Justice.*" The presence of Chief Justice Richards, therefore, became necessary to solve the difficulty, and he was accordingly telegraphed for.

STENOGRAPHY IN THE COURTS.

"An old Stenographer" has addressed to us a letter on the subject of stenographers' fees, and the use of stenography in the courts, to which we willingly give place in the present issue. From this communication it appears that an accusation is made against certain stenographers of improper or exaggerated charges, that is to say, of charging for more work than has actually been done. This is a matter which has no connection whatever with the rate of muneration fixed by the Court. It would be strange indeed that the *rate* should be cut down because the *quantity* is commonly exaggerated. That would be only punishing those who are honest and holding out a direct incentive to dishonesty. Overcharging should not be tolerated for a moment. The verification of stenographers' accounts should be entrusted to a proper officer, and on his certificate only should the amounts be collectable. This is a mere matter of detail, much easier than the account keeping for telegraphic messages, which are also charged by the word. Anything like wilful overcharging should involve the exclusion of the offender from similar employment in the future.

We think our correspondent is right, when he says that the subject of stenography in the courts requires mature consideration with a view to legislative regulation. Thus far the system has been experimental, and with the experience of the past few years, some valuable improvements might perhaps be suggested in the course of a fresh consideration of the question. We have heard it proposed that stenographers should be officers of the court, paid by salaries, and should be empowered to curtail and abridge the notes of evidence. Doubtless, a great deal of useless matter may be found in the examinations of witnesses as conducted at present, and the printing of this for the purposes of appeals adds largely to the cost. But, on the other hand, it is possible for the Court to arrive at a much safer conclusion from the entire and unabridged examination than could be based upon any summary, even if made by lawyers, and the stenographers, be it remembered, need not be lawyers nor even law students. If stenography were commonly understood and practised, and the judges were sufficiently conversant with the art to take notes themselves, the power of abridgment might usefully be allowed. Under such a condition of things the notes taken by the judge who tried the case might be transcribed, if asked for, by secretaries engaged for the purpose. Where the judge's decision was accepted as final, and no intimation of appeal was given, there would be no practical end served by transcription at all. It might be too much at present to exact an acquaintance with short hand from all lawyers appointed to the bench. Yet the art seems to be gaining ground in mercantile establishments, and it is regarded as indispensable in many railway companies' offices. A great many clergymen write their sermons in this abbreviated style, and read their manuscripts with ease in the pulpit. In some printing establishments the notes of reporters have been

set up by compositors from the original manuscripts. These facts show that sufficient legibility can be attained to enable others to read short hand manuscripts, and it is obvious that the labor imposed on the judges would be less than that entailed on them at present at criminal trials where the judge alone takes notes. We offer this, however, as a simple suggestion, and not as a matured opinion.

JUDGE MILLER'S ADDRESS.

Mr. Justice Miller has occupied a seat on the bench of the Supreme Court of the United States for sixteen years, and besides the long and varied experience thus acquired, brings a clear judgment and an eloquent pen to the treatment of his theme. His address on legislation affecting the judiciary and the administration of justice generally, which will be found in the present issue, will well repay careful perusal.

CORRECTION.—Our attention has been called to an obvious erratum on page 481, in reference to the case of Sanborn, insolvent. At line 20 it is said that the "application" was rejected. As the context shows, it was the insolvent's "pretention" that was rejected, for the application was by the assignee to have the watch given over to him, and this was granted by the Court. We may take this occasion to say that we shall be thankful to any reader who observes an inaccuracy in the LEGAL NEWS., to call our attention to it. We strive to attain the utmost degree of accuracy, but if error by any chance creeps in, we are anxious that the correction shall be made in the same volume, so that no misconception may arise hereafter.

REPORTS AND NOTES OF CASES.

CIRCUIT COURT.

Montreal, Oct. 31, 1878.

PAPINEAU, J.

LA COMPAGNIE D'ASSURANCE DES CULTIVATEURS v. BEAULIEU.

Tariff—Preliminary Exceptions—Action for $60 and under.

Held, that in cases for $60 and under, preliminary exceptions should be received gratuitously by the clerk of the Court. The deposit of $4, and the fee of 6s. 8d. mentioned in the 25th Rule of Practice for the Circuit Court, being exigible only in cases above $60.

The action was for a sum under $60. The defendant having a *garant* to call in, filed a dilatory exception for that purpose, without making the deposit of $4 required by the 25th Rule of Practice, or paying the fee of $1.40, which she contended was not required in cases of $60 and under.

N. Durand, for plaintiff, moved that the dilatory exception be rejected, being unstamped, and unaccompanied by the deposit required by law and the 25th Rule of Practice.

J. G. D'Amour, for the defendant, resisted the motion, contending that the 25th Rule of Practice had reference only to cases above $60 He referred to *Alie* v. *Gamelin*, 14 L. C. J. 134; and *Desjardins* v. *Chretien*, 15 L. C. J. 56.

The Court rejected the motion, remarking that the jurisprudence was now settled both in the District of Montreal and Quebec.

Motion rejected.

N. Durand for plaintiff.

D'Amour & Dumas for defendant.

SUPERIOR COURT.

Montreal, Nov. 15, 1878.

TORRANCE, J.

MELLES et al. v. SWALES.

Motion for Security for Costs—Delay—Art. 107 C. C. P.

Held, that a motion for the production of a power of attorney and for security for costs cannot be presented after the expiration of four days from the return of the writ of summons.

Bethune & Bethune for plaintiffs.

E. Carter, Q. C., for defendant.

Montreal, Nov. 18, 1878.

MACKAY, J.

ANDERSON v. GERVAIS, and GERVAIS, Petitioner.

Insolvent—Permission to continue Trade.

Held, that a Judge has no jurisdiction under the Insolvent Act of 1875, to permit a trader to continue his trade, against whom a Writ of Attachment under the Act has been issued.

On the 6th of November instant, upon the affidavit of the plaintiff, disclosing a debt

amounting to $375, a writ of attachment was issued, under the provisions of the Insolvent Act of 1875, addressed to William Rhind, official assignee, and the estate of the insolvent was seized and attached thereunder.

On the following day the defendant presented a petition to quash the writ, and also a petition praying to be permitted to continue his business pending the contestation of the first-mentioned petition, and offering to give security to such an amount as might be fixed by the Court.

On the argument of this petition, the counsel for petitioner cited section 7 of the Insolvent Act of 1875, and contended that this section authorized the Judge to grant it, and that the security to be ordered should not exceed the amount of the debt disclosed in the affidavit of the plaintiff.

The plaintiff's counsel argued that section 7 did not apply to cases in which a writ of attachment had issued, but only to those in which a demand of assignment had been made. The preceding sections, 4, 5 and 6, referred entirely to proceedings on a demand of assignment, and to the petition against such demand. In section 8 proceedings on writ of attachment were first mentioned, and neither in section 18, which allows the insolvent to present a petition to set aside the writ, nor anywhere else in the act is authority given to a Judge to permit an insolvent to continue his business while the contestation of a petition to quash the writ is pending. If the Judge held he had such authority, the answer to the petition set forth that the defendant was indebted to plaintiff in a much larger sum than that disclosed in the affidavit, and security should at least be given for the full amount due by the defendant to plaintiff.

MACKAY, J., dismissed the petition on the ground that he had not power under the act to order or allow the prayer thereof in a case where a writ of attachment had issued.*

Gonzalve Doutre, for Plaintiff.

M. M. Tait, for Petitioner.

COMMUNICATIONS.

STENOGRAPHERS' FEES.

To the Editor of THE LEGAL NEWS.

SIR,—Although you say the question of stenographers' fees is hardly within the province of THE LEGAL NEWS, I am glad you have referred to it, as it is now and has been for a long time, one of the most vexed questions of the bar. The stenographers on one side bring a long array of figures to show that their labor is in other places considered to be worth what they are charging for it; while the members of the bar complain, and with a good deal of reason, of the amounts what they are called upon to pay on their depositions, and the burdens which are in consequence thrown upon their clients. It is no uncommon thing at all for the stenographers' fees to amount to half the total costs of the suit. Examine half a dozen witnesses at any length, *e. g.*, so as to occupy the greater part of a day, and the stenographers' fees alone will amount to thirty, forty or even fifty dollars. The reasons why they swell to so large an amount appear to be these: First, because there are now so many short-hand writers who have attached themselves to the Courts, and so much time is lost by the ordinary delay, adjournments, and postponements of suits, that they are compelled to charge a high price in order to make it an object to them to do the work—in other words, they are compelled by that law of self-preservation by which we are all influenced, to make as much out of each case as possible. Secondly, because many of the writers—I will not say all—dishonestly reckon a hundred words as two hundred. Indeed, I have myself seen folios which did not contain more than fifty words reckoned as two hundred. Under the old system, for which ten cents a hundred is paid, a little of this sort of thing is tolerable; but where you pay thirty cents, and have a number of depositions to file, it becomes intolerable. If the stenographers had been accustomed to exercise a little more honesty in this respect, they probably would not now find themselves reduced to twenty cents a hundred. The truth is that the whole system requires reformation. At present it is a perfect muddle. It has grown up like a wild plant, subject to no rules nor restrictions, and has been the cause of no end of dissatisfaction and probably of injustice. And the only parties to blame for all this are the lawyers themselves. Why do they not devise some plan which shall be equitable to all parties, and if necessary have it enforced by an Act of the legislature? The position as it is at present is

* Reversed in Review. See next number.

this: There is a large number of short-hand writers,—some who make a profession of it, and some who find it a useful auxiliary while prosecuting their studies for the bar. Some of them are proficient and some are not. The plaintiff's counsel engages the stenographer, that is, he yields to his solicitation to give him "the case," knowing no difference; or if the case has not been promised, takes the first who may happen to present himself, and in nine cases out of ten, does not know whether the evidence he has adduced has been correctly reported or not. He may be under the impression that a witness said something which he does not find in the deposition, but as the witness is supposed to have listened to and ratified what is there, and the writer has certified that it is a correct transcript of what the witness said, there is no help for it but to accept it as such. The reports of a really skilful short-hand writer are, as a rule, correct and reliable, but the great importance of the work which they are called upon to do, would seem to dictate that none but the most skilful should be employed, and these should be limited to a certain number and paid according to a tariff fixed by law. It would naturally be supposed that a matter of so much importance would long ago have been placed on a well-defined basis, but though the members of the bar here are very prompt to grumble, they are very slow to act, and the consequence is that that and a thousand other things connected with the practice of the courts in need of reformation are allowed to continue unchanged from year to year. What I would suggest, would be, that the Government employ the stenographers (by the medium of a judge who would appoint them on petition of members of the bar, or on other satisfactory evidence of fitness,) and pay them so much per day for the time they are actually engaged in Court, and so much per hundred words for transcribing. That this expense be met by a fixed rate or tax to be charged by the prothonotary per 100 words, payable as the Court-house tax or other regular tax on legal proceedings. The number of stenographers required under such a system would (at a rough guess) be four, viz: two French and two English, who would be sworn in once for all, and be, in fact, officers of the Court, and subject thereto. Any question which would then arise concerning their remuneration would be between them and the Prothonotary, and would in no way affect the attorney or his client. Under this system, also, students who desired it, and were qualified for the position, might be appointed, as their removal or change would create little or no difficulty. In case of a vacancy another in the same way could be appointed and sworn in by a judge, and the number authorized by law always maintained. By some such plan as this a great deal of the present difficulty would be avoided, and the great question of remuneration be placed on a basis satisfactory to all parties.

Yours, &c.,

AN OLD STENOGRAPHER.

MR. JUSTICE MILLER ON LEGISLATION AFFECTING THE ADMINISTRATION OF JUSTICE.

At the second annual meeting of the New York State Bar Association, held on the 19th inst., Mr. Justice Miller, of the Supreme Court of the United States, delivered the following address:—

Gentlemen of the Bar Association of the State of New York:

The administration of justice in this country is committed by positive law and by immemorial custom, to a class of men for whom I know no better designation than that of Lawyers, because it comprehensively suggests the functions they are designed to fulfill, and the attainments which they are supposed to possess in the Science of the Law. In the practical exercise of these functions they are divided into two classes—the courts and the bar—the judges and the practitioners. It has been the custom sometimes to speak of the Bench and the Bar as of distinct bodies, with separate interests. But this is so only in a limited and qualified sense.

The Judge, from the nature of his duties as well as by the law of the land, must be a lawyer, and when he ceases to be a lawyer, he ceases to be fit for a Judge.

We are, therefore, all Lawyers, all members of the same honorable profession, all equally interested in the purpose for which our order exists—namely, the pure, the efficient, the perfect administration of Justice, so far as that is attainable.

The system of laws by which this is done,

founded mainly on that large body of customs, ancient statutes, and judicial decisions known as the Common Law of England, has in this country undergone many changes, and received large accessions from two sources—Legislation and the decisions of the courts. It is not necessary to inquire here, which of these has been of greater value, but it is appropriate to remark, that so far as judicial judgments have made or modified the law, it has been by reason of a necessity forced upon the courts and against their wishes. The progress of the people in wealth, in population and in the application to the varied pursuits of life, of new powers and new modes of doing business, required modifications of old rules and the application of new principles of law to this varying condition of affairs, which the legislative branches of our governments, State and National, failed in a large measure to provide.

I do not propose to discuss the nature and value of precedents of judicial judgments as authorities which must govern the decision of subsequent cases; but as preliminary to the observations which I propose to make on legislation, the other source of change in the law, it is important to say that according to my experience, the judge and the lawyer are more frequently called to consider the modifications of the Common Law arising from judicial, than from legislative action.

With these prefatory remarks I wish to call your attention to Legislation in this country—our common country—as it affects the administration of Justice in the courts; what it has been—what it ought to be.

It is not proposed to examine the general course of legislation, for very little of that is intended to affect the courts of justice. If we leave out of the account the various attempts at codification or revision of the laws, and examine the annual and biennial volumes which record the acts of Congress and of our State Legislatures, we shall be surprised at the very limited space which in such a volume is occupied by legislation strictly appropriate to improvements in the criminal law, or the law of private rights, or to securing the proper enforcement of such laws. Appropriation bills, acts and resolutions of a purely partizan political character, statutes creating corporations, private acts for the benefit of individuals, laws which are often mere jobs, carried through by reason of the money which somebody expects to make out of them, fill not only the statute book, but occupy a much larger proportion of the time of the legislative bodies. But I design to confine myself to the consideration of legislation which concerns the organization of the courts and the methods by which the business of the courts is conducted, and I use the word Legislation in its larger sense, as including both Statutory and Constitutional law.

For the first fifty or sixty years after our forefathers had established our national individuality and independence, they and their immediate successors were too much engaged in consolidating, securing and regulating the general framework of political government, to give much attention to the modes by which private justice was to be regulated. In the absence of any surplus wealth to litigate about, in a country where that wealth was mainly in the ownership of the soil, and the inhabitants therefore essentially rural; at a period when by reason of the virtuous character of the people crime was rare, and personal integrity so common that only its absence was noticeable, the organization of the courts, and the modes of procedure to which they had long been accustomed, were deemed sufficient.

The first innovation in these matters which calls for attention is the change in the tenure of office and in the mode of appointment of the judges. The life tenure of office for the judges has always been regarded as one of the most valuable results of the Revolution of 1688 in England. For while their appointment, and their removal from office, were both prerogatives of the Crown, experience had shown that they were not to be relied on by the subject, in any contest between him and the appointing power. The independence of the judiciary, which has been the theme of such abundant eulogy with Englishmen, meant therefore independence of the King. But when our people, instructed by the growing strife of party politics, had learned to extend the principle of election by the people to all the legislative and executive departments of the Government, and the popular but deceptive doctrine of rotation in office had taken root among them, it was hardly to be expected that the judiciary would remain the solitary exception to the universal application of those

principles. It was said very plausibly that the life tenure of office had been adopted as a protection against the monarch, and since there was no monarch in this country, but the people themselves were sovereign, there was no need to protect the people against themselves, and the judges, like all other public servants, should be made to feel a proper sense of accountability to their masters, by the necessity of a frequent renewal of their appointment. The agitation of this subject led in most of the States to such changes in their fundamental law, that the judges were appointed or elected by the Legislatures.

I do not say that this mode of appointment was adopted by all the States, but I speak now as I must hereafter speak on these subjects only of the general or prevalent course of affairs.

Of all the depositories of political power in this country, from the people to whom the most extended right of suffrage has been given to the executive whose power is under least restraint, the legislative bodies, jointly or singly, are the most unfit to be trusted with appointments to office. And notwithstanding the very excellent manner in which this power has been exercised in one or two small States, notably Vermont, in the appointment of judges by the Legislature, annually or bienially, I fearlessly appeal to the experience of the age and the sentiment of the people as shown by the more recent revisions of their State Constitutions, in support of this proposition.

My earliest recollection of a phrase, since become common in the mouth alike of the patriot and the demagogue, I mean the words "bargain, intrigue and corruption," is in reference to that charge against the House of Representatives of the National Congress, in its election of a President of the United States.

When Mr. Clay, the Speaker of that House, after successfully exerting his powerful influence in favor of Mr. Adams, was made by Mr. Adams the premier of his cabinet, the belief that this was the result of a previous bargain was so strong, that the words I have mentioned became the battle cry of a generation, and the source of power of a great political party, which governed the country for that time, and may do so again. Let it be observed that it was not the evidence of an actual bargain which produced such results on the public mind, for there was none. Nor do I think that any candid mind now believes such a bargain was made; but it was the great probability that men, placed in the position of these two, would be governed by selfish and improper motives, and would, therefore, make the bargain suggested by the situation, and by their subsequent conduct.

When the election of judges by the Legislatures of the States became the accepted theory of American statesmanship, the appointment of many other officers was vested in the same bodies. Men were to be elected at the same session; senators, judges of the higher and lower courts, presiding officers of the two houses, and, perhaps, many other places were to be filled. Here was a wide field for combinations, for exchanges of votes and influence, temptation for the use of money and the appliance of all those corrupt, but efficient means, by which bad men secure power at the expense of the general good.

This system has given rise to the expressive term, "log rolling," as applicable to that and to other forms of legislative action. It comes from the customs of the early settlers in clearing the trees from the soil which they intended to cultivate. When the trees were all felled and cut into logs from ten to twenty feet long, they were gathered into large piles and burned up to get them out of the way. This piling business required more force than was at the command of one farmer, and so it became the custom, as it did in house-raising, corn-husking, and other similar matters, that when the settler was ready for the performance, his neighbors came, and putting their joint forces together, the logs were soon piled ready for the fire. He in turn helped each neighbor when needed, and so these neighborhood meetings came to be called "Log-rollings." It is aptly expressive of the combination of forces in a legislative body, by which one member or set of members who have a particular object to accomplish, secures the aid of others, indifferent in that matter, by promising to assist in matters in which the others *are* interested. This log-rolling system found a fruitful theatre of operation in legislative appointments to office, and was soon transferred to other subjects of legislation, in which members or their constituents had local or individual interests, often at variance with the general welfare.

But the American people with that political sagacity which so eminently distinguishes them, were not slow to perceive the evils of this system. In the exercise of frequent revisions and amendments of their State Constitutions, they have been engaged for the last quarter of a century in striking at this log-rolling practice. Hence we see in all the more modern Constitutions, provisions, that all laws shall have a uniform operation; that every statute shall have relation to but one subject, which shall be expressed in its caption; that taxation shall be uniform and equal; that private corporations shall only be organised under a general law, and others of a similar character, all of which are aimed at this evil of log-rolling, and thus far with only limited success.

One of the earliest of the constitutional amendments was the transfer of the election of judges from the Legislatures to the people by popular vote. Whether this was the result of the growing distrust of legislative bodies, or the general tendency of public opinion to reduce everything to the test of popular suffrage as far as possible, it is difficult to tell. No doubt each motive had its influence. But what we are principally concerned about is the effect of this mode of appointment, the one now generally in operation, upon the efficient and sound administration of Justice in the Courts. Those who have given the subject much thought are divided between this mode and a return to the old one, of nomination by the executive and approval of the more conservative branch of the Legislature. The former mode has not been in operation long enough to enable a careful and reflective mind to arrive at a satisfactory opinion upon it. It has worked so much better than the legislative method, that it has established that claim at least to favor. It is also to be considered that it has been adopted almost exclusively in connection with short terms of office, about the evil of which there can be no question, so that these two principles, which have no necessary connection, have very generally been mingled in the consideration of the subject.

As to the tenure of the office it is satisfactory to know that public opinion has undergone and is still going through a very decided re-action.

There are seven States in which life tenure prevails. In one the term is twenty-one years, in another fifteen, in another fourteen, in three it is twelve, and in two it is ten. In the remainder it is six and eight years, with three or four exceptions. So in regard to the manner of appointment. Three States appoint by legislative election; seven by the Governor and Senate, and twenty-eight by popular election. In all these cases I speak of the higher courts of the States.

It must be confessed that the party conventions, which for years past have proposed the only candidates for office who have any chance of election, have been much more careful in their nominations for judicial offices, than in those of any other class. How long this exceptional case will last, or how soon these offices will be subjected to all the degrading forces which are brought to bear in putting before the people candidates for offices more purely political, it is impossible to tell. If the elections for judicial offices were held at times when no other offices were to be filled, it would go far to remove the worst evil of the present system. This has been done by the State of Wisconsin, and as proof of what has just been suggested, it may be stated that recently where two judges of the Supreme Court were to be elected at one time, the convention of each political party called to nominate candidates only nominated one, leaving one to the other party with the result of securing two judges every way fitted for the place.

But however this mode of selecting judges may operate among a people mainly rural, there are well-founded fears of its results in cities where the criminals, against whom a judge must enforce the law, if it is enforced at all, exert a very powerful influence in nominating conventions as well as in the final vote. And we are not without warrant in the experience of more than one large city to justify these fears.

But apart from abstract reasoning on the subject we have an element of comparison in the different modes by which the State and the Federal judiciary are appointed. The latter under the Constitution of the United States have always been appointed by the President, subject to approval by the Senate; and I apprehend that very few of the statesmen of this country, however democratic their general views of government may be, have any wish to

adopt for the judges of the United States the system of popular election.

The dependence of the judiciary on the appointing power is not dangerous only when the appointment is by a monarch. It is much to be doubted if dependence on the vote of the populace is any less so if the power is exercised at short intervals. The passions, the prejudices, the hasty impulses of the people, when brought to bear on the judge, are as likely to be unfavorable to the defence of innocence in criminal prosecutions, and to the establishment of an unpopular claim of private right, as the occasional exercise of that influence by a king or a governor. The interest which great corporations or large classes of men in other instances have in the rules by which their cases are to be governed in the court, or in the manner in which individual causes are decided, is very likely to be understood and felt by a weak or timid judge, who remembers the power they can exert on election day.

Having traced the cause of legislation in this branch of our subject, let us inquire for a moment what it ought to be.

The primary object, the highest purpose to be attained in the organization of the courts, as regards these members, is to secure honesty, capacity, and independence, exemption from all improper influences.

I do not think the question of the source of their appointment so important as a means of securing these qualities, as stability in the tenure of office, and in the composition of the court, and reasonable compensation of the judges. In both of these respects the tendency of modern thought as shown in legislation, both constitutional and statutory, is in the right direction. In some of the States the salaries are perhaps sufficient. In New York, if not all they ought to be, they are much more liberal than in most of the States. The Congress of the United States has been generous to the Supreme Court since I have been a member of it. In the sixteen years of my service, they have twice increased the salary, bringing it from $6,000 to $10,000, and have provided for every judge not only of that court, but of all other Federal courts, who has reached the age of seventy, and has also served ten years, a retiring pension equal to his salary. But while they have been liberal to the members of the Supreme Court, they have been niggard and unjust to the judges of the District and other Federal courts. As regards the judges of the District courts, the hardship is very great. With one or two exceptions their salary is only $3,500 per annum, and some of them, notably the two whose courts are held in St. Louis and Chicago, if they had to pay rent for the houses in which they lived in the city, and live in the style of gentlemen of their standing in the world, would find the salary insufficient to support the man alone, to say nothing of wife and children. It is a shame to this great government that it should be so. Every judge who has the power and whose duty it is to decide upon the right to life, liberty and property, should be provided with a support which would at least not suggest temptation and would leave him free from immediate anxiety concerning the means of comfortable existence. Whether it is wiser to make the office one for life, or of a period so long that reasonable stability in the court, and security in the office is guaranteed to the judge, I will not undertake to say. But it is a fair subject for consideration in future legislation, and there can be no doubt that such advances can be made and ought to be made, as will secure compensation and stable tenure in office.

On the other hand it must be confessed that the means provided by the system of organic law in America for removing a judge who for any reason is found to be unfit for his office, is very unsatisfactory. With the exception of a few States which have retained the old fashioned mode of removing an officer by an address to the governor of two-thirds of each house of the Legislature, impeachment is the only remedy. The constitution of the United States, which in this respect is the model on which those of the States are formed, declares that the President, Vice-President, and all civil officers shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors; that the trial shall be by the Senate on articles preferred by the House of Representatives, and that no person shall be convicted without the concurrence of two-thirds of the members present.

What the "high crimes and misdemeanors" are, for which the remedy may be invoked, remains unsettled to this day. It was the most

important question in the most important State trial ever held in this country, namely, the impeachment of President Johnson, and was left there as undecided as ever. There were those who believed that some specific penal offence, defined by statute, must be proved, or there could be no conviction; and on this ground several of the senators who voted for acquittal rested their judgment; while many of those who voted for conviction, constituting, perhaps, a majority of the Senate, were of opinion that there might be such dangerous exercise of unauthorized power, such total refusal to perform, and such moral delinquency in regard to the duties and requirements of the place as would amount to a high misdemeanor in the sense of the Constitution. Whichever view of that point may be right, it is very certain that after the experience of nearly a century, the remedy by impeachment in the case of judges, perhaps in all cases, must be pronounced utterly inadequate. Besides the main difficulty of deciding in each case whether the charge, if proved, is an impeachable offence, there is almost equal difficulty in obtaining a two-thirds vote in a body political rather than judicial in its character, liable to changes in its constituency during the usual delay of such a trial, and open from its very nature to appeals to party prejudice, to compassion, and to personal friendship.

It is not easy, however, to suggest a better remedy. The tribunal would be rendered more efficient and more safe by a specific definition of the causes of removal. There are many matters which ought to be causes of removal that are neither treason, bribery, nor high crimes and misdemeanors. Physical infirmities for which a man is not to blame, but which may wholly unfit him for judicial duty, are of this class. Deafness, loss of sight, the decay of the faculties by reason of age, insanity, prostration by disease from which there is no hope of recovery—these should all be reasons for removal, rather than that the administration of justice should be obstructed or indefinitely suspended.

So, also, there are offences against the law, or conduct which might be made so, that peculiarly unfit a man for the office of judge. A vile and overbearing temper becomes sometimes in one long accustomed to the exercise of power unendurable to those who are subjected to its humors. But I think the experience of observers will bear me out in saying, that habitual intoxication is of all this class of disqualifications the most frequent.

Two things may be suggested as worthy of consideration in any effort to amend Constitutions on this subject, namely: that the causes for which a judge may be removed from office shall be described with the same precision as that which is used in defining indictable offences. Second, that whatever may be the nature of the court before which he is tried, the facts of his guilt of the impeachable offence, or disqualification charged, should be found by a jury or some similar tribunal. It is however to be remembered that a judge should, in the exercise of his functions, be trammeled as little as possible by fear of consequences to himself, and in view of the resentments of disappointed suitors the providing for removal should not be made too easy.

As occupying an important place in the machinery of the courts, the jury is next entitled to our consideration. No institution which we have inherited from our ancestors has been as little disturbed by legislative action as trial by jury; and none seems so firmly fixed in the affections of the people with all its accessories. It is the theme of the popular orator when all else fails, and a comparison of our happy condition with that of the benighted nations of Europe would fail to satisfy the public taste, if it did not dwell with emphasis on our ancient system of trial by jury, as the palladium of our liberties. Still there are indications of dissatisfaction. Illinois, by her most recent Constitution, permits the Legislature to abolish grand juries. Colorado does the same. Nevada allows three-fourths of the jury to render a verdict. Perhaps this last is a valuable innovation. It requires all the veneration which age inspires for this mode of dispensing justice, and all that eminent men have said of its value in practice, to prevent our natural reason from revolting against the system, and especially some of its incidents. If a cultivated oriental were told for the first time that a nation, which claims to be in advance of all others in its love of justice and its methods of enforcing it, required as one of its fundamental principles of jurisprudence, that every controversy be-

tween individuals, and every charge of crime against an offender, should be submitted to twelve men without learning in the law, often without any other learning, and that neither party to the contest could prevail until all the twelve men were of one opinion in his favor, he would certainly be amazed at the proposition. Nor have the European nations differed much with him in their estimate of trial by jury. It has been well understood and received the careful consideration of continental jurists for a great many years, without being adopted by any of them, in the form that we have it from England. Many attempts have been made to introduce it in some modified shape, but I think it safe to say that it has not in its essential Anglo-Saxon feature met the approval of any people except those of that race. In the days when kings exercised arbitrary power, the jury was among the sturdy, liberty-loving Englishmen a valuable barrier against oppression by the Crown. But in this country, where the people are sovereign, the jury is too often the mere reflection of popular impulse, and the safety of an innocent man is more frequently found to depend on the firmness of the judge than the impartiality of the jury. Still it is probably wise that no man shall be convicted of an infamous crime until twelve fair-minded men are convinced of his guilt. I am also forced to admit, however, that even in civil cases my experience as a judge has been much more favorable to jury trials than it was as a practitioner. And I am bound to say that an intelligent and unprejudiced jury, when such can be obtained, who are instructed in the law with such clearness, precision, and brevity, as will present their duty in bold relief, are rarely mistaken in regard to facts which they are called upon to find.

Since public opinion is not ripe for a candid consideration of the abolition of the jury system in civil cases, it is the part of wisdom in the legislator to make it as useful as possible. To this end the doctrines of the residence need other qualifications and disqualifications of jurors and amendment. The principle of trial by a jury of the vicinage was founded originally in the idea that the neighbours were better qualified to decide the controversy, by reason of their knowledge of the character of the parties and the circumstances of the issues to be tried. In modern times we have adopted the rule to exclude a man from the jury who knows anything of the case, or has an opinion of its merits, searching in some instances for weeks to find a man so ignorant or obscure that he has never heard of a case which has attracted universal attention, and does not know the most prominent public character in his neighbourhood. The evils of these restrictions have challenged public attention of late years. I can see no reason at this day for a trial in the vicinage, nor for restricting the area from which the jury is to be taken by county lines, and still less for refusing a man otherwise well fitted for a juror, because he has read an account of the famous case in the newspapers. In these respects, as well as in the number of the jury, which is too large, and in the requirement of unanimity in the verdict in civil causes, there is a fair field for judicious legislation.

An essential element of any system of administering justice is the law of evidence. The rules by which testimony offered in a suit is to be admitted or rejected, and the probative force of the different classes of evidence admitted, must always have a controlling influence on the verdict of the jury or the judgment of the court.

The common law of evidence was in many respects a very artificial system, and probably more restrictive in the rules which admitted testimony than any civilized code of laws. And while the courts have felt the evil of many of these limitations upon the use of testimony, calculated to throw light on the issue, they have been comparatively helpless by reason of their obligation to follow the established law of the case. In this matter, also, legislation has made no progress until a few years back. The exclusion from testifying of the individuals who were likely to know more of the matter in controversy than all others, because they are parties to the suit, or are interested in the result, is still the law of some of the States though abolished now by most of them.

It was until recently the universal law of this country that the mere contingent liability to costs rendered the party liable incompetent to testify in the suit. Wherever the rule of exclusion on account of interest or of

being a party to the suit has been abolished, it has met the approval of judges and lawyers, with rare exceptions. The only question yet open on that subject relates to its application to criminal cases. Many States of the Union now permit a man to testify who is on trial for a criminal offence. In most of them this must be voluntary on his part, and he can remain silent if he chooses. But it has been thought proper in such cases that the jury shall be instructed that his silence is to raise no presumption against him, as it might do if he refrained from giving explanations which the situation seemed to require. It may be doubted, however, if the charge of the court in such cases will be very effectual.

The exceptions to the law excluding hearsay evidence, which have been somewhat increased by the courts, might profitably be further enlarged by legislation.

The proof of character, whether good or bad, should, in my opinion, be admitted in many cases, both for and against the party, where it is now excluded. On a charge of crime, or an issue of fraud, which of itself proves the man, if guilty, to be a very bad man, it is usual to reject the light which his previous character, whether good or bad, will throw on the probability that he would do the act charged.

Without enlarging on the subject, I am of opinion that in criminal causes the French system of repeated and very free preliminary examination of the prisoner, in the presence of a judicial officer, in which questions are put and answered with great freedom, as the facts are developed, in which the accused has the fullest opportunity of prompt and early explanation, and is held responsible for its absence, when the examination is postponed and resumed as new information is obtained bearing on the guilt or innocence of the party, is much more likely to relieve the party, if innocent, of the disgrace and trouble of a formal trial, and to produce conviction in case of guilt, than our artificial strait-laced law of evidence permits. It is the boast of the common law that it protects the innocent at all hazards, and that it is better that many guilty should escape than that one innocent man should be punished. Yet I entertain a very strong conviction that, leaving out of the account prosecutions for offences purely political, fewer men are wrongfully punished, and fewer guilty ones escape, under the French than under our system of criminal procedure. There is in the law of evidence an inviting field for the Jurist and the Legislator. The book of Mr. Justice Appleton, of Maine, and the works of Mr. Stephen, are encouraging in this direction; and an examination of Mr. Bentham's labors on this subject would well repay the time so expended.

Looking at such legislation as affects the methods by which justice is administered in the courts, the modes of procedure in them, it will be found that the changes have been very important.

In several of the New England States, and in the State of Pennsylvania, courts of Equity, as distinct from Courts of Law, have always been unknown; but within the last thirty years they have conferred, to a limited extent, equity jurisdiction on their Common Law courts. It is not within the scope of these remarks to discuss the sufficiency of the courts of common law, as we received them from our English ancestors, to meet the demands of remedial justice. I take it that the struggle of the two States of Pennsylvania and Massachusetts, to do without the principles of the equity courts, in which struggle they finally yielded to the necessity of adopting them, is conclusive on that point. But it came very soon to be understood, that while the system of chancery law was a necessary element of our jurisprudence, it was not indispensable that there should be a separate court for its administration.

The States accordingly began very early to dispense with chancellors, and to require the judges of their courts of law to act also as chancellors. But while this was done by virtue of the same commission, and the style of the court was the same, in which the remedies were administered, there was a separate docket for each class of cases, the distinctive modes of pleading and practice were kept up, and the courts were in fact courts of law and courts of equity.

But about the time that Massachusetts and Pennsylvania had come to recognize the necessity of the principle of equity, to the completeness of their system of jurisprudence, the State of New York, which has taken the lead in all these innovations, or improvements, as you may

choose to call them, began to consider, whether the principles and methods of courts of equity were necessarily so antagonistic to those of the courts of law, that they could not be combined and administered in the same forum and as part of the same system of legal procedure.

They said, if A has the legal title to a tract of land, and sues B to recover possession of it, and B has a valid equitable right to the land and to its possession, why must B submit to let A recover judgment for its possession in a court of law, and then file a bill in chancery to obtain from A the legal title, and for a perpetual injunction against A's judgment? Why, since the same judge, sitting in the same court, must try both the action at law and the suit in chancery, shall he not do it in one suit, thereby saving both time and money to the litigants? The answer to these questions, based as it was on the want of flexibility in the forms of action at common law, led to an enquiry into the value of those forms, which came to be very much disturbed. And no wonder this was so. Actions at law were divided into actions of tort and actions of contract. These again were subdivided into specific forms, and however good or well-founded a plaintiff's right of action might be, he was defeated if he had mistaken the form in which he had brought it. If it was detinue when it should have been debt, or trespass when it should have been trespass on the case, he was beaten, though his right to recover the sum, or thing claimed, was made clear during the progress of the suit. And so if he had brought an action at law, the subject-matter of which was only cognizable in equity, he was when this was ascertained, at whatever stage of the litigation, and however clear his right to relief, turned out of court with costs, and compelled to bring another suit or abandon the assertion of his right.

[To be concluded in next issue.]

GENERAL NOTES.

A MAHOMETAN IN COURT.—A Toronto report states that on the 7th instant, a Mahometan appeared before the Police Court. It is said to be the first instance on record. The man, who is a Circassian, goes by the English name of Henry Jackson. He appeared against Nathaniel Hammond, a hotel-keeper, for, as he alleged, obtaining from him under false pretences $150 in cash and two stoves. The case was adjourned in order that a book of the Koran might be procured whereon to swear the complainant.

GREAT LAWYERS AT DRILL.—Ellenborough and Eldon were both turned out of the awkward squad of Lincoln's Inn corps for awkwardness. The former's attempt at this military training gave him an opportunity to utter a memorable jest. When the drill serjeant reprimanded the company for not preserving a straiter front, the great judge replied, "we are not accustomed to keeping military step, *as this indenture witnesseth.*"

A FEMALE ATTORNEY IN DIFFICULTIES.—Mrs. Belva Lockwood has succeeded in obtaining admission to the Washington bar, but finds this is not a passport to other legal fraternities. A short time ago she entered the Court of Judge Magruder, of the Seventh Judicial Circuit of Maryland, and there attempted to act as an attorney. But the court would not permit her to do so, and lectured her after this manner: "God," said the judge, "has set a bound for woman. She was created after and is a part of man. The sexes are like the sun and moon moving in their different orbits. The greatest seas have bounds, and the eternal hills and rocks that are set above them cannot be removed." When the court finally adjourned Mrs. Lockwood attempted to address the ladies and gentlemen who were present, but a bailiff prevented her from making any speech in the court room.

HORSEMONGER LANE GAOL, which has just been closed under the Prisons Act recently passed, was built in 1798, and is famous as the place of confinement not only of criminals and debtors, but of political and other offenders also. It was here that in 1803 Colonel Despard, with six of his companions, suffered death for conspiring to "overturn the Constitution and destroy King George III and the rest of the Royal Family." Here too Leigh Hunt spent two years of his imprisonment, and more recently Colonel Valentine Baker and the Rev. Arthur Tooth have been accommodated within its walls.