

The Maitland Mercury

SATURDAY, MARCH 18, 1843.

MAITLAND ASSIZES.

The assizes for Maitland commenced on Wednesday last, before his Honor Mr. Justice Burton, who arrived at Morpeth by the steamer Shamrock on Tuesday morning, attended by the Solicitor General, Mr. Prout, under sheriff, and Mr. Raneland, his Honor's clerk, who acted as clerk of arraigns. W. Purefoy, Esq., was the only barrister who came up from Sydney for the assizes. His Honor staid at Morpeth until Wednesday morning, when he was escorted into Maitland by several gentlemen on horseback. His Honor then attended divine service in St. Peter's Church, East Maitland, when a sermon was preached by the Rev. G. K. Rusden. At about half-past eleven his Honor took his seat upon the bench, and the list of magistrates was then called over, after which her Majesty's proclamation against vice and immorality was read. His Honor then delivered the following address:—

I have now the honor for the third time, in the performance of my duty as one of her Majesty's Judges, of holding the assizes at this place.

On the first of these occasions it was my lot to introduce into this district the new system of the administration of justice by circuit courts; it is now my lot to find the period of my judicial visit again marked by an event most deeply interesting to us all, I mean the establishment of a local legislature, which will be to a considerable extent formed by representatives freely chosen by yourselves.

It would be foreign to my present purpose to make any comment upon the particular mode in which it has pleased her Majesty, with the consent of Parliament, to provide for the discharge of legislative functions in the colony; but, having been called to the honor of presiding in this court, held in one of the electoral districts into which the colony has been divided for the exercise of the new privileges of its inhabitants, at the first assizes after the proclamation of the recent act of parliament, the 5th and 6th of her Majesty's reign, I can do no less than congratulate you, as I do most heartily, upon this accession to your liberties, and express my hope that, as graciously intended by her Majesty and by her Majesty's Ministers, and sanctioned by the Parliament of Great Britain, it may be received in a corresponding spirit, and may be productive to the community of all the good effects which have been undoubtedly intended. I may also, as by virtue of my office I am one of the principal conservators of the peace within the colony, take this occasion of earnestly recommending to all those who hear me that they depart not from the principles of peace and goodwill towards one another in the exercise of their new-born privileges; and charge with authority those trusted with the duty of keeping the peace, whether as magistrates or as officers of justice in any degree, that they be mindful of the duty of enforcing these principles by their own conduct and example, and be not found in any way to infringe them. Those whom you elect as your representatives will, I doubt not, be worthy of your confidence, and will enjoy it. It is no light and unimportant duty to which you call them, and they undertake; it is one which, if they perform faithfully, will entitle them to your lasting gratitude. To call forth, to encourage and improve, the resources of the country; to increase its home production and foreign export; to conduct the government in its various branches upon a system of prudent but liberal economy; to increase its finances by impositions fair and equal, and faithfully to apply them for the public good—are doubtless amongst the chief duties of the politician. But the new legislators of this country have before them a task which at present perhaps has been little contemplated, but is yet more interesting to those who are called upon, as we are upon this occasion, to administer the laws; I mean, with respect to the laws themselves.

It has been a subject uppermost in my mind, ever since I first took my seat on the bench of this colony, more than ten years ago; frequently expressed to those in whom the power has been vested; frequently urged, and, in particular instances, from the bench where I have presided; and always accompanied with regret on my part—that, in the long period during which a Legislative Council has been established in this colony, to make laws for its good government and welfare, nothing should have been done to adapt the laws of England to local circumstances; nothing to simplify the code which we are to administer; and nothing, in comparison

with what is required, to make sure the landmarks, and to simplify the transfer of property.

Many years of glorious opportunity have been lost, whilst the transactions of the colony were few and simple, and when a legislature acquainted with its requirements might have laid its foundations broad, and deep, and irremovable. The present is, however, the commencement of a new era, and I trust a better, in this part of the work of a legislature. It will be so if there be placed in the council those, and I hope to see some such, whose minds have been led to the study of the law as a science; who are acquainted with it, both in principle and detail. And, if the same weight be given to their opinions and advice which is due to the properly qualified professor of any other science, it would be found, although a considerable labour, yet one worthy to be encouraged and undertaken, and, to a lawyer, of no distant accomplishment, to do now what has never yet been done—critically to scan the statute law of England, and to determine, by legislative authority, how much is really applicable to our condition, and then to adopt it by apt terms; to review the colonial statute book, reject its incongruities and discordances, and reduce it to legal order; to remodel the criminal code, providing an efficient system of secondary punishment; to devise a simple and inexpensive mode of conveying, both by way of mortgage and sale, real property, and, above all, of simplifying and securing the evidence of title by a well conceived and well organised system of registration.

It cannot fail to be considered a remarkable oversight that the only law in this colony relating to the duty of justices of the peace in taking examinations, and admitting to bail, persons brought before them on a charge of felony or misdemeanour, is the statute of the Imperial Parliament 7 Geo. IV., c. 69, adopted here word for word by the local Act 9 Geo. IV., No. 1, passed on the 26th March, 1828. In the first clause of that act the recited intention is declared to be as follows: "Whereas the technical strictness of criminal proceedings might in many instances be relaxed, so as to ensure the punishment of the guilty without depriving the accused of any just means of defence, and the administration of justice in that part of the United Kingdom called England might in other respects be rendered more effectual, be it therefore enacted, &c." In effect, a law is made here for the better administration of justice in England.

In the second clause it is enacted that every justice shall have authority to bind by recognizances persons to appear and prosecute or give evidence, amongst other courts, at the "inferior criminal court of a county palatine, or great session;" terms which are only applicable to certain counties in England, and to the principality of Wales.

In the third the justices are directed to subscribe all examinations, informations, bailments, and recognizances, and deliver, or cause the same to be delivered, to the proper officer of the court in which the trial is to be, whereas under the circumstance of this colony the Attorney General being the prosecuting officer, and there being no grand jury, the examinations, it should have been provided, shall be delivered to him.

Passing over similar inconsistencies in intermediate clauses, the seventeenth section relates to offences committed on property belonging to *turnpike trusts*; the eighteenth to property belonging to *commissioners of sewers*; neither of which classes of persons were in existence in this colony at the time of the adoption of the act, or have been hitherto. Sections twenty-two to thirty authorise the court before which any offender shall be prosecuted or tried to order payment of the expenses of prosecutions, by a written order for payment, made by the proper officer of the court, on the *treasurer of the county, riding, or division in which the offence shall have been committed*; that such expenses shall be paid out of the county or other rates; that the justices in quarter sessions assembled are to establish the rate of costs and expenses to be allowed; that the court may order compensation to those who have been active in the apprehension of certain offenders, such orders to be paid by the sheriff, who may obtain immediate repayment on application to the treasury; and that if any man is killed in attempting to apprehend certain offenders, the court may order compensation to his family.

All these it is well known are legislative regulations constantly acted upon in Eng-

land, but although thus adopted here would, if acted upon, I apprehend, be considered by the executive government an interference with its province; but they nevertheless occupy several pages of the statute book as the law of the colony.

Another remarkable instance of the unguarded adoption of English enactments is to be found in the statute 11 Geo. 4, ch. 66, relating to forgeries, some few of the sections of which are proper to adopt, but there are also clauses relating to the forging the great seal, privy seal, royal sign manual, exchequer bills, exchequer debentures, East India bonds, making false entries in the books of account kept by the Governor and Company of the Bank of England, of the South Sea Company, or relating to the public funds transferable at the Bank of England or South Sea House, and offences against the Bank of England and other public companies in England, which can by no possibility be committed in this colony—all, however irrelevant, are nevertheless adopted, and many pages of the statute book of the colony filled with matter in no way relating to it.

Another instance occurs in the statute 11 Geo. 4, ch. 36 (adopted here by 5 W. 4, No. 8), an act regulating commitments by courts of equity for contempts, in which the warden of the fleet prison, and the Lord Chancellor, and persons having privileges of Parliament, are to perform certain acts or to do certain things, and proceedings are directed to be had in the high court of chancery, court of exchequer, and court of the duchy chamber of Lancaster, at Westminster, and to be advertised in the London Gazette. In short, the act adopted here is for the performance of things in England, for which it had been well to make provision here by an act conveying similar authority to analogous persons. But it is not too harsh a thing to say of such a mode of legislation that it is perfectly absurd, to make an act here enabling the Lord High Chancellor and other great officers to do certain acts in England; and it is equally absurd to suppose that such terms can be applied to any persons in this colony.

The same observations apply to several other most important enactments which really deserved the care of being rendered applicable in apt terms, as the 11 Geo. 4, and 1 Wm. 4, ch. 40, 46, 47, 60, 65, and various others.

It is true that the 6th Wm. 4, ch. 12, was passed on the 9th October, 1836, entitled "An Act to remove doubts respecting the power of the *Supreme Court of New South Wales* to do and perform certain acts which are required to be done and performed by his (her) Majesty's Courts in England." This may be said to have removed one part of the objection, viz., as to the Judges, leaving all others as they were, and applying only to foregone adoptions, those which follow in the same course being still liable to similar objections.

Another branch of this subject is that which relates to the too ready adoption of statutes passed in England for the ameliorating the punishment of death in certain cases, and instituting transportation; doubtless applicable to a state of society in which every man is free, and when to such persons, if they commit offences, the punishment of transportation may be sufficient in its operation to prevent these crimes being committed, and consequently sufficient for the due protection of person and property; and means exist for carrying the sentence into effect. But it is far otherwise in this colony, where, for instance, the crime of robbery with violence, and shooting with intent to commit murder, are common, and which, when they occur, are usually committed by persons already under sentence of transportation. Instances have occurred before me of this kind (and I doubt not before my brother Judges also): one in which a prisoner already under sentence of transportation for life pleaded guilty to a charge of shooting at a constable with intent to commit murder, and did actually wound him, but not so as to endanger his life; the other in which a prisoner similarly circumstanced was tried for a similar offence (wounding), and found guilty. The highest sentence which the law, as recently adopted by the local legislature, now provides for such offences being transportation for life, the effect of the sentence passed on each of these prisoners was only to remove them from this colony to Van Diemen's Land; and, looking into the calendar, I perceive that another instance of the same kind may occur at the present assizes, of the insufficiency of the criminal code of this point.

We must all greatly rejoice at any

lenity towards criminals which can be shewn consistently with the safety of the community; but I must maintain the life of the honest citizen, peacefully pursuing his lawful calling upon the public roads, who is in this country too frequently subject to the attempts of the robber and murderer, is of infinitely greater value than that of the ruffian who attempts to take it, and that it is of far greater importance to the community to protect the one than to spare the other.

Again, it is essential to the value of any criminal code, that punishment should be both appropriate and certain; conviction will follow trial, and sentence follow conviction, in vain, unless when the mildness of the law happily exacts not the death of the offender the secondary punishment which is instituted be both effective and certain.

In both these respects, however, the new legislature will find the criminal code of this colony to be wanting. It is not effective in those numerous cases where transportation is the punishment awarded and the offender is already under sentence of transportation, and it is not certain, for there do not exist means for carrying the sentence of transportation into effect after it is passed.

The state of the jury law is another subject which has long attracted the attention of the judges, and the necessity for a revision of it has been suggested.

It is diffused throughout many local acts, which may be and frequently are lost sight of, instead of being comprised, as it should be, in one general law made applicable by proper terms to every court in the colony, and it is, besides, constantly found to be unequal and insufficient, and burthensome in its operation, especially as to special juries.

All these are subjects which, affecting as they do the administration of justice, I consider proper to be presented by me at this time and in this place to the notice of the gentlemen of this district who may become legislators, and of those who are about to elect them; they are deeply important to the public interests, and ought not to be lost sight of by those who are charged with the duty of legislating for the public welfare.

There is yet another subject on which I must make a few observations before I close, I mean the duty, which I am sorry to have observed upon my two last circuits was very much neglected, of the attendance of the magistrates of this district at the assizes held within it.

I have caused the list of magistrates to be called over upon the present occasion in order to ascertain the extent of their attendance; only three magistrates out of sixty-five in this district have answered when called on. What, may I ask, would be our embarrassments if the jury were equally remiss in their attendance? The objects for which the court is assembled could not be effected. But it is no more the duty of one class than the other. If the law did not absolutely require the attendance of the magistrates on such occasions as the present, I should have expected that gentlemen in their rank of society would have imposed upon themselves the duty of shewing their respect to the Queen's authority exercised in the persons of her Majesty's judges, by being present at the assizes holden in their district; in all which is then transacted they are deeply concerned. It is a general gaol delivery, at which it is the duty of the presiding judge to enquire into the cause of the commitment of every person in custody, whether under warrant or otherwise, and to liberate all who are improperly confined.

It may happen, and frequently has happened, that magistrates have committed persons to gaol under insufficient circumstances, and in an informal manner, and the judge may require further information on the subject, which it is the duty of the magistrate to give, or may discharge persons for want of information, which might be readily afforded if the magistrates were present. It is by being present when decisions are pronounced in such cases that magistrates may best inform themselves of the grounds of decision, and regulate their acts accordingly, and avoid many errors, some of very grave amount, into which some of their body have fallen, from ignorance of the law. It is a court of oyer and terminer, at which informations lawfully prosecuted against individuals must be tried; and what can be more important to the magistrates of a county than an occasion on which the imprisoned, if guilty, are consigned to just punishment, and the innocent are set free?

What occasion more interesting and important to persons of property in the district than one on which, under the jurisdiction of a court of assizes and nisi prius, rights of property come to be determined, and disputes between their neighbours adjusted, when wrongs are to be redressed and rights to be restored?

But the law does not leave to them the choice of attendance. I must remind them that it is their duty to give their attendance at the assizes of the judges, and that if they make default without lawful impediment the judges may set a fine upon them for their neglect.

I will conclude my observations on this point by quoting from the report of Sir Littleton P. W. Knt. on his circuit in England more than one hundred years ago, on a similar neglect, a passage which is very applicable to the present occasion.

"I did in all my circuits by command of the occasion and necessity of that certification (viz. a certification *visu* had been issued by the Lord Chancellor to the justices on the subject of their attendance at the assizes), for that there was grown a sort of general neglect all over England of the appearance of the justices of peace at the assizes, when the Judges had often matters to inquire them of (viz. a certification *visu* were often of his Majesty, and trials of felony were committed by the non-attendance of the attending Justice of peace; and that their government was a respect due to the King and his court upon those solemn occasions; and that it was no hardship upon them, there being on excuses which will be readily admitted, if the call, mentioned to the court, and only upon the word of some other justice, or proof upon oath by some other person, viz. 1. If not fit to travel by age or want of health; 2. If living out of the county; 3. If then actually out of the county. But if justices of peace shall remain at home about their private affairs, or to avoid the trouble of a journey to the assizes, it ought to be looked on as a neglect of the duty of their office; for they are not called only to notify to the people that they are in commission, but to answer to their names in person."

I am sorry to observe from the two calendars before me, one of prisoners confined in goal, and the other of prisoners named for trial, that the calendar for trial does not comprehend the whole of the prisoners in custody, there being in gaol 77, for trial 19. Some embarrassment may possibly occur in the performance of my duty, which is to try all the prisoners who are in gaol, if their cases are in a condition to be disposed of; and to liberate on bail, or discharge out of custody, all those who are entitled to be liberated.

The terms of the Habeas Corpus Act are very explicit and peremptory; they are in favor of liberty, and I am not only bound to give due effect to them, but also disposed to do so to the fullest extent. I think it right to draw the attention of her Majesty's Solicitor General to the subject thus early in the session, in order that, perceiving the force of the act, he may desire the law officers under him to lay the necessary affidavits before the court in those cases where he is not prepared to go to trial, in order that those which can be legally postponed may be.

The circumstance which has led to the apprehended embarrassment is the not holding the court of quarter sessions before the court of gaol delivery, as should always be the case. I am aware that this has occurred from an arrangement having been made which could not be altered, and for which the crown law officers are not to blame; and it was verbally explained to me by her Majesty's Attorney General, and the difficulty is not likely to occur again. I am not therefore observing on it in the way of censure; I desire only to point the attention of the Solicitor General to the precise terms of the Habeas Corpus Act, in order that if any application be made on behalf of any prisoner to be discharged, he may be prepared to meet it.

By the seventh section of the act a prisoner in custody may claim to be tried at the next session of oyer and terminer, or gaol delivery, before whichever his offence is cognisable after his commitment; and if he applies to the court on the first day of its session, or within the first week of the term, as the case may be, by petition in open court, to be brought to his trial at that session, or in that term, and if not so brought to trial he is entitled to be liberated on bail, unless it shall appear to the court on affidavit that the witnesses for the crown could not be procured in the same term, session, or general gaol delivery. This as to the first branch of the section. The second branch of it provides that if a prisoner be not brought to trial within the second session of oyer and terminer or general gaol delivery (before whichever his offence is cognisable), or in the second term as the case may be, he is entitled to be discharged out of prison without bail.

This is the summary of the provision of the Habeas Corpus Act, as to the time within which persons committed for treason, felony, or misdemeanour must be brought to their trials, and I shall be obliged to the Solicitor General to give it his attention.

(Continued in page 2.)

PLEASE NOTE

**THE FOLLOWING
SUPPLEMENTARY PAGE
IS UNAVAILABLE AT TIME
OF FILMING**