the law of Massachusetts. See also *Wilson Bryan's Case*, 1 Cr. C. C. 151 (1804), where a person refusing to be sworn as a juryman, not belonging to any religious society whose principles forbade taking an oath, was committed until he consented thereto. This would seem to have been under the laws and Bill of Rights of Maryland. Refusing to answer before a grand jury and insolence to them, is a contempt of a court of the United States: *United States* v. *Canton*, 1 Cr. C. C. 150. But a refusal to answer is justifiable if an assertion of a constitutional right, and a commitment for contempt is illegal, and may be examined in the Supreme Court by *certiorari*, even if not on a *habeas corpus*. This was under the New York statutes: *People* v. *Kelly*, 24 N. Y. 74. If a witness remain in the court-room from which he has been excluded by order of court, it is a contempt: *People* v. *Boscovitch*, 20 Cal. 436.

CHARLES CHAUNCEY.

Philadelphia.

(*To be continued.*)

RECENT ENGLISH DECISIONS.

High Court of Justice. Court of Appeal.

BRAIN v. MARFELL.

The defendant sold to the plaintiff a spring and the right of conveying the water therefrom through a pipe under the defendant's land without any interruption or disturbance by the defendant, his heirs or assigns, or any other person or persons whatsoever. A railway company purchased from the defendant land in the proximity of the spring, without recourse to their compulsory powers. The effect of the works of the railway company was to drain the water from the land before it reached the spring, in consequence of which the spring became dry, and the water did not flow through the plaintiff's pipes. The plaintiff sued the defendant for breach of contract. *Held*, that the defendant had only conveyed the flow of water after it had reached the spring, and therefore the draining of the water before it reached the spring was no breach.

THIS was an action for breach of contract on the part of the defendant in permitting an interruption of the flow of water from a spring on his land to the plaintiff's house.

The plaintiff and defendant, were adjoining land-owners, and entered into an agreement the material part of which was as follows: "The said James William Marfell, as absolute owner in fee-simple in possession of the aforesaid freehold land, shall sell unto the said Alfred James Brain, and the said Alfred James

Brain shall purchase, at or for the price or sum of 20*l.*, all that well or spring hereinbefore mentioned or referred to, and the sole right to the water therein and obtainable therefrom, and the right and liberty by the means aforesaid to conduct and convey the said water, and from henceforth for ever hereafter to continue the flow and keep good the stream of water therefrom through the aforesaid freehold land to the said dwelling-house of the said Alfred James Brain in manner aforesaid, and also the right and liberty at all times hereafter whenever occasion shall require the same to open and repair and continue and improve the said drain for the purpose of continuing, perpetuating, or improving the stream or flow of water from the said well or spring to the said dwelling-house and premises of the said Alfred James Brain for the uses and purposes aforesaid, the intent and meaning of the said parties hereto being that for and in consideration of the said purchase-money or sum of 20*l.*, he, the said Alfred James Brain, his heirs and assigns, shall from henceforth for ever hereafter be absolutely entitled to the said well or spring, water, rights, and premises, so agreed to be sold to and purchased by the said Alfred James Brain as aforesaid, and shall have, hold, use, possess and enjoy the same well or spring, water, rights and premises, and each and every of them unconditionally, and without any denial, interruption, disturbance, claim, or demand whatsoever of or by him, the said James William Marfell, his heirs, assigns or any other person or persons whomsoever."

Under this agreement the plaintiff enjoyed the flow of water from the spring until 1874, when the Forest of Dean Railway Company purchased from the defendant a small piece of land close to the field in which was the spring and pipe, but not touching either of them. The company purchased the land voluntarily, but it appeared they could have done so under their compulsory powers. A tunnel was made by the company through this piece of land, and in the construction of the tunnel a shaft was sunk from the surface of the land to the tunnel. The shaft and tunnel acted as a drain to the land, the spring in consequence became dry, and the plaintiff lost the supply of water, and so brought his action for damages for breach of contract in permitting the flow of water from the spring to be lost to the plaintiff.

The action was tried before POLLOCK, B., without a jury, at the Hereford Summer Assizes, and judgment was given for the defend-

ant, upon the grounds that the railway company were not assigns within the meaning of the agreement, and that, inasmuch as they might have obtained the land under their compulsory powers, the case came within *Bailey* v. *De Crespigny*, Law Rep. 4 Q. B. 180.

From this judgment the plaintiff appealed.

Powell, Q. C., and *A. T. Lawrence*, in support of the appeal. —The flow of water from the well has been interrupted by the act of the railway company in preventing the water from reaching the spring, for which the defendant is responsible by the terms of the agreement. [Lord COLERIDGE, C. J., referred to *Chasemore* v. *Richards*, 7 H. L. Cas. 349.] That case is distinguishable, for here the defendant covenanted that the plaintiff should enjoy the flow of water without interruption, and it was immaterial in what way the cause of that interruption arose. They were not heard on the question as to whether the railway company were assigns within the meaning of the agreement.

J. O. Griffitts, Q. C., and *Jelf*, for the defendant, were not called on.

Lord COLERIDGE, C. J.—I am of opinion that this judgment should be affirmed, though, as at present advised, not in the sense that Mr. Baron POLLOCK decided, for in one sense the company were undoubtedly assigns of the defendant, but I have some doubt whether they were so within the meaning of the agreement. I doubt very much if the defendant meant to covenant against the acts of his assigns of his property other than that mentioned in the agreement. However, it is not necessary to decide that point. Assuming that the company were assigns within the meaning of the agreement, I am clearly of opinion that neither the defendant nor his assigns have done anything in contravention of the agreement. Now it has been decided as matter of law that there is no right of action for draining a well dry unless there has been an interference with the physical or defined flow or stream running in a defined channel or in a channel capable of being defined. See *Chasemore* v. *Richards*. It has been rightly contended that there is nothing to prevent persons extending or limiting their common-law rights by agreement. The question is, whether the agreement in the present case has given the plaintiff a more extended right so as to restrict in any way the defendant's common-law right of

draining his land. If it has not, then the plaintiff cannot recover in this action. All that has been conveyed is the well, and the right to the water in the well and obtainable therefrom, and the right to have the water conveyed therefrom through the pipe. In a case on the Western Circuit, the name of which I do not remember, it was held that in a conveyance of a spring with the water flowing from it the spring-head with the defined stream of water flowing from it was meant, and that the interference with the water before the head was formed, or before the water began to run in a defined channel, was not actionable. There is nothing in the words of this agreement to include the right in the plaintiff to prevent the defendant from interfering by means of underground operations with the flow of water before it reached the spring-head. There are no such words, and we ought not to introduce them. It has been argued that such a construction will operate as a hardship to the plaintiff, for the defendant might sink a well close to the spring and drain off the water. On the other hand, if the construction contended for by the plaintiff were upheld, the defendant might not be able to sink a well for draining water anywhere on his land if it would have the effect of diminishing the flow of water to the spring. It has been said that by the terms of this agreement the grantor retains the right of defeating his own grant. That is hardly correct, for he has not granted away his common-law right of draining his land. All we have to do is to construe this agreement, and according to the true construction, the defendant has committed no breach.

BRAMWELL, L. J.—I am by no means clear that the company were the assigns of the defendant. Assuming that they were, I doubt very much whether the word assigns does not mean assigns of the spot itself, *i. e.*, of the spring, and not of the land adjacent. The plaintiff must fail on the ground that the interference with the water was not brought about by an act contemplated by the agreement. It is manifest that the agreement was to define the plaintiff's right, without it the defendant would have had a perfect right to tap the well if he pleased. It was intended that the plaintiff should have the right to water in the well, and which should flow therefrom along the pipe. If the plaintiff's argument were sound, the defendant could not do any acts on his own land which would have the effect of diminishing the supply of water to

the well. In other words, he would be limited in the use of his land.

BRETT, L. J.—I agree that this appeal must be dismissed. A spring is a natural chasm into which the water has got by percolation, and out of which it either percolates or rises in a defined channel. It is perfectly clear that that which was conveyed in this case was the water in the well, and which would flow therefrom along the pipe to the plaintiff's house, but that that water which would percolate and flow elsewhere than through the pipe was not included, and no right was conveyed to the water before it reached the spring. The company undoubtedly prevented water from percolating into the spring, and drained away water that had percolated out of the spring, but had not flowed along the pipe, neither of which acts can be said to be a breach of the agreement.

Appeal dismissed.

The American law quite generally agrees with the English as to underground water, viz., that no action lies for diverting underground water which is simply percolating or straining through the earth, and not collected in any visible or tangible stream. Such water is considered a part of the soil itself, like rocks and stones, and may be taken away in the same manner and to the same extent as the soil itself can be, although the effect and consequence to the adjoining owner may be very different: See *Chase* v. *Silverstone*, 62 Me. 175; *Delhi* v. *Youmans*, 50 Barb. 316; 45 N. Y. 352; *Mosier* v. *Caldwell*, 7 Nev. 363; *Green of* v. *Francis*, 18 Pick. 117; *Wilson* v. *New Bedford*, 108 Mass. 265; *Frazier* v. *Brown*, 12 Ohio St. 294; *Chatfield* v. *Wilson*, 28 Vt. 49; *Roath* v. *Driscoll*, 20 Conn. 533; Goddard on Easements (Am. ed.) tit. *Water*. The authorities are nearly uniform as to this; if there be any exception or modification of this right of every riparian proprietor to underground percolating water, it is to be found in New Hampshire, where the decisions do not seem to recognise the right so absolutely as elsewhere; but they hold that the right should be subject somewhat to the rights of others, and exercised only in a manner and to an extent reasonable under all the circumstances of each individual case. See *Bassett* v. *Salisbury Manufacturing Co.*, 49 N. H. 569; *Swett* v. *Cutts*, 50 Id. 439.

Whether this right ever depends upon the motive with which it is exercised, is not universally agreed. Some apparently hold that no man can "maliciously and wantonly" cut off the water which supplies another's well, even when he might do so for the *bona fide* purpose of improving or using his own estate. See *Greenleaf* v. *Francis*, 18 Pick. 121; *Wheatley* v. *Baugh*, 25 Penn. St. 528; *Delhi* v. *Youmans*, 50 Barb. 316. And such is said to have been the rule of the civil law: Lord WENSLEYDALE in *Chasemore* v. *Richards*, 5 H. & N. 990; 7 H. L. C. 349.

On the other hand, in *Chatfield* v. *Wilson*, 28 Vt 49, it was distinctly decided that it was immaterial with what motive the act was done; and the remarks of PUTMAN, J., in *Greenleaf* v. *Francis*, were declared to be only *obiter dictum*. See, also, *Frazier* v. *Brown*, 12 Ohio St. 294; *Rawston* v. *Taylor*, 11 Exch. 369, MARTIN, B., p. 378; *Phelps* v. *Nowlen*, 72 N. Y. 39; *Clinton* v