

been made in a reasonable time after the return of the commission, that such privilege would have been accorded them. The commission to Mr. Mullikin, issued in February, 1851. The witness, Tolson, was examined in September of that year, and the proof was returned to the office in November, 1852, and it is not until July, 1853, after the Auditor's report was filed, and the cause submitted to the court for final decision, that the defendants set up the objection that there was no previous order for the examination, or opportunity of cross-examination.

If they have lost the benefit of the cross-examination, they have none but themselves to blame, and the question, therefore, is, whether, in the absence of all substantial ground of objection, the mere omission to procure the order of the court for the examination of the witness, (which is almost always passed as of course,) shall exclude it from consideration?

The order for the examination of a party, says the late Chancellor Bland in *Lingan vs. Henderson*, 1 *Bland*, 268, "is granted almost as a matter of course, leaving the objections to be made and considered when the testimony is brought in." The omission to procure the previous order of the court is at most a mere irregularity, and when it is apparent, as in this case, that no substantial injustice has been inflicted upon the opposite party by denying him the benefit of a cross-examination, and that delay and consequent injury will be visited upon the party relying upon the proof by allowing the objection to prevail, it seems to me it ought not to be permitted to do so.

The lying by and withholding the objection until the present time, when it might have been interposed at an earlier period, and thus vexatious delay and expense avoided, relieves the court, in my judgment, of all obligations to give effect to it. In speaking of an objection to testimony of this description, the Court of Appeals, in the case of *Jones vs. Hardesty et al*, 10 *G. and J.*, 414, say, "had this irregularity been made the subject of an exception to the testimony in the County Court, it *might* have been available to the appellants in this court."

But it by no means follows that the objection, if presented in the form of an exception in the inferior court, would have