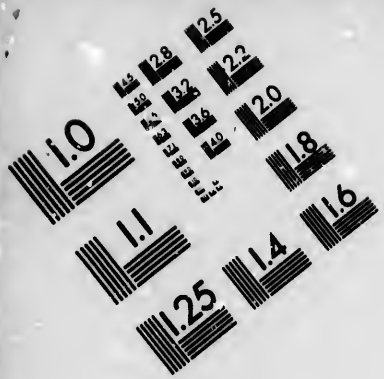

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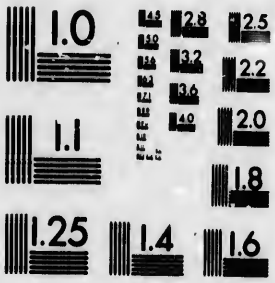

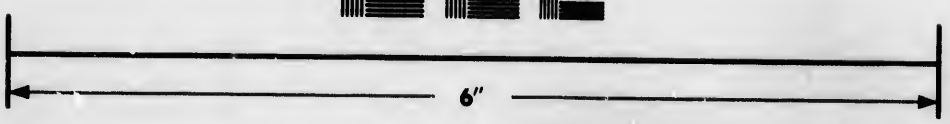

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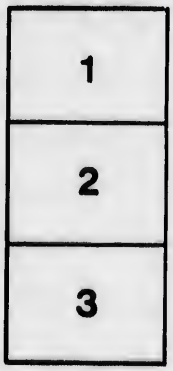

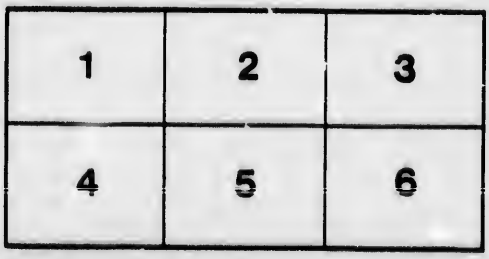

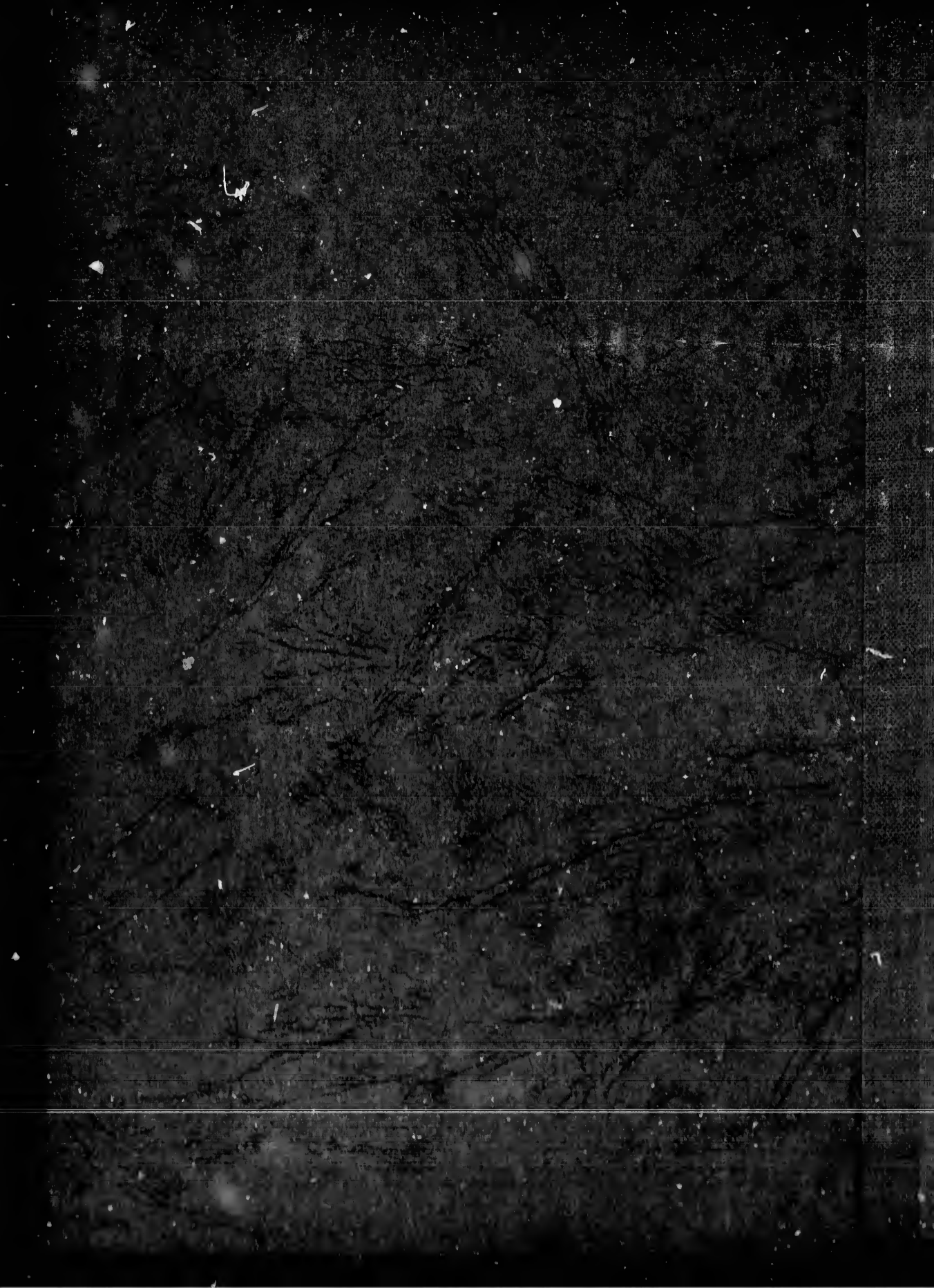

REMARKS, ETC.,

OF

MR. JUSTICE PARKER,

ON

THE ACT RELATIVE TO THE ADMINISTRATION OF JUSTICE IN EQUITY,

(17 Vic., c. 67.,)

FOUNDED ON THE SECOND REPORT

OF

THE LAW COMMISSIONERS.

J. & A. McMillan, Printers, St. John, N. B.

SIR,—

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St. John, N. B., May 15th, 1854.

Sir,—

Your Excellency having desired that any remarks I might wish to make by way of objection to the allowance by Her Majesty in Council of the Act passed by the General Assembly, "Relative to the Administration of Justice in "Equity," should be transmitted at the same time with the Act, and that at an early day, in order that full opportunity might be afforded for considering the same before the time appointed for the Act to take effect, I have prepared, with as much care as the time and my other duties would permit, such observations as appear to me pertinent and proper, which I now respectfully submit.

I cannot bring myself to think that the due administration of Justice in the Courts of the Province, whether of Law or Equity, and the character and sufficiency of the Judiciary, are matters of such merely internal concern as not to require and justify some effectual supervision by Her Majesty in Council over Acts of the Colonial Legislature which materially affect the constitution of the Courts and the duties of the Judges, especially when it is considered that the Judges of the Superior Courts have now no voice in either branch of the Legislature or the Executive Council.

The inhabitants of New Brunswick, during the seventy years of its existence as a separate Province, have increased from about twenty to two hundred thousand; and the Colony is growing rapidly in population, commerce and wealth. Its mercantile marine is extensive, and greatly on the increase.

The transactions which come before the local tribunals do not merely concern the people of the country, but creditors and contractors, British, foreign and Colonial; shipowners, freighters, insurers, merchants and mechanics, beyond its borders, may be directly or indirectly affected by the constitution of our Courts and the exercise of their jurisdiction.

The projected introduction of rail-roads, to be constructed mainly through the advance of British capital, and by British contractors, engineers and operators, under arrangements with companies who are to some extent connected with the Provincial Government, gives additional importance to this subject.

The British Colonies of North America under the (so termed) system of Responsible Government have lost, I admit, some of the ancient character of dependencies, and are more under self-regulation; but, in every popular form of government, the importance of maintaining the independence of the Judiciary is very generally acknowledged. That this is an American as well as a British principle, the writings of the late Mr. Justice Story and Mr. Chancellor Kent, and other eminent Jurists in the United States abundantly attest.

Constitutional questions of no trifling moment may occasionally arise even in Colonies. It is possible that Acts of Assembly may be found to conflict with Acts of Parliament, and give rise to questions demanding the consideration of Judges superior to local influence.

The jurisdiction of the Exchequer vested in the Supreme Court requires, for its proper and satisfactory exercise, a freedom from unnecessary dependence on the Legislature or the Executive Government.

Your Excellency has now been six years in the Province, and you have visited almost every section of it. You have had an opportunity of forming a correct opinion of the conduct of the Judges, and of learning whether they have dis-

charged their duties faithfully or not, and how far they enjoy the confidence of the public. Your Excellency must judge also whether they have done right or wrong in resisting the attempts made year after year in the Assembly to reduce their judicial incomes. I need not particularize them. They have caused Your Excellency some trouble. I advert to them merely for the purpose of showing that, while the Judges must not expect exemption from them, they cannot rely for protection on the support or influence of the Provincial Government as exerted in the Assembly. It is made an open question, and so probably will continue. This circumstance, I humbly urge, forms the strongest possible reason for the exercise of the authority of the Queen in Council, as the only power which the Colonial system provides against the evils which would otherwise arise from arbitrary and inconsiderate local legislation; and which I believe the good sense of the people recognizes as a wholesome and necessary check. It supplies, to some extent at least, what is an essential element in the Institutions of the United States, a written Constitution which is recognized as the paramount Law, not only in the Federal Government, but in that of each separate State of the Union.

This Constitution is no dead letter. It is often called into exercise to annul, when it cannot altogether prevent, unconstitutional legislation. Of the effect of this safeguard in one instance of legislation not very dissimilar from that I am considering, a case which occurred in Virginia in 1794 may be cited as a proof.

By the Constitution of that State the two Houses of Legislature were to appoint, by joint ballot, Judges of the Supreme Court of Appeals, and General Court, Judges in Chancery, &c., who were to be commissioned by the Governor, to hold their offices during good behaviour. A law was passed in 1794 enacting that the Judges of the District Court, who were also Judges of the General Court, should so far exercise Chancery jurisdiction as to

grant injunctions to their own judgments and decree finally in cases of an Equitable nature which originated by way of injunction. An application having been made under this Act to one of the District Courts for an injunction, it was referred to the General Court, and on solemn consideration unanimously rejected on the principle that the law was unconstitutional. One of the Judges, referring to the words of the Constitution and the great purpose of securing the independence of the Judiciary, says, "Contrary to their express direction, which admits of no doubt, implication, or misconstruction, the Legislature has made the appointment by an Act mandatory to the Judges, leaving them not at liberty to accept or refuse the office conferred, which is a right every citizen enjoys in every other case; a right too sacred to be yielded to any power on earth; but were I willing to do so as relates to myself, as a Judge I ought not, because it would frustrate that important object before mentioned intended by the Constitution to be kept sacred for the wisest and best of purposes, to wit, that justice and the law be done to all manner of persons without fear or reward. For how would the right of individuals stand when brought in contest with the public, or even an influential character, if the Judges may be removed from office by the same power which appointed them, to wit, by a Statute appointment as in this case, and by a Statute disappointment as was the case in the Court of Appeals? Might not danger be apprehended from this source when future times shall be more corrupt? Let me now compare this law with the Constitution in another point; that is, the want of a commission during good behaviour, and the reasons will fully and forcibly apply. When I receive the commission I see the ground on which I stand: I see that my own integrity is that ground, and no opinions but such as are derived from base motives can be sufficient to remove me from office; in which case, whensoever an appeal is made to me by

an injured citizen I will do him justice as far as my mental powers will enable me to discover it, without any apprehension of an unjust attack."

It was observed by another Judge that "if the Legislature might at any time discontinue or annihilate either of the Courts provided for by the Constitution, it is plain the tenure of office might be changed, since a Judge without any breach of good behaviour might in effect be removed from office by annihilating or discontinuing the office itself."

Your Excellency, to whom the defects of the present Colonial system, as exemplified in New Brunswick, are clearly apparent, has very fully taken up the two important subjects of "Exceptional legislation" and "Finance," and pointed out most forcibly the necessity of reforms which cannot be secured without some modification of our Legislative procedure. May I be permitted most respectfully to suggest that the future administration of Justice in the Province, and position of the Judiciary, are not less worthy of Your Excellency's special notice.

I have the honor to be, with great respect,

Your Excellency's faithful and ob.'t servant,

R. PARKER.

His Excellency
Sir EDMUND WALKER HEAD, Bart.,
Lieutenant Governor, &c. &c. &c.

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Letter of the Chief Justice and Mr. Justice Street, to His Excellency the Lieutenant Governor.

Fredericton, N. B., May 18th, 1854.

Sir,—

Mr. Justice Parker having laid before Your Excellency some remarks on the Act of Assembly recently passed for the abolition of the Court of Chancery, and the transfer of its jurisdiction to the Supreme Court, we beg to express to Your Excellency our full and entire concurrence in every thing contained in his communication.

As we presume Your Excellency will deem it expedient to transmit that communication to Her Majesty's Secretary of State, we have to request that it may be accompanied by this expression of our concurrence in all which is therein contained.

We have the honor to be

Your Excellency's ob.'t servants,

J. CARTER.

G. F. STREET.

His Excellency
Sir EDMUND HEAD, Bart.,
&c. &c. &c.

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Remarks of Mr. Justice PARKER on the Act of the last Session, (17 Vic. c. 67,) intituled "An Act relating to the Administration of Justice in Equity," founded on the second Report of the Law Commissioners of New Brunswick.

THE Act of Assembly 15 Vic. c. 42 recites the benefits to be expected, if the Acts of Assembly are revised and properly arranged, and the proceedings in Suits at Law and in Equity abridged and simplified; and empowers the Lieutenant Governor in Council to appoint Commissioners to carry out these objects, as well [1st] "to consolidate, "simplify in their language, revise, and arrange in one "uniform code, the Acts of Assembly, incorporating such "alterations and amendments as the Commissioners might "deem necessary:" As, [2ndly] "to report upon the prac-"tice and proceedings in the Courts of Law and Equity, "and to suggest such alterations therein as might appear "to the said Commissioners, or a majority of them, best "adapted to lessen expense and advance justice, and espe-"cially to take into consideration the Law of Evidence, and "the propriety of altering the same; and to report to the "Lieutenant Governor, in separate reports, embracing in "*one report*, the revision and codification of the Acts of "Assembly, and in the *other*, the practice and proceedings "in the Courts of Law and Equity, and the other matters "directed to be reported upon; to be laid before the Legis-"lature for their consideration and action."

The Commission, I presume, was issued in these term
and the intention is obvious, that the codification sho
form one branch of the Commissioners labours; and t
practice and proceedings in the Courts of Law and Equi
having especial reference to the Law of Evidence, the oth
So that the Legislature might have before them under o
general view, *improved Legislation;* under another, *i*
proved administration of justice.

At the Session of the General Assembly in 1853, t
Report on Codification was presented, commonly called t
Commissioners' first Report. And in that of 1854, ju
concluded, three separate Reports were laid before t
Legislature.

The 2nd Report relates to the Administration of Justi
in Equity; the 3d to that of Law; the 4th is supplement
to the 1st.

I do not stop to inquire whether the great changes r
commended by the Commissioners were exactly within th
purview of their Commission; the queries issued by the
would show that they so viewed them; but it would hardl
seem to have been contemplated by the Act, that the ne
arrangement of Courts, and Law and Equity procedur
were to be embraced in two distinct Reports; so as to b
taken up piece-meal, and before one part was at all consid
ered, the other should be embodied in an Act appointed t
take effect in a few months, without receiving the expres
confirmation of Her Majesty in Council. This, however
has been the course of proceeding. After devoting many
laborious weeks to the first branch of the subject, codifica
tion, adopting the revision of the Commissioners with some
alterations, the Legislature have, certainly with great dis
patch for so grave and important a matter, and with very
little or no discussion on the principle or details of the
measure, passed an Act founded solely on the second Re-
port of the Commissioners, to take effect on the 1st day o
September next, while the Bill embracing the other part o

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be second branch of their inquiry has been merely introduced into the House of Assembly, and after two readings, *pro forma*, the further consideration postponed to the next session of the Legislature, when, in consequence of a general election taking place, it will come under the consideration of a new House, and may or may not be adopted.

The result has been, that the Legislature abolish the Court of Chancery, and vest the Equity Jurisdiction in the Supreme Court, before even entering on the consideration whether the additional legal—and certainly more appropriate—duties proposed by the Commissioners, shall be imposed upon the Court.

A very cursory examination of the third Report of the Commissioners will show that the new duties thereby proposed to be transferred to the Supreme Court are neither few nor inconsiderable, and some are rather of a novel character.

Why, without any pressing emergency, this new Act, creating so great a change in the administration of justice, which is but a part of the projected improvement, should be forced into operation before the next Session of the Legislature, when the whole might be considered, it is difficult to conceive.

Taking up the Act, however, by itself, without any reference to future legislation, there appear to me many and very grave objections to its receiving Her Majesty's allowance, which I shall endeavour to point out under the following heads:

I. Violation of Constitutional principles.

II. Inexpediency of the proposed amalgamation.

III. Objection to the details of the Act, as the new duties will affect all the Judges.

IV. Its unjust operation in my own particular case.

(1.) *Violation of Constitutional principles.*

By the Royal Commission to the first Governor of the Province on its erection in 1784, he was appointed Chancellor, and a Court of Chancery was immediately called into operation, and has always been in existence; the Judges of the Supreme Court, or some of them, having sat, as occasion might require and their other duties would admit, sometimes as Assessors to the Chancellor, and at others, in the absence of the Chancellor, as Commissioners, by virtue of a Commission under the Great Seal; and in this manner the duties were discharged until the first year of Her present Majesty's reign, when the Master of the Rolls was appointed and provided for under the Act of Assembly 1 Vic. c. 8.

The Supreme Court was constituted by Commission to the Chief Justice and three puisne Judges dated November 25th, 1784, having the legal jurisdiction of the King's Bench, Common Pleas, and Exchequer, at Westminster. This Court has always consisted of a Chief Justice and three puisne Judges, and no more. No addition has ever been made by the Crown, and the recommendation of the House of Assembly, and several members of the Executive Council, to reduce the number to a Chief Justice and two puisne Judges, did not receive Her Majesty's sanction.

The tenure of the Master of the Rolls is expressly declared by the terms of the Act of Assembly, and his Commission under the Great Seal, to be *during good behaviour;* that of the Judges of the Supreme Court is expressed to be "during the pleasure of the Sovereign." Thus (to use the words of Earl Grey in his Despatch of 31st May, 1847,*) "The Master of the Rolls enjoys the *legal* tenure during "good behaviour, which is *rare;*" while the other Judges hold under what His Lordship styles "the general rule of "the public service, during good behaviour, in the *popular* "*sense* of the term."

* Journals of Assembly, 1848, p. 130.

The difference of tenure is most distinctly recognized in law. In the case of *Harcourt* vs. *Fox*, reported at great length in 1 Shower's Reports, 426, 506, 516 and 556, and more briefly by other contemporary Reporters, the question arose as to the power of the Custos to remove a Clerk of the Peace, appointed pursuant to Statute by his predecessor, *quamdiu bene se gesserint.* The Judges of the Court of King and Queen's Bench, though concurring, delivered their opinions seriatim, Lord C. J. Holt using the following emphatic words: "The words themselves, in their natural and "proper extent, do signify an estate for life, the Clerk be- "having himself well." * * * "It seems to me that, "upon the whole frame of the Act, to be the intent of "Parliament to make such provision that the Sessions and "Justices should always be furnished with an able Clerk "of the Peace; and to encourage him in the faithful execu- "tion of his office, they settle the estate so as to put him "out of fear of losing it for anything but his own misbeha- "viour." * * * "The design was that men should have "places, not to hold precariously or determinable upon will "and pleasure, but to have a certain durable estate, that "they might act in them without fear of losing them."

This judgment was affirmed on appeal, by the House of Lords, (See Shower's P. C. 158,) and the correctness of it has never, I believe, been questioned.

But it may be said, perhaps, that the power of the Legislature to repeal all Statutes creates an implied exception or qualification of the tenure, and that the meaning was that he should hold during his good behaviour and the pleasure of the Assembly. The answer is, that it is not the power, but the constitutional exercise of the power, we have to consider. What, upon the principles of the Constitution, and the practice in analogous cases, had the Master of the Rolls a right to expect, when he accepted the office, giving up therefor a large and increasing practice at the Bar, and changing his place of residence from St. John to Fredericton?

The abolition of Courts and Judges is not, it is true, without precedent. The Courts of Great Session in Chester and Wales were abolished by the Statute 11 Geo. IV. and 1 Wm. IV. c. 70, and the jurisdiction transferred to the Courts at Westminster. This Act affords a good example of the *mode* of transferring duties from one Court to another. The 14th section provides for the transfer of the duties to the respective Courts of Westminster.

The 24th Section recites that it is expedient that due provision should be made for the compensation of the Judges, and *other* persons *having a freehold* in their office in the county of Chester and principality of Wales, and grants annuities to such of the Judges as had not accepted office under a qualification that their appointment was subject to the future provision of Parliament, (this change having been some time before contemplated, and the later appointments made subject thereto).

The annuities are to continue during the lives of the parties entitled thereto, or until such time as they may be respectively appointed by His Majesty to any other place or office, the salary or emoluments of which shall be of equal or greater amount; or if less, the annuities are subject to a proportionable abatement only.

This clause left it in the power of His Majesty, on due consideration of all the circumstances, to substitute for the annuity of any Judge, the appointment to another office. It could never have been intended that the annuity could be got rid of by appointing the retired Judges to offices, irrespective of their ability or readiness to undertake them. No such act of injustice was contemplated or has been perpetrated in England.

But I would here venture to ask, if the repealing power of Parliament is to be considered an *implied* qualification of all appointments *during good behaviour*, where was the necessity for adding the provision of the 26th section of that Act, that no person shall be entitled to such compensation

whose appointment to his office was qualified by a condition or reservation expressed in his Patent, or otherwise made known to such person, that such office or the emoluments thereof were to be held and enjoyed subject to any future provision to be made by Parliament touching the same, without any claim to compensation in case the same should cease, or be subjected to any regulations.

We are quite familiar now with this qualification upon ordinary departmental officers; but hitherto the higher judicial officers, who hold only under the tenure of good behaviour *in the popular sense*, have been considered exempt from it.

I might further inquire why the clause in Statute 13 Wm. III. c. 2, (which Act first directed that the Commissions to the Judges should be *quamdiu bene se gesserint,)* that it might be lawful for His Majesty to remove them on the address of both Houses of Parliament, should have been deemed so important, if the right to remove them at the will of the King, Lords and Commons, which could always be manifested by Statute, was an implied qualification of their appointment to hold during good behaviour?

It has not, I believe, been pretended that, at the time of the appointment of the Master of the Rolls, there were any conditions or reservations made known to him, qualifying the settled import of the words of the Act and of his Patent; but any presumption of the sort must be rejected at once by reference to the message of Lieutenant Governor Sir John Harvey, to the House of Assembly, 18th January, 1838, (Journals of 1837–8, p. 72,) and the Report of the Committee of the House 13th February, 1838, p. 137, which led to the appointment; and to the Despatch of Lord Glenelg 26th May, 1838,* confirming it on the condition that the appointment of this high officer should for the future rest in Her Majesty, and not be exercised, except provisionally, by Her Majesty's Representative.

* Journals of Assembly, 1839, p. 315.

To obviate the difficulty suggested in the Despatch, the Act 2 Vic. c. 37 was passed; into which also one condition was introduced, viz.: "That the usual place of residence "of the Master of the Rolls should be in the place where "the Court of Chancery sits." The expediency of this provision was so obvious that no objection could be made to it; but it certainly affords no additional reason for considering the tenure of his office to be otherwise affected.

More, I think, need not be said at present to prove that the abolition of the office of the Master of the Rolls by Act of Assembly, without continuing to him his salary, and that without the previous sanction of the Crown being obtained, or the Act being made expressly subject to Her Majesty's pleasure, is not warranted by principle or precedent.

It might have been competent for the Legislature to have done as was done by Parliament in the case of the Welsh Judges, namely, to have provided for the payment of an adequate annuity, with the limitation introduced in that case, which would have enabled Her Majesty, had She so thought fit on due consideration of all the circumstances affecting the public, as well as the individual, to have appointed the Master of the Rolls to the Bench of the Supreme Court.

But here, I contend, has been another improper exercise of power by the Colonial Legislature, namely, virtually making an appointment of a fifth Judge of the Supreme Court, instead of enabling the Queen to make provision for such Judge if Her Majesty thought fit to make the appointment.

It is unnecessary to consider the extent of the Royal prerogative in this respect. We know that in former times, when the Judges were paid by the King out of the Crown's peculiar revenues the power of adding Judges to the Courts in England was exercised in several instances. I am not aware of its having been done in the Colonies, though it may have been.

A parliamentary recognition of the prerogative may be found in the Statute I have already referred to (11 Geo. IV. and 1 Wm. IV. c. 70), but what is the course there taken? The preamble recites the expediency of appointing an additional Judge to each of the Superior Courts of Common Law, and abolishing the Welsh Judicatures; and it is then enacted, that "Whenever His Majesty shall be pleased to "appoint an additional puisne Judge in either of the Courts "of King's Bench, Common Pleas, or Exchequer," such and such shall be the mode of sitting and transacting business; and salaries and retiring allowances are provided for the new Judges and their successors.

If it were intended that the Supreme Court should consist hereafter of five Judges, so constituted, not by Her Majesty, but by authority of a Legislative enactment, why, I may ask, is not that clearly expressed, instead of being left to a doubtful inference? The Act leaves no option to Her Majesty, either as to the nomination of the new Judge, or increasing the number of the Judges, but enacts "that "the Master of the Rolls shall be one of the *five Judges* of "the Supreme Court, both at Law and in Equity, but his "salary, as such Judge, shall, during his incumbency, be "paid in the same manner, and to the same extent, as when "Master of the Rolls, without fees or allowances, other "than for travelling charges on circuit, and the present of- "fice of the Master of the Rolls is hereby abolished." Nothing is said of any successor. He is made a fifth Judge of the Supreme Court, and though Her Majesty might on his death or resignation, appoint a fifth Judge (by virtue of Her prerogative) what is to be his remuneration or how to be paid? The Master of the Rolls is now paid from the Province Treasury, not out of the Civil List; as Judge, he is to be paid in the same manner, unless some other regulation may be made for adding it to the Civil List.

The Act does not even provide for the continuance of his present tenure of office, nor recognize the necessity of his

receiving a Commission from the Queen, or being sworn in as Judge of the Supreme Court. If he be constituted a Judge of the Supreme Court, it is by this unprecedented method—an Act of the Colonial Legislature—as much as if the Act had appointed him by name. And whether he receive a commission or not, if he become a Judge when the Act takes effect, he will continue so. Should he be commissioned to hold *during good behaviour*, his tenure will differ from that of all his brother Judges on the same bench.

The Act further prescribes that he shall receive no fees; and yet, it is well known, besides the fees on entries at the term, hitherto divided equally among the Judges, each Judge is entitled to certain other fees on Circuit and at Chambers. These fees, when the service is performed by the new Judge, are not directed to be received and paid into the Treasury, but are not to be received at all. There will therefore be this anomaly, that for the same service, when executed by one Judge, a fee is to be paid by the suitor; when executed by another, no fee is to be paid.

On the subject of the successor to the fifth Judge of the Supreme Court, and the Judges' fees, it might be considered superfluous to animadvert. But it must be borne in mind, as regards the question of succession, that already the House of Assembly have recorded their opinion, that there ought to be but four Judges to discharge the duties both at Law and in Equity; Her Majesty, however, has not been pleased to sanction this reduction; and as regards fees, that the Assembly have repeatedly endeavoured to deprive the Judges of them without compensation; refusing to assent to a moderate composition being made, in lieu thereof, out of the surplus of the Civil List fund, as has been strongly recommended by Her Majesty's Government on the suggestion of the Lieutenant Governor. And it will be seen that in the new table of fees, proposed by the Commissioners at the close of the third Report, the Judges' fees are

entirely omitted; two of the Commissioners only signing this part of the Report, and leaving it to be inferred, I presume, that the Judges will still receive their fees under the old ordinance of the Governor and Council, while the third Commissioner refuses to sign it, because he is of opinion the Judges are not entitled to fees, and he cannot unite in a statement which leaves that question *in doubt*.

Should this new Table of Fees be adopted by the Legislature at the next Session, as may probably be the case, the Judges fees will be alone left dependent on the authority of the Ordinance, under which at present the fees of the Attorneys and Officers of the Court are paid.

There is one other point to be noted under this head. The new Act provides that the Supreme Court shall hear and determine in Equity, all causes heretofore cognizable by the Court of Chancery; and that the said Court of Chancery is hereby abolished, except where it may be necessary for the transaction of business in cases of Lunacy,—Idiotcy has, probably through inadvertence, been omitted. The exception, however, which is introduced, renders any doubt as to the intention of the Legislature not merely to deprive the Court of Chancery of its Equity Jurisdiction and transfer it to the Supreme Court, but to abolish the Court altogether, reserving only to the Chancellor the specially delegated Jurisdiction over Lunatics.

What becomes then of the Common Law Jurisdiction, which has been exercised here, as well as in England? It is only the Equity Jurisdiction that would seem to be transferred to the Supreme Court; but the Common Law and Equity Jurisdiction of the Chancellor are made to cease by the abolition of the Court of Chancery.

Admitting that the Master of the Rolls has no original jurisdiction respecting matters arising in the Common Law side of the Court; the abolition is not, as it might have been, confined to the jurisdiction which he exercised; but

includes that of the Court of the Chancellor. What becomes then of the office of the Clerk of the Crown in Chancery?

Have these by no means unimportant questions been at all discussed, or the possible consequences of this sweeping abolition been in any way considered? There is no indication that they have been.

(2.) *The inexpediency of the proposed amalgamation.*

It is not proposed that there shall be a fusion or mixture of the equitable with the legal jurisdiction. The two parts are to be distinct. An equitable defence is not to be admitted to an action at Law; nor will the Judges when sitting on the Law side of the Court be empowered to afford equitable relief. This mode of attempering the administration of Justice seems to have been considered the great *desideratum* of Law Reformers in England; but the Commissioners here (on due consideration,) have rejected it. But the plan they have adopted again introduces the objection so strongly pointed out by Sir John Harvey in his Message of 18th January, 1838, and which the appointment of a Master of the Rolls was intended, and well calculated, to obviate.

These are the words of His Excellency: "The Lieutenant Governor is under the necessity of delegating the "exercise of his judicial functions as Chancellor to the "Judges of the Supreme Court. This arrangement presents "the incongruity of the Common Law and Equity jurisdiction being vested in the same persons, while these two "systems of jurisprudence depend upon principles, and are "administered in modes widely differing from each other. "This incongruity is strikingly exemplified in the case, by "no means uncommon, of the Court of Chancery being called "upon to restrain proceedings in the Supreme Court."

The great expediency as well as necessity of relieving the Judges of the Supreme Court of the duties, and appointing and devolving them on a Master of the Rolls, as the re-

sponsible Judge in Chancery, was fully concurred in by the Assembly when they adopted and acted on the Report of the Select Committee, to whom the message was referred, by passing the Act 1 Vic. c. 8, and the subsequent Act 2 Vic. c. 37.

The Judges are, on the Equity side, liable to be called on to grant Injunctions to restrain the Judgments pronounced on the Law side. But they are not at liberty to import into the one the knowledge obtained in the other.

The proceedings are to be still distinct and the evidence distinct, and the principles and rules for their guidance essentially different. With one they may be well acquainted, of the other comparatively ignorant.

During the incumbency of the Master of the Rolls, there have been two extensive Statutory Jurisdictions almost entirely confided to him,—that for the relief of unfortunate and insolvent debtors, and that of bankruptcy. These two systems, after continuing in force for some years, have now, it is true, ceased to exist; but one or the other of them may at any time be revived by the Legislature, or some substitute provided; and it will be found exceedingly inconvenient to impose the duties of either on the Supreme Court, or on the Judges of that Court indiscriminately. In addition to this, the Court of Chancery has been made the Appellate Court for all the Surrogate Courts, of which there is one in each County of the Province. Rules and Regulations for the government of these Courts have been prepared by the Master of the Rolls. This jurisdiction must necessarily be transferred to the Supreme Court, which will therefore have another system of Laws to administer.

It is not contended, in the main, that either the duties of the Master of the Rolls, or of the Judges of the Supreme Court, have been imperfectly performed; or that the ordinary administration of Justice, either at Law or in Equity, will be improved by the proposed change; but the want of a proper Court of Appeal is the sole reason given for the

great change. But yet, the new Court of Appeal is to be composed of the same materials as now form that Court; and the one objection which has been urged, on a perverted or mistaken view of the only case in which any thing of the kind occurred, that the Master of the Rolls might be called upon by the Chancellor to assist in the re-hearing of cases already adjudicated upon by him, is not, I conceive, substantially relieved by, but rather embodied in, and extended by, the new system.

"We propose," (say the Commissioners) "that any one "of the Judges shall decide a case in Equity in the first "instance, with an appeal to the whole five Judges in term; "and that, agreeably to the present practice in a suit at "Law, there shall be no other, as we conceive there can be "no better appeal than from the first decision in this branch "of Jurisprudence, to the five Judges in the Supreme "Court."

After observing that there will still remain an ultimate appeal to the Judicial Committee of the Privy Council in England, the Commissioners add: "We do not propose this "as the best arrangement under any circumstances, but as "the best which the country in its present circumstances "can offer: nor are we insensible to the argument that "when five Judges of the Supreme Court will have to turn "their attention to so many branches of the Law, they can- "not be expected to reach the same eminence as when the "sole time and attention of one individual has been bestow- "ed on a particular department."

To carry out their views, and to preserve the appearance of a Court of Appeal, the Commissioners have found it necessary not merely to call in the Judges of the Supreme Court to exercise the ordinary jurisdiction of and sit as Judges in the Court of Equity, styled, instead of Chancery, the Equity side of the Supreme Court, but each of the five Judges is really made to constitute a Court of Chancery in his own person. The Equity Court, so far as represented

by the Supreme Court *in banc*, cannot, it is seen, be always open, but can only at stated times be accessible; but the five Courts,—if I may use the expression,—the five Chancery Courts, of original and co-ordinate jurisdiction, are to be always open before the Judges respectively, the Judge to be selected, very generally, at the discretion of the party, for his ability or inability (as may best suit the occasion). The duty required of the Judge is not confined to any stated Court or place; it is to be always open; whether he ride the Circuit, or a journey of business, health, or pleasure, he cannot throw off this burthen.

"Post equitem sedet atra *cura*,"

curia would be as literally true.

True, there might be no great difficulty in a Judge, conversant with Equity practice and principles, and devoting himself to that department, and aided by a good Clerk, discharging these duties; but it is a very different thing when undertaken by a Common Law Judge at chambers, without any officer to apply to, or Clerk to assist him. There must necessarily be great delay, great uncertainty, and probably for some time, very little uniformity in the decisions. The present Judges of the Supreme Court are to be set to the discharge of duties in Equity, which they have yet mostly to learn; while the Master of the Rolls, well practised in Equity, is to be set to try causes in Courts of Nisi Prius and Oyer and Terminer, to which for sixteen years he has been a stranger. Surely when you have the same five men to form Judges for all purposes, it is best to employ each in the ordinary discharge of that duty with which he is most conversant, and which is always called for; especially when it is found by experience that this arrangement is still not incompatible with the other requisite—an appeal—which is comparatively rare.

No one who feels aright the weight of judicial responsibility can content himself with saying, You have imposed

on me a duty which I am confessedly inadequate to perform, therefore I may be indifferent to the consequences of my decisions. But yet, how is it to be expected that the Judges of the Supreme Court are, with all their Common Law duties undiminished, to sit down to the study of Equity practice and procedure, with any hope of ever attaining to the most ordinary proficiency?

I think it will be found that, so far from the revision of the Laws affording relief to the Judges in their labours, either at Law or in Equity, as the Commissioners seem to anticipate, it will be found, for a time at least, materially to increase them. However carefully Laws may be revised and condensed, experience shows that changes in expression, omission of some words, addition of others, and substitution of one term or phrase for another, and even an alteration in the arrangement of the different clauses in a law, give rise to new questions, and tend to unsettle what had before been settled. This is one of the penalties paid for improved legislation. I will not say that it is not amply compensated by the brevity and condensation of the code: this is yet to be tested. Ingenuity will raise objections, and these objections must be heard and decided on.

That the sittings at Term, under the combined jurisdiction, will necessarily be lengthened, can hardly admit of a doubt; but the difficulty we shall have most to contend with is the increase of duty at chambers, where our primary Courts of Equity must in general be held. These, however, will be more properly noticed under my third proposed head.

(3.) *Objections to the details of the new Act.*

Let me first remark, that, contrary to the recommendation of the Commissioners, and without any adequate substitute, the Legislature have abolished the Master's office, and thereby removed from the Equity Court every officer but the Registrar, who is to be transferred to the Supreme

Court, under the new title of Clerk on the Equity side of the Court.

There are now fifteen Masters, residing in eight different parts of the Province. I do not suppose that all of these are necessary, or that all might not be dispensed with, if the present English practice had been adopted. The Judge is to be allowed no Clerk, either senior or junior. There is no officer to whom he can readily refer for assistance or information. It is provided indeed that the Judge may appoint any Barrister as an Examiner, when he cannot perform the duty himself. The Commissioners have expressed an expectation "that much of the evidence will, by the new "plan, be taken before the Judge on the hearing, with all "the advantage of a decision on what he himself hears and "sees," they therefore regard the employment of an examining Barrister as an occasional only, not an ordinary resort. They think it would be quite impossible for the five Judges to perform any more duties; and upon mature consideration they decide on retaining the Masters, as they do not see that the duty can be dispensed with, or that we could be better served in those cases in which Masters will still be required, than by gentlemen already well accustomed to their business.

The Legislature have been pleased to dispense with the services of the Masters. They have retained, however, that part of the Report which enables a Judge to make reference to any Barrister, or scientific person, or accountant, not interested; but it is optional in any of them whether he will serve. The Barrister is not an Officer of the Court who *is required* to act. He becomes an Officer only, *pro hac vice*, after he is appointed and agrees to act, and the selection will probably soon rest entirely with the Solicitor instead of the Judge.

The assistance of an experienced Master, whom a Judge might call in as Assessor, would be frequently found useful;

but it will be seen that much of the duty hitherto discharged by the Master is to be devolved on the Judge.

Besides hearing cases, and deciding, in the first instance, with the same powers heretofore exercised by the Master of the Rolls, he must hear and decide on applications for immediate execution, and give directions. This is no light responsibility. He is to decide in case of an absent person, whether there are good *prima facie* grounds for filing a Bill against him. To a Judge not conversant with the principles of Equity, this investigation may often be an embarrassing one; and he may be called on to express an opinion on a variety of matters. He is to decide on exceptions to the answer, or to the Plaintiff's answer to interrogatories; and on alleged impertinences, without their being excepted to, on a simple application, and without any previous reference.

After the cause is at issue, and before proof or hearing, he is to determine what allegations on both sides are admitted by the pleadings, and direct proof to take place on the allegations not admitted. This will call for a careful perusal of the pleadings in all contested cases. He may be called on for orders for the production of documents. Whenever an issue may be found necessary, he is to order the same; and, in an injunction case, may be called on to hold a special Court to try the same. There are many other matters, which might appear light and insignificant to an experienced Equity Judge, but which may prove very perplexing to an inexperienced one, whose mind is occupied with various other judicial matters. I do not attempt to enumerate all the *improvements*. There is, however, one very serious and most inconvenient addition to the duties of a Judge prescribed, which must be noticed. All cases in Equity, after issue, and after the Judge shall have settled the points admitted or denied by the pleadings, are to be heard on evidence taken *viva voce* in open Court before the Judge at one of the monthly sittings at Fredericton; or

(which will be of far more frequent occurrence) at any Circuit Court where the majority of witnesses reside, if the parties desire the same *or the Judge shall so order*. And if at any Circuit Court, then the causes are to be entered at the foot of the Common Law cases, and heard after the Jury is discharged, the Clerk of the Circuits attending himself or by deputy.

To any one who knows the labour and exhaustion of some of our Circuits, it will be seen how imperfectly will this duty be performed, as long as Judges are subject to ordinary human infirmities, which must necessarily increase with increasing years.

As a 4th head of objection, I feel compelled to state

The particular circumstances in which I shall be placed by the change.

In October next, I shall have completed twenty years service as a Judge of the Supreme Court. The little knowledge I had previously acquired of Chancery practice, even did I still retain it, would be of small avail, so many and great are the changes since made. At the age of fifty-eight, even could I expect sufficient leisure for the purpose, and were there any reason for imposing on me so irksome and difficult a task, I could hardly expect to become familiar with the practice. I have devoted myself exclusively to my judicial duties in a Court of Common Law. Had not the appointment of a Master of the Rolls been made,—a measure so much desired at the time, and which has answered all reasonable expectations,—I might, by giving less attention to Law have kept up better acquaintance with Chancery procedure; but had even this been done, so as to have made me familiar with the present practice, the new duties which a Judge in Equity is to be called on to perform by the Act of 1854, so far exceed, and so far vary from, any that as an Assessor or Commissioner of the Court might have occa-

sionally devolved on me, that I should feel very reluctant to undertake them.

For nearly fifty years past a Judge of the Supreme Court has resided at St. John, which is by far the largest place, and is always likely to be the Commercial Capital of the Province. Within its immediate vicinity is the Provincial Penitentiary, the place of imprisonment for almost all convicts at the Courts of Oyer and Terminer and Sessions, and whereto prisoners may in some cases be sent by the Police Magistrates, and soldiers under sentence of Courts Martial. All applications therefore for writs of Habeas Corpus by prisoners in the Provincial Penitentiary are made to a Judge at St. John.

Many British and Colonial Ships resort to its harbour; and there are different legislative enactments affecting the Ships of the Colony and other Ships, on which questions arise, and are brought before a Judge on application for writs of certiorari or habeas corpus.

There are two separate Police establishments; one for the City of St. John, and the other for the Parish of Portland, immediately adjoining it; the Magistrates of which exercise extensive summary authority, but with an appeal in many cases to a Judge of the Supreme Court, which will generally be brought before the resident Judge.

There are about forty Attorneys residing and practising in St. John, more than double the number of those practising in any one other place in the Province.

The applications from several other counties are more conveniently made to a Judge resident at St. John, than to one at Fredericton.

All these different circumstances occasion a good deal of business before me at chambers. Rarely a day passes without some application or attendance; and often there are several on the same day.

There is no law or rule requiring the residence of a Judge at St. John; but I am sensible it would be very inconve-

nient to the profession, and occasionally be the cause of serious injustice, if there were not a resident Judge here.

With this business, the preparing for, and attendance at the Terms of the Court at Fredericton, and on the Circuit Courts which fall to me, I find abundant occupation. And so unable and unwilling do I feel to undertake the duties of an Equity Court, which will devolve on me if this new Act takes effect, that I should not hesitate in preference (though I am not anxious to resign my present office,) to retire at once, if the same privilege were afforded to Judges here, after twenty years service, as are secured to Judges in England, and I believe also in Scotland and Ireland, after fifteen years service.

It is true, I may resort to the alternative of removing my residence from St. John to Fredericton, which may become indispensable if I retain my office, where, if all the Judges resided, some arrangement might be made for a daily attendance of the Judges in rotation, at the Court House or Judges room, to sit in Equity.

My removal, however, would be attended with much inconvenience to myself, as well as the public; and only then afford partial relief; for much of the business would follow the Judge on Circuit, which could not be escaped.

I have not shrunk from the performance of any duties properly appertaining to my office as a Judge of the Supreme Court, nor do I complain of the weight of them; but I am unable to see the justice or propriety (there certainly is no pretence of necessity) for requiring me to act, in my old age, not only as a Judge, but as a *Court* of Chancery, any more than there would be in requiring one of the Judges of Her Majesty's Courts of Law in England or Ireland to have that duty cast upon him against his will, in pain of forfeiture of his office, if he decline to undertake it.

If it be demanded of me why I did not urge these objections at an earlier stage, I can only say, that the second and third Reports of the Commissioners were only presented in

January last. I never saw them until the end of the month. I had no expectation they would have been passed by the Legislature without full discussion, for which I knew there was not sufficient time at the last Session. I was fully occupied from the time I received the Reports until the Act was passed with my judicial duties, and could pay little attention to them. The public has scarcely had the matter at all before it.

I cannot but entertain a strong hope that, on review of all these circumstances, there will appear abundant reason that this Act should not be left to its operation, but that Her Majesty may be graciously pleased to disallow the same. At the next Session of the Assembly, when time may be afforded for consideration and discussion, as well of the matters contained in the Commissioners third, as in their second Report, the whole subject of the Administration of Law and Equity in the Province may receive at the hands of the Legislature that treatment which its importance, as affects the public and the judiciary, would seem to demand, and some at least of the material objections I have pointed out may be removed or obviated.

All which is most respectfully submitted.

R. PARKER.

St. John, New Brunswick, May, 1854.