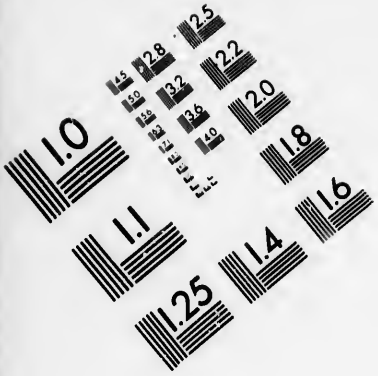

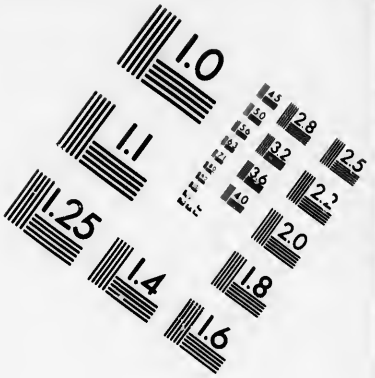

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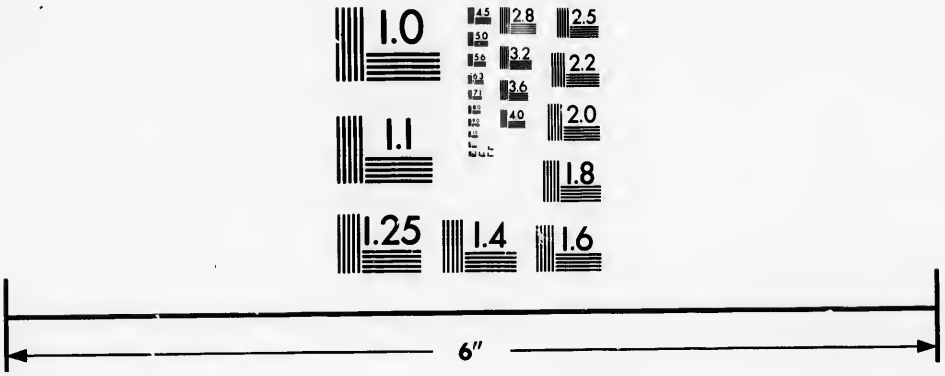

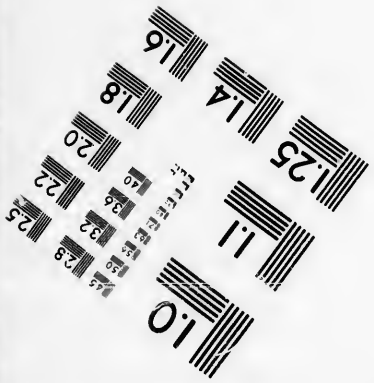

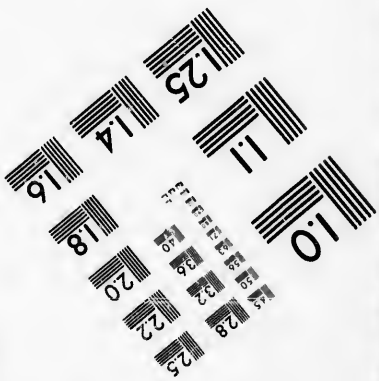

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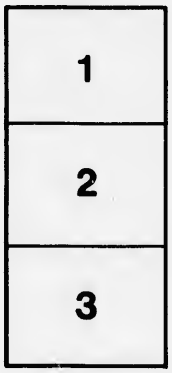

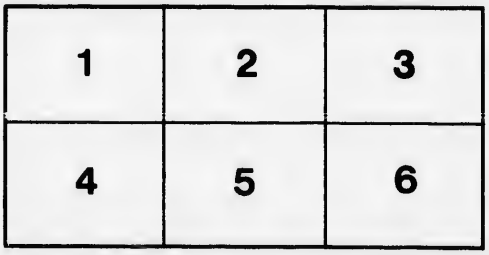

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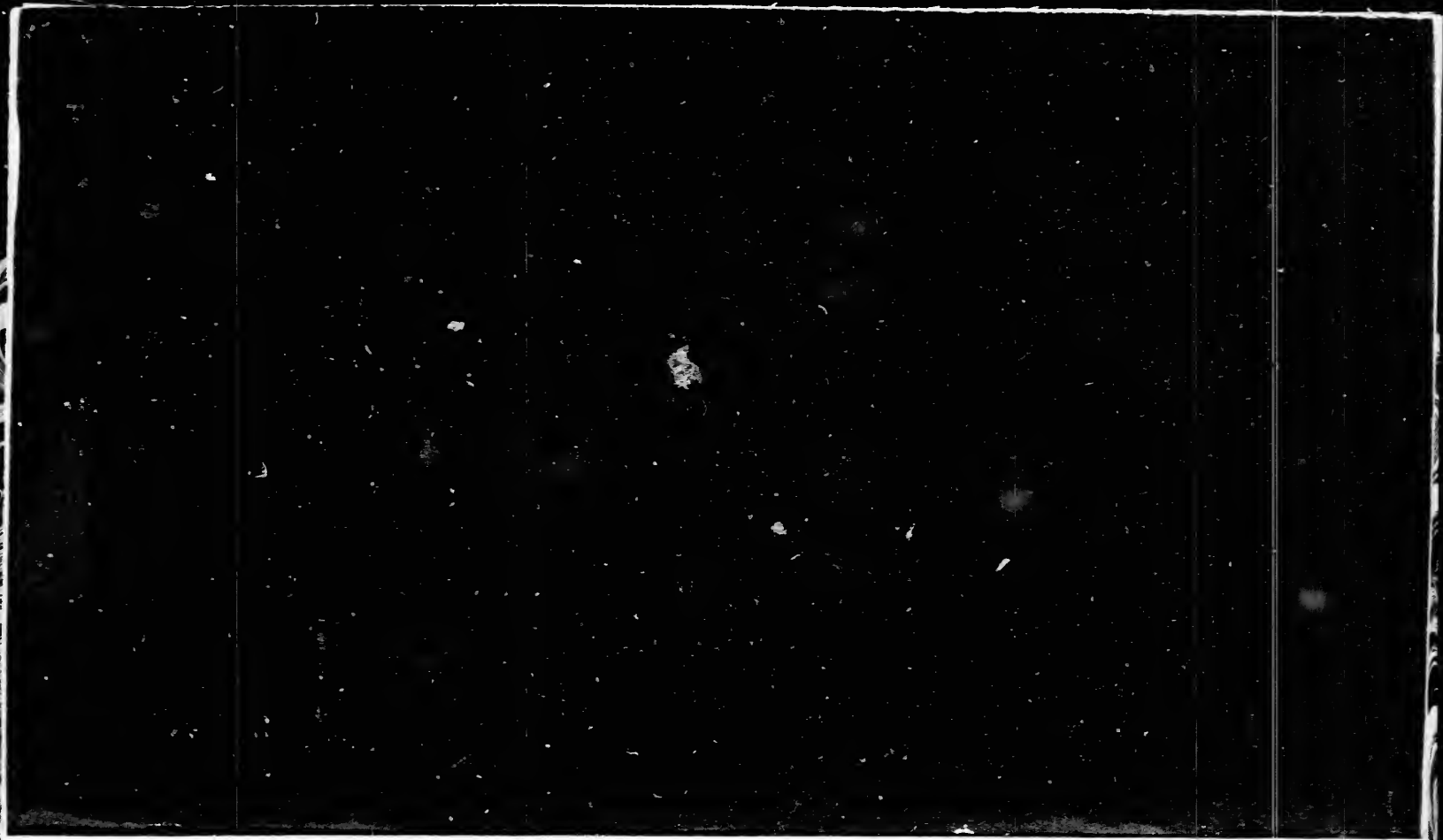

REMARKS

ON THE

PROPOSED ABOLITION

OF THE

COURT OF CHANCERY.

FROM THE COLUMNS OF THE CHRONICLE AND NEWS.

"*Audi Alteram Partem.*"

KINGSTON.

1851.

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PREFACE.

In offering the following remarks to the public in the present shape, the writer is not induced by any idea that they possess in themselves any merit that entitles them to much favor—for he does not suppose that they contain anything that was not before known to the well informed part of the community;—but whether known or not, there are in them many facts which might have been and were not urged on the representatives of the people when the subject was before the House of Assembly. The amount of ignorance betrayed by those who attacked, and the very weak defence offered by those who defended the Court as now constituted, ought to be quite a sufficient excuse for the humblest pen endeavoring to disseminate some information upon the subject. Whether any arguments contained in these few pages are at all entitled to weigh with the public in deciding on a question which will doubtlessly be brought before them at the coming election, the writer is content to leave to the judgment of that public; he has, however, been careful in obtaining, from what he deems reliable sources, the facts that he lays before his readers; and if the conclusion he arrives at from those facts is not a correct one, he nevertheless considers that he has attempted a laudable task in collecting those facts in the shape he now submits them, to enable his readers to draw from them such conclusions as they may deem they warrant. Limited space, haste, and the interruption of numerous engagements, must be his excuse for many errors in the execution of that task, which he sincerely regrets had not fallen to better and more competent hands to discharge.

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COURT OF CHANCERY.

We have given in our columns to-day the report of the debate on this important subject—for important we deem it in considering the results to which it might and may yet lead, though very unimportant and unsatisfactory in the amount of information it affords the public, and the acquaintance the parties to it displayed with the subject under discussion.

We candidly confess that we look upon it as a most reckless and ill-considered attempt on the part of the restless mortal who introduced it, to interfere unnecessarily with the administration of the laws of the land. We forbear for the present to remark upon the part taken by those who voted for the present motion, after having aided in establishing the Court as now constituted, or of those who would pander to popular prejudice and make political capital out of this question, without much regard to its real merits. We propose to discuss it as a question of deep interest to the public, without regard to party politics. We care not now who introduced the system, if it be but a good one: we heed not now who sustains it, if we are convinced it is a bad one. Let us, then, exercise a little patient inquiry before we abolish at one fell swoop what has cost no little labor, time and expense, to establish.

The advocates of the abolition of the Court of Chancery propose to vest in the Common Law Judges of the Province an equitable jurisdiction, and to do away altogether with the Court of Chancery as a separate tribunal. We would ask, first, is such a change desirable? and why? and next, is it practicable,

and are the supposed advantages to be derived from the change at all commensurate with the risk attendant on hasty interference with an established system? We are convinced that the subject is not fairly understood by that portion of the public for whom we write; and it will therefore not be considered amiss if we go back a little to consider what perhaps we might fairly assume—the necessity of an equitable jurisdiction vested in some competent tribunal; next, the establishment of a Court of Chancery in this Province—its progress, working and abuses—its reorganization, the recent changes and their effects, with the present practice; and having done this, with an earnest endeavor to

"Nothing extenuate or set down aught in malice,"

we shall contentedly leave it to those who may favor these remarks with a perusal to answer the above queries for themselves.

When the present province of Canada West was empowered to make its own laws, its first act was to enact that the then existing Common Law and Statute Law of England should become the law of this Province; but it was not then considered necessary to establish a Court of Equity, the transactions of a community then in its infancy perhaps not being found sufficiently complicated to need it; but as increasing wealth, numbers, and refinement, rendered more intricate the dealings between man and man, the want of an equitable tribunal became sensibly felt. It may be considered that the want could then have been supplied by vesting in the Common Law Courts equitable powers—by deciding law-suits on equitable principles, and creating a mixed system of equity and law suited to the necessities of the country; but such an idea can only be entertained by those who give to the word equity the meaning attached to it in ordinary parlance, as equivalent to universal or natural justice, and as such, distinguished from law. In the sense in which they receive it, equity was already and still is combined with law, and guided its decisions. To have blended law with equity, in its technical sense, would have

involved a codification of the whole law, which, with all the recklessness that has distinguished Canadian legislation in questions of jurisprudence, was an undertaking no one had the temerity to attempt. It is not, as some suppose, that the decisions of a Court of Chancery are guided more by the principles of natural and universal justice, and those of Courts of Law by rules rigid, severe and uncompromising, that forms the distinguishing features between the two Courts, for no such distinction in reality exists; but every one must be aware that in the varied and multifarious dealings of mankind, and the rights that arise between parties, no rule of general and universal application can be so framed as not in individual instances to work a hardship, admit of evasion, or fail to do justice. In such instances equity (in its technical sense) averts the threatened wrong; for "it has jurisdiction in cases of rights recognized and protected by the municipal jurisprudence, where a plain, adequate and complete remedy cannot be had in the courts of common law." To afford relief where the powers of a Court of Law were not sufficient; to protect property, the subject of litigation; to enforce contracts binding in conscience or where damages at law would not afford compensation; to prevent mere legal rights being unjustly exercised; to compel discovery; to enforce trusts; to prevent multiplicity of suits; to protect infants and lunatics—were some, but not all, of the objects for which it was found necessary to establish a Court of Chancery. Accordingly, in 1837, an Act was passed for its creation, which introduced all the expensive and cumbrous machinery of the English court as the rules of practice. This Court became, in the course of a few years, deservedly unpopular: a course and system of practice which had gradually grown up in England, where the subject-matter of dispute was in most cases of great value—where the litigants were wealthy, and more confined to those classes whose education, judgment, and knowledge, would prevent them appealing to a court of justice except in extreme cases, was itself altogether unsuited to the wants of a youthful community. But few understood

its proceedings. The head of the Court was wanting in energy, if not in capacity, for the duties of his position; and the business being in the hands of a few, delays vexatious and harassing to suitors, soon began to create dissatisfaction; the expense was ruinous; and the relief, when granted, often affected the wealthiest and most influential members of society, whose former speculations did not on all occasions bear strict investigation; so that even the good it did by no means lessened the dissatisfaction that these indignant but not innocent sufferers by its decrees took pains to spread. That this one cause of the outcry against the Court is by no means imaginary, could be readily shown by a comparison of the names of its present opponents with names of the cases on the records of the Court. The causes of complaint, real and alleged, were numerous and great, and created a prejudice which the most extensive reform has as yet failed to remove.

About ten years after the creation of the Court, the necessity for its reform became strongly felt, and representations of that necessity were made by the profession of which the supporters of Mr Mackenzie's measure are members, and in which they joined. It was easier, however, to cry out for reform than to point out in what manner it was to be effected. There were then no means which in that particular instance could be made available of removing the head of the Court from his seat, however unanimous public opinion was as to the policy of such removal. It was not easy to find any one fitted to discharge with credit to himself and advantage to the public, those high duties that would devolve on whomsoever might be called on to succeed to this office. Under these circumstances, the ministry (whose measures in general it is well known we are not too apt to admire) adopted the only course which we think was open to them, and established the foundation of the present Court. In considering the propriety of that act, the questions that arise are whether any sufficient necessity existed for putting the country to the expense of providing for two more

Judges, and whether the selection of such Judges was a judicious one.

We will take up the last of these first, and merely say that the two leading and best members of the Equity bar were selected to bear judicial honors. Their fitness to acquit themselves well and honorably in their new calling is not denied even by the advocates of the proposed change; the political enemies of Mr Blake all admit his talents, abilities and learning. The shortness of his political existence gave some handle to the outcry that the appointment was made to provide for him—that it was in fact a political job. We were never an ardent admirer of Mr Blake's political career, but we think Mr Hincks did him but justice when he defended him from this charge; and we know that as far as emolument is concerned, he was receiving from his practice as large an income as his salary as Chancellor. Where else, indeed, could the choice have fallen? Colonel Prince, it is true, in Thursday's debate said there were other men in the House equally well fitted for the Chancellorship: the gallant Colonel, who also stated that he only supported the change in 1849 from fear of the bayonets with which the House was surrounded, was wrong. We need not disguise, for it is very generally understood, that he alluded to John Hillyard Cameron. With every respect for the abilities and acquirements of the learned gentleman, we repeat that the member for Essex was wrong. Mr Cameron was not, is not, and probably never will be, equally well fitted with Mr Blake for an Equity Judge; he has not, we believe, made that branch of the profession his study, or ever distinguished himself at the Equity bar. The circumstances of the cases justified the choice of Mr Blake; the result has proved that choice a good one; and with no very warm feeling either personal or political for the learned Chancellor, we feel that on no one else could the choice have fallen. So much for the Judges themselves. Let us turn to the other part of the subject, the necessity for three Judges at all.

As a general principle, we are willing to concede that the

business of a Court of Equity can be conducted equally well by one Judge as by three; nay more, we even believe that the nature of the questions upon which the head of the Court of Chancery is called on to adjudicate is such as are perhaps better decided by one mind. But apart from the difficulty before alluded to, of substituting a new Judge in the place of the old one, it was well understood at the time, that the new Court would be engaged on other matters than the ordinary routine duties usually devolving on it, and that a complete reorganization, and an extensive and comprehensive reform in its pleadings and practice, was contemplated. To effect this, the aid of the extra Judges would of course be very desirable, if not altogether necessary. But the chief and most important object of the appointment of three Judges, and that which at the time was dwelt on by the advocates of the measure, was the formation of an efficient Court of Appeal, and the rendering unnecessary the ruinously expensive appeals to the Queen in Council. That this subject, which was then looked on as all important, has been attained, is not attempted to be denied; and we are at a loss to conjecture what substitute for the present Court of Appeal, the supporters of Mr Mackenzie's resolutions intend to offer. Again, one of the leading features in the reform of the practice then contemplated, and which Mr Baldwin stated from his place in the House is about to be carried into effect, was in the method of taking evidence. Where formerly it was taken down in writing, in answer to written interrogatories filed and returned by the Examiner to the Court, it was proposed that witnesses should be examined *viva voce* before the Court. That this change would entail great additional work upon the Judges must be readily apparent. If, as Mr Baldwin said, the intention is that they are to go on circuit for the purpose of taking evidence (and it may be also the hearing causes in outer districts), then the necessity for more than one Judge becomes imperative, as one must always be at the seat of the Court. How far these contemplated changes have already been carried out, will be considered hereafter.

However opinions may differ as to the number of Judges required, it seems clear to us that the reform which was so loudly called for, could not have been attained without the appointment of the present number; and we look on it that no fair comparison can be made with the Court in England in this respect, as the difference in the amount of business is not so great as might be supposed from the difference in the population of England and this Province, owing, probably, to all classes here being engaged in business, or owning property and consequently liable to be engaged in litigation. Moreover, it is one of the crying causes of complaint in England that the business is always in arrear; and it was a desideratum to avoid giving the same grounds of complaint here. Needlessly or not (but needfully we conceive, as far as we can venture an opinion), three Judges were appointed, and provision for the increased expenditure created by their appointment was made by the funding of all fees theretofore received by all officers of the Court, and the payment to them of fixed salaries, less than the fees had amounted to. As long, therefore, as the fee-fund amounts to sufficient to pay the salaries of the extra Judges, which it probably does (in the absence of statistics we cannot state positively), the burden falls on the suitors and not on the public generally. Whether this is a just arrangement, and whether these fees, which are now high and form a heavy tax on the suitor and the practitioner, may not be advantageously reduced, is perhaps worthy of consideration, but is foreign to our present purpose.

It behooves us next to inquire whether the promised reformation has been or is likely to be accomplished; and if not, whether the plan suggested by Mr Mackenzie is calculated to insure it.

A proportion (but not so large an one as is generally supposed) of the suits instituted in Chancery is for the foreclosure or redemption of mortgages: it was contended that these at least could be more expeditiously and less expensively conducted in Common Law Courts. We presume the speakers must have

forgotten at the moment that the present practice enables a plaintiff in Chancery seeking foreclosure or redemption to obtain a decree (when, as usually happens in such cases, no defence is set up) in fourteen days after his bill is filed, and this at a cost of about three pounds: a reference is at once made to a Master to calculate the amount due on the mortgage, and the usual indulgence of six months' time to redeem being extended to the defendant, the plaintiff obtains his money or an absolute title to the lands on which it is secured at the end of that period without further expense. We should suppose it to be next to impossible to invent any practice more speedy and inexpensive than this. But it is not to such suits alone that this new practice is applicable, but it extends to all the following cases:

"1. A creditor upon the estate of any deceased person seeking payment of his debt.

"2. A legatee under the will of any deceased person seeking payment or delivery of his legacy.

"3. A residuary legatee, or one of the residuary legatees of any deceased person, seeking an account of the residue and payment or appropriation of his share therein.

"4. The person or any of the persons entitled to the personal estate of any person who may have died intestate, and seeking an account of such personal estate, and payment of his share thereof.

"5. An executor or administrator of any deceased person seeking to have the personal estate of such deceased person administered under the direction of the Court.

"6. A legal or equitable mortgagee, or judgment creditor, having duly registered his judgment, or a person entitled to a lien for security for a debt, seeking foreclosure or sale, or otherwise, to enforce his security.

"7. A person entitled to redeem any legal or equitable mortgage, or any charge or lien seeking to redeem the same.

"8. A person entitled to an account of the dealings and transactions of a partnership dissolved or expired, seeking such account.

"9. A person entitled to an equitable estate or interest, and seeking to use the name of his trustee in prosecuting an action for his own sole benefit.

"10. A person entitled to have a new trustee appointed in a case where there is no power in the instrument creating the trusts to appoint new trustees, or where the power cannot be exercised, and seeking to appoint a new trustee."

In all these instances, then, a summary reference can be applied for at any time after fourteen days from the commencement of the suit: such reference is made to the Master in the County in which it may be most convenient for the suitors to attend, and the Master settles the readiest way in which the evidence on points to be proved can be taken: in some instances affidavits can be used, or the oral testimony of witnesses given: provision is made to insure the admission of the execution of documents produced, and the party refusing to make such admission is saddled with the costs of proof: the Master reports to the Court the result of his labors, and if no appeal is made, decides according to his finding. In the debate in the House on Thursday the member for Frontenac complained that there was no finality attending the decisions of Masters in the country: he could scarcely be serious in even suggesting that their judgment should be final. An appeal from the Report can be made to the Court, as was formerly the case with respect to the Report of the Master of the Court at Toronto, but such appeal is attended with far less expense than the "exceptions" from the Master's Report before in use—the fee on argument 25s., with the notice of the appeal and reasons briefly stated forming the principal items of expense: if such appeal is not made within fourteen days, the Master's Report becomes absolute without any further steps being taken or costs incurred. It will be seen, then, that the list of cases in which this summary way of proceeding is adopted comprises all the ordinary circumstances under which equitable relief is usually sought: the expense attending them of course varies with the intricacy of the accounts to be taken before the Master. In ordinary foreclosures the costs will seldom exceed five pounds, and in every instance the amount will be less than in a trial by jury before the Courts of Superior Jurisdiction at Law: the time employed must also vary with the circumstances of the case; but the Court generally limits the time within which a Master must Report, and it lies with the litigant parties to push on the inquiry with due speed, the relief being at their own doors, and

the proceedings conducted under their own eyes. In few cases need more time be consumed than in ordinary law suits: there is no waiting for the Assizes—no delay until "Next Term"—no waiting for the Sheriff's return to writs—no advertising for a year under a fi fa against lands. In the cases enumerated the remedy is quicker and cheaper than at law.

But it is not alone in the above instances that important changes have been made: the system of taking evidence in *viva voce* examinations in open Court has been adopted in the Home District. The voluminous pleadings that helped to swell the expenses in former proceedings have been abolished, and a short and simple form substituted, and the costs generally reduced to a scale that barely affords a return for the labor and care necessary in the conduct of causes. The appointment of Deputy Registrars and Masters in the different counties throughout the Province has thrown open the practice to the members of the profession not residing in Toronto, and is calculated to bring the actual and beneficial working of the Court to every man's door, saving expensive journeys to Toronto, and enabling the suitor to have the business conducted under his own eye. This change will eventually prove of immense advantage to the public: that it has not done so already, and has not been taken advantage of more generally by the profession, is simply because it has been too recently made to be as yet fully understood and acted on.

It must not be supposed that these extensive reforms have been or could have been the work of a day. The present Chancellor took his seat in October 1849. In May 1850, a set of new Orders were issued, making numerous alterations in the practice, shortening the pleadings, abolishing written interrogatories, providing for the admission of the execution of documents, for the examination of parties to a suit, for immediate reference in foreclosure and redemption suits in the manner we have before mentioned, and lessening the costs and the delay in proceeding very materially. These improvements are now scarcely a year old. Before the more recent changes and

the creation of Deputy Registrars and Masters, it was necessary to procure an enactment authorizing their appointment. Such an Act was passed last Session, and in February 1851, a further set of Orders were issued, extending the operation of the Orders relating to foreclosure and redemption suits to all the cases enumerated in the list we have before given, and making still farther reduction in the costs, and facilitating the progress of causes; and since then a Master and Deputy Registrar (one party holding both offices) has been appointed in almost every county in the Province. The reform promised, and on the faith of which the advocates for the abolition of the Court say that they supported the measure for its reorganization, has, then, been completed about four months, and was made in about a year from the first appointment of three Judges. Considering that business was in arrear at the time of their taking their seats, and has greatly increased since, it can scarcely be pretended that an unnecessary length of time has been consumed over what must surely have required great attention and deliberation. Now it cannot, with any show of reason, be contended that these changes, whether good or bad, sufficient or insufficient for the removal of the causes of complaint which we admit to have formerly existed, can possibly be tested in the space of four months. Many of those voting with Mr Mackenzie are themselves lawyers practicing in outer districts: they are themselves scarcely aware of the changes that have taken place, and have not taken the pains to make themselves acquainted with the very simple system of practice necessary to enable them to conduct their own causes; but this is not likely to be the case long, and in the more populous counties (for instance in this city and at Hamilton) a large proportion of the business is even now conducted where it arises. In Toronto, practitioners who formerly confined themselves to the practice in Courts of Law are seen constantly in attendance at the Court of Chancery; and the array of counsel there, instead of those only whose practice was in the Court of Equity, now displays a full bar, comprising a large portion of the legal

talent of the city. The benefit of these changes will be daily more and more felt. The most tiresome and tedious proceedings in a Chancery suit occur in the Master's office; and it is usually there that the delay which has become proverbial occurs. This part of the cause is now conducted before the new Masters (except where it may be more conveniently done before the Master in Ordinary), and the suitor is at hand to supply instructions, information, and to watch its progress himself. To the Masters and Deputy Registrars is delegated in short all the jurisdiction which the Court can with safety place in their hands: their powers as Masters are judicial as well as ministerial; and a cheap and ready appeal lies from their decisions to the Court as we have stated above. Now the proposed resolution of the member for Haldimand is that the powers of the Court be vested in County Judges. What earthly difference does it make to the public whether the duties are discharged by the new Masters or by County Judges, as long as they are not taxed to pay the stipends? The County Judges in most instances would not be more, and in many instances would be less, competent for the efficient discharge of the duties of the office; and they have the duties of their own courts with an increased jurisdiction to discharge. The Masters and Deputy Registrars are paid by fees which were formerly paid to the officers of the Court at Toronto: out of these one-half is retained for their own salaries, and the other goes into the "fee-fund"; they are paid then by the suitors.

It is true that the arrangement as to those fees might perhaps be altered for the better, but that is a matter of detail which in no way affects the main question. If one-half of the fees is sufficient remuneration for their duties, then the fees should be lessened; if not, they should be allowed the whole.

There is no reason to suppose that if the business was done by the County Judges the fees would be less. With regard to this part of our subject, then, we cannot see that anything can be gained by transferring the exercise of the powers vested in the new Masters to the County Judges. We have spoken only

of the practice as it now exists; if the plan of going on circuit is carried out, suits would be conducted altogether in the counties where the parties to them reside.

The arguments in favor of the proposed measure are all based on facts as they existed before the remodelling of the Court, and either in ignorance or disregard of the reforms we have described. That the prejudice created by past abuses is strong we are aware, but that confidence in the present tribunal is daily increasing, is evident from the increased business occupying its attention; the matters adjudicated upon in open Court, of greater or less importance, average about one hundred cases a month, and are constantly becoming more numerous.

In conclusion, let us ask, what are the advantages which it is supposed may possibly be derived from the contemplated changes? There are six Common Law Judges in the Province—three in the Queen's Bench, and three in the Court of Common Pleas. It is well known that the Court of Queen's Bench is fully occupied; it is said that the Court of Common Pleas is not so—that may be an argument for abolishing *it*, but can scarcely be an argument in favor of abolishing the Court of Chancery. There are three Equity Judges, who are now pretty fully employed, and who are likely to have much greater demands on their time and exertions. It is proposed to get rid of these three Judges and give their work to the Judges of the Common Pleas, or of some other Law Courts. The reason of this is said to be numerous abuses in the Court of Equity—delay, expense, insufficient administration of its powers, &c., &c., &c. These abuses we have endeavored to show exist no longer. But did they, it seems a strange way of remedying them to transfer an equitable jurisdiction from those acquainted with the practice and principles of equity, to others ignorant of the details of the proceedings, and to whom the whole duties must be entirely new. What guarantee have we that the evils complained of will not exist still? Are the Judges of the Common Pleas more likely to dispense equity better, quicker or

cheaper than those in whom the power of doing so is now vested? Is it that equitable relief may be brought to every man's door? We have shown that under the present system, which is not yet fully developed, it is already done. The system of mingling law and equity in one Court is of doubtful practicability; it certainly cannot be a desideratum. In the United States its advantages have not yet been proved; in England and Ireland it has been condemned and abandoned. Is it then to save the salaries of the Judges? The expense ought to be a trifling consideration when the due and efficient administration of justice is in question. But it has not been shown by any one that nine Judges are on the whole too many for Canada—were they even so at this moment, the rapidly increasing population and business would render it worth while bearing the burden now, as they would soon be no longer too many. But it seems to be thought that by merely enacting that the Common Law Judges are to do the work of both Courts, that the whole system can be changed in a moment; the idea is absurd. It would take a great length of time to get the plan to work at all, if indeed it ever could be rendered practicable. It may be very well in theory, but its supporters would be sorely puzzled when they came to details. But do those who exclaim against £3,250 as being paid to Equity Judges, know the amount of interests involved in the cases on which these Judges adjudicate, and which they would so heedlessly jeopardize by interfering with the present Court? Hundreds of thousands of pounds in value are involved in the cases which come before them during the year. In a single office in fair practice we have been told that the suits defended or instituted, involve property or money to the amount of £200,000. But should we escape the payment of the £3,250, by abolishing the Court? Can the learned Judges who compose it, be deprived of their office and its emoluments, without pensioning them? Would such an act be right or just if it could be done? Shall we pay them their full salaries, and have their services, or two-thirds of those salaries and have them idle? Or, admitting

that despite of justice and right, the learned members of the Court can be deprived of their stipends and the amount saved to the country, will any one endowed with reason, who has any respect for the purity of the judicial tribunals, who has the least experience in the courts of justice, be found to advocate the abolition of a well constituted court for so paltry a consideration? Let judicious reform be exercised where it is needed; but it is easier to destroy than to create. Let those then beware who either from ignorance, recklessness, or for party purposes, would endeavor to foster an imaginary grievance that they may gain popularity by its pretended removal, even at the expense of interests which should be dear to every lover of justice.