DIARY FOR MARCH.

1. Wed. *St. David.* Last day for County Clerk to transmit to Chief Superintendent audited school account.
5. SUN. *2nd Sunday in Lent.*
7. Tues. *Shrove Tuesday.* Last day for notice of Trial for County Court, York.
12. SUN. *3rd Sunday in Lent.*
14. Tues. General Sessions and County Court Sittings in York.
17. Frid. *St. Patrick's Day.*
19. SUN. *4th Sunday in Lent.*
25. Sat. *Annunciation.*
26. SUN. *5th Sunday in Lent.*
31. Frid. Last day for Local Superintendent of Common Schools to complete first half-yearly visits to schools.

THE

Canada Law Journal.

MARCH, 1871.

ELECTION OF BENCHERS.

There are three prominent characteristics in mankind in the present age of the world. Firstly—Those who are so infatuated with the belief that nothing new can be and that everything old must be good, and so fearful of changes that they cannot tolerate any alteration in the present state of things. Secondly—Those who, when a change is from any reason or combination of circumstances rendered necessary or inevitable, are willing after a fair trial of the old machinery, by degrees, warily and carefully, to alter, rectify and remodel it; and lastly, those who, when there is some slight disarrangement in detail, some part inefficient or effete, with axe in hand, rush blindly at the machine, and after hewing it in pieces, endeavour out of the wreck to construct something which they imagine will be better than the old.

Of the first class there are but few, and though we may respect them for their large development of the organ of veneration, we cannot wish to see more of them than are necessary to act somewhat in the same way as fly wheel does in a steam engine.

The third class are at the other extreme, and unhappily rather numerous—of them beware, for their tendency is towards primeval chaos, disintegation and ruin.

Let not any of our readers now thoughtlessly exclaim that we are trenching on politics, of such matters we are profoundly ignorant, and though we have smelt the smell of it in this matter it is offensive to all those who wish the profession well; and we only allude to these peculiarities of human nature in so far as they affect the individual members of our honorable profession, which as a whole is, we fondly trust, composed of the second or moderate class we have above alluded to. There may of course be a few stray ones of the destructive class, but they are too few to be worth considering.

Certain changes have been made in the mode of appointing the governing body of our Law Society. Whether these changes have been brought about by the second or third class spoken of above, or by means of influences outside the Society, or a little of all three, it is not our present purpose to enquire; the fact may be accepted without further comment, except to keep in view that we have to do with a new state of things where moderation, caution, and mutual forbearance are essential to our future well-being. In other words, it now becomes our duty so to work the new Act respecting the appointment of the governing body of the Law Society, that such Society may hereafter receive the respect and confidence it has hitherto enjoyed; and we may at the same time express a hope that whatever our difficulties may be, it may derive from the new system an increase of vigor and activity.

In making the selection of Benchers it must never be forgotten, that to that body the Bar and the public have in a great measure to look for the maintenance of a high standard of professional feeling and professional morality, both in the admission of members and in the supervision of their conduct as practitioners.

To secure this the Benchers to be selected should be those who from their attainments, integrity, and position at the Bar, will command the respect and confidence as well of their brethren as of the public at large; and though younger blood may usefully be infused, age and experience are most important elements in the formation of a good Bench; and we speak not only of the experience arising from length of years, but also that which has been gained from a practical knowledge of the working of the Society in times past.

There are, we believe, seven gentlemen who are by virtue of the Statute *ex-officio* Benchers, having held the office of Attorney or Solicitor-General, viz:—Sir John A. Macdonald,

John Hillyard Cameron, John Sandfield Macdonald, Lewis Walbridge, James Patton, Jas. Cockburn and Albert N. Richards, but of these Mr. Cameron is the only one whose home is in Toronto; and this is important in considering where the Benchers are to come from. In distributing the thirty Elective Benchers between Toronto and the Country it would seem proper to give about one-half to Toronto; and a little reflection will shew that this number is not excessive, because, in the first place, although the Toronto Bar does not exceed one-third of the whole, yet the burden of the routine work of the Society must unavoidably fall, and always has fallen on Toronto men, and also because the preponderance of *ex-officio* Benchers from the Country will make the proportions almost equal. It must moreover be borne in mind that the Election is of Benchers to represent the Profession as a body, and not any particular town or place, and the object should therefore be, not to attempt to represent this and that locality, so much as to secure those who will be the right men in the right place.

Several prominent members of the Bar have taken the matter up in a very proper and professional spirit, and will endeavour if possible in their different localities to bring before their brethren a list of names which will be generally acceptable, and which is intended, to use the words of a circular emanating from the Hamilton Bar, "to bring before the profession generally a list which at all events shall have obtained the approval of a large number of members and yet shall leave every Barrister free to reject any name or all." It would be a great thing for the Bar to be able to say that they had elected their representatives at Convocation without any of those unseemly contests and squabbles that flow so naturally from elective institutions—a possible result which formed one of the great objections to the recent act.

The question as to whether County Judges and others, such as the Clerks of the Crown and Pleas in Toronto, the Master in Chancery and Referee in Chambers, and other Barristers who pay no bar fees, are eligible as Benchers, has been decided in the negative. The Secretary of the Law Society did not put their names on the list, thinking that as they did not pay these fees they were not eligible under section 11 of the Act. The matter was then brought before the scrutineers by one of the conductors of this Journal by way of appeal under section 12, but the scrutineers sustained the list as made out by the Secretary. We are sorry for this, as many of the persons who are thus held ineligible would make excellent Benchers, but whilst their services are lost for the present it may result in an amendment of the law whereby some of them may be appointed *ex officio* Benchers, and thus save the necessity of any election of those whose names, owing to the position they hold, it would not perhaps be pleasant to have on the lists as possible contestants.

The election about to take place is of vital moment to our future well-being, not only in respect of the internal management of the Society but because the election of a body of men who would not command general respect and confidence would be a dangerous weapon in the hands of those who might hereafter desire to throw open the Profession.

We have every reason to be proud of a Law Society second to none in the world. Let us heartily unite in striving if possible after a greater measure of success, for that country may well be happy that has an independent and honorable Bar, and a Bench beyond reproach.

PAYMENT OF EXECUTORS.

FIRST PAPER.

On the 1st September, 1858, the law came into force touching compensation to executors and others, which is now embodied in the Consolidated Statutes of Upper Canada, cap. 16, sec. 66. This section provides that the judge of any Surrogate Court may allow to the executor, or trustee, or administrator acting under will or letters of administration, a fair and reasonable allowance for his care, pains and trouble, and his time expended in or about the executorship, trusteeship, or administration of the estate and effects vested in him under any will or letters of administration, and in administering, disposing of and arranging and settling the same, and generally in arranging and settling the affairs of the estate, and therefor may make an order or orders from time to time, and the same shall be allowed to an executor, trustee or administrator in passing his accounts.

Prior to this enactment the English rule obtained in this Province, that in all matters of trust, or in the nature of a trust, whether testamentary or otherwise, the trustee was not

entitled to any remuneration whatsoever for his pains, trouble and personal services. There are some English cases to be found pointing in an opposite direction, such as *Marshall* v. *Holloway*, 2 Swanst. 452; *Ex. p. Fermor*, Jac. 404; *Newport* v. *Bury*, 23 Beav. 30. These have been usually considered as cases of special exception, but may perhaps be viewed as instances wherein the rule has been properly relaxed, on the ground that compensation had been intended.

The English Courts, however, did not consider the rule in question applicable to their Colonial possessions. In many cases touching both East and West Indian estates, a commission of five per cent. has been allowed to the Indian executor, upon passing his accounts in the English Courts: *Chetham* v. *Audley*, 4 Ves. 72, in which five per cent. was allowed upon the payments made on account of the estate: *Cockerell* v. *Barber*, 1 Sim. 23 *S. C. in appeal*, 2 Rus. 585, in which five per cent. was allowed on all assets *collected* by the executor in East India, including assets retained by him for a legacy to himself, not given to him as executor,

In *Matthews* v. *Bagshaw*, 14 Beav. 123, five per cent. was allowed on the gross receipts of the East Indian assets. There the Master of the Rolls laid it down, that by the custom of India, which the law of England will follow, Indian executors are entitled to five per cent. on the gross sum received by them. (A note to this case shews that this custom was abolished in 1849.) See also *Campbell* v. *Campbell*, 13 Sim. 168; and 2 *Y. & C.* 607. Similar allowances have been sanctioned as to West Indian estates on the ground among others that such was the constant course of practice in those colonies—a practice indeed in some of the islands which was recognized and regulated by the acts of colonial legislatures. See *Denton* v. *Davey*, 1 Moo. P. C. 15; *Chambers* v. *Goldwin*, 9 Ves. 254, 267. In this case it is said that the commission is the reward of personal care and attention, and if that care and attention are not administered, the unquestionable principle of the Court is that not being within the case, upon which the commission can be claimed, the executor is in the situation of a person entitled only to the commission actually paid to those who really managed the estate: *Forrest* v. *Elwes*, 2 Mer. 68.

The like principle of compensation to executors has been declared by the Legislatures of many of the States in the American Union. Thus for instance in New York State an Act was passed in 1817, declaring that in settling the accounts of guardians, executors and administrators, the Court of Chancery should make a reasonable allowance to them for their services over and above their expenses, to be fixed by a general rule of the Court in that behalf. Upon this the Chancellor passed a general order providing a scale of per-centages by way of commission, as follows:—For receiving and paying out money, five per cent. on all sums not exceeding $1,000; two and a half per cent. upon all sums between $1,000 and $5,000; and one per cent. for all above $5,000. The mode adopted of computing the allowance was to reckon two and a half, one and a quarter, or a half per cent., according to circumstances on the aggregate amount received; and the same in respect of the aggregate amount expended. Thus if $10,000 had been collected, the per centage on $1,000 would be $25, on 4,000 would be $50, and on $5,000 would be $25; total amount allowed, $100, and the same scale of allowances on the amount paid out. These regulations were afterwards changed upon legislative interference, and the rules in New York are now settled by the revised statutes of 1852, in which it is provided that "on the settlement of the account of an executor or administrator the Surrogate shall allow to him for his services, and if their be more than one, shall apportion among them, according to the services rendered by them respectively, over and above his or their expenses:—

"1. For receiving and paying out all sums of money not exceeding one thousand dollars at the rate of five dollars per cent.

"2. For receiving and paying any sums exceeding one thousand dollars and not amounting to five thousand dollars, at the rate of two dollars and fifty cents per cent.

"3. For all sums above five thousand dollars at the rate of one dollar per cent.; and in all cases such allowance shall be made for their actual and necessary expenses as shall appear just and reasonable."—*Rev. St. N. Y., Tit* 3, *Part II., Cap. VI., Sec.* 64.

The manner of estimating the allowance is, and always has been the same in the New York Courts—that is to say, full per-centages

are not reckoned both on the receipts and disbursements: one half commission is allowed on the amount received, and one half on the amount paid out. Their practice in ordinary cases is to reckon commission upon the aggregate amount of the receipts and expenditures for the whole period of accounting. Where however an account is taken with annual rests for the purpose of charging interest on the yearly balances, then the commission is computed upon the aggregate amount of receipts and disbursements during each year. —*Vanderheyden* v. *Vanderheyden*, 2 Paige, C. R. 287.

It may be noticed that these provisions and regulations of the New York law are objectionable in extending merely to the receipt and payment of money, and in not providing any allowances for care and trouble in the management of the estate. And apart from this consideration, many cases will occur in which the rate allowed may on the one hand prove inadequate, or on the other hand, exorbitant. It would seem the better course not to fix the remuneration by the terms of an inflexible tariff, which must be equally applied to all estates, however varied in their circumstances and however differing in the degrees of skill, care and responsibility, requisite on the part of the executors. In Canadian practice accordingly, the rate of compensation has been left to the judgment of the officer of the Court, who exercises his discretion upon a survey of all the special features of each case.

In our next paper we shall comment upon the scope of the Canadian Act, and collect the decisions thereupon.

LAW SOCIETY EXAMINATIONS.

HILARY TERM, 1870.

The examination papers of the students last Term shew, on the whole, a marked improvement over previous years. The Attorneys' examination was remarkably good, the first man being very near the maximum, and it may not be saying too much to attribute this improvement over former years to the present system of education, which is now beginning to bear fruit. The Law School and the intermediate examintions all tend in the same direction, and as time goes on the benefits will be more and more perceptible.

The following gentlemen were called to the Bar:

Messrs. Jas. J. Foy, Toronto; S. R. Clarke, Perth: (without oral) J. R. Cartwright, Kingston; J. F. Bain, Perth: W. W. Evatt, Port Hope; J. G. Ridout, Toronto; W. Boggs, Cobourg; G. L. Tizard, Toronto; G. M. Cox.

And the following were admitted to practise as Attorneys:

Messrs. J. Muir, Kingston; J. J. Foy, Toronto; J. Akers, Toronto; J. Taylor, London; J. F. Bain, Perth; J. Masson; W. H. Bartram; D. McGibbon, Toronto; A. Lindsay, Toronto; J. G. Ridout, Toronto; W. W. Evatt, Port Hope; G. L. Tizard, Toronto; G. E. Corbould, Toronto; J. A. Gemmell, Ottawa; J. G. Hall, Port Hope; W. F. Walker; R. H. Caddy; C. C. Backhouse; G. M. Cox.

The intermediate examinations were also exceedingly good, as will be seen from the following lists. The maximum number of marks both in the third and fourth years was 240. The successful candidates in the third year were seventeen in number out of twenty who went up. We give the names of those who made over two-thirds: Biggar, 224; Smith, 216; McKenzie, 203; Kingsford, 180; Hall, 175; Macdonald, 168; McQuesten, 167; McMillan, 162; Ball, 161.

It is worthy of remark that the first seven of these, with the exception of Mr. Hall, are University men. Let not therefore those who can in any way afford the expense of a University education imagine that it is not without its benefits, even in connection with the study of the law. It is not however our purpose at present to dilate upon the advantages of a University course, but the profession will be none the worse for being recruited mainly from those who have received the most liberal education that the country can offerd.

The gentlemen who head this list, and Mr. White, of the fourth year, could scarcely have done better. We notice also that number six on the list in the third year seems determined to follow in the footsteps of his talented and learned father the Minister of Justice, for he takes a very good place, considering that that part of the time which would have been most valuable to him for reading was devoted to working his way to Manitoba and back as a volunteer in the Red River expedition.

In the fourth year Mr. White, who is also a University man, is only one mark behind Mr. Biggar. He makes 223; Ritchie, 213; Bowes, 195; Bleecker, 193; Akers, 186; Burritt, 184; McDonell, 182; Strathy, 166;

and Platt, 163. These are very good papers, better on the average than the third year, though of course this is only as it should have been. In this year twenty-two students went up, of whom only four were rejected.

ILLNESS OF THE CHANCELLOR.

We are glad to learn that Mr. Spragge is slowly recovering from the alarming illness which for some time cast a gloom over Osgoode Hall. At one time fears were entertained for his life, but there has been a great change for the better, and there is a good prospect of his being spared to the country for many years to come; he must, however, be very careful not to return to his duties too soon. He has never spared himself, and for this reason, if for none other, he may feel assured that a little extra caution now will be more acceptable to his brother judges, the profession, and the public, however much they may feel the loss of his services, than a hurried rest and a speedy return to work.

Our readers in the Counties of Elgin and Oxford may be glad to know that Mr. S. B. Newcomb, who studied law in the former County, and practised as a barrister at Ingersoll for some years, and who went to Austin, Texas, about twelve months ago, after having been admitted to the Bar of that State, has been recently raised to the Bench of the El Paso District. If the objectionable system of electing Judges by the direct voice of the people was in force there, this would be no compliment, but we understand the appointment is still made on the ground of merit alone. We cut the following from a paper published at Austin:

"Hon. S. B. Newcomb, of Austin, has been appointed Judge of the Twenty-fifth Judicial District. Mr. Newcomb has taken the degree of barrister-at-law in Canada, where he practised his profession for several years. He is a member of the bar of the State of Ohio, as well as of our own State. We congratulate the El Paso bar on their good fortune. The vacancy made by the sudden and cruel death of Judge Clarke, has been filled satisfactorily and ably by the appointment of a gentleman of energy, firmness and courage, of advanced political views, and a mind trained to legal pursuits by the habits of years. We understand that this appointment passed the Senate almost without opposition."

ACTS OF LAST SESSION.

The Bills that were passed during the last Session of the Ontario Legislature received the Royal assent on the 15th Feburary last. The following are those of general interest to the professional reader with their numbers as they appear in the list published in the *Gazette*:—

8. *An Act* to make valid certain Commissions for taking affidavits issued by the Court of Queen's Bench.

This Act refers to some invalid commissions issued under an Act of Upper Canada in the second year of George IV., without the seal of the Court.

11. *An Act* to alter the names of the Superior Courts in Ontario.

This Act we publish in this number.

14. *An Act* to confirm the deed for the distribution and settlement of the estate of the Honourable George Jervis Goodhue, deceased.

We have incidentally referred to this, and to the Spragge Will Act, and to the Caverno Act, as measures of a most objectionable nature, and may refer to the subject hereafter at greater length. One result of these Acts will be seen by looking at Act No. 95 *infra*.

17. *An Act* respecting Affidavits, Declarations and Affirmations, made out of the Province for use therein.

We publish this in another page of this number.

27. *An Act* to empower the trustees under the will of the late Joseph Bitterman Spragge to sell certain lands in the township of Blenheim and County of Oxford.

We have referred to this under No. 14.

33. *An Act* respecting Commissioners of Police.

The purport of this Act appears in the preamble, which recites that by 31 Vic., cap. 73rd, the Governor-General in Council is authorized to appoint one or more fit and proper persons to be and act as a Commissioner or Commissioners of Police within one or more of the Provinces of Canada; and it is desirable and expedient the better to enable such Commissioner or Commissioners of Police so appointed to execute the Criminal Laws of the Dominion, that they should have proper criminal jurisdiction granted to them within this Province, &c.

48. *An Act* to amend Chapter Eighty Five of the Consolidated Statutes for Upper Canada intituled. "An Act respecting the conveyance of Real Estate by Married Women," and the Act passed in the thirty second year of the reign of Her Majesty, chapter nine, intituled,, "An Act to amend the Registry Act, and to further provide as to the certificates of married women, touching their consent as to the execution of deeds of conveyance.

This Act will be found on another page.

50. *An Act* to make the Benchers of the Law Society of Ontario elective by the Bar thereof.

We have referred to this Act on several occasions, and our readers are doubtless familiar with its provisions (*ante* pp. 3, 32). All members of the Bar who are not in default as to their Bar fees are eligible. The list is to be prepared by the Secretary on or before the 15th March, and the same is to be subject to inspection, correction and revision until the 1st April. The first election is to be on Thursday, the 6th April. The mode of voting, as provided by the Act, is set out on page 32 *ante*. The voting list required by the Act is as follows:—

Law Society Election, 18 .

I, —— ——, of the ————, in the county of ———, Barrister-at-Law, do hereby declare—

1. That the signature affixed hereto is my proper handwriting.

2. That I vote for the following persons as benchers of the Law Society:—

A. B., of the ———, in the county of ———

C. D., of the ———, in the county of ———, &c.

3. That I have signed no other voting paper at this election.

4. That this voting paper was executed on the day of the date thereof.

Witness, my hand, this ——— day of ———, A. D. 18 .

51. *An Act* to amend the Act to regulate the procedure of the Superior Courts of Common Law, and of the County Courts.

This Act, as amended in special Committee, was published in full in our last issue (page 33). The only alterations made since then are:—Section 3, in the fourth line from end, strike out "entered" and insert "entitled in such last mentioned Court." In 9th Section, fifth line, insert after "suit," "tendering themselves as witnesses," and in the next line after "necessary" insert "or he may instead require the party intending to give evidence for himself to be examined before his other witnesses." In 11th Section, sixth line from end, strike out "on any" and insert "any telegraph or," and in the next line after "office" insert "belonging to any such corporation and any such master, operator, or express agent." The following new sections have been added:—

Sec. 15. The several County Courts of this Province shall hold four terms in each year, to commence respectively on the first Mondays in the months of January, April, July and October in each year, and end on Saturday, of the same week; Provided always, it shall not be necessary for the Sheriff or his officers to attend the sittings of said Court in Term.

Sec. 16. The sittings of the said County Courts, for the trial of issues of fact and assessment of damages, shall be held semi-annually, to commence on the second Tuesday in the months of June and December in each year, except the County Court of the County of York, which last mentioned Court shall hold three such sittings in each year, to commence respectively on the second Tuesday in the months of March, June and December in each year.

Sec. 17. Sections two and three of the "Law Reform Act of 1868," are hereby repealed.

Sec. 18. Section seven of the "Law Reform Act of 1868," is hereby amended by substituting the word "June" for "July," in the tenth line of the said section seven.

Practitioners are warned that two days longer is required for services of papers when they are to be served on the Toronto agent of a country attorney. Readers would do well to note on their sheet almanacs the alterations made by the Act.

71. *An Act* to enable Sullivan Caverno to convey certain Lands in the County of Welland.

This we have referred to under number 14.

78. *An Act* to amend the Assessment Law.

We shall publish this in the next number of the *Local Courts' Gazette.*

80. *An Act* respecting the establishment of Registry Offices in Ridings, and to amend the Registration of Titles (Ontario) Act.

This Act was spoken of in our January issue (page 7). It gives power to the Lieut.-Governor in Council to establish a Registry Office in such city, junior county or riding, as he shall deem advisable, and he may order

the removal of any Registry Office from one place in a county to another. We trust these powers will be very sparingly exercised, and that the safety of titles and the convenience of the bulk of the profession will not be made subservient to the exigencies of party politics. Section 50 of 31 Vic., cap. 20, is amended so as to read as follows :

"Every notarial copy of any instrument executed in Quebec, the original of which is filed in any notarial office according to the law of Quebec, and which cannot therefore be produced in Ontario and every prothonotarial copy of any instrument executed in Quebec shall be received in lieu of and as *prima facie* evidence of the original instrument, and may be registered and treated under the Act for all purpose as if it were in fact the original instrument, and such notarial or prothonotarial copy shall be registered without any other or further proof of the execution of the same, or of the original thereof, with the seal of the notary or prothonotary attached."

82. *An Act* to amend an Act respecting the Courts of Error and Appeal, and to amend the Act intituled "An Act for quieting titles to Real Estate in Upper Canada.

This is a short but useful Act, which we publish in full elsewhere.

83. *An Act* to amend Chapter 52, 29 & 30 Vic., and Chapter 30, 31 Vic., relating to Municipal Institutions.

We shall publish this in the next issue of the *Local Courts' Gazette.*

90. *An Act* respecting the Court of Chancery.

This will be found in full on another page of this number.

Thomas Wardlaw Taylor, Esq., heretofore the Judge's Secretary, has been appointed "Referee in Chambers." We shall have occasion to speak of this Act and matters connected with it hereafter. When the item of $2,000 as salary to the Referee came up in the estimates, Mr. Blake moved in amendment "that the chief duties which may be performed by the Referee in Chambers are such as have heretofore been performed by, and form a part of the work of the Judges of the Court in Chancery; that the salaries of the Judges ought to be paid by Canada and not by Ontario; that Ontario has already burdened itself with the payment of $10,000 a year for additional remuneration of Judges of the Superior Courts, and that the said resolution be recommitted with instructions to strike out the provision whereby the further sum of $2,000 a year is made payable by Ontario for the salary of the Referee." On a party vote this amendment was lost and the item concurred in. The judges have promulgated some new orders with reference to this Act.

95. *An Act* to provide for the appointment of Judicial Officers to whom Estate Bills may be referred.

This is a very short Act contained in one clause, and provides that "the Lieutenant-Governor in Council may from time to time issue commissions to the Judges of the Superior Courts of Law and Equity, empowering them, or any two of them, to report, under the rules and orders of the Legislative Assembly, to the Assembly in respect to any estate bills, or petitions for estate bills, which may be submitted to the Assembly." The rules and orders referred to in this Act are as follows.

"From and after the appointment of Commissioners for the purpose, every Estate Bill, when read a first time, shall, without special reference, stand referred to the said Commissioners, for their Report, and a copy of such Bill, and of the petition on which the same is founded (to be furnished by the petitioner), shall be forthwith transmitted by the Clerk of Private Bills to the said Commissioners, or one of them, in order that they, or any two of them, may, after perusing the Bill, without requiring any proof of the allegations thereof, report to the House their opinion thereon, under their hands; and whether, presuming the allegations contained in the preamble to be proved to the satisfaction of the House, it is reasonable that such Bill do pass into a law, and whether the provisions thereof are proper for carrying its purposes into effect; and what alterations or amendments, if any, are necessary in the same; and, in the event of their approving the said Bill, they are to sign the same; and the said Report, with the said Bill and Petition, are to be transmitted by the said Commissioners to the Clerk of Private Bills; and the same are to be submitted to the Standing Committee on Private Bills, which is not to consider the said Bill before the delivery of the said Report, Bill and Petition, to the Chairman of the said Committee."

98. *An Act* relating to Unpatented Lands sold for taxes.

This will be published in the *Local Courts' Gazette.*

99. *An Act* to amend the Act chaptered 20 of 31 Vic., intituled, an Act respecting Registrars' Offices, and the Registration of Instruments relating to Lands in Ontario.

By this Act, every Deed executed prior to the passing of 31 Vic., cap. 20, affecting lands situate in more than one county, and of which Deed no memorial has been executed, may be recorded in any one of the counties in which some of the lands are situated, upon proof made in accordance with the said Act, and in the other counties by deposit of a copy of every such deed and proof certified as is provided with respect to powers of attorney in section 47 of the said Act.

101. *An Act* to facilitate the business of the Superior Courts.

This Act is comprised in one section and provides:—

"That it shall be lawful for the Chief Justice of Appeal, (if he shall find it convenient,) to sit in the Court of Queen's Bench, Chancery or Common Pleas, and for any one of the Judges of the said last mentioned three Courts, (if he shall find it convenient,) to sit in either of the said other Courts, upon the request of the Judges or Judge with or for whom he shall be so requested to sit; and the said Chief Justice or other Judge so requested shall while so sitting have all the powers and authority of a Judge of the Court in which he shall be so sitting."

One hundred and four Acts in all were assented to; a goodly array, certainly, as far as numbers are concerned, but the wisdom of some of them is more than questionable. The following are some of the Acts already referred to, and now published in advance of the volume in the hands of the Queen's Printer:—

An Act to alter the names of the Superior Courts in Ontario.

(Assented to 15th Feb. 1871.)

Whereas it is expedient to alter the names, &c. Therefore Her Majesty, &c., enacts as follows:—

1. The "Court of Queen's Bench for Upper Canada," shall, during the reign of a King be called "His Majesty's Court of King's Bench for Ontario," and during the reign of a Queen "Her Majesty's Court of Queen's Bench for Ontario."

2. "The Court of Common Pleas for Upper Canada," shall be called "The Court of Common Pleas for Ontario."

3. "The Court of Chancery for Upper Canada" shall be called "The Court of Chancery for Ontario."

4. Notwithstanding anything herein contained, no writ, process, or pleading, shall be held void or irregular, merely on account of the use of the old style of any of said Courts, but the same shall be as valid as if the proper style of such Court had been used.

5. The last preceding section of this Act shall be in force until the first day of January, in the year of our Lord one thousand eight hundred and seventy-two, and no longer, and after such time the same effect and no other shall be given to such misnomer as if such section had never been passed.

An Act respecting Affidavits, Declarations, and Affirmations made out of the Province of Ontario for use therein.

(Assented to 15th Feb. 1871.)

Her Majesty, &c., enacts as follows:—

1. [26 V., ch. 41, repealed except as to commissions issued and proceedings thereunder.]

2. [Lieutenant-Governor in Council may appoint commissioners for taking affidavits, etc., without Ontario, to be used in any court here.]

3. The commissioners so to be appointed shall be styled "Commissioners for taking affidavits in and for the Courts in Ontario."

4. Oaths, affidavits, affirmations or declarations administered, sworn, affirmed or made out of the Province of Ontario, before any commissioner authorized by the Lord Chancellor to administer oaths in Chancery in England, or before any notary public certified under his hand and official seal, or before the mayor or chief magistrate of any city, borough or town corporate in Great Britain or Ireland, or in any colony of Her Majesty without Canada, or in any foreign country, and certified under the common seal of such city, borough, or town corporate, or before a judge of any court of supreme jurisdiction in any colony without Canada belonging to the Crown of Great Britain, or any dependency thereof, or Consular Agent of Her Majesty exercising his functions in any foreign place, for the purposes of and in or concerning any cause, matter or thing depending or in any wise concerning any of the proceedings to be had in the said courts, shall be as valid and effectual and shall be of like force and effect to all intents and purposes as if such oath, affidavit, affirmation or declaration had been administered, sworn, affirmed or made in this Province before a commissioner for taking affidavits therein or other competent authority of the like nature.

5. Any document purporting to have affixed, impressed, or subscribed thereon or thereto the signature of any such commissioner, or the signature and official seal of any such notary-public, or the seal of the corporation, and the signature of any such mayor or chief magistrate as aforesaid, or the seal and sig-

nature of any such judge, consul, vice-consul, acting-consul, pro-consul, or consular agent in testimony of any such oath, affidavit, affirmation, or declaration having been administered, sworn, affirmed or made by or before him shall be admitted in evidence without proof of any such signature, or seal and signature, being the signature or the seal and signature of the person whose signature or seal and signature, the same purport to be, or of the official character of such person.

6. Any affidavit, declaration, or affirmation proving the execution of any deed, power of attorney, will or probate, or memorial thereof, or other instrument for the purpose of registration in this province, may be made before a commissioner appointed under this act, or other person authorized hereby to administer or take oaths, affidavits, declarations, and affirmations.

7. No informality in the heading, or other formal requisites to any affidavit, declaration, or affirmation, made or taken before any commissioner, or other person under this act, shall be any objection to its reception in evidence, if the court or judge before whom it is tendered think proper to receive it.

An Act respecting Appeals in certain cases to Courts of Error and Appeal.

(Assented to 15th Feb. 1781.)

Whereas it is expedient, &c.; Con. Stat. U. C. cap. 13 & 29 Vic. cap. 25; Therefore Her Majesty, &c., enacts as follows:—

1. That section twenty-four of said Statute shall be amended by striking out all after the word "appeal" in the fourth line of the said section to the end.

2. Section twenty-eight of the said Statute chaptered thirteen is amended, so as to read as follows: "An Appeal shall lie in all cases in which a Rule Nisi to quash a by-law of a Municipal Corporation in whole or in part has either been discharged or made absolute."

3. Section forty-six of the said Act chaptered twenty-five is hereby amended to read as follows:—

"An appeal shall lie from any order or decision of a judge under this Act to the full court, or to the Court of Error and Appeal, and also from any order or decision of the full court to the said Court of Error and Appeal, as in the case of orders, decrees, rules and judgments in suits.

4. All appeals under sections twenty-two, twenty-three and twenty-four of the said Statute shall be brought to a hearing within one year after the giving of the judgment, decision or rule appealed from, or within such further time as the Court of Error and appeal may allow.

An Act respecting the Court of Chancery.

Assented to 15th Feb., 1871.)

Whereas it is advisable to provide greater facilities for the transaction of business in the Court of Chancery, and to make various other provisions in respect to the said court: Therefore Her Majesty, &c., enacts as follows:—

1. The Lieutenant-Governor in Council may appoint an officer of the said court, to be called "Referee in Chambers," who shall perform the duties indicated in the next succeeding section of this Act, and to whom, as far as possible, shall be made all references to be conducted in Toronto, under the "Act for Quieting Titles to Real Estate in Upper Canada," and who, for the purpose of expediting business in the Master's office, shall take such references, and none other, as the Master in Ordinary shall certify that he is unable by reason of press of business, or otherwise, presently to proceed with, and who shall in addition perform such other duties of a ministerial nature as the judges of the said court may by any general order assign to him.

2. It shall be lawful for the said court to make and publish general orders for the following purposes:—

(1.) For empowering the said officer to do any such thing, and to transact any such business, and to exercise any such authority and jurisdiction in respect of the same as by virtue of any statute or custom, or by the practice of the said court, is now done, transacted or exercised by a judge of the said court sitting in chambers, and as shall be specified in any such order, except in matters relating to granting writs of Habeas Corpus, and adjudicating upon the return thereof, and to appeals and applications in the nature of appeals, and to proceedings under the thirty-third section of chapter twelve of the Consolidated Statutes for Upper Canada, or under sections five to eleven, inclusive, of the Act of the late Province of Canada, passed in the twenty-eighth year of the reign of Her present Majesty, and chaptered seventeen, and to applications for writs for arrest, and to applications for advice under the Trustee Acts, and to matters affecting the custody of children, and to matters under the first section of the Act passed in the twenty-eighth year of the reign of Her Majesty, chaptered seventeen, and to opposed applications for administration orders, and to opposed applications respecting the guardianship of the person or property of children: Provided always, that in case all the judges of the court are absent from the city of Toronto, such referee may adjourn any motion in chambers in respect to any of such excepted matters upon such terms as he may consider proper.

(2.) For conferring upon any of the local masters of the court all or any of the powers which the said court are hereinbefore authorized to confer upon the said referee in chambers, and to make such regulations as to filing and keeping records, and the transmission of the same, or copies thereof, to an officer of the court at Toronto, as to such court shall seem expedient.

3. Every order or decision made or given

under this Act by the said referee in chambers, or a local master, shall be as valid and binding on all parties concerned as if the same had been made or given by a judge sitting at chambers; Provided always, that it shall be lawful for any person affected by any order or decision of such officer, to appeal therefrom to a judge in chambers, within such time and in such manner as shall be appointed by any general orders to be made in that behalf.

4. The said Referee in Chambers shall not, nor shall the accountant of the said court, nor any clerk appointed under section sixteen of chapter twelve of the Consolidated Statutes for Upper Canada, take for his own benefit, directly or indirectly, any fee or emolument, save the salary to which he may be entitled by law; and all the fees received by or on account of such offices shall form part of the Consolidated Revenue Fund of this Province.

5. There shall be paid out of the Consolidated Revenue Fund of this Province the yearly sums following, as and for the salaries of the Master in Ordinary of the said court and of the said Referee in Chambers, that is to say: To the Master, three thousand dollars (in lieu of all sums heretofore directed to be paid); and to the said Referee in Chambers, two thousand dollars, free from all taxes and deductions whatever, and so in proportion for any broken period.

6. Any clerk of the Master in Ordinary shall, for the purposes of any proceedings directed by the court or the Master to be taken before him, have full power to administer oaths, to take affidavits, to receive affirmations, and to examine parties and witnesses, as the court or Master shall direct; and the said Referee in Chambers shall have like authority in all matters before him.

7. On the first day of March, 1871, all mortgages, stocks, funds, annuities and securities whatsoever, which shall then be standing in the name of the Registrar of the Court of Chancery, or shall be in the custody or power of said Registrar, as such Registrar, and in respect to his office, together with all the interest and estate of the said Registrar in the lands and premises embraced in such mortgages or other securities, shall become by force of this Act vested in the Accountant of the said court for the time being, as such Accountant, subject to the same trusts as they shall then respectively be subject to, and shall and may be proceeded on, by and in the name of the said Accountant, in right of his office, by any action or suit at law or in equity, or in any other manner, or may be assigned, transferred or discharged, as the same might have been proceeded on, assigned, transferred or discharged by or in the name of the said Registrar; and all such funds, stocks, securities and moneys as shall, on the said first day of March, be standing in the name of the said Registrar, as such Registrar, in the books of any bank or other body, politic or corporate, or company, shall on the said first day of March be carried by the proper officers to the credit of the said Accountant, in the books of the said bank or other body, politic or corporate, or company, in trust to attend the orders of the said court.

8. In all cases in which any interest in real or personal estate, effects or property, shall be vested in the Accountant for the time being of the Court of Chancery, as such Accountant and in respect of his office, all such real and personal estate, effects and property whatsoever, upon the death, resignation or removal from office of each and every Accountant of the said court from time to time, and as often as the case shall happen, and the appointment of a successor shall take place, shall, subject to the same trusts as the same were respectively subject to, vest in the succeeding Accountant by force of this Act; and shall and may be proceeded on by any action or suit at law or in equity, or in any other manner, or may be assigned, transferred or discharged in the name of such succeeding Accountant, as the same might have been proceeded on, assigned, transferred or discharged by or in the name or names of such Accountant so resigning, removed or dying, his heirs, executors or administrators.

9. And whereas doubts have been raised respecting the validity of certain proceedings in the said Court of Chancery, and it is advisable to remove the same, be it therefore enacted that all orders heretofore made, and proceedings had and taken in Chancery Chambers since the tenth day of September, one thousand eight hundred and sixty-six, shall be and the same are hereby declared to be as valid and effectual as if the same had been made, had or taken by a Judge of the said court, although there may have been no Judge actually sitting in chambers when the said orders were made or the said proceedings were had.

An Act to amend Chapter Eighty-five of the Consolidated Statutes for Upper Canada and the Act passed in the thirty-second year of the reign of Her Majesty, chaptered nine.

(Assented to 15th Feb. 1871.)

Whereas it is expedient to facilitate the taking the necessary examination of a married woman, as by law required, on executing a deed of lands and the granting the necessary certificate thereon: Therefore Her Majesty, &c., enacts as follows:—

1. Sections two, three and four of chapter eighty-five, of the Consolidated Statutes for Upper Canada, are hereby repealed, and sections two, three and four of this Act are inserted in lieu thereof.

2. In case such married woman executes such deed in the Province of Ontario, she shall execute the same in the presence of a Judge of one of the Courts of Queen's Bench, Common Pleas, or the Court of Chancery or of the Judge, Junior or Deputy Judge of the County

Court, or of a Notary Public for the Province of Ontario, or two Justices of the Peace for the county in which such married woman happens to be when the deed is executed, and any such Judge, Notary Public, or two Justices of the Peace shall examine such married woman apart from her husband, respecting her free and voluntary consent to convey her real estate as expressed in the deed, and if she gives her consent, such Judge or Justices, or Notary Public under his seal of office, shall on the day of execution by her of such deed certify on the back thereof to the following effect:

"I, (*or* we *inserting the name or names and "place of residence, &c.,*) do hereby certify "that on this —— day of —— A.D., at —— "in the County of ——, the within deed was "duly executed in my (*or* our) presence by "A. B., of —— wife of ——— therein named, "and that the said wife (*or* wives) of the said "(*insert name of husband or husbands*) at the "said time and place, being examined by me "(*or* us) apart from her (*or* their) husband "(*or* husbands), did give her (*or* their) con-"sent to convey her (*or* their) estate in the "lands mentioned in the said deed, freely and "voluntarily, and without coercion or fear of "coercion on the part of her (*or* their) hus-"band (*or* husbands), or of any other person "or persons whomsoever."

3. In case any such married woman executes any such deed in Great Britain or Ireland, or in any colony belonging to the Crown of Great Britain, out of Ontario, she shall do so in the presence of the Chief Justice, or a Judge of the Superior Court, or a Notary Public duly appointed, or of the mayor or chief magistrate of a city, borough or town corporate, or any person authorized by the laws of any such colony for that purpose, who shall examine such married woman apart from her husband, touching her consent in the matter, and certify on the back thereof to the effect, as by the second section of this Act is required.

4. In case any such married woman executes any such deed in any state or country not owing allegiance to the Crown of Great Britain, she shall do so in the presence of the governor or other chief executive officer, or the resident British Consul, or of a Judge of a Court of Record of such state or country, or of a Notary Public duly appointed, or of a mayor or chief magistrate of a city, borough, or town corporate in any such foreign country, who shall examine such married woman apart from her husband, touching her consent in the manner, and certify on the back thereof to the effect, as by the second clause of this Act is required; such certificate to be under the hand and the seal used in the office of the person or court by the person so making such examination; Provided always, that no party to any such deed, or engaged in the preparation thereof, either by himself, his partner or clerk, shall make the examination or grant the certificate required by any of the foregoing clauses under a penalty of four hundred dollars, to be recovered from him, her or them by any person suing therefor in any court of competent jurisdiction.

5. Sections one and two of the Act passed in the thirty-second year of the reign of Her Majesty, chaptered nine, are amended by expunging from section one the words: "any Judge or Justice of the Peace," and from section two the words "the Judge or Justice of the Peace therein mentioned," and inserting in lieu thereof in each of such sections the words "any of the parties entitled by law to take such examination."

6. The following shall be inserted as clause three of said last mentioned Act, and incorporated therewith: "All certificates of discharge of mortgage and the registering thereof, executed or registered previous to the passing of this Act, according to the terms thereof, shall be as valid and binding as if done since the passing hereof.

FUSION OF LAW AND EQUITY.

On the 18th day of September, 1867, a Royal Commission was issued to the following eminent men, Hugh McCalmont, Baron Cairns, a Judge of the Court of Appeal in Chancery (subsequently Lord Chancellor); Sir William Erle, Knight; Sir James Plaisted Wilde, Knight, Judge of the Court of Probate and Judge Ordinary for Divorce and Matrimonial Causes (now Baron Penzance); Sir William Page Wood, Knight, Vice-Chancellor (raised to the Peerage as Lord Hatherley upon being appointed Lord Chancellor in the place of Lord Cairns); Sir Colin Blackburn, Knight, one of the Justices of the Court of Queen's Bench; Sir Montague Edward Smith, Knight, one of the Justices of the Court of Common Pleas; Sir J. Burgess Karslake, Knight, Attorney-General; Sir Roundell Palmer, Knight; William Milbourne James, Esquire, Queen's Counsel, Vice-Chancellor of the County Palatine of Lancaster (subsequently a Vice-Chancellor, and now the Right Hon. Sir William Milbourne James, one of the Lords Justices of Appeal); John Richard Quain, Esquire, Queen's Counsel; Henry Cadogan Rothery, Registrar of the High Court of Admiralty of England; Acton Smee Ayrton, Esquire; George Ward Hunt, Esquire; Hugh Culling Eardley Childers, Esquire; John Hollams, Esquire; Francis Dobson Lowndes, Esquire. By a Royal Warrant, dated 22nd October, 1867, the Right Hon. Sir Robert Joseph Phillimore, Knight, Judge of the High ourt

of Admiralty; Sir George William Wilshere Bramwell, Knight, a Baron of the Court of Exchequer, and William Gandy Bateson, Esq.; and by a further warrant, dated 25th January, 1869, Sir Robert Porrett Collier, Knight, Attorney-General; and Sir John Duke Coleridge, Knight, Solicitor-General, were added to the Commission.

This Commission was appointed to make full enquiry into the operation and effect of the present constitution of the different Courts in England, and of the present separation and division of jurisdiction between the several Courts, as well as the arrangements for holding the Courts, and the distribution and transaction of business in them, with a view to ascertain whether any and what changes and improvements,—either by uniting and consolidating the said Courts or any of them, or by extending or altering the several jurisdictions, or assigning any matters or causes now within their respective cognizance to any other jurisdiction, or by altering the number of Judges in the said Courts, or any of them, or empowering one or more Judges in any of the said Courts to transact any kind of business now transacted by a greater number, or by altering the mode in which the business of the said Courts or any of them, or of the sittings and assizes, is now distributed or conducted, or otherwise,—may be advantageously made so as to provide for the more speedy, economical, and satisfactory dispatch of the judicial business now transacted by the same Courts, and at the sittings and assizes respectively, and further to make enquiry into the the laws relaing to jurors and trial by jury in general.

Thomas Joseph Bradshaw, Esquire, was appointed Secretary of the Commission.

On the 25th March, 1869, the following Report was presented.*

After reciting the Commission under which they acted the Report proceeds as follows:—

Introductory Observations.

In commencing the inquiry which we were directed by your Majesty to make, the first subject that naturally presented itself for consideration was the ancient division of the Courts, into the Courts of Common Law, and the Court of Chancery, founded on the well known distinction in our law between Common Law and Equity.

This distinction led to the establishment of two systems of Judicature, organized in different ways, and administering justice on different and sometimes opposite principles, using different methods of procedure, and applying different remedies. Large classes of rights, altogether ignored by the Courts of Common Law, were protected and enforced by the Court of Chancery, and recourse was had to the same Court for the purpose of obtaining a more adequate protection against the violation of Common Law rights than the Courts of Common Law were competent to afford. The Common Law Courts were confined by their system of procedure in most actions,—not brought for recovering the possession of land,—to giving judgment for debt or damages, a remedy which has been found to be totally insufficient for the adjustment of the complicated disputes of modern society. The procedure at Common Law was founded on the trial by jury, and was framed on the supposition that every issue of fact was capable of being tried in that way; but experience has shown that supposition to be erroneous. A large number of important cases frequently occur in the practice of the Common Law Courts which cannot be conveniently adapted to that mode of trial; and ultimately those cases either find their way into the Court of Chancery, or the suitors in the Courts of Common Law are obliged to have recourse to private arbitration in order to supply the defects of their inadequate procedure.

The evils of this double system of Judicature, and the confusion and conflict of jurisdiction to which it has led, have been long known and acknowledged.

The subject engaged the attention of the Commissioners appointed in 1851 to inquire into the constitution of the Court of Chancery. Those learned Commissioners, after pointing out some of the defects in the administration of justice arising out of the conflicting systems of procedure and modes of redress adopted by the Courts of Common Law and Equity respectively, state their opinion, that "a practical and effectual remedy for many of the evils in question may be found in such a transfer or blending of jurisdiction, coupled with such other practical amendments, as will render each Court competent to administer complete justice in the cases which fall under its cognizance."

In like manner the Commissioners appointed in 1850 to inquire into the constitution of the Common Law Courts make, in their second report, a very similar recommendation. They report that "it appeared to them that the Courts of Common Law, to be able satisfactorily to administer justice, ought to possess in all matters within their jurisdiction the power to give all the redress necessary to protect and vindicate Common Law rights, and to prevent wrongs, whether existing or likely to happen unless prevented;" and further that "a consolidation of all the ele-

* We are indebted to Mr. Snelling for a copy of this report.

ments of a complete remedy in the same Court was obviously desirable, not to say imperatively necessary, to the establishment of a consistent and rational system of procedure."

In consequence of these Reports several Acts of Parliament have been passed for the purpose of carrying out to a limited extent the recommendations of the Commissioners.

By virtue of these Acts the Court of Chancery is now, not only empowered, but bound to decide for itself all questions of Common Law without having recourse, as formerly, to the aid of a Common Law Court, whether such questions arise incidentally in the course of the suit, or constitute the foundation of a suit, in which a more effectual remedy is sought for the violation of a common law right, or a better protection against its violation than can be had at Common Law. The Court is further empowered to take evidence orally in open Court, and in certain cases to award damages for breaches of contract or wrongs as at Common Law; and Trial by Jury—the great distinctive feature of the Common Law,—has recently, for the first time, been introduced into the Court of Chancery.

On the other hand, the Courts of Common Law are now authorised to compel discovery in all cases, in which a Court of Equity would have enforced it in a suit instituted for the purpose. A limited power has been conferred on Courts of Common Law to grant injunctions, and to allow equitable defences to be pleaded, and in certain cases to grant relief from forfeitures. These changes, however, fall far short of the recommendations of the Common Law Commissioners, who in their final report expressed the opinion, that power should be conferred on the Common Law Courts "to give, in respect of rights there recognized, all the protection and redress which at present can be obtained in any jurisdiction."

The alterations, to which we have referred, have no doubt introduced considerable improvements into the procedure both of the Common Law and Equity Courts; but, after a careful consideration of the subject, and judging now with the advantage of many years experience of the practical working of the systems actually in force, we are of opinion that "the transfer or blending of jurisdiction" attempted to be carried out by recent Acts of Parliament, even if it had been adopted to the full extent recommended by the Commissioners, is not a sufficient or adequate remedy for the evils complained of, and would at best have mitigated, but not removed the most prominent of those evils.

The authority now possessed by the Court of Chancery to decide for itself all questions of Common Law has no doubt worked beneficially. But the mode of taking evidence orally before an examiner, instead of before the Judge who has to decide the case, has justly caused much dissatisfaction; and Trial by Jury—whether from the reluctance of the Judge or of the Counsel to adopt such an innovation, or from the complexity of the issues generally involved in the suit, or because the proceedings in Chancery do not give rise to so many conflicts of evidence as proceedings in other Courts,—has been attempted in comparatively few cases.

In the Common Law Courts the power to compel discovery has been extensively used, and has proved most salutary; but the jurisdiction conferred on those Courts to grant injunctions and to allow equitable defences to be pleaded has been so limited and restricted, —the former extending only to cases where there has been an actual violation of the right, and the latter being confined to those equitable defences where the Court of Chancery would have granted a perpetual and unconditional injunction,—that these remedies have not been of much practical use at Common Law, and suitors have consequently been obliged to resort to the Court of Chancery, as before, for the purpose of obtaining a complete remedy.

Much therefore of the old mischief still remains, notwithstanding the changes which have been introduced; and the Court of Chancery necessarily continues to exercise the jurisdiction of restraining actions at law on equitable grounds, and even claims to exercise that jurisdiction in cases where an equitable defence might be properly pleaded at Common Law.

It may be further observed, in illustration of the evils of the double procedure, that whenever a new class of business arises, such as the litigation arising out of railway and other joint stock companies, proceedings, frequently of an experimental character, are commenced both at Law and in Equity by different suitors, leading to the inconvenience of protracted litigation, and the danger of conflicting judgments. We may refer to the litigation lately pending between the sellers of railway shares and the jobbers on the Stock Exchange, by which the sellers sought to obtain an indemnity from the jobbers against calls. The litigation began in a Court of Common Law. A suit in Equity soon followed, by a different plaintiff against the same defendants, both suits asking for a similar redress. The Court of Common Law decided in favour of the plaintiff. The Court of Equity shortly after delivered judgment to the same effect. The defendants appealed in both suits; in the one case to the Exchequer Chamber, in the other to the Court of Appeal in Chancery. Both appeals were pending at the same time, but there was no official machinery by which the Judges of Appeal in Chancery and the Court of Exchequer Chamber could enter into communication with the view of arriving at a common result. The Court of Exchequer Chamber reversed the judgment of the Court below; the Court of Appeal in Chancery, acting independently of the Court of Exchequer Chamber, arrived at

the same conclusion, and about the same time delivered its judgment, reversing the decision of the Vice-Chancellor. The defendants were thus subjected to litigation (at the instance, no doubt, of different parties), carried on at the same time in different courts, and exposed to the risk of conflicting decisions, those courts operating under different forms of procedure, and being controlled by different Courts of Appeal.

The litigation arising out of joint stock companies has constituted a very large proportion of the business which has engaged the attention of courts of law and equity for some years. Directors of joint stock companies fill the double character of agents and trustees for the companies and shareholders; and the effect of their acts and representations has frequently been brought into question in both jurisdictions, and sometimes with opposite results. The expense thus needlessly incurred has been so great, and the perplexity thereby occasioned in the conduct of business so considerable, as to convince most persons, who have followed the development of this branch of the law, of the necessity that exists for a tribunal invested with full power of dealing with all the complicated rights and obligations springing out of such transactions, and of administering complete and appropriate relief, no matter whether the rights and obligations involved are what are called legal or equitable.

We may refer also to the present condition of the High Court of Admiralty. A conflict, bearing some analogy to that which has so long existed between the Court of Chancery and the Courts of Common Law, seems likely to arise, if it has not already arisen, between the latter Courts and the Court of Admiralty. From ancient times the Courts of Common Law exercised a jealous supervision over the jurisdiction of the Court of Admiralty, and by the issuing of frequent writs of prohibition took pains to confine the jurisdiction of that Court within the narrowest limits. The consequence was, that, except in time of war, when it sat as a Prize Court, there was very little business in the Court of Admiralty until its jurisdiction was extended by recent legislation. Now, however, by virtue of several Acts of Parliament, the first of which was passed so lately as 1840, but more especially by the Admiralty Court Act, 1861, the jurisdiction of the Court has been extended to a variety of cases, which had been theretofore considered as exclusively cognizable in Courts of Common Law. As the Court of Chancery, chiefly by means of its power of granting injunctions for threatened as well as actual injuries, has extended its jurisdiction over a large class of cases properly cognizable in Courts of Common Law, the Court of Admiralty, assisted by the recent legislation above mentioned, and enjoying the peculiar advantage of a Court enforcing the law of maritime lien by proceedings in rem, might be expected, if this system were continued, to extend its jurisdiction over many kinds of litigation relating to ships or cargoes, in respect of which the Courts of Common Law have a concurrent jurisdiction, but are not able to afford such convenient redress. The cause of this is manifestly the imperfection of the Common Law system, and the consequent necessity of seeking for a more complete remedy elsewhere.

Not only are the procedure of and the remedies administered by the Courts of Common Law and the Court of Admiralty different, but sometimes the redress to be obtained is regulated by different and conflicting principles. Thus in a collision suit the damages are, in some cases, assessed on one principle in a Court of Common Law, and on an entirely different principle in the Court of Admiralty. At Common Law, if both parties are found to be in fault, the plaintiff fails. In the Court of Admiralty, the plaintiff, under exactly similar circumstances, is entitled to recover half his damages from the defendant; and there being generally in such cases a cross suit, the defendant is also entitled to recover half his damages from the plaintiff This anomaly, if our recommendations are adopted, will require to be corrected by legislation.

The Court of Admiralty, even with the extended jurisdiction conferred on it by recent enactments, still labours under the same defect as the other courts. It cannot, in many cases, give a complete remedy; the suitor may obtain one portion of his redress in the Court of Admiralty, but he must go into a Court of Common Law, or it may be into the Court of Chancery, for the rest. The Court of Admiralty has jurisdiction over a claim for damage to cargo, where the owner is not domiciled in England, but it has no jurisdiction over the claim of the shipowner for the freight due in respect of the same cargo; the shipowner must proceed for that in a Court of Common Law. It seems plain that these are counter claims, which ought to be capable of being set off against each other in the same suit. In the same way, the jurisdiction of the Court of Admiralty over claims for necessaries supplied to a ship is restricted to the case of a foreign ship, and to that of a British ship where there is not any owner domiciled in England; but if it happens that for some other cause the ship is under arrest, or that the proceeds thereof are in Court, then the Court exercises jurisdiction over all claims for building, equipping, or repairing the ship. All these claims may at the same time be litigated by a different procedure in a Court of Common Law; and hence it may happen not unfrequently that litigation may be proceeding simultaneously in the Court of Admiralty and at Common Law for the adjustment of disputes arising out of the same transaction, between the same parties or those who are liable to indemnify them. The conflict of judicial decisions, which may be thus occasioned, is

made more perplexing, by the want of a Common Court of Appeal, as the appeal from the Court of Admiralty is to the Privy Council, and from the Common Law Courts to the Exchequer Chamber and the House of Lords.

[The state of the English County Courts is then referred to, as exhibiting the strange working of a system of separate jurisdictions even when exercised by the same Court.]

Constitution of the Supreme Court.

We are of opinion that the defects above adverted to cannot be completely remedied by any mere transfer or blending of jurisdiction between the Courts as at present constituted; and that the first step towards meeting and surmounting the evils complained of will be the consolidation of all the Superior Courts of Law and Equity, together with the Courts of Probate, Divorce, and Admiralty, into one Court, to be called "Her Majesty's Supreme Court," in which Court shall be vested all the jurisdiction which is now exerciseable by each and all the Courts so consolidated.

This consolidation would at once put an end to all conflicts of jurisdiction. No suitor could be defeated because he commenced his suit in the wrong Court, and sending the suitor from equity to law or from law to equity, to begin his suit over again in order to obtain redress, will be no longer possible.

The Supreme Court thus constituted would of course be divided into as many Chambers or Divisions as the nature and extent or the convenient despatch of business might require.

All suits, however, should be instituted in the Supreme Court, and not in any particular Chamber or Division of it; and each Chamber or Division should possess all the jurisdiction of the Supreme Court with respect to the subject-matter of the suit, and with respect to every defence which may be made thereto, whether on legal or equitable grounds, and should be enabled to grant such relief or to apply such remedy or combination of remedies as may be appropriate or necessary in order to do complete justice between the parties in the case before the Court, or, in other words, such remedies as all the present Courts combined have now jurisdiction to administer.

We consider it expedient, with a view to facilitate the transition from the old to the new system, and to make the proposed change at first as little inconvenient as possible, that the Courts of Chancery, Queen's Bench, Common Pleas, and Exchequer should for the present retain their distinctive titles, and should constitute so many Chambers or Divisions of the Supreme Court; and as regards the Courts of Admiralty, Divorce and Probate, we think it would be convenient that those Courts should be consolidated, and form one Chamber or Division of the Supreme Court.

We further recommend that in order to prepare for any changes that may hereafter be thought expedient in the constitution of these Chambers or Divisions of the Supreme Court, all future judicial and other appointments therein should be made subject to the possibility of such changes.

Between the several Chambers or Divisions of the Supreme Court so constituted, it would be necessary to make such a classification of business as might seem desirable with reference to the nature of the suits and the relief to be sought or administered therein, and the ordinary distribution of business among the different Chambers or Divisions should be regulated according to such classification. For the same reason which induces us to recommend the retention for the present of the distinctive titles of the different Courts in their new character, as so many divisions of the Supreme Court, we think that such classification should in the first instance be made on the principle of assigning as nearly as practicable to those Chambers or Divisions such suits as would now be commenced in the respective Courts as at present constituted; with power, however, to the Supreme Court to vary or alter this classification in such manner as may from time to time be deemed expedient.

It should further be competent for any Chamber or Division of the Supreme Court to order a suit to be transferred at any stage of its progress to any other Chamber or Division of the Court, if it appears that justice can thereby be more conveniently done in the suit; but except for the purpose of obtaining such transfer, it should not be competent for any party to object to the prosecution of any suit in the particular Chamber or Division in which it is being prosecuted, on the ground that it ought to have been brought or prosecuted in some other Chamber or Division of the Court. When such transfer has been made, the Chamber or Division, to which the suit has been so transferred, will take up the suit at the stage to which it had advanced in the first Chamber, and proceed thenceforward to dispose of it in the same manner as if it had been originally commenced in the Chamber or Division to which it was transferred.

From the consolidation of all the present Superior Courts into one Supreme Court, it follows, that all the Judges of those Courts will become Judges of the Supreme Court; and thus every Judge (with the exception of those who are to sit exclusively in the Appellate Court hereinafter recommended), though belonging to a particular Division, will be competent to sit in any other Division of the Court, whenever it may be found convenient for the administration of justice.

Here arises an important and difficult question, as to the number of Judges who should ordinarily sit in each Chamber or Division of the Supreme Court. Hitherto the constitution of the Court of Chancery and of the Courts of Common Law, in this respect, has been entirely different. Each division of the Court

of Chancery is presided over by a single Judge, who adjudicates on all matters as a Court of first instance, except in the few cases when he sits as a Court of Appeal from the County Courts. In like manner, a single Judge administers justice in the Courts of Probate, Divorce and Admiralty, respectively. On the other hand, in the sittings of the Courts of Common Law in banc, the Court is ordinarily constituted of four Judges. The matters adjudicated upon by the single Judge in the Court of Chancery are in many instances as important as the business transacted before the four Judges in the Courts of Common Law; so that there would seem to be either a want of power in the Court of Chancery, or an excess of power in the Courts of Common Law; but it must be borne in mind that a considerable proportion of the business of the Courts of Common Law is transacted by one of the Judges sitting at Chambers; much of the business of these Courts also consists of the review of trials which have taken place before a Judge and jury; they also review the decisions of the Judge sitting at Chambers; they are also empowered to decide various important matters, some of which involve questions of general public interest, on which their determination is in some cases final.

With a Court of Appeal such as we propose to recommend, common to all the divisions of the Supreme Court, constantly sitting, and easy of access, we think that matters of great importance may properly, as now in the Court of Chancery, be intrusted to the jurisdiction in the first instance of a single Judge; but, having regard to the principles which have guided us in our previous recommendations, and to the importance of avoiding any too violent transition from the modes of conducting judicial business to which the public have been accustomed, and in which they may be presumed to place confidence, we think it will be advisable to authorise a single Judge to exercise the jurisdiction of the Supreme Court in the despatch of all such business appropriated to the divisions of the Queen's Bench, Common Pleas and Exchequer, respectively, as by general orders, or by the special order of the Court, or the consent of the parties, may be remitted to him; and that all matters now disposed of in banco in those Courts shall be heard and determined by not more than three Judges. We also think that the Judges of each Division or Chamber in which there are several Judges should have power to sit in banco in two sub-divisions at the same time, with the assistance, whenever necessary, of a Judge or Judges from any other Division of the Court.

Procedure in the Supreme Court.

The next question that arises for consideration is that of the procedure to be adopted in the Supreme Court as above constituted. We can only give a sketch in this report of the leading principles of the system which we recommend, leaving for general orders, or for a code of procedure, as may appear most advisable, the fuller development and completion of the scheme proposed.

The present modes of procedure in the Court of Chancery, the Courts of Common Law, the Court of Admiralty, and the Courts of Probate and Divorce, are in many respects different; the forms of pleading are different, the modes of trial and of taking evidence are different, the nomenclature is different, the same instrument being called by a different name in different Courts; almost every step in the cause is different. Each Court is confined to its own forms of procedure. Nor is this difference due entirely to the different nature of the cases which the Courts are called upon to try; for often the same question has to be tried, and the same remedy sought, by a totally different method, according as the proceeding is in the Court of Chancery, the Courts of Common Law, or the Court of Admiralty. This variety in procedure was originally due to causes connected with the origin and history of the different jurisdictions, and it has been influenced in more recent times by the almost complete isolation of the several Courts, and by the circumstance that in the Courts of Common Law the ordinary rule and practice is to refer the decision of disputed questions of fact to a jury, without any appeal except by way of reference to a new jury; whilst in the Court of Chancery the judge ordinarily, in the Courts of Divorce and Probate frequently, and in the Court of Admiralty invariably decides all questions of fact and law, subject to appeal.

We recommend, that as much uniformity should be introduced into the procedure of all the Divisions of the Supreme Court as is consistent with the procedure in each Division appropriate to the nature of the cases, or classes of cases, which will be assigned to each; such uniformity would in our opinion be attended with the greatest advantages, and after a careful consideration of the subject, we see no insuperable difficulty in the way of its accomplishment.

Much may be done at the very commencement of a suit to prevent unnecessary litigation, delay and expense. In a considerable number of suits there is no substantial question as to the right of the plaintiff to at least some relief. Frequently the object of the defendant is to gain time; sometimes he only disputes part of the claim, or of the amount sought to be recovered. In other cases, such as administration suits, suits to take partnership accounts, suits for specific performance, and suits for foreclosure or redemption, it is often from the first known what order must be made upon the hearing of the cause. In many such suits, notwithstanding improvements recently introduced, the proceedings are still conducted as they are in suits involving a real question as to the plaintiff's right to

relief. Considerable delay is thus caused, and useless costs are incurred.

All suits, we think, should be commenced by a document to be called a Writ of Summons, and these writs of summons should be issued from one office. In all cases in which the plaintiff seeks to recover a money demand, whether founded upon a legal or equitable right, the practice established by the Common Law Procedure Act, 1852, should, we think, be adopted, and the writ should be specially endorsed with the amount sought to be recovered, and in default of appearance the plaintiff should be allowed to sign judgment for it. Further, in all cases in which a special endorsement has been made on a writ, and the defendant has appeared, the plaintiff should be entitled, on affidavit verifying the cause of action, and swearing that in his belief there is no defence, to take out a summons to show cause why he should not be at liberty to sign judgment; upon which summons such order may be made as the justice of the case may require.

In like manner, in cases of ordinary account, as in the case of a partnership or executorship, or ordinary trust account, where nothing more is required in the first instance than an account, the writ should be specially endorsed, and in default of appearance, or after appearance, unless the defendant shall satisfy a Judge that there is really some preliminary question to be tried, an order for the account, with all usual directions, should be forthwith made. The Judge should also be empowered at any time, on summary application in Chambers or elsewhere, to direct, if he think fit, any necessary inquiries or accounts, notwithstanding it may appear that there is some special or further relief sought, or some special matter to be tried, as to which it may be proper that the suit should proceed in the ordinary manner.

Pleadings.

When the Defendant enters an appearance, and the suit has to proceed further, the issues between the parties must be ascertained by pleading, or otherwise. The systems of pleading now in use, both at Common Law and in Equity, appear to us to be open to serious objections. Common Law pleadings are apt to be mixed averments of law and fact, varied and multiplied in form, and leading to a great number of useless issues, while the facts which lie behind them are seldom clearly discoverable. Equity pleadings, on the other hand, commonly take the form of a prolix narrative of the facts relied upon by the party, with copies or extracts of deeds, correspondence, and other documents, and other particulars of evidence, set forth at needless length. The best system would be one, which combined with comparative brevity of the simpler forms of Common Law pleading with the principle of stating, intelligibly and not technically, the substance of the facts relied upon as constituting the plaintiff's or the defendant's case, as distinguished from his evidence. It is upon this principle that most modern improvements of pleading have been founded, both in the United States and in our own colonies and Indian possessions, and in the practice recently settled for the Courts of Probate and Divorce.

We recommend that a short statement constructed on this principle, of the facts constituting the plaintiff's cause of complaint, not on oath, to be called the Declaration, should be delivered to the defendant. Thereupon the defendant should deliver to the plaintiff a short statement, not on oath, of the facts constituting the defence, to be called the Answer. When new facts are alleged in the Answer, the plaintiff should be at liberty to reply. The pleadings should not go beyond the Reply, save by special permission of a Judge; but the Judge should, at any stage of the proceedings, permit such amendment in or addition to the pleadings as he may think necessary for determining the real question or controversy between the parties, upon such terms, as to costs and otherwise, as he may think fit.

We think, that a defendant, having a right or claim against a plaintiff with reference to the subject matter of the suit, or arising out of the same transaction, which at present he cannot enforce without a separate or cross action or suit, should be at liberty to bring forward such right or claim by his Answer, which in that case should have the same effect as if it were a Declaration in a cross action or suit, so as to enable the Court or a Judge to pronounce a final judgment between the parties with respect both to the original and to the cross demand. The same principle might, we think, be extended to the recovery of other demands of the defendant, capable of being set off against the plaintiff's demand, when the balance is in favour of the defendant. But a Judge should be empowered, on application by the plaintiff before trial, to refuse permission to allow such cross right or claim to be brought forward, if he shall be of opinion that it cannot conveniently be adjudicated upon in the case to be tried.

We think also, that the Court should have power to direct that any person not originally a party to the suit, but who may have such an interest in the subject matter thereof as to make his presence necessary or expedient to enable the Court to do complete justice, should be summoned to attend the further proceedings, and be bound thereby; and that, with this view, the plaintiff should be at liberty to make any person, against whom he may conceive himself to be entitled to relief, a party defendant to the suit. And, on the other hand, that, where the defendant is or claims to be entitled to contribution or to indemnity or other relief over against any other person or persons, or where from any other cause it shall appear to the Court fit that a question in the suit should be determined, not only as between the plaintiff and defendant, but as

between the defendant and any other person, the Court should have power to make such order as may be proper for the purpose of having the question so determined.

We think, that either party should be at liberty to apply at any time, either before or after pleading, for such order as he may upon the admitted facts in the case be entitled to, without waiting for the determination of any other questions between the parties.

Mode of Trial.

With regard to the trial and determination of disputed questions of fact, the mode of trial varies according to the court in which the litigation happens to be pending, without any sufficient power of adaptation to the requirements of particular cases.

In the Court of Chancery, until recently, the Judge had no power to summon a jury, whatever might be the conflict of evidence or dispute as to the facts; all questions of fact as well as of law were generally decided by the Judge. In some cases it was the practice to send issues to be tried by a jury at Common Law. This course, however, was taken, not as a mode of trial, but merely for the assistance or information of the Court, which still reserved to itself the ultimate decision of the facts, and if dissatisfied with the first verdict might send the case before a second jury, or decide the facts according to its own view, and without regard to the verdict. Substantially the practice of the Court of Chancery remains unaltered; but there is now a power, which is rarely exercised, of summoning a jury, and the practice of sending issues to be tried at Common Law has become less frequent.

The Court of Admiralty, which decides for itself all questions of law and fact, may in special cases call in the assistance of nautical or mercantile assessors, but it has no power to summon a jury. The Court, however, by a recent statute, has power to direct any question of fact arising in a suit to be tried in a Court of Common Law, and, if it thinks fit, to order a new trial; but the verdict of the jury, when final, is conclusive upon the Court. This power, we understand, has been exercised in only one instance.

[The mode of trial in the Courts of Probate and Divorce is here spoken of.]

In the Courts of Common Law, a jury has always been regarded as the constitutional tribunal for trying issues of fact; and the theory is, that all such questions are fit to be tried in that way. It has, however, long been apparent, in the practice of the Courts of Common Law, that there are several classes of cases litigated in those Courts to which trial by jury is not adapted, and in which the parties are compelled—in many cases after they have incurred all the expenses of a trial—to resort to private arbitration. Until the Common Law Procedure Act of 1854, the parties could not be compelled to go to arbitration, and the power given by that Act is limited to cases where the dispute relates wholly or in part to matters of mere account, or where the parties have themselves before action agreed in writing to refer the matter in difference to arbitration.

The system of arbitration which has thus been introduced, is attended with much inconvenience. The practice is to refer cases which cannot be conveniently tried in court either to a barrister or to an expert. A barrister can seldom give that continuous attention to the case which is essential to its being speedily and satisfactorily disposed of; and an expert, being unacquainted with the law of evidence, and with the rules which govern legal proceedings, allows questions to be introduced which have nothing to do with the matters at issue. In neither case has the referee that authority over the practitioners and the witnesses which is essential to the proper conduct of the proceedings. If the barrister or solicitor who is engaged in the suit, or even a witness, has some other engagement, an adjournment is almost of course. The arbitrator makes his own charges, generally depending on the number and length of the meetings, and the professional fees are regulated accordingly. The result is great and unnecessary delay, and a vast increase of expense to the suitors. The arbitrator thus appointed is the sole judge of law and fact, and there is no appeal from his judgment, however erroneous his view of the law may be, unless perhaps when the error appears on the face of his award. Nor is there any remedy, whatever may be the miscarriage of the arbitrator, unless he fails to decide on all the matters referred to him, or exceeds his jurisdiction, or is guilty of some misconduct in the course of the case.

In the Court of Chancery questions involving complicated inquiries, particularly in matters of account, are always made the subject of reference to a Judge at Chambers. These references are practically conducted before the chief clerk, but any party is entitled, if he thinks fit, to require that any question arising in the course of the proceedings shall be submitted to the Judge himself for decision. In such a case the decision of the Judge is given after he has been sitting in Court all day hearing causes. It has been represented to us that this system does not give satisfaction, and that there is not sufficient judicial power to dispose of the business in Court, and at the same time to give that personal attention to the business in Chambers which was contemplated when references to the Judge in Chambers were substituted for the old references to the Masters in Chancery.

In the Court of Admiralty references are always to the Registrar, assisted if necessary by one or two merchants or other skilled persons as assessors or advisers; the Registrar from his knowledge of law, is enabled to regulate the conduct of the case; the merchants—assuming them to be properly chosen—

have that practical knowledge which enables them to advise him on questions of a commercial nature that may arise in the course of the proceedings. The reference proceeds like a trial at law until it is concluded, without adjournment, except for special cause, and there is an appeal at once to the Judge in case the Registrar miscarries.

It seems to us that it is the duty of the country to provide tribunals adapted to the trial of all classes of cases, and capable of adjusting the rights of litigant parties in the manner most suitable to the nature of the questions to be tried.

We therefore recommend that great discretion should be given to the Supreme Court, as to the mode of trial, and that any questions to be tried should be capable of being tried in any Division of the Court.

(1.) By a Judge.
(2.) By a Jury.
(3.) By a Referee.

The plaintiff should be at liberty to give notice of trial by any one of these modes which he may prefer, subject to the right of the defendant to move the Judge to appoint any other mode. When the trial is to be by a Jury or by Referee, a Judge, on application by either party, if he think the questions to be tried are not sufficiently ascertained upon the pleadings, should have power to order that issues be prepared by the parties, and if necessary settled by himself. The Judge should also, on the application of either party have power to direct that any question of law should be first argued, that different questions of fact arising in the same suit should be tried by different modes of trial, and that one or more questions of fact should be tried before the others.

The system which, in all the Divisions of the Supreme Court to which it can be conveniently applied, we would suggest for the trial of matters suitable for trial by Referees, is as follows:

Official Referees.

We think that there should be attached to the Supreme Court officers to be called Official Referees, and that a Judge should have power, at any time after the writ of summons, and with or without pleadings, and generally upon such terms as he may think fit, to order a cause, or any matter arising therein, to be tried by a Referee; and that whenever a cause is to be tried by a Referee, such trial should be by one of these Official Referees, unless a Judge otherwise orders. We think, however, that a Judge should have the power to order such trial to be by some person not an Official Referee of the Court, but who on being so appointed should *pro hâc vice* be eemed to be and should act as if he were and Official Referee. The Judge should have power to direct where the trial should take place, and the Referee should be at liberty, subject to any directions which may from time to time be given by the Judge, to adjourn the trial to any place which he may deem to be more convenient.

The Referee should, unless the Judge otherwise direct, proceed with the trial in open Court, *de die in diem*, with power, however, to adjourn the further hearing for any cause which he may deem sufficient, to be certified under his hand to the Court.

The Referee should be at liberty, by writing under his hand, to reserve, or pending the reference to submit any question for the decision of the Court, or to state any facts specially with power to the Court to draw inferences; and the verdict should in such case be entered as the Court may direct. In all other respects the decision of the Referee should have the same effect as a verdict at Nisi Prius, subject to the power of the Court to require any explanation or reasons from the Referee, and to remit the cause or any part thereof for reconsideration to the same, or any other Referee. The Referee should, subject to the control of the Court, have full discretionary power over the whole or any part of the costs of the proceeding before him.

In connection with the subject of trial, it seems proper to refer to the recommendation of the Patent Law Commissioners in their Report of the 29th of July, 1864, who, after observing, that the present mode of trying the validity of patents is not satisfactory, advise, that such trials should take place before a Judge, sitting with scientific assessors to be selected by himself in each case, but without a jury, unless at the desire of both parties to the suit; and that on such trials the Judge, if sitting without a jury, should decide questions of fact as well as of law. It appears to us that a plan similar in substance to that recommended by the Patent Law Commissioners, might with advantage be applied to the trial, not of patent cases only, but of any cases involving questions of a scientific or technical character, in which the Judge, or the Referee by leave of the Judge, may think it desirable to have the aid, during the whole or any part of the proceedings, of scientific assessors.

Evidence.

As respects the mode of taking evidence at the trial, the practice of the Courts varies considerably. The rule in the Common Law Courts always was and still is that the evidence at the trial should be taken by oral examination of the witnesses in open Court. Formerly, in the Court of Chancery, the witnesses were examined and cross-examined on written interrogatories by an officer of the Court, in the absence of the parties and their legal advisers. At present the evidence in chief is taken, either by affidavit, or orally before an examiner generally in the absence of the opposite party, who has however the power of cross-examination at a later stage, in some cases orally before an examiner, and in others in open Court. In the Court of Admiralty the practice of examining the witnesses in open Court has been recently intro-

duced, and is now in general use. In the Courts of Probate and Divorce the witnesses are also examined in open Court. There can be no doubt that whenever there is a conflict of evidence the best way of extracting the truth is by oral examination of the witnesses in open Court, in the presence of the Judge or jury who have to to decide the case; but there are often formal and collateral matters necessary to be proved in the course of a suit which can be conveniently proved by affidavit, and written evidence may sometimes be combined with oral evidence so as to save expense, and facilitate a speedy trial.

We recommend, for these reasons, that, in the absence of any agreement between the parties, and subject to any general order of the Court applicable to any particular classes of cases, the evidence at the trial should be by oral examination in open Court, but that the Court should have power at any time to direct that the evidence in any case, or as to any particular matter at issue, should be taken by affidavit, or that affidavits of any witnesses may be read at the trial, or that any witnesses may be examined upon interrogatories or otherwise before a commissioner or examiner. Any witness who may have made an affidavit should be liable to cross-examination in open Court, unless the Court or a Judge shall direct the cross-examination to take place in any other manner. Upon interlocutory applications, the evidence should, we think, as a general rule be taken by affidavit, but the Court or a Judge should upon the application of either party have power to order the attendance, for cross-examination or otherwise, of any person who may have made an affidavit.

The existing practice as to requiring admissions of written documents should, in our opinion, be continued. We think, also, that a similar practice might with advantage be extended to the admission of certain facts as well as documents; and therefore we recommend that if it be made to appear to the Judge, at or after the trial of any case, that one of the parties was a reasonable time before the trial required in writing to admit any specific fact, and without reasonable cause refused to do so, the Judge should either disallow to such party or order him to pay (as the case may be) the costs incurred in consequence of such refusal.

Incidental Powers.

Some other incidental powers which the Court, in our opinion, ought to possess, may be conveniently mentioned in this place.

The Judge at the trial should, without consent of the parties, have power to reserve leave to the Court to enter a nonsuit or verdict, and when the Judge at the trial has reserved any question of law, he should have power to direct the cause to be set down for argument before the Court, without motion for a rule *nisi*. Upon motion for a new trial the Court should have power, although no leave has been reserved at the trial, to order a nonsuit or verdict to be entered.

The time within which an application must be made for a new trial should be regulated by general orders of the Supreme Court.

We recommend that every order of a Judge at Chambers or at Nisi Prius should have the same force and effect as a rule of Court now has, and that a Judge sitting in Chambers or at Nisi Prius should have the same power to enforce, vary, or deal with any such order by attachment or otherwise as is possessed by the Court, but the Court should have power, upon application in a summary way, to enforce, vary, or discharge any such order.

We think that a Judge should have power, at any time after writ issued, upon being satisfied that the plaintiff has a good cause of action or suit, and that the defendant is about to leave, or is keeping out of the jurisdiction in order to avoid process, to order an attachment to issue against any property of the defendant which may be shown to be within the jurisdiction; such property to be released upon bail being given, and in default of bail to be dealt with as a Judge may direct. This power, which is analogous to that now vested in the Court of Admiralty, may make the use of writs of Capias and Ne exeat regno by the Court of Common Law and Chancery (which are sometimes used oppressively) less frequent. It may also render the retention of the process of foreign attachment in the Lord Mayor's Court in the City of London unnecessary.

Costs.

In the Court of Chancery, the Court of Admiralty, and the Courts of Probate and Divorce, the Court has at present full power over the costs. We think that the absence of this power in the Courts of Common Law often occasions injustice, and leads to unnecessary litigation. We therefore recommend that in all the Divisions of the Supreme Court the costs of the suit and of all proceedings in it should be in the discretion of the Court.

General Orders.

Power should be vested in the Supreme Court to regulate from time to time by general orders the procedure and practice in all its divisions, and to make such changes in the duties of the several officers of the Court, as may from time to time be thought fit, and may be consistent with the nature of their appointments.

Sittings and Assizes.

We now proceed to consider the present general arrangements for the conduct of judicial business.

The sittings during Term are occupied, together with a portion of those after Term, in the Courts of Common Law, by business in banco, Nisi Prius sittings going on at the same time. Some descriptions of business in the Courts of Common Law can only be transacted during Term. In all other Courts

there is practically no difference in the business done at the Sittings during and out of Term.

We think that, unless it should be thought right wholly to abolish the division of the legal year in three Terms, there should be three instead of four Terms, commencing respectively on the 2nd November, 11th January, and 1st May in each year, the duration of each Term to be four weeks.

There may be some convenience in retaining such fixed periods with a view to the necessary times of vacation, which immediately precede the autumnal and winter sittings of the Courts, and which it might be expedient in the spring to regulate, so as to coincide as nearly as possible with the Easter recess of Parliament. But we are of opinion that there should not be in any Division of the Court any distinction between the business capable of being transacted in or out of Term, and that all the Courts should have power to sit any time, in or out of Term, for the despatch of any business.

With respect to the business of the Common Law Courts in banco, it is unnecessary to add anything here to the recommendations in the previous part of our Report. For the despatch of any part of the present Chamber business of the Common Law Courts, as requiries to be transacted by a Judge, we think that one Judge at least should sit continuously during the legal year.

[The arrangements for holding sittings for the trial of causes in particular localities in England are discussed next in order, but it is useless to give the remarks at length.]

Circuits.

The arrangements for holding Sittings or Assizes in the other parts of England and Wales have been much considered by the Commission; but we are not prepared, without further deliberation, to submit to Your Majesty a detailed scheme on that subject.

[The Commissioners then indicate briefly the direction of the changes on this subject, which they were disposed to recommend, and some of the principles on which those changes should be founded. The changes alluded to were called for by the necessity for holding assizes in every County without regard to the extent of the business to be transacted, and without regard to the changes made by the lapse of centuries in the population of the various towns and counties. We omit therefore all except the latter part of it.]

We also consider it advisable that all local venues in civil actions should be abolished, leaving it to the Court or Judge to control the choice of the plaintiff in case an inconvenient venue should be chosen.

In order to lighten the business on circuit, we think it expedient that the jurisdiction of Quarter Sessions should be extended to burglary, and some other offences which we do not think it necessary here to define; and that a classification of offences triable at the Assizes and at Quarter Sessions should be made, and that all magistrates be directed to make their commitals in accordance with such classification, unless it appear to the Magistrate, and he state in his warrant of commitment, that the case appears to him to be of such importance as to be fit for trial at the Assizes.

A proviso* similar to that which is now introduced into the Commissions for the Winter Assizes should, in our opinion be invariably inserted in the Commissions of every Assize, limiting the duties of the Judges to the trial of persons committed to the Assizes only.

[The question of juries is then taken up, but this does not touch upon the matter in hand, and is therefore omitted.]

Appeals.

We now come to the important subject of Appeals. It follows, from the principles of our preceding recommendations, that the system of appeal from all the divisions of the Supreme Court exercising jurisdiction in the first instance ought to be made, as far as possible, simple and uniform.

At present, the appeal for orders or decrees made by the Judges of first instance, in the Court of Chancery, is either to the Court of Appeal in Chancery, or to the House of Lords, at the option of the appellant; there is also an appeal to the House of Lords from the Court of Appeal in Chancery. Appeals and errors from the Courts of Queen's Bench, Common Pleas, and Exchequer must in all cases go to the Court of Exchequer Chamber, from whence a further appeal, or error, as the case may be, lies to the House of Lords. From the Court of Probate appeal also lies to the House of Lords. From the decrees and orders of the Judge Ordinary of the Divorce Court an appeal lies to the full court, consisting of the Judge Ordinary and two Common Law Judges; and also in certain cases from the full court, or from the Judge Ordinary exercising the powers of the full court, to the House of Lords. From the Court of Admiralty, the sole appeal is to your

* *Note.*—The form of the proviso above referred to is as follows:—

Provided always, and our will and pleasure is, that wherever it shall be made to appear by the warrant of commitment or recognizance to prosecute, or otherwise, that the offence of any person or persons was intended to be inquired into and heard and determined at any sessions of the peace in the county aforesaid, it shall not be necessary for you or said justices hereby assigned, or for any of you, to inquire into or hear or determine such offences; provided also, and our will and pleasure is, that whenever it shall be made to appear by the warrant of commitment or recognizance to prosecute, or otherwise, that any prisoner in our said gaol has been committed thereto in order to his or her being tried at the next sessions of the peace for the said county, you our said justices hereby constituted, or any of you, shall not be required to deliver our said gaol of such prisoner, but shall be at liberty to order such prisoner to remain in our said gaol.

Majesty in Council, or, practically, to the Judicial Committee of the Privy Council.

Upon the constitution of the House of Lords, considered as a Court of Appeal, we do not consider it to be within the scope of our Commission to offer any other remarks than than that it unavoidably impairs the efficiency of the Court of Chancery during the session of Parliament, by withdrawing the Lord Chancellor for the whole of four days in every week from his own Court. Upon the constitution of the Judicial Committee of the Privy Council we also abstain from saying more, than that it has been, for many years, found impossible to discharge the appellate duties of that body without withdrawing one or more Judges (often the Lord Justices or the Master of the Rolls, sometimes the Judge of Admiralty or Probate, or one of the Chiefs of the Courts of Common Law) from their respective Courts, to the great inconvenience of suitors, and delay of business in those Courts, during the considerable, and continually increasing, periods of time occupied in every year by the transaction of Privy Council business. Any arrangements, therefore, which may tend to relieve the House of Lords, or the Judicial Committee, from any appeals which now go there will so far add to the strength of the Supreme Court.

The Court of Appeal in Chancery, consisting of the Lord Chancellor and the Lords Justices, is in practice generally divided into two Courts, in one of which the Lord Chancellor presides alone, in the other the Lords Justices; and, during the Session of Parliament, the Lord Chancellor's Court is closed, as has been already stated, except for two days in the week. When the Lord Chancellor happens to be less conversant with equity business than the Lords Justices, his decision, sitting alone in appeal from a Court of Equity, cannot be so satisfactory to the suitors, as if he had the benefit of their assistance; and when the Lords Justices, as has sometimes happened, differ in opinion, the appeal to them necessarily fails, the judgment of the Court below is affirmed, and a further appeal to the House of Lords frequently results. Cases of more than usual importance are, indeed, sometimes reserved for hearing, or are directed to be reargued, before the full court of Appeal; but the pressure of business, and the engagements of the Lord Chancellor for so great a portion of the year in the House of Lords, confine within very narrow limits the time which can be allotted to sittings of the full court.

The Court of Exchequer Chamber is formed by a combination of all the Judges of the Courts of Queen's Bench, Common Pleas, and Exchequer, under such arrangements, that errors and appeals for each of those Courts are determined by Judges taken from the other two. The inconveniences of this system are, in practice, very serious. All these Judges having, during nearly the whole year, pressing demands upon their time for other purposes, are only able to devote a very limited number of days after each term to the hearing of appeals and errors; and each of these periods requires to be broken up into three parts, and the constitution of the Court to be three times changed, in order to dispose of a portion of the appeals and errors from each of the Courts of first instance. The effect generally is so far to reduce the number of Judges, who are able to attend in the Court of Exchequer Chamber, as, in case of any difference of opinion, to render it possible that the majority of opinions, in the Court of Appeal and the Court of first instance taken together, may be overruled by the minority,—a result which, as the Judges of Appeal are not appointed or selected specially to act as such Judges, and the Judges who have been overruled to-day may to-morrow themselves sit in appeal from some decision of the Judges who have taken part in overruling them, is eminently unsatisfactory. The same causes also lead, in many cases, to great and unavoidable delays in the disposal of Common Law errors and appeals.

The constitution of the full court of Divorce, by the addition of two Judges of the Common Law Courts, withdrawn *pro hâc vice* from their own duties, and associated with the Judge the Ordinary, is liable to some of the same objections.

The conditions on which appeals or errors can be brought from the different Courts are also widely different.

To the Court of Appeal in Chancery and to the House of Lords from the Court of Chancery, an appeal lies from all orders and decrees, whether interlocutory or final, of the Courts below, and upon all questions, whether of fact or of law; except that the verdict of a jury, or of a Judge exercising the functions of a jury, can only be impugned by a motion for new trial. The jurisdiction of the Court of Appeal in Chancery, or of the Master of the Rolls or a Vice-Chancellor to rehear his own decree, a practice which is also allowed, may be excluded by a formal procedure called enrolment, which takes place at the instance of any party, practically at any time within five years from the date of the decree or order enrolled, if nothing has been done in the meantime by the suitor with a view to bring the matter before the Court of Appeal. After this no error in the decree or order enrolled, except mere clerical mistakes, can be corrected by the Court of first jurisdiction, or by the Court of Appeal in Chancery, without a new suit for that purpose, called a Bill of Review. The same formality, which shuts the door of the Court of Appeal in Chancery, opens to the dissatisfied suitor that of the House of Lords, which does not receive appeals from decrees or orders of the Court until after they have been enrolled. Both the Court of Appeal in Chancery, and the House of Lords, proceed upon the same record and evidence,

which were before the Court from which the appeal is brought; and the Court of Appeal in Chancery, both in what are technically called rehearings of decrees and decretal orders, and upon appeal petitions or motions, has all the powers possessed by the Court of first instance, and can therefore allow amendments of the record, and in some cases may receive new and further evidence; which is contrary to the practice of the House of Lords.

From the Courts of Common Law to the Exchequer Chamber, error lies in certain cases, and appeal in others. Error is brought, as of right, on matter of law apparent on the record, on judgments on demurrers, on bills of exceptions for the improper reception or rejection of evidence, or for misdirection by the Judge at the trial on special cases, on judgments *non obstante veredicto*, and for arrest of judgment. Appeal lies, as of right, from decisions upon points of law reserved at a trial. It also lies, but not without leave of the Court, unless the Judges differ, on motions for new trial on the ground of improper reception or rejection of evidence, or of misdirection by the Judge. No judgment, rule, or order is appealable which does not fall within one or other of these classes of cases. From all judgments of the Court of Exchequer Chamber, a further appeal or error, as the case may be, lies to the House of Lords.

Among the inconveniences of this system are the following:—Error cannot be brought from any interlocutory judgment, *e. g.*, a judgment allowing a demurrer, before the final determination of all issues of law and of fact joined upon the record. The points of law decided on the demurrer may be sufficient, if the judgment stands, to determine the whole controversy between the parties; yet if, as is commonly the case, issues of fact, as well as law, have been joined in the pleadings, it is necessary to go through the expense and delay of trying all those issues, though according to the judgment on the demurrer they are wholly immaterial, in order to get into the Court of Error. As to bills of exceptions, the rule is that they must be tendered at the time of trial, and before verdict given, excluding all opportunity for deliberate consideration, and giving occasion to difficulties as to the proper mode of stating the terms, or substance and effect of the Judge's ruling; no bill of exceptions being admissible unless signed by the Judge, and no proof of his ruling, extrinsic to the bill of exceptions itself, (*i.e.*, by shorthand note or otherwise,) being allowed. The practice has been to hand in a hasty and imperfect note at the trial, leaving the bill of exceptions itself to be afterwards agreed upon by the parties, or settled by the Judge. In some cases it is found difficult, in others impossible, to come to any agreement or settlement, and, whenever any difference arises, it leads to great delay and expense. The cases are so few in which the points of law really intended to be raised can be satisfactorily taken by this form of proceeding that it is of little use. The convenient mode, and that generally adopted, of raising those points, except when the parties agreed to have a special case stated, a practice attended with its own inconveniences, is either by reserving them at the trial, which depends on the leave of the Judge, and the consent of the parties, or by motion for a new trial. The power of appeal when the latter mode is adopted, if the Court gives an unanimous judgment, is not of right, but depends upon the will and discretion of the Court.

When appeal is brought, the Court of Exchequer Chamber does not proceed simply upon the materials which were before the the Court below, but a case must be made up between the parties, which must be settled by the Judge if the parties differ; and, as such differences often happen, this is apt to lead to considerable expense and delay.

Appeals lie to the House of Lords, as of right, from all final orders or decrees of the Court of Probate, whether depending on questions of law or of fact only, and from all interlocutory decrees or orders of that Court, by the leave of the Court, but not otherwise.

In the Divorce Court, every decision of the Judge Ordinary, whether on law or on fact, is subject to an appeal to the full Court, whose decision is final, except in cases of dissolution of marriage, nullity of marriage, or declaration of legitimacy, in which excepted cases only an appeal lies from sentences and final judgments of the Divorce Court to the House of Lords.

In the Court of Admiralty, as in the Court of Probate, all final sentences are appealable as of right, and all interlocutory judgments are appealable by the leave of the Court only.

The rules as to the time for appealing, in the different Courts, are also different.

For appeals and rehearings in Chancery, a period of five years from the date of the decree or order appealed from is allowed, after which the leave of the Lord Chancellor or Lords Justices is necessary, and such leave may be given at any time, but will only be given if it shall "appear, under the peculiar circumstances of the case, to be just and expedient."

For appeals to the House of Lords from the Court of Chancery, two years from the date of the enrolment of the order appealed from, and thenceforth until the end of a fortnight after the beginning of the next session of Parliament, are allowed; and when a final decree is appealed from, all prior interlocutory orders in the same cause, though enrolled for more than the prescribed period, may be included in the appeal.

At Common Law, six years from the date of final judgment are allowed for bringing error to the Exchequer Chamber, and a like period of six years for bringing error from the Exchequer Chamber to the House of Lords. In cases of appeal, as distinguished from error, in the Common Law Courts, notice

of appeal must be given within four days after the decision appealed from, unless the time is enlarged. When such notice is given, as for want of the opportunity of full consideration it generally is, no time is limited within which the party must proceed to prosecute his appeal.

In the Probate Court application for leave to appeal from an interlocutory decree or order must be made within a month after the delivery of the decree or order, or within such enlarged time as the Court may direct; and it may be doubtful whether any time is limited for appealing from final decrees or orders.

In the Divorce Court, the appeal from the Judge Ordinary to the full court must be filed within three months from the date of the decree appealed from; and that to the House of Lords, whether from the full court or from the Judge Ordinary, within one month.

Appeals from the Court of Admiralty must be founded either on notice given to the registrar immediately after the delivery of the judgment, or upon a declaration, called a protocol of appeal, made before a notary and witnesses within fifteen days, and must be prosecuted by presenting a petition of appeal to your Majesty in Council within one year from the date of the sentence or decree appealed from.

As to security for the costs of appeal:—

In the Court of Chancery none is required beyond a deposit of 20*l.* with the registrar, when the petition is for rehearing of a decree or decretal order. Upon interlocutory appeals no deposit is made. In the Courts of Common Law, every appellant (in an appeal technically so called) and every defendant in an action who brings error is required to give substantial bail to pay costs; but a plaintiff who is also plaintiff in error gives no security. In the Courts of Probate and Divorce no security for costs is taken, but the general orders of the House of Lords require all appellants to that tribunal to enter into their own recognizances, without sureties, for 400*l.* Appellants from the Court of Admiralty, if resident out of the jurisdiction of the Court, may be required to give bail in 300*l.*; if within the jurisdiction, they give no security.

In the Court of Chancery and the Probate Court an appeal does not operate as a stay of execution unless the Court, upon a special application, so directs. In the Divorce Court it does, practically, so operate. In the Courts of Common Law appeal or error operates always as a stay of execution as soon as security is given. In the Court of Admiralty an appeal is followed, as of course, by an inhibition, which has the same effect.

Court of Appeal.

For these various and discordant systems of appeal we recommend the substitution of the scheme embodied in the following suggestions:

Constitution of Court.

First, we propose that in the place of the Court of Exchequer Chamber, and of the Court of Appeal in Chancery, both which Courts, as now constituted, would cease to exist, there should be established, as a part of the Supreme Court, a Court of Appeal, consisting of—

The Lord Chancellor,
The Lords Justices,
The Master of the Rolls, and
Three other permanent Judges, with
Three of the Judges of the Supreme Court to be nominated annually by the Crown;

an additional Vice-Chancellor being substituted, as a Judge of First Instance, for the Master of the Rolls. The Court of Appeal thus constituted should be empowered to sit either as a full court, or in divisions, but the number of Judges sitting together in any division ought never to be less than three. The Judges of the Court, other than the nominated Judges, should always form a majority of the Court.

We propose further, that to this Court an appeal should lie from all judgments, decrees, rules, and orders, in suits or proceedings not strictly criminal, of any division or Judge of the Supreme Court, with certain exceptions which we shall afterwards specify. It may hereafter deserve consideration, after experience of the working of the Court thus constituted, whether its decisions may not be made final, unless leave to appeal from them be given, either by the Court itself, or by the House of Lords. In the meantime, we recommend that there should be a right of appeal to the House of Lords.

A direct appeal to the House of Lords, without going through the Court of Appeal, might, we think, be allowed in all cases in which an appeal on matter of law would lie to the Court of Appeal, if the respondent consents to that course being taken, but not otherwise.

The limitations or exceptions to which we think the right of appeal ought to be subject are the following: judgments, decrees, or orders founded upon and applying the verdict of a jury, or the verdict of a Judge discharging the functions of a jury ought not to be appealable, except upon matter of law. Interlocutory orders, if made by any division of the Supreme Court, consisting of three or more Judges, should not be appealable, except in case of difference of opinion among the Judges, or by special leave of the Court; and, if made by any division or judge with respect to any question of procedure or practice, as to which the Court or Judge had power to make the order, should be appealable only under such regulations as may be made by General Orders. As a general rule, no appeal should be allowed as to costs only.

The time of appealing from interlocutory orders made in the progress of a suit, before the final decision upon the merits between the parties, ought to be regulated by general

orders. In all other cases a fixed period, not exceeding six months from the time when any judgment, decree, rule, or order is made or entered upon the record, should, we think, be allowed for appealing against it. These rules, as to the time for appealing, should apply both to appeals to the Court of Appeal, and to appeals to the House of Lords; and the office of the Clerk of the Parliaments ought to be open for the reception of appeals at all times of the year, whether Parliament be or be not sitting.

All proceedings in error and bills of exceptions should be abolished; and every appeal to the Court of Appeal should be brought by notice of motion by way of appeal, in a summary way, without any petition or formal procedure. No enrolment of any judgment, decree, rule, or order should be necessary in order to enable any party to appeal therefrom to the House of Lords; and every appeal to the House of Lords should be brought by a petition in a short form, stating the title of the cause or matter, with the names of the parties thereto, and the date of the order appealed from, and when the same was made or entered on the record; and also, who are the respondents to the appeal, and whether a general reversal, or a variation in any and what particulars, of the order appealed from is sought, but without setting out at length any of the proceedings.

The right of appeal should, we think, as a general rule, be conditional on substantial security being given by the appellant for the costs of the appeal. Inasmuch, however, as there may be cases to which this rule could not be applied without inconvenience or injustice, we think, that both the nature and the amount of such security, and the regulations according to which it may be required or dispensed with, are subjects which may properly be dealt with by general orders of the Court.

No appeal should operate as a stay of execution, or of proceedings under the order appealed from, unless the Court, or a Judge of the Court, from which the appeal is brought, or the Court of Appeal, shall so order. But such stay of execution should be granted, as of course, when the order under appeal is for a money payment, on the terms of payment of the money into Court, or of security being given to the satisfaction of the Court.

With respect to the hearing of appeals, we would propose that the following rules should be established and made applicable both to the Court of Appeal and to the House of Lords.

Every appeal should be deemed to be in the nature of a rehearing, and the Court of Appeal should have power, if the justice of the case shall appear so to require, to allow any pleading or any special case to be amended, or any supplemental pleading or statement to be added to the record; or, upon any question of fact, to admit further evidence. Upon appeals and motions for new trial, proof of a Judge's ruling by a shorthand writer's notes ought, in our opinion, to be received. Upon the hearing of the appeal the Court should have jurisdiction over the whole record, and no interlocutory order, from which there has been no appeal, should operate so as to bar or prejudice a decision upon the merits.

The Court should also have power, upon the hearing of any appeal, to vary or alter the order under appeal in favour of the respondent, in any manner which may appear proper to do complete justice between the parties, as if the respondent had presented a cross appeal, complaining of any part of the order by which he may deem himself to have been aggrieved.

If these recommendations are adopted, we think that there should be no rehearing of any cause or matter before the Court by which it was originally heard, except by leave of the Court, nor, unless by consent of all parties, after the expiration of the time limited for appealing; and that bills of review for error apparent on the record should be abolished. Nothing, however, in these rules should take away or abridge the power of the Court to rectify any error which may have occurred in drawing up any judgment, decree, rule, or order.

We shall proceed, with due diligence, to consider the other matters embraced in Your Majesty's Commission; and we humbly submit to Your Majesty's gracious consideration this our First Report.

Hatherley.	(L.S.)
W Erle.	(L.S.)
James Plaisted Wilde.	(L.S.)
* Robert J. Phillimore.	(L.S.)
George Ward Hunt.	(L.S.)
Hugh C. E. Childers.	(L.S.)
W. M. James.	(L.S.)
† G. Bramwell.	(L.S.)
Colin Blackburn.	(L.S.)
‡ Montague Smith.	(L.S.)
R. P. Collier.	(L.S.)
‡ John Duke Coleridge.	(L.S.)
Roundell Palmer.	(L.S.)
John B. Karslake.	(L.S.)
J. R. Quain.	(L.S.)
H. C. Rothery.	(L.S.)
§ Acton S. Ayrton.	(L.S.)
William G. Bateson.	(L.S.)
John Hollams.	(L.S.)
Francis D. Lowndes.	(L.S.)

Thos. Bradshaw, Secretary,
25th March, 1869.

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* Agreeing with the general spirit and with most of the recommendations of the Report, I have subscribed it.

There are two subjects on which I desire to guard the expression of my opinion:

(1.) I think it is not expedient to destroy the special jurisdiction of the High Court

of Admiralty. That Court has always administered in peace and war maritime international law. To no other Court has the Crown ever granted a commission of prize; and even before the issue of such commission, it has, in the opinion of Lord Stowell, an inherent jurisdiction in these matters. I may observe that the forms of pleading now in use in the High Court of Admiralty are as nearly as possible those which this Report recommends to be generally adopted by all Courts.

(2.) I think that the want of power in the Commission to consider the composition of the final Court of Appeal has been unfortunate, because it has practically excluded from our consideration—

(*a.*) Whether it be expedient that two Final Courts of Appeal, namely, the House of Lords and the Judicial Committee of the Privy Council should still continue:

(*b*) Whether, if so, the composition of either or both should remain unaltered.

Yet the consideration of both these questions ought, in my judgment, to have preceded, and would perhaps have considerably modified the suggestions for the intermediate Court of Appeal made in this report. I think it also very doubtful whether that Appellate Court should be composed for the most part of Judges exercising appellate jurisdiction only.

Robert J. Phillimore.

† Circuits: I cannot concur in this recommendation to its full extent.

G. Bramwell.

‡ We are not able to concur in the recommendation that several counties should be consolidated for assize purposes to the extent indicated in the Report. Our general view is, either that the present system of holding assizes, which is based on the existing divisions of counties, and which brings justice reasonably near to the homes of suitors, witnesses, and jurymen, should, with some modifications, be retained; or that the present system of circuits should be altogether discontinued, and Provincial Courts established with assigned districts, having Judges who should go frequent circuits to convenient places within such districts; and with appeal from the Provincial Courts in certain cases to the Metropolitan Courts of Appeal.

Montague Smith.
John Duke Coleridge.

§ I desire to record my opinion, that the following questions should be further considered:—

Whether all proceedings should not be commenced and prosecuted in the County Courts, unless it appears from the nature of the case that it is proper to remove it into the Supreme Court.

Whether it is desirable to allow such facilities for appealing, and repetition of appeals.

Whether, having regard to the unequal means of litigants, the changes proposed might not render it desirable to establish a new system of legal remuneration, and to limit the claims of suitors against each other for costs.

Whether it might not be desirable to substitute for the discretion of the Judges in respect of costs certain rules of positive application.

Whether the qualification of jurymen should not rather be lowered than increased.

Whether sufficient consideration has been given to the other elements in the administration of the law beyond that of excellence of judicial decision, namely, the time of the suit, the expense to the suitor, and the influence of the administration of justice on the social and political condition of the people.

Whether the House of Lords, if it is to continue a Court of Appeal, might not be rendered efficient for the purpose by legal peerages conferred on Judges of a certain standing, so as to make the Bench independent of the pleasure of the Crown, and by constituting a permanent Committee of such peers, on the principle of the Judicial Committee of the Privy Council.

Acton S. Ayrton.

Thus concludes the first Report of the Commissioners. The Bill first founded upon it fell through, but we understand it will, in an altered shape, be again brought before the Houses of Parliament in England.

The subject is one of great interest to the profession in Canada in view of this and of the resolutions recently brought before the Ontario Legislature by Mr. Edward Blake:—

"1. That according to the present plan of dispensing justice in civil cases, there are two different and inconsistent systems of law, one of which is framed chiefly to soften the rigour and supply the defects of the other.

2. That these two systems are administered by different Courts, with different modes of procedure, neither Court being competent to do full justice or administer the whole law of the land in each case before it.

3. That this plan is anomalous in theory, and in practice involves great and needless expense to suitors, causes confusion, embarrassment and uncertainty in the law, and retards its amendment.

4. That under any well regulated plan there should be but one system of law, under which each party to a suit should be able to enforce in that suit against the opposite party his full rights.

5. That in the opinion of this House steps should be taken to obviate the defects indicated,

and accomplish the result aimed at in the preceeding resolutions."

In the discussion arising on these resolutions, the Attorney-General said that a matter of such importance should be carefully considered, and not be adopted in haste (though he quite agreed with the spirit of them); he therefore suggested that a Commission should issue to inquire into the matter, and the resolutions were thereupon withdrawn.

We do not ourselves at present express any opinion on this subject, but we increase the the size of our present number, to give our readers the benefit of the labours of the eminent men who have in England considered to a certain extent at least the bearings of this most important subject.

Whatever be done let there be none of that haste which characterised too much of the legislation of last Session affecting law bills.

CANADA REPORTS.

ONTARIO.

COMMON LAW CHAMBERS.

(Reported by Henry O'Brien, Esq., *Barrister-at-Law.)*

Belyea and Wife v. Muir et al.

Equitable plea.

Part of the land included in a conveyance was inserted by mistake, the vendor not being, and not pretending to be, the owner of it. To an action on the covenants for title in the deed, the defendant pleaded these facts as an equitable defence.

Held that the plea was good as pleaded.

Semble, 1. Where a Court of Equity would give unconditional relief, although the procedure necessary to obtain it is unknown to Courts of Law, the matter of defence can be well pleaded as an equitable plea at law.

2. When a contract has been executed, and nothing remains but the relief to be granted against the existing wrong, a Court of law can grant it.

[Chambers, October 27, 1870.—*Mr. Dalton.*]

This was an application by the plaintiff for leave to reply and demur to the defendant's plea.

The action was for breach of covenants for title in a deed of conveyance by the defendant to the female plaintiff of part of lot 5, 7th concession Burford.

The plea, which was pleaded upon equitable grounds, was in substance as follows:—

That the real contract between the parties was for the sale by the defendant to the female plaintiff of twenty acres of said lot 5, adjoining two other lots also part of lot 5, which last-mentioned lots were fenced off, and in the visible occupation of their respective owners; the title to which had never been in the defendant, and which he had never assumed to sell, as was well known to the plaintiff: that with those lots the contract had no concern whatever, but respected, as before said, twenty acres adjoining them: that by a mistake of the conveyancer, who was employed by both parties, a portion of the said two lots was included in the description in the deed, which was contrary to the intention of the parties, and to their bargain; so that the deed not only conveys the twenty acres really contracted for, but also purports to convey a portion of the said two lots; and that the breach in the declaration alleged upon the covenants for title apply not to any portion of the twenty acres, but to those portions of the two lots, which, but for that mistake, would not have been included in the deed, and should not have been in it at all.

E. B. Wood, for defendant, shewed cause. The plea shews that the plaintiff obtained a conveyance of all the lands to which he was entitled, and that he was let into possession of the same, in addition to the lands included in the conveyance, by mistake. This mistake is shewn to have been made by the conveyancer employed by both plaintiff and defendant. The trial of this case will do complete justice, and it is therefore unnecessary to have the deed reformed as is contended on the other side and, the assistance of the Court of Chancery is not required. A court of law can do complete justice so far as required. This court will allow equitable pleas, although the contract does not disclose the true agreement between the parties.

He cited *Borrowman* v. *Rossell*, 16 C. B. N. S. 68; *Chilton* v. *Carrington et al.*, 16 C. B. 206; *Fairweather* v. *Welchman*, 24 L. J. Chan. 412.

Kerr supported the summons. The plea is bad. The Court of Chancery would not grant an injunction, as it is not shewen that there was mutuality of mistake, nor that the plaintiff accepted the conveyance in its present shape by a mistake, although it is pleaded that he had notice of the adverse title; and the Court of Chancery would not grant an injunction until they had reformed the deed, and then only on condition of defendant conveying that portion of the land which has not been included in the conveyance—the southern limit of the land described.

Mr. Dalton.—The plea in this case is carefully drawn, with much circumstance of detail, and is, I think, a good equitable plea at law.

Equitable pleadings at law have now been discussed for many years, and several limitations have been imposed, arising from the different machinery of Courts of Equity and Courts of Law. There are many cases of mistakes in contracts for which no relief can be given at law—as where the only remedy is to reform the contract, or where from special circumstances the relief would necessarily be qualified with conditions which a court of law could not impose.

But I think it is established by clear authority in the cases cited by Mr. Wood, and other cases, that where a contract has been executed, and nothing remains but the relief to be granted against the existing wrong, a Court of Law may grant it as well as a Court of Equity.

And this latter observation seems to me to lead to the true principle to be extracted from the decided cases, upon which such pleadings at law are to be tested. Would a Court of Equity

grant unqualified relief? No matter through what forms that court would act, that is a matter of the practice of the court merely, if in the result it would give unconditional relief, and a court of law has in the particular case equal means of testing the truth, then the matter affords a defence at law.

I refer particularly to *Wood* v. *Dwarris*, 11 Ex. 493, and I cite a portion of the marginal note to that case:—"Where a plaintiff sues on a written contract, and the defendant pleads as a defence matters which he is in Equity precluded from setting up, by a term of the contract not stated in the written instrument, a court of law may, under the C. L. P. Act, give equitable relief without the instrument being first reformed." And I particularly cite *Collett* v. *Morrison*, 9 Hare 162, where a term of the agreement was left out of a life policy, and Vice-Chancellor Turner decided the case upon the footing of the agreement, and not of the policy, without putting the parties to reform the policy.

Now, what is the case here? The conveyance was made some years ago; the plaintiffs have had full possession of, and title to, all they bargained for; the consideration has been paid; the plaintiffs have nothing they can justly seek from the defendant. What remains is that the defendant should be relieved from a claim now unjustly made, arising from a mistake in drawing the deed.

That, I think, a court of law can grant, and therefore I think this plea good.

Leeming v. Marshall.

Affidavit—Interlineation.

An interlineation in an affidavit, not noted by the commission, does not necessarily avoid it.

[Chambers, November 1, 1870.—*Mr. Dalton.*]

J. B. Read applied to set aside the copy of declaration served, and all subsequent proceedings, for irregularity, with costs, on the ground that at the time of service no declaration had been filed in the office from whence the writ was issued.

One of the affidavits on which the summons was obtained, put in to show that no declaration had been filed, had these words interlined without being noted by the commission: "At which office the writ in this cause was issued."

McDonald showed cause and objected to the above affidavit on the ground, that the interlineation was material, and was not initiated by the Commissioner, as required by the practice: *In re Fagan*, 5 C. B. 436.

J. B. Read, contra.

Mr. Dalton.—The order must be made as asked, to set aside copy of declaration served, with costs.

The practice referred to in *In re Fagan*, 5 C. B., has not prevailed in this country: *Lyster* v. *Boulton*, 5 U. C. Q. B. 632.

Order accordingly.

Cockburn v. Rathbun et al.

Declaration before appearance.

An attorney who should have entered an appearance for defendants on 22nd did not do so until 25th. On the 24th the plaintiff filed and served declaration. The defendants, by the same attorney, then applied to set aside the copy and serve of declaration on the ground that at the time of declaring no appearance had been entered, but

Held that as the attorney had authority to act as such the service could not be set aside.

[Chambers, Nov. 1, 1870, *Mr. Dalton.*]

The summons in this case was to set aside the service of the declaration, or the copy and the service, or one or both, and the notice to plead served on the agents of the defendant's attorney, or as attorney for defendant, Hugo B. Rathbun, with costs, as irregular, on the ground that no appearance was entered on behalf of the defendants, the said attorney, at the time of such service, and also on the ground that neither the writ of summons, or judges order, nor affidavit pursuant to the 56th sec. of the C. L. P. Act was filed, with a copy of the said declaration filed, and on the ground that the plaintiff had no authority to serve the said attorney or his agents as attorney for the defendants, and on further grounds disclosed in affidavits and papers filed.

The only affidavit filed was the affidavit of the defendant's attorney himself, sworn on the 26th October, wherein he stated that he was the attorney of the defendants in the cause; that on the 13th October, the summons was personally served on the defendant Edward Rathbun, by the Sheriff of Hastings, and that he the attorney on that same day, accepted service of the summons for the defendant Hugo, the writ not being specially endorsed; that on the 24th of October the declaration and notice to plead were served on deponent's Toronto agents, as he was advised by letter, enclosing the declaration, received by him on the 25th; that no appearance was entered for either of the two defendants until the 25th of October, when deponent caused an appearance to be entered for both defendants; that when the said declaration was served on the agents (the 24th) there was no appearance entered for the defendants, or either of them, by deponent, as their attorney.

Osler shewed cause.

Lauder, contra.

Mr. Dalton.—As to the bearing of these facts upon the present application, it is to be observed that the declaration itself and the filing of it are not attacked by the summons; it is the copy and service that are sought to be set aside. The summons assumes, therefore, the declaration itself and the filing to be regular. Whether they are so or not, I have not to enquire.

Is the service, then, on Mr. Holden good as to both defendants?

The appearance was due by both defendants on the 22nd of October. Mr. Holden, it is evident, was then attorney in fact for both defendants—in truth, there is no objection that he was not such attorney—but the objection is that he had not entered an appearance when the declaration was filed and served. As respects the defendant Hugo, for whom he accepted service on

the 13th, I think he then became bound, as between himself and the plaintiffs, to enter the appearance on the 22nd. Evidently he was Hugo's attorney from the 13th. The facts show that he was equally the attorney of the other defendant. And I understand he makes this application as attorney for the defendants.

Then what suppose he had not entered an appearance, or never enters an appearance, he is still the attorney of the defendants; and the only ground upon which, as I take it, this service could be set aside, would be the actual want of authority in Mr. Holden to act as attorney.

I have regarded very strictly the application to set aside the service of this declaration, as I think it my duty under the circumstances; and as the summons is moved with costs, I must discharge it with costs.

NOVA SCOTIA.

IN THE SUPREME COURT.

Avon Marine Insurance Co. v. Barteaux.

[Halifax, Nova Scotia, 1870.]

This was a special case stated for the opinion of the Court, and involving questions of general and particular average. The latter was withdrawn in the course of the argument and the former turned upon the obligation of the underwriter to pay the general average upon a foreign adjustment. The defendant pleaded such an average by way of set-off to an action on the premium note, and the admitted facts are, that the defendant being a British subject, resident in this Province, and having insured his brigantine, "The Foyle," on a time-policy with the plaintiffs, the vessel on a voyage from Liverpool to New York, sustained damage, which was the subject of general average, and if adjusted at New York, would amount to a larger sum than if adjusted in Nova Scotia. The single point, therefore, for our determination is, by what law ought the general average to be ascertained—by the usage as it prevails in New York, or by the usage of our Province where the policy was made.

Although the weight of authority is in favor of foreign adjustment, this must still be considered one of the *vexatæ questiones* in mercantile law. In 1 Parsons on Maritime Law, 332, edit. 1859, he cites in note 4 a number both of English and American cases, where the adjustment made at a foreign port was held not to be binding on an insurer, and where it was held, that it was so binding. The latter case, however, being the later in point of time, and of the higher authority.

The leading English case which figured so largely at the argument is that of *Simonds* v. *White*, 2 Barn and Cres., 805, decided so far back as 1824, Lord Tenterden there puts it on the footing of a know maritime usage, which the shipper of goods must be taken to have tacitly if not expressly assented to, and by assenting to general average, he must be understood to assent also to its adjustment at the usual and proper place, that is at the home port or the port of destination and discharge. If the shipper is so bound it is plain that he will not be indemnified under his policy if the underwriters be not equally bound. In *Strong* v. *N. Y. Fire Insurance Company*, 11 Johns, 323, Van Ness, J., in giving the opinion of the Court, said:—"There is no principle more firmly established than that the insurers are bound to return the money which the insurer has been obliged to advance in consequence of any peril within the policy, provided it be fairly paid, and does not exceed the amount of the subscription."

Arnould,—in his treatise in Insurance 2—947,—argues with irresistible force that it seems impossible, on general principles, to arrive at any other conclusion. The law of England compels the owners of the several interests (that is the ship, cargo, &c.) to pay all general average charges assessed on them by foreign adjustment, if settled according to the law of the port where it is made, whether such charges would be allowed in England or not. Now it seems certain that the English underwriter must be bound by the very terms of his contract to reimburse to the assured their proportion of all such general average charges as they (the assured) have been compelled to pay by the law of England. If this be so, and it seems quite incontrovertible, then it follows by necessary inference, that the underwriter is bound to reimburse all such general average charges as have been assessed on the insured by a foreign adjustment, if correctly settled according to the law of the port of adjustment.

Several of the cases cited at the argument rest upon distinctions which have no application here. A foreign adjustment, to be binding, must be clearly proved to have been made in strict conformity with the laws and usages of the foreign port, and it would doubtless be set aside, or corrected for fraud or gross error.

The case in hand is relieved of all such inquiries, as we have merely to settle the principles on which the adjustment is to be made.

It was ingeniously argued by Mr. MacDonald, for the insurers, that, supposing the rule to be established on a voyage defined in the policy, and extending to foreign ports, where the operation of the rule might be fairly contemplated, it would not apply to a time policy, as in this case. But a time policy, unless there be special restrictions, confers the power of sailing for every port, domestic or foreign; and in our own Province, whose ships are to be found in every sea, and where the ship, once launched, often instantly embarks in foreign commerce, and never returns perhaps to her home port, foreign employment must be understood to be as much in the contemplation of the shipowner and insurer as domestic use. No authority, besides, was cited for this construction.

The only English case that seems to have touched this question since 1865 is that of *Fletcher* v. *Alexander*, 18 L. T. Rep, 434, decided in 1868. There Bovill C. J., observed "that different countries had adopted different rules, with regard to almost every point connected with the statement of averages. Upon the general principle all are agreed, but with those differences in the law of different countries, it became necessary to ascertain and determine what law

was to prevail when a vessel started from a port in one country and its destination was in another, or where the adventure came to an end in some intermediate port. And it has now been the adopted and settled law of this country, and I believe most other countries, that the adjustment must take place according to the law of the place where the adjustment is to be settled."

In 2 Parsons on Insurance 360, 370, all the cases, except the last, are reviewed, and many subtleties are suggested, which will doubtless be resolved as new cases arise. He assigns the principal reasons why a foreign adjustment should bind owners and shippers, and concludes that the rule, like some others of the law merchant, is founded on the average of all the cases, and, on the whole, does justice. If this be allowed, it is as much, perhaps, as can be attained. Average justice is a significant expression which I do not remember to have found in any of the cases. It is here in a text book of authority, and I met with it recently in a production of another stamp, from which it may not be amiss to extract one or two paragraphs. I refer to a thoughtful and brilliant lecture delivered on the 1st of November last, by the Lord Justice Clerk of Scotland to the Edinburgh Juridical Society, where he vindicates the law and its professors from the reproaches often ignorantly cast at them, and justly observes that in the systems of science there is quite as much uncertainty as in the system of law—indeed, a great deal more. Lawyers, he says, are not only much more harmonious among themselves than some other professions, but the system and science of law is more consonant with itself and there are fewer real disputes upon fundamental matters than in almost any other branch of human knowledge. It is only this, that the differences of opinion between lawyers, that is, between courts administering the law, come so close home to all our social relations, and tell so greatly upon domestic comfort and personal rights (as, for instance, in the varying law upon the question of marriage) that such differences of opinion assume much larger proportions in consequence of their practical application, than if they were occuring in a more scientific and theoretical dispute. But then we are met on the threshold with the old and vulgar notion—that the part of a lawyer is, after all, an unworthy one, and that truth and falsehood find no place in his vocabulary and in his science. In one sense that is perfectly true, because law is not conversant with truth or falsehood, in that sense. Law aims at nothing more and can attain nothing more than average justice. It is the general rule made before hand to embrace a given category of circumstances, and in its application, individual wrong is often unavoidable. The facts being accurately ascertained, the general principle is then to be applied. The worse cannot appear the better reason, because that must be taken to be the better reason which the Court, after argument approves, and that is the worst reason which it disapproves, and that is the end of it.

Apply this philosophical principle to the case in hand, and looking to the average justice which the cases recognize, we are of opinion, in answer to the third question submitted to us, that the insurers are bound to pay the general average on an adjustment to be made at New York in conformity with the laws and usages of the United States.

GENERAL CORRESPONDENCE.

To the Editors of the Law Journal.

Gentlemen,—I wish to draw your attention to the 60th section of the Dominion Statute, 32, 33 Vic. cap. 22 (1869), whereby, without declaring such offences as are therein provided against, to be crimes or misdemeanors, it is declared, that "whosoever *unlawfully or* maliciously commits any damage, injury or spoil to or upon any real or personal property whatsoever, either of a public or private nature for which no punishment is hereinbefore provided, shall, on conviction thereof before a justice of the peace, forfeit and pay such sum of money, not exceeding $20, as to the justice seems meet, and also such further sum of money as appears to the justice to be a reasonable compensation," &c.; "which last mentioned sum, &c., shall be paid to the party aggrieved," &c., and if the moneys are not paid with costs, "the justice may commit the offender to the common gaol, &c., not exceeding two months, &c., and kept at hard labor, &c.; Provided that nothing therein contained is to extend to cases where the party acts under a fair and reasonable supposition that he has a right to do the act complained of, nor to any trespass, not being wilful and malicious; committed in hunting, fishing, or in the pursuit of game," &c.

Now it occurs to me to enquire of you, that as the words "unlawfully or maliciously" are disjunctive, whether or not any complaint for a trespass where the damage is within the prescribed amount, and there can be no pretence for the party acting under a supposition of right, may be tried summarily by a justice of the peace under this statute? because every trespass is "unlawful" whether it be "malicious" or not.

Most of the preceding sections constitute particular acts "unlawfully and maliciously" committed, misdemeanors or felonies, and certain other acts of a more grievous nature are constituted felonies; or the words "unlawfully" and "maliciously" are coupled by the conjunction "and." So that if there exists no doubt (which I do not admit) as to the power of the Dominion Legislature over that

class of cases. I should like your opinion as to whether or not the jurisdiction of prescribing a remedy for a civil trespass does not belong exclusively to the Provincial Parliament under the British North America Act, 1867?

I observe the Acts respecting petty trespasses in Upper Canada, Con. Stat. U. C. cap. 105, and Statute of Canada, 25 Vic. cap. 22, remain unrepealed. I imagine if either were to be repealed it would have to be done by the Provincial Parliament under the 13th subsection of section 92 of the British North America Act, 1867; and if similar or any other provisions were to be made by the same Parliament it might well be done under the 15th sub-section of the same section, because there is power given to impose punishment by fine, penalty or imprisonment, for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in that section. The Dominion Act of 1869 purports to repeal the 28th section of Con. Stat. of Canada, cap. 93, as set forth in Schedule B. of Dominion Statute of 1869, cap. 36, p. 410, unless the second paragraph of the 1st section, which provides a very wide field for thought and consideration, that "such repeal shall not extend to matters relating solely to subjects as to which the Provincial Legislatures have under the B. N. A. Act, 1867, exclusive powers of legislation," limits the repeal, and withholds from its provisions certain cases of petty trespass.

It would be interesting to know your opinion as to whether section 28 of Consolidated Statutes of Canada, cap. 93, or the section of the Dominion Statute just referred to is to be regarded as the sole authority for a summary proceeding for a petty trespass not maliciously committed. You will observe that the terms 60th section of the Dominion Statute, and of the 28th section of the Consolidated Statutes of Canada, cap. 93, are not the same. The terms of the latter are, "If any person *wilfully or maliciously* commits any damage," &c., and the terms of the former are, "Whosoever *unlawfully* or maliciously commits, &c., any damage," &c.

Yours, &c.,

February, 1871. UNION.

[The above affords an argument for the existence of a competent court to settle all such questions, and thereby avoid involving people who have to administer the law in trouble. The subject is well deserving discussion. If the expression of our opinion would probably serve a useful purpose, we should not hesitate to consider it in all its bearings. It involves one of many difficult questions of constitutional law which will present themselves for decision under our new political state of existence; but because those of our subscribers who are magistrates, and who are not supposed to be well versed in law, may be misled, we think it well to say as to the first question put by "Union," that the 92nd section of the B. N. A. Act, 1867, confers upon the Provincial Legislature the power (to the exclusion of the Dominion Parliament) to make laws in relation to property and civil rights; and, as a general proposition, we think with that power goes the right to legislate, prescribing remedies and punishments for trespass or injuries thereto—for whatever affects the subject at all, the power to legislate upon it must be confined to one jurisdiction, and cannot be divided between the two legislative bodies—that is, for anything short of, or apart from, a criminal offence. If it be considered necessary to constitute any act or trespass relating to property, or any other subject, a crime, the Provincial Parliament would still possess the undoubted right to prescribe and control the *civil* remedy; the Dominion Parliament alone would have the exclusive jurisdiction to declare the crime and prescribe the procedure and the punishment; but nothing short of enacting a law declaring the crime would take the remedy out of the jurisdiction of the Provincial Legislature.

As to the last question in "Union's" letter, we think the word "maliciously" does not materially affect the question, unless the Dominion Parliament were to declare that the "wilfully AND maliciously," or "wilfully OR maliciously," or "unlawfully *or* maliciously" doing certain acts affecting a man's property or civil rights should constitute or be declared a crime or misdemeanor; and for want of that exercise of jurisdiction, we are, as at present advised, of opinion that the 22nd section of C. S. of Canada, c. 93, is still in force, and that it will be probably decided by the Dominion General Court of Appeal when constituted, and that if the Dominion Parliament chooses to exercise jurisdiction on the subject it can only be done by way of making a law

in such a form that there will be no doubt of its intention to declare certain acts affecting property and civil rights crimes.

It has been held that whenever the imposition of punishment may be by imprisonment for enforcing any law, that such is to be regarded as criminal law; but we apprehend that that could be scarcely held to apply to our Constitutional Act of 1867, because, as observed by "Union," the power to impose such punishment is expressly conferred upon the Provincial Legislatures for enforcing any law of the Province made in relation to any matter coming within any of the subjects concerning which exclusive jurisdiction is conferred upon them; whilst jurisdiction as to the criminal law and procedure in criminal matters is expressly withheld.

There is another question which may arise out of the peculiar provisions of the B. N. A. Act, 1867, that is not touched by "Union," which it may interesting to consider; and it is this:—Although the Dominion Parliament may declare the criminal law, and prescribe the procedure in criminal cases, what right has that body to pass any enactment constituting a jurisdiction for the trial of criminal offences when the Provincial Legislatures have exclusively the jurisdiction conferred upon them by the 14th sub-section of the 92nd section of organizing Provincial Courts of both civil and criminal jurisdiction?—unless the enactment of the 101st section, which gives the Dominion the power of establishing any additional courts for the better administration of the laws of Canada, means that, notwithstanding the power so conferred on the Provincial Legislatures, the same jurisdiction exists in the Dominion Parliament—Eds. L. J.]

SPRING CIRCUITS, 1871.

Eastern Circuit.—*Mr. Justice Wilson.*

Brockville	Tuesday	March	21
Perth	Tuesday	"	28
Ottawa	Monday	April	3
Kingston	Wednesday	"	12
Cornwall	Tuesday	"	25
L'Orignal	Monday	May	1
Pembroke	Monday	"	8

Midland Circuit.—*Mr. Justice Morrison.*

Whitby	Monday	March	20
Napanee	Monday	"	27
Cobourg	Monday	April	10
Lindsay	Monday	"	17
Peterborough	Friday	"	21
Picton	Tuesday	May	2
Belleville	Friday	"	5

Niagara Circuit.—*Mr. Justice Galt.*

Hamilton	Monday	March	20
Milton	Wednesday	April	12
St. Catharines	Monday	"	17
Welland	Monday	"	24
Barrie	Monday	May	1
Owen Sound	Tuesday	"	9

Oxford Circuit.—*The Chief Justice of the Common Pleas.*

Guelph	Monday	March	20
Woodstock	Monday	"	27
Berlin	Monday	April	3
Brantford	Monday	"	10
Stratford	Monday	"	17
Cayuga	Tuesday	"	25
Simcoe	Tuesday	May	2

Western Circuit—*The Chief Justice of Ontario.*

Sandwich	Tuesday	March	21
Chatham	Tuesday	"	28
Sarnia	Tuesday	April	4
St. Thomas	Tuesday	"	11
London	Monday	"	17
Goderich	Tuesday	May	2
Walkerton	Tuesday	"	9

Home Circuit.—*Mr. Justice Gwynne.*

Brampton	Tuesday	March	21
Toronto	Tuesday	"	28

CHANCERY SPRING SITTINGS.

TORONTO.

(Hon. Vice-Chancellor Mowat.)

Toronto	Monday	March	20

HOME CIRCUIT.

Hon. Vice-Chancellor Mowat.

Guelph	Thursday	April	20
Brantford	Monday	"	24
St. Catharines	Thursday	"	27
Whitby	Monday	May	15
Hamilton	Friday	"	19
Lindsay	Friday	"	26
Barrie	Monday	"	29
Owen Sound	Thursday	June	1

EASTERN CIRCUIT.

Hon. the Chancellor.

Ottawa	Wednesday	April	5
Cornwall	Monday	"	10
Brockville	Monday	"	17
Kingston	Wednesday	"	19
Belleville	Wednesday	"	26
Cobourg	Tuesday	May	9
Peterboro'	Tuesday	"	23

WESTERN CIRCUIT.

Hon. Vice-Chancellor Strong.

Stratford	Tuesday	March	21
Goderich	Friday	"	24
Sarnia	Wednesday	"	29
Sandwich	Saturday	April	1
Chatham	Tuesday	"	4
London	Friday	"	7
Woodstock	Friday	"	14
Simcoe	Tuesday	May	9

By the Court,

A. Grant,

Registrar.