

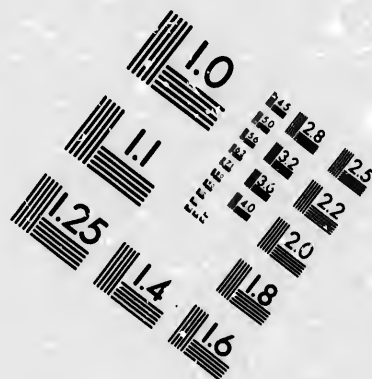
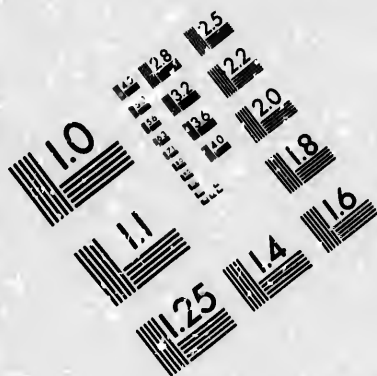
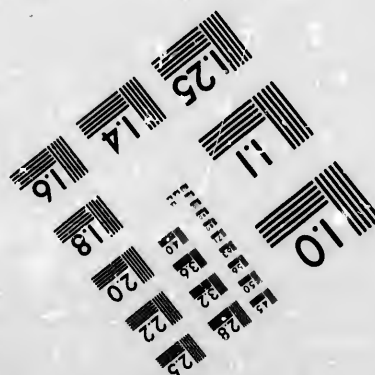
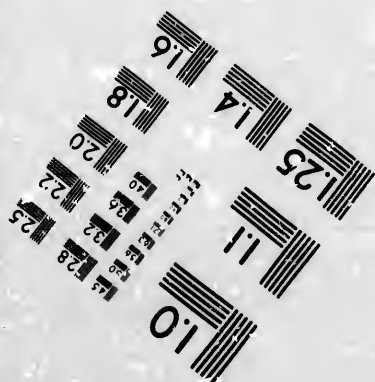
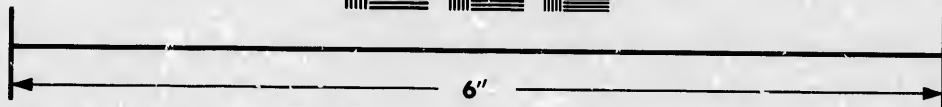
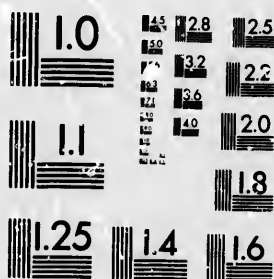


IMAGE EVALUATION TEST TARGET (MT-3)



Photographic
Sciences
Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503



**CIHM/ICMH
Microfiche
Series.**

**CIHM/ICMH
Collection de
microfiches.**



Canadian Institute for Historical Microreproductions / Institut canadien de microreproductions historiques



© 1981

Technical and Bibliographic Notes/Notes techniques et bibliographiques

The Institute has attempted to obtain the best original copy available for filming. Features of this copy which may be bibliographically unique, which may alter any of the images in the reproduction, or which may significantly change the usual method of filming, are checked below.

L'Institut a microfilmé le meilleur exemplaire qu'il lui a été possible de se procurer. Les détails de cet exemplaire qui sont peut-être uniques du point de vue bibliographique, qui peuvent modifier une image reproduite, ou qui peuvent exiger une modification dans la méthode normale de filmage sont indiqués ci-dessous.

- ☐ Coloured covers/
Couverture de couleur
- ☐ Covers damaged/
Couverture endommagée
- ☐ Covers restored and/or laminated/
Couverture restaurée et/ou pelliculée
- ☐ Cover title missing/
Le titre de couverture manque
- ☐ Coloured maps/
Cartes géographiques en couleur
- ☐ Coloured ink i.e. other than blue or black/
Encre de couleur (i.e. autre que bleue ou noire)
- ☐ Coloured plates and/or illustrations/
Planches et/ou illustrations en couleur
- ☐ Bound with other material/
Relié avec d'autres documents
- ☐ Tight binding may cause shadows or distortion along interior margin/
La reliure serrée peut causer de l'ombre ou de la distortion le long de la marge intérieure
- ☐ Blank leaves added during restoration may appear within the text. Whenever possible, these have been omitted from filming/
Il se peut que certaines pages blanches ajoutées lors d'une restauration apparaissent dans le texte, mais, lorsque cela était possible, ces pages n'ont pas été filmées.
- ☐ Additional comments:/
Commentaires supplémentaires:

- ☐ Coloured pages/
Pages de couleur
- ☐ Pages damaged/
Pages endommagées
- ☐ Pages restored and/or laminated/
Pages restaurées et/ou pelliculées
- ☒ Pages discoloured, stained or foxed/
Pages décolorées, tachetées ou piquées
- ☐ Pages detached/
Pages détachées
- ☒ Showthrough/
Transparence
- ☐ Quality of print varies/
Qualité inégale de l'impression
- ☐ Includes supplementary material/
Comprend du matériel supplémentaire
- ☐ Only edition available/
Seule édition disponible
- ☐ Pages wholly or partially obscured by errata slips, tissues, etc., have been refilmed to ensure the best possible image/
Les pages totalement ou partiellement obscurcies par un feuillet d'errata, une pelure, etc., ont été filmées à nouveau de façon à obtenir la meilleure image possible.

This item is filmed at the reduction ratio checked below/
Ce document est filmé au taux de réduction indiqué ci-dessous.

10X	12X	14X	16X	18X	20X	22X	24X	26X	28X	30X	32X
				✓							

The copy filmed here has been reproduced thanks to the generosity of:

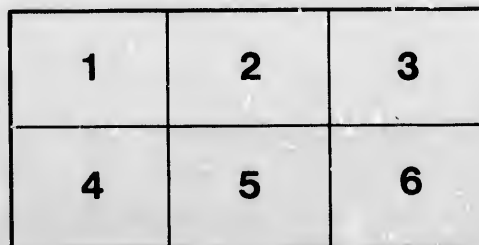
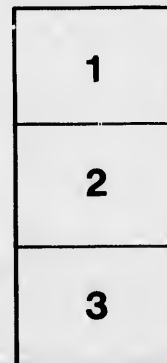
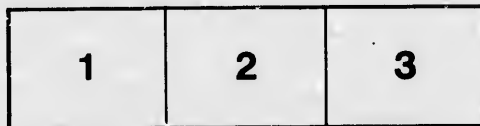
Library of the Public
Archives of Canada

The images appearing here are the best quality possible considering the condition and legibility of the original copy and in keeping with the filming contract specifications.

Original copies in printed paper covers are filmed beginning with the front cover and ending on the last page with a printed or illustrated impression, or the back cover when appropriate. All other original copies are filmed beginning on the first page with a printed or illustrated impression, and ending on the last page with a printed or illustrated impression.

The last recorded frame on each microfiche shall contain the symbol → (meaning "CONTINUED"), or the symbol ▼ (meaning "END"), whichever applies.

Maps, plates, charts, etc., may be filmed at different reduction ratios. Those too large to be entirely included in one exposure are filmed beginning in the upper left hand corner, left to right and top to bottom, as many frames as required. The following diagrams illustrate the method:



L'exemplaire filmé fut reproduit grâce à la générosité de:

La bibliothèque des Archives
publiques du Canada

Les images suivantes ont été reproduites avec le plus grand soin, compte tenu de la condition et de la netteté de l'exemplaire filmé, et en conformité avec les conditions du contrat de filmage.

Les exemplaires originaux dont la couverture en papier est imprimée sont filmés en commençant par le premier plat et en terminant soit par la dernière page qui comporte une empreinte d'impression ou d'illustration, soit par le second plat, selon le cas. Tous les autres exemplaires originaux sont filmés en commençant par la première page qui comporte une empreinte d'impression ou d'illustration et en terminant par la dernière page qui comporte une telle empreinte.

Un des symboles suivants apparaîtra sur la dernière image de chaque microfiche, selon le cas: le symbole → signifie "A SUIVRE", le symbole ▼ signifie "FIN".

Les cartes, planches, tableaux, etc., peuvent être filmés à des taux de réduction différents. Lorsque le document est trop grand pour être reproduit en un seul cliché, il est filmé à partir de l'angle supérieur gauche, de gauche à droite, et de haut en bas, en prenant le nombre d'images nécessaire. Les diagrammes suivants illustrent la méthode.

rrata
co

pelure,
n à

T

T

ARTICLES
ON
THE COURT OF CHANCERY
AND
THE FUSION OF LAW AND EQUITY,
CONTRIBUTED TO
THE TORONTO "LEADER" IN 1868.
BY
RICHARD SNELLING, LL.B.,
OF OSGOODE HALL, BARRISTER-AT-LAW.

TORONTO :

PRINTED AT THE LEADER OFFICE, KING STREET EAST.

1871.

NOTE.

I am induced to reprint the following articles (which, some years since, I contributed to the editorial columns of the Toronto "Leader") in consequence of the resolutions which Mr. Edward Blake, Q. C., recently moved in the Ontario Legislature, on the subject to which they refer. They were written before the first report of the Commissioners appointed by the Queen to inquire into the operation and effect of the present constitution of the High Court of Chancery in England, and the other Superior courts, was promulgated on 25th March, 1869. These articles and that report strictly accord with Mr. Blake's resolutions. Mr. Sandfield Macdonald was urged in 1868 to appoint a commission to enquire into the question of the fusion of the Courts, and he then, as I understood, promised to do so. I am glad that Mr. Blake has so far succeeded in his efforts, as to induce the *quasi* Reform Government of Ontario to take up this great and important matter of reform; and a wise law, in accordance with Mr. Blake's resolutions, I regard as one of the deepest responsibilities of the Legislature of Ontario.

RICHARD SNELLING.

Toronto, 30th January, 1871.

ARTICLES
ON
THE COURT OF CHANCERY
AND
THE FUSION OF LAW AND EQUITY.

"Leader," February 29th, 1863.

None will dispute, while all are well aware of the great advantages which result from simplicity in judicial establishments. Confining to a limited number of judges, resident at the seat of the courts, discussions upon questions of law, whilst the same judges on their several circuits preside over the trials of fact before juries in their respective counties, tends at once to produce order and regularity in process, impartiality in the trial of issues, and above all, those most important objects in the administration of justice, uniformity and certainty of decision. We are fully sensible, on the other hand, that numerous disadvantages exist, in every country that ought to be governed by a uniform law and uniform practice, in having different and opposing systems of jurisprudence—in other words in sustaining distinct courts for the administration of law and equity.

We do not say that on investigation it will be found that our Court of Chancery administered as a Court of Equity is unsatisfactory or that its practice is, on a question of the actual labour employed, in proportion more expensive than the courts of common law. Its judges are men of high legal acquirements and its officers for the most part efficient.

But no one will deny that its practice is essentially different from that of the courts of law, and the question has been raised whether any good reason can be urged why its practice should not be assimilated to that of the courts of common law, and if, as a distinct court it is necessary to the requirements of the people. It is unquestionably expensive as a separate establishment, and it is worth considering whether the defects or limited jurisdiction of the common law, which the object of the Court of Chancery is to remedy and redress, can be so regulated by the Legislature, that by a simple remodelling of the courts of common law, ample and adequate justice to the public can be secured in the courts of law in one action without the additional expense of recourse to a Court of Equity.

The long existence of any institution, and the attachment of some portions of the community to it, are cogent reasons for preserving it, even although it may be urged by advocates for the necessity of a distinct and separate jurisdiction in equity that the court as such, is possessed of, and that it bestows that perfection of justice which it is possible to imagine in theory, but not always attainable in practice. The establishment of one court of civil jurisdiction, with the certainty that the same rules of law and uniformity of decision will be secured, combined with a large degree of economy in procedure, would certainly render the administration of justice highly satisfactory to the people of Ontario. If the question of necessity and convenience were questionable, no man of sense would doubt that it ought to be bestowed in favour of the continuance of the Court of Chancery as a separate court, because every man of sense must know that it is morally impossible to anticipate all the consequences of abolishing an institution. But is the question open to doubt? Those who have witnessed the progress of the Court since its establishment in 1837 have not—certainly not until within the period of the past few years—been aware of any particular energy which animated it, or of

any particular necessity which demanded its existence as a separate tribunal. The increase of population, wealth and production necessarily creates more frequent demands for legal process and investigation and perhaps for a more frequent resort to this Court; but it does not follow that thereby its existence as such is a greater necessity now than heretofore, or that equal facility and despatch in the adjustment of *quasi*-equitable controversies could not be as well secured in a remodelled Court of Common Law as in that of the existing Court of Chancery. It has become a matter to be seriously considered whether the improvement of the present jurisdiction would be best secured by the inauguration of one Court, it retaining, however, all the advantages which are peculiar to equitable jurisdiction. This assimilation, we apprehend, is possible of accomplishment by a general statute for "reforming the courts of common law and equity;" removing certain defects which are common to both; and creating one jurisdiction, so that the rights of all parties to the litigation, whether they be legal or equitable, can be determined in one suit.

Whence the necessity of two courts? Why punish the suitor and the sued by driving them first to one jurisdiction with limited and inadequate powers to afford remedy and relief, and thence to another with amplified powers to distil natural justice? Why the expense and the delay, keeping them in the miseries of litigation; sometimes with tardy, and always with expensive justice? These are not the times for extravagance. England is becoming more practical, and so are the people of this Province, politically, commercially, legally and constitutionally every day. True, the powers of the Court of Chancery are strong in their remedial effects; but with proper remodelling the one court of universal jurisdiction in civil cases can be equally as strong, and we think too, without that expense of protection which often absorbs the whole of the property protected. The expense and delay of the Master's office is very

great. Every warrant, every certificate, every report, every proceeding, indeed, carries its fee, and those fees are heavy. The disbursements in this office are out of all proportion to the advantages secured to the suitor and the sued—for both should be alike considered—and although the amount of fees is carried to the consolidated fund, the system is bad. The solicitor gets professional charges for attending to these matters—warrants, certificates, reports and proceedings—but his fees are not an adequate compensation for his labours in that office, which are rendered much more tedious and laborious by the defects of the system and the proceedings we have enumerated. It is the practice to proceed by a great many steps, and sometimes with much delay. It is obvious what must be the course of litigation, carried on and prosecuted in a hostile manner, and in a case of complicated circumstances. Each item of an account may form the subject of a distinct investigation, and very frequently does so, with its adjuncts, charge and sur-charge, each of which may be supported by affidavits, depositions or *viva voce* examinations.

A very useful Act was passed by the Imperial Parliament a few years since, which has to some extent been acted upon by our Chancery Judges in Toronto in the appointment of an officer called the Judge's Secretary, and by which all Chamber business and the drawing up of orders and decrees made by the the Judges in Court is greatly facilitated, and in this respect, and to this extent, practice rendered uniform and certain, as well by the nature of the office, as the efficiency of the officer. The Act is entitled "An Act to abolish the office of Master in Ordinary of the High Court of Chancery, and to make provision for the more speedy and efficient disposal of business in the said Court." The preamble is also worthy of attention. It recites, "That proceedings before the Master are attended with great delay and expense, and it is expedient that the business now disposed of in the office of such Master

"should be transacted by and under the more immediate direction and control of the Judges of the said Court." The office of Master is, however, still retained as an essential part of the machinery for the administration of our Court of Chancery.

As to the one court of universal jurisdiction in civil cases; its effect may be briefly set forth. A suitor who may now go to a court of common law for redress, frequently finds that it is incompetent to afford him the relief to which he is entitled, or he may find that from the nature of his case he is compelled to go to the expensive and tardy court of equity for redress, because he has not by reason of the limited jurisdiction of the courts of law, relief in those courts. The change proposed will render this double and expensive litigation unnecessary. The suitor will get relief in one court by a speedy and inexpensive process. Surely this would be a step in the right direction, and it is, we conceive an obvious principle of policy and convenience that where the attainment and adjustment of civil rights and remedies is clearly within the limits of one tribunal and attainable in one suit, by simple and efficacious means, by an easy, direct, cheap, and effectual process, it must conduce to the material prosperity of the people, lessen litigation and promote peace instead of fostering strife. It will not be said of the Government of Ontario, if it should take up this question, as was once said in the same particular of "practical" England that, "it was obstinate because it was ignorant, and careless because it was not attacked with sufficient vehemence of indignation." But it may be said, and with much shew of reason, that our Government in this matter is not obstinate, because it is not ignorant of the necessities of the people, and it is not careless, since its desire is by a wise system of assimilating the jurisdiction of the courts of Law and Equity to secure to its people the most beneficial code, to regulate their relations one with another, free from whimsical extravagance on

the one hand, and circuity of process and delay on the other.

On a future occasion we shall refer to the nature of the amendments in the juridical code which to us seem necessary to accomplish the object of assimilating the jurisdiction of the courts of law and equity, and to erect one court for the determination of all civil questions. In the meantime, we would refer our readers to the following extract from a recent number of the *Law Times*:—"The report of the "commissioners appointed to enquire into the administration of the law is expected shortly. It is believed that "the adoption of the original scheme of Lord Cairns will "be advised, namely, *a fusion of Law and Equity*." And inasmuch as Lord Cairns has now been appointed Lord Chancellor, there is little doubt that his scheme of fusion will be shortly laid before Parliament, and in that case it will in all probability receive legislative sanction.

"*Leader*," *March 4th*, 1868.

Every measure of improvement must in this, as in every other free country, pass patiently through the several grades of established process, before it will be consummated by legislative sanction. The people must require, before parliament will effect it; the proposal may be philosophically just, and capable of clear demonstration, but that is no guarantee for its immediate adoption; for, the majority of people are not philosophers, and yet the majority must first learn its merits, and then set the machinery of legislation in motion. This process of instruction is tedious and laborious, but it is the almost necessary consequence of our free institutions. The legislature cannot safely advance in front of public opinion. Some one suggests the idea of an improvement; then it is discussed—among the few first, and afterwards by the many; then the press applies itself to the subject, and discusses it bit by bit, and

frequently repeats it over and over again; and then the public become gradually conscious of it, and symptoms occur to manifest their present wishes. Then some member proposes an amendment of the law with regard to the particular subject and, with a view of bringing the proposed improvements before the House, he perhaps brings in a Bill; the arguments in its favor are rehearsed, a debate ensues. "It is an important matter," say some. "The Legislature should pause before they consent to such a great alteration," say others. "The government ought to take it up," says the opposition. This may appear to the Ministry doubtful; they prefer to wait, but private members having taken up the cue, press other amendments, obtain leave to introduce and introduce other Bills, and then bill after bill being brought before the House tinkering with the question, the government finally interferes, and the whole matter stands over for further consideration. The question has been agitated, and the people are alive to its importance; individual members have essayed to deal with it; the Opposition urge the government to do so; and the Ministry, finding that the question possesses intrinsic merit, take it up. Perhaps it is of such importance that they appoint a commission to report. The Government adopt the principle; the act is passed. A great advantage, doubtless a positive good, has been accomplished for the people. The Government have only given the last polish, and affix the maker's mark to a work which has previously been put together for them by a multitude of hands.

The revision of many of the acts relating to the administration of justice and the reform of the Courts of Common Law and Equity for the Province of Ontario is going through these stages. During the present session bill after bill has been introduced by independent members proposing various amendments in the law relating to the administration of justice and the various Courts of Law,

and they have for the most part been withdrawn to enable the ministry to prepare a scheme of relief during the recess. The remodelling of these Courts; the assimilation of their jurisdiction; the creation of one court for universal jurisdiction in civil cases, is arriving at that stage, that we may reasonably expect that next session the subject will be fully launched before the House, and become the law of the land. We have advocated the necessity of this measure, and have no doubt that it will soon assume a character of greater probability. In England, by a report of a committee composed of the best men that could be selected, a unanimous and decided opinion has been expressed that a fusion of Law and Equity is not alone practicable but a necessity for the due and efficient administration of civil justice.

Having, as we think we have, ascertained the necessity for this proposed Law and Equity reform, we shall proceed to enquire in what mode the amendment should be effected.

The Government of Ontario has promised that the revision and consolidation of the various statutes relating to the administration of justice shall occupy the serious attention of the Executive during the recess. This revision and consolidation can, we think, be best effected by the appointment of a Commission for that purpose, to be composed of the best legal practitioners that we have, two Equity, two Common Law, and two real property lawyers, with a good and efficient and recognized industrious chairman, or president. One of the principal directions to be given to this Commission should be—apart from all other duties as to the revision and consolidation of the legal code—to report upon and prepare a statute for reforming the Courts of Common Law and Equity by assimilating the two jurisdictions, and to renew and amend the existing defects common to both, so that one jurisdiction for legal and equitable relief in all civil cases may be inaugurated.

For all the preliminary matter which leads us down to this arrangement, we must refer to the evidence and arguments embodied in our former articles on this question, and must assume it to have been there proved that the measure is one of necessity. We are anxious, however, to clear the subject from one general objection which we did not previously encounter. This question should be considered quite independent of party politics. We regard it as we would any improvement in commerce, manufactures, agriculture, or the like, and shall believe that those who judge of it with any political bias, do not really understand it. We welcome the necessity for the reform, we repeat our concurrence in its object, and trust that in its progress—with or without a commission—through the legislature, it will receive that consideration which its importance requires, and any amendments of which it is susceptible.

There should, we think, be one court of universal jurisdiction in civil cases, and that the seat of that court should be at Toronto, the capital of Ontario. Nevertheless, every means should be devised and should be afforded to the people of this Province of having their suits tried as speedily and as near their own homes as may be, whereby expense, vexation and delay may be avoided. To place the due administration of justice upon a sure foundation the whole question between the litigants, be it one of law or equity, should be decided in one suit, and this will necessitate the abolition of the Court of Chancery as a distinct and separate court of jurisdiction, and assimilate and merge, as it were, the boundary lines between the present existing respective jurisdictions of Common Law and Equity. We are convinced, however, that the principles which the Court of Chancery has ever professed peculiarly to take as its guide and to enforce, must not be lost sight of and that they must be engrafted in the Common Law system. The various heads under which its jurisdiction may be classed are stated in the "Chancery

Act." It is unnecessary to exhibit and illustrate the principles upon which the jurisdiction of the court is now exercised, but it is necessary to say that they must be fully and completely recognized in any act by which fusion may be accomplished.

It is a well credited maxim of all jurists that "Equity is to be kept in view in all things, but especially in the "administration of the law." This rule was laid down to inform the conscience and to guide the decisions of the judge, by the Roman jurist, as to that paramount and universal principle which was, indeed, then, and is now emphatically called "*viva vox juris civilis*." "When the "common law is insufficient Equity steps in to give redress, "following, however, the rules of law." This is the present system. What we require is that the common law shall not be ineffectual to give redress, but that without any necessity for equity as a court with a distinct and separate jurisdiction to step in, the common law may be enabled to afford that redress, without recourse to a distinct or separate court for relief. Lord Mansfield was once severely censured for endeavouring to administer equity in a court of common law, and we have been told "that a man will "deserve ill of his country who should endeavour to "confound the rules by which courts of Law and Equity "are severally guided." We are no longer, in this enlightened age, to be governed by technicalities. It is no longer desirable that there should be two sets of courts in the same country, acting upon opposite rules, and it is absurd and pernicious to the public, that different rules should prevail in different courts on the same subject. We are not of opinion that there should be too strict an adherence to technical rules as to render them subversive of substantial justice: but we do think that the rules and principles to govern the administration of justice should be so assimilated as to Law and Equity, as they are recognized, as to make them a blessing to the people for whose welfare they should

be designed, but to whose misery and ruin, in too many instances, by circuitry of process, vexatious delay, and expense, they have as distinct and separate courts unquestionably contributed.

"Leader," March 9th, 1868.

We have several times already stated in these columns that in our opinion there should be one court of universal jurisdiction in civil cases. It must not be supposed that thereby we would dispense with equity altogether. We cannot dispense with its principles; we simply urge that a distinct court is unnecessary for their administration. We recognize and advocate the adoption of the well-settled principles of the Court of Chancery, but we claim that they should be incorporated with and form a part of the common law system, so that every right and every remedy which the suitor or the sued may have, shall be determined in one, and the same court, and in one and the same suit. We maintain that our law should be what the common law of England would have been, had the judges accommodated themselves to the successive exigencies of the times, and by a skilful use of the malleable nature of the system, given to it that refinement and polish of which it was more susceptible than any other body of jurisprudence. What we require is not the common law of England or of Canada in its restricted sense, but the common law incorporated with equity, (more completely than it is at present,) mitigated however in every instance by the principles of the latter, and thus adopted to the necessities of our time, and our country. We require this system, compounded of the two now in use, uniting all their excellencies, but administered by one tribunal. The particular object, we think, to which public attention should be directed, and on which our legislators must decide, is to eliminate the *modus operandi* by which the two systems should be incorporated, to ascertain the course which should be pursued by the

Legislature and afterwards by the Court, in the preparation of rules of practice, to make the new system complete.

Lord Cairns has suggested a scheme by which the common law courts in England will be made to do the work now performed by a court of equity, and has devised a means by which courts of equity are relieved, and many admitted anomalies which disfigured both systems swept off. This scheme we shall shortly print for the information of our readers. We have more than once enumerated the principal expedients by which a coalition of law and equity may be effected. We believe that the objects of a court of equity can be effected by a common law court, but at the same time we maintain that its powers as well as principles; remedies as well as rules, must be assimilated. It has been urged that the whole question resolves itself into a division of labor. We think not. It is not a question of the division of labour, but on the contrary, it is one to prevent circuity of action, vexatious delay, and much expense. It has also been suggested that the Legislature of Ontario has not the power to deal with the question, but in this opinion we do not concur. Although if it can be shewn that its powers are only partial to effect the final accomplishment of the great work, and that the aid of the Federal Legislature is necessary to fully complete it we have no hesitation in expressing our conviction that such aid will be cheerfully and readily accorded. We borrowed our first principles of jurisprudence and our modes for administering justice from England, and although important alterations in our laws have been from time to time effected, the English principles and modes, for the most part, are still retained, and England has now declared herself in favor of a fusion of the Courts of Law and Equity.

In Courts of Equity both here and in England the judge who hears the cause decides all questions of fact, and it rarely happens (although the power is possessed and in some cases exercised) that Courts of Equity call in aid that

evanescent Common Law tribunal—a jury. There is no doubt that decisions upon matters of fact by the judge in equity, have given great satisfaction in this country to suitors; the strong inclination, the manifest and controlling desire of the judge, is to do justice between the parties, and, although the litigant who fails may sometimes betray annoyance and vexation at defeat, we never heard of a single instance—we never heard of an occasional whisper against the system which prevails in equity in this particular. On the other hand, we have frequently heard that the feelings and prejudices of the sometimes inexperienced and irresponsible jury have been wrought upon by the latitude and license which are allowed to the advocate in the Courts of Common Law on a trial at *nisi prius*. The facts in an equity suit are decided according to the evidence, and by calm reason alone. Now, all discursive matter (and especially almost all that is addressed to the passions) is pruned away from the evidence in Equity, and at any rate has little, if any, weight with the Judge.

If, therefore, in cases which have for many years come before the equity courts for decision, the verdict of the judge upon the evidence has been accepted with universal satisfaction, and if we are to have a fusion of the courts, and one court of universal jurisdiction in civil cases, we do not see why in future the practice which has been found to work so well for all parties in equity should not be adopted under the new system, and trial by jury in civil cases be abolished altogether; or if not abolished altogether, at any rate left to the option of the parties to be declared by the first proceeding they or either of them may take in the cause. That is, if the plaintiff should require a jury he should so declare on the initiation of his suit; or if the defendant he should so declare on the entering of his defence. The efficiency of a judge to determine questions of fact in Equity cases, where those questions are of infinite variety, and frequently more complicated than those which come before courts of law and juries, has never been

disputed, and we are therefore, justified in the conclusion that the efficiency of a jury as an instrument in the administration of justice in proceedings of a civil nature, is not only open to much doubt, but is very questionable. If it be admitted that the questions of fact, having reference to the most intimate relations of man and man—questions adjudicated upon by the extensive jurisdiction of the Court of Equity have been, for many years, satisfactorily, honestly, and faithfully determined by the judge who hears the evidence; if this, we say, is taken for granted—and past experience cannot be offered in refutation—then, we think, it follows as a matter of course, that questions of fact which arise in matters of law, as distinguished from equity, can be and would be as satisfactorily determined by a judge without the intervention of a jury. The abolishment of the jury system in civil cases would be a great pecuniary gain to the country, and, we think, a certain and positive advantage to the people. The business of a court moreover, without a jury is conducted with a seriousness and decorum which are well calculated to impress the litigant parties, and the public also, with the full belief, with the conviction, that justice is being done to them; but the process for appealing to the jury, the declamation of the advocates, the torturing of the evidence, the appeal to the passions, spoils all. This proposed change, we think, will recommend itself to every right-minded man in the country. Change for the mere sake of change—change, where the defects of an old, or the merits of a new system are not perfectly obvious, we deprecate; and such changes should be discountenanced. But, on the other hand, if we are shortly to assimilate the jurisdictions of law and equity—if we are about to erect one court of universal jurisdictions in civil cases, if we have found for some years the practice in equity as to decisions of fact to work well, beneficially to the public, and satisfactory to the suitor and the sued, it is surely wise to retain this system and not to claim an

immortality for trial by jury in civil cases, because courts of law may boast and the public may aver that it is venerable for its antiquity.

If such consideration should prevail the amendment of our juridical system will lose the benefit of what we think will be regarded, the well-considered, rational and practicable advantages which have resulted to Courts of Equity, by the mode which they have adopted for deciding questions of fact by the Judge without the intervention of a jury. The interests of the public, and we make bold to say, the interests of justice manifestly require this change in the common law system of the present mode of trial by jury in civil cases; and should the Legislature adopt the same view of the subject, we venture to predict that the loss of the "time-honored" institutions of trial by jury in civil cases, will be a great practical gain to the people of Ontario.

"Leader," March 18th, 1868.

Notwithstanding opinions vaguely expressed to the contrary, we are convinced that without some such enactments as those which we have in former articles on this subject suggested, with regard to the fusion of the Courts of Law and Equity, and the erection of one Court of universal jurisdiction in civil cases, the administration of justice in the Courts will remain as it is, imperfect; and we are equally convinced that our suggestions, if carried into effect, will not only be the means of saving much vexation, expense and delay in litigated cases, but will also conduce generally to a better observance of justice, by adding to the speed and facility with which it can be thoroughly enforced.

These opinions have been reiterated and fully discussed and enforced on the several occasions we have brought this subject before our readers. Glaring instances of the defects in the two systems we have already pointed out—

instances where Courts of Law are obliged to hold defences untenable, which in a Court of Equity are considered valid—instances where a Court of Law must give a judgment in favor of a plaintiff which a Court of Equity will restrain him from enforcing—instances in which courts of law have not sufficient power to prevent the law, as administered by them, from being made the instrument of vexation and of useless expense. And the true remedy for such evils is to make the law, as we have already pointed out, uniform by a fusion of the Courts by legislative enactment. Why should not the final, and if justice be done, inevitable result of litigation be attained in one Court, and in one suit? Why should Courts of Law and Equity be longer permitted to apply different rules of right and wrong to the same subject matters? Are we not often told that certain matters or things are invalid in equity, though the like are good at law—and are not statutes frequently passed by the legislature with the explanatory preamble “that it “is expedient that such matters or things should be as “valid in equity as at law?” Can more wretched imbecility be exhibited than this, that this or that something is good at law but invalid in equity? Is there not a complete want of practical sense? Why is it that the decisions of law and equity do not coincide? And why should they not do so? Is it when cases are quoted (in the court of law) from the decisions of the court of chancery, that we are repeatedly told—and it happens at Osgoode Hall every term, “that none of them is of the least avail in the court “of law, *because the two courts act on different principles*; “and that which is the groundwork and foundation of the “decisions of courts of equity is directly repugnant to “every rule and determination of the courts of law?” Yet this was the language of Justice Buller, and similar language is often reiterated from the Common Law Bench of our own courts.

To fix the precise period of the origin in England of the

courts of equity, the jurisdiction of which is in England and in Canada, as the reader is well aware, distinct from that of the courts of law, is unnecessary. We concede that in England the Court of Equity is of some antiquity, and that in Canada it was erected in 1837, but was not very frequently heard of until about 1850. But at the same time it is clear, that in England as well as in Canada, charges have been frequently made against the equity jurisdiction, as being an innovation upon the jurisdiction of the courts of law. The great argument which is advanced by the Court of Chancery advocates is, that without this court, suitors would be and remain without remedy and redress, in respect of many rights as regards which courts of law are remediless, or as to which they will not take cognizance, and they say that as the courts of equity have acquired a jurisdiction derived chiefly from the narrow decisions of the Courts of Law, and having now strictly possessed it, Courts of Law ought not now to be at liberty to deprive them of it. We have answered this argument over and over again. The separation of law and equity as a system is pregnant with many evils, ineffectual for any good purpose and has created the very mischief it was intended to prevent. "Whatever may be the language of bigots, of men whose minds have never been enlarged by science or refined by cultivation, of pettifoggers and barbarians, whatever may be the opinions of eminent solicitors, or pleading judges, the great masters of jurisprudence have taught all who will hearken to their voice, that justice and equity are synonymous. Therefore it is high time that a divorce between law and equity, which has so long been the scourge and scandal of this country, should terminate, and that elements which God and reason have joined together should no longer be by the miserable narrowness and ignorance of man, be kept asunder." Thus wrote an able English jurist, J. G. Phillimore, more than ten years ago, and this writer is a

member of the Law Commission which has recently declared in favor of the fusion of law and equity, and the erection of one Court of universal jurisdiction in civil cases. Dr. Heron, an eminent Irish barrister, in his history of Jurisprudence (1863) says:—"It is to be hoped that the "division of the administration of justice between the Courts "of Law and Equity will be abolished in England and Ireland, after the example of New York in 1850; and that "every court as to the decision of rights, will be made a "court of unlimited jurisdiction; although different processes may be adopted to enforce such rights; and some "courts may decide questions of larger pecuniary importance than others. The union of Law and Equity in the "Courts of England and Ireland is a project approved by "very enlightened law reformer. In New York in the "year 1850, the technical system has been in a great "measure destroyed by the fusion of the Courts of Law "and Equity." And we agree with Dr. Heron. The project upon which we have been writing is one to be approved by every enlightened law reformer.

"The distinction between law and equity, and the "administration of justice in two sets of courts, was, till "of late years, retained in most of the United States of "America; but this distinction has now been abolished in "several of the States, in which therefore the courts "administer both law and equity; and a similar fusion of "jurisdictions has been for some time contemplated in the "courts of this country, and by several recent statutes, "some steps in this direction have been made. (See 2nd Rep. of C. L. Commissioners, England, 1853.") This distinction between law and equity as administered in different courts, is not at present known, nor seems to have ever been known in any other country at any time, and yet the difference of one from the other where administered by the same tribunal was perfectly familiar to the Romans—the power centered in one and the same magistrate who

was equally intrusted to pronounce the rule of law, and to apply it to particular cases by the principles of Equity. Thus, too, the Parliament of Paris, the Court of Session, in Scotland; and every other jurisdiction in Europe, of which we have any tolerable account, formed all their decisions as well upon principles of Equity as those of positive law. And surely, says the English Jurist, Blackstone,—“There cannot be a greater solecism than that in two sovereign “independent courts established in the same country, “exercising concurrent jurisdiction and over the same “subject matter, there should exist in a single instance two “different rules clashing with or contradicting each other. “And thus of late it has been proposed that a fusion should “be made, and that the distinction between Law and “Equity should be abolished.” The system of our Courts of Equity is a labored connected system, governed by established rules, and bound down by precedents from which they do not depart.

We have collected these opinions upon the question. They cannot be without an influence on the public mind, in preparing it for the fuller consideration of the subject when it will, as we believe it will, be brought more prominently before the people of Ontario—and probably in the next Session of Parliament before their representatives. More might have been said and urged in favor of the practical utility of a fusion of the courts; but probably enough has been said to make the question intelligible to the public and to stimulate the thoughts of those who are disposed to consider this great question of law reform. If the views we have advanced are sound—if the opinions of the able jurists which we have recorded are entitled to any consideration—it is plain that the question recommends itself to the earnest consideration of all—for all are alike interested. It is progression—it is reform—it is an advance—the like of which we find among other nations. England has adopted the principle and will shortly put it

into practice. We go heartily with this suggested reform, and the amendments of the legal code to give effect to it—and a wise law to this end we regard as one of the deepest responsibilities of the Legislature of Ontario.

The Confederation Act provides that in each Province the Legislature may exclusively make laws in relation to "Property and Civil Rights in the Province," and for "the administration of justice in the Province, including the constitution, maintenance and organization of Provincial Courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those courts." It also provides that the Governor-General shall appoint the Judges of the Superior, District and County Courts in each Province. It also provides that, "notwithstanding anything in this Act, the Parliament of Canada, may make provisions for the uniformity of all or any of the laws relative to property and civil rights in Ontario, Nova Scotia and New Brunswick, and of the procedure of all or any of the courts in those three provinces, and from and after the passing of any Act in that behalf the power of the Parliament of Canada to make laws in relation to any matter comprised in any such Act, shall, notwithstanding anything in this Act, be unrestricted; *but any Act of the Parliament of Canada making provision for such uniformity shall not have effect in any Province unless and until it is adopted and enacted as law by the Legislature thereof.*"

There is no doubt that the Legislature of Ontario possesses the power to revise and consolidate the various statutes relating to the administration of justice, and to blend our courts of common law and chancery into one court of universal jurisdiction in civil cases.

JUDICATURE COMMISSION.

The first and, up to the present, the only report of the Commissioners, referred to in the foregoing articles, and of

which Commission Lord Cairns was Chairman, is dated 25th March, 1869. I extract a few paragraphs from this Report:—

“INTRODUCTORY OBSERVATIONS.”

In commencing the enquiry 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 enquire 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 prevent wrongs, whether existing or likely to happen unless prevented;" and further that "a consolidation of all the elements 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 authorized 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.

* * * * *

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 exercisable 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."

On Wednesday, 25th January, 1871, Mr. Blake brought this subject before the Ontario Legislature, and I subjoin a copy of his resolutions:—

"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 con-

fusion, 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 preceding resolutions."

"A debate ensued, and from a report thereof which I have extracted from the "*Globe*" of the 25th January. The Attorney General (The Honorable J. S. Macdonald) said:

"He never had but one opinion as to the necessity of the changes sought for by the hon. member for South Bruce (Mr. Blake.) Within the last two months he had told the Chancellor, Chief Justice Richards, and Judge Morrison, that it was his intention, after this session, to appoint a commission to see how those courts could be better constituted than at present. This was no new idea of his, for he had spoken to his colleagues about it. It was his intention to procure two or three of the best minds to inquire into this matter; and he would observe that when a similar change took in the courts of the State of New York, sixteen or seventeen years ago, they were preceded by a report. It was not an easy matter to adopt suddenly the system proposed by the hon. member for South Bruce. It was too serious a matter to go now into committee on those resolutions without adopting the precaution of previous inquiry. The Government would issue a commission to inquire into the matter, and have a report next session. He hoped that the hon. member for South Bruce would be satisfied with the exertions he had made, and with the promise that had been given."

Mr. Blake, as I gather from the same report, said in reply:—

"That he did not anticipate that any great progress would be made by this commission, and thought that the House would, after all, have to legislate without assistance from the commission. He would accept the proposal of the Attorney-General, and ask leave to withdraw the resolutions."

The House having granted permission, the resolutions were withdrawn.

gress
the
ance
f the
solu-
tions

