Equitable Jurisdiction and the Court of Chancery in Upper Canada

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The courts of common law and equity in Ontario were fused to create one Supreme Court of Judicature in 1881. In this new court, equity prevailed over common law and the procedure adopted drew more from Chancery than from common law practice. Earlier in the century, this triumph of equity would have been predicted by very few. Although the need for equity to complement the common law had always been recognized, the traditional administration of a separate court of Chancery was unpopular. Therefore, the introduction of equity into the province had been delayed for many years, despite the harsh legal consequences this entailed. In 1837, a court of Chancery was established, but as John Spragge, later Chancellor of Upper Canada, noted “[I]t was from no love of a Court of Chancery that it was introduced, but in spite of many and strong prejudices.”¹ These prejudices were understandable. A commission established in 1843 to investigate the Court reported:

There was probably an apprehension not ill-founded, that expense and other inconveniences, which would be hard to bear, and yet not easy to obviate, would follow the introduction of any thing like the English Courts of Equity, and this may have restrained the Legislature from making any attempt of the kind before the year 1837.²

At first the Court lived up to the dismal reputation of its British counterpart; by the 1860s, however, many of the problems had been resolved. By then momentum was building for the reform that culminated in the Judgment Act of 1881.

Given the hostility directed towards the Court of Chancery, it may seem strange that the province waited until 1881 to effect fundamental reform, but there were profound conceptual and practical objections to such a move. To those educated in the English legal tradition it was unthinkable that law and equity could be dispensed from the same court. One legal historian has remarked:

The notion of this separation, despite its accidental origin, had been so bred into the bone of the legal profession... that it wore the aspect of something declared by nature, something integral to the processes of civil justice.³

As the century progressed the conceptual difficulties diminished, only to be replaced by a more practical concern with amalgamation of the widely differ-

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² Journals of the Legislative Assembly of the Province of Canada, 1844-45, Appendix J.J.
³ Millar, Civil Procedure of the Trial Court in Historical Perspective (New York: National Conference of Judicial Councils, 1952) at 32.
ing practice and procedure of the two courts. This difficulty seemed so insur-
mountable that fusion in Ontario would have been delayed even longer had it 
not been for the impetus provided by the English union of the jurisdictions in 
1875.

After the creation of Upper Canada in 1791, the first act of the new 
legislature was to provide that "in all matters of controversy relative to prop-
erty and civil rights, resort shall be had to the Laws of England."4 In 1794, the 
courts of Common Pleas were abolished and replaced by the Court of King's 
Bench, which was given "all such powers and authorities as by the law of 
England are incident to a Superior Court of civil and criminal jurisdiction."5 
Thus the common law was introduced into the province. However, no similar 
provision was made for equity. In some ways this is surprising because 
Lieutenant-Governor John Graves Simcoe was fervently British and William 
Osgoode, the first Chief Justice, had been an English Chancery practitioner.6 
Both, arguably, might have welcomed equity. Riddell suggests that had 
Osgoode not become Chief Justice of Lower Canada in 1794, he would prob-
ably have attempted to establish a court of equity in Upper Canada.7 This is 
possible, but the young province had more pressing problems and, as later 
became apparent, there were a number of obstacles to the introduction of 
equity.

The first serious proposal for the establishment of such a court was made 
in 1801 by Henry Allcock, then a judge of the Court of King's Bench in Upper 
Canada. He was strongly supported by the Lieutenant-Governor, Peter 
Hunter. Allcock's plan was based on Blackstone's theory of royal prerogative 
which held that the Crown alone "has the right of erecting courts of 
judicature."8 Therefore, when the Great Seal of the province was delivered to 
the Lieutenant-Governor, he became Keeper of the Great Seal for the Province 
and, under the Statute of 1562,9 had all the powers of the Chancellor. Under 
the statute no legislation would then be required to create a court of Chancery 
and the Lieutenant-Governor was free to establish himself as the dispenser of 
equity in the province.

It was on this assumption that Courts of Chancery, presided over by the 
Governor, had been established in Nova Scotia,10 Quebec11 and many of the 
American states. In Upper Canada, however, Lieutenant-Governor Hunter 
was a soldier by profession and, as such, unqualified to dispense equity.12

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4 1792, Upper Canada 32 Geo. 3, c. 1, s. 3 [hereinafter U.C.].
5 1794, U.C. 34 Geo. 3, c. 2.
6 Riddell, "William Osgoode, First Chief Justice, Upper Canada," Upper Cana-
dian Sketches: Incidents in the Early Times of The Province (Toronto: Carswell, 1922) at 111.
7 Riddell, The Bar and the Courts of the Province of Upper Canada or Ontario 
(Toronto: Macmillan, 1928) at 161.
Press, 1770) at 257.
9 1562, 4 Eliz. 1, c. 18.
10 Townshend, Historical Account of the Courts of Judicature in Nova Scotia and 
the History of the Court of Chancery in Nova Scotia (Toronto: Carswell, 1900).
11 Riddell, The First Court of Chancery in Canada (1922), 2 Bos. U.L. Rev. 231, 
12 Supra note 6, at 149.
Allcock proposed, therefore, that a court of Chancery be established with Hunter as Chancellor and a Master of the Rolls to act on his behalf. The British Government would not approve the project, ostensibly because the Lieutenant-Governor already had the power to dispense equity and to request assistance if necessary. In reality, Britain's principal objection appears to have been the cost of paying another judge. Accordingly, Alcock modified his plan to allow fees to be collected from users of the court. Hunter would still be Chancellor, but Alcock would do the work and receive his remuneration from the fees. The British approved the scheme but before it could be implemented, Hunter died and Alcock became Chief Justice of Lower Canada. With its two architects gone, the proposal was forgotten.

In 1806, Mr. Justice Thorpe, another judge of the court of King's Bench in Upper Canada, advocated the establishment of a court of Chancery largely because he wished to head it. In fact, he generously wrote to his friend, Edward Cooke, to say "there is such a strong necessity for its establishment that I will undertake it for the sake of public justice, without fee, or reward." It cannot be said whether this offer would have been accepted, for Thorpe became embroiled in politics and was removed from office.

Interest in the project was not revived until the 1820s when the British authorities expressed concern over the absence of equity in Upper Canada. As early as 1806, the Standing Counsel for War and the Colonies, W. Harrison, had written to the Under-Secretary, Sir George Shee:

It seems extraordinary that a court was not established at the time of the introduction of the English laws. The separation of our jurisdiction into legal and equitable makes such a court a most essential part of our establishment and many cases of hardship and instances of failure of justice must occur until it is established.

In 1827, John Walpole Willis was sent from England on the understanding that he would be appointed to a court of Chancery, should one be established. By then, however, the English law officers were less certain that the Crown could create a court without legislative sanction. Consequently, Britain recommended that the Legislative Assembly of Upper Canada be asked to create a court of Chancery.

This change in policy introduced new impediments to the establishment of a court of equity. Chancery was distrusted by the people of Upper Canada, for its costs and delays were legendary. Furthermore, many members of the Legislature were hostile towards the legal profession in general. The Assembly briefly considered the matter before determining that it was too busy to provide that "mature consideration which is due to so important a subject in its complicated details." Riddell says that "it is practically certain that the Legislature could not have been induced to pass any Bill to erect such a court."

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13 Id. at 50.
14 Id.
15 Undersecretary for War and the Colonies 1804-1806 and 1807-1809.
17 W. Harrison to Sir George Shee, (Apr. 1806), P.A.C., Series Q. Vol. 305 at 119.
18 Supra note 7, at 163.
19 Id. at 165.
20 Id.
There were other complications. Willis was removed from office after a conflict with the Attorney-General, and no suitable candidate was commissioned to replace him. Even more important was the continuing controversy over how the proposed equitable jurisdiction was to be exercised. Three possibilities existed, the most radical of which was to confer equitable jurisdiction on the entire Court of King's Bench. This had been done in Massachusetts where public hostility made establishment of a separate court of Chancery impossible. Instead, beginning in 1817, Massachusetts extended equitable jurisdiction to the common law courts until they were accorded full equitable powers in 1857.21 This proposal was much too radical for the conservative citizens of Upper Canada, however, and it appears to have been dismissed out of hand. Britain suggested that one judge be added to the Court of King's Bench to sit as the equity judge rather than creating a separate court of Chancery.22 The most popular alternative, however, was to create a completely separate court to dispense only equity.

Discussion continued but no action was taken until November 1832, when a select committee was appointed to study the problem.23 The committee recommended the establishment of a separate court of Chancery and produced a draft bill, which reached second reading before being abandoned. The Legislature finally took up the matter in earnest in 1836, and created a court of Chancery in Upper Canada in March 1837.24

Although there was no court of equity in Upper Canada before 1837, the concept of equity had often been acknowledged. When justice could not be done at law the courts frequently stated that the injured party must seek his remedy in equity, as if all he needed to do was to cross the hall to obtain relief.25 The first statute, passed in 1792, provided that "all matters relative to testimony and legal proof in the investigation of fact, and the forms thereof, in the several Courts of Law and Equity within this Province, be regulated by the rules of evidence established in England."26 The 1834 Act revising the law of real property also contained several provisions regarding equitable interests in land.27

Nevertheless, in the 1840s, Boulton J. in Simpson v. Smyth expressed his opinion on the position of equity in Upper Canada prior to 1837:

I am of opinion, that before the establishment of the Court of Chancery, those rules of decision, or that system of jurisprudence called equity, as administered in England in the Court of Chancery, did not exist in Upper Canada. For although the word equity is used in 32 Geo. 3, chap. 1, sec. 4, and occasionally in other acts of the legislature, yet I cannot regard these expressions even as indicative of the legislative mind, that equity as a system had been or was thereby intended indirectly

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22 Supra note 7, at 164.
24 1837, U.C. 7 Wm. 4, c. 2.
26 1792, U.C. 32 Geo. 3, c. 1, s. 5.
27 1834, U.C. 4 Wm. 4, c. 1, ss. 13, 19, 22, 23, 24, 25, 43.
to be recognized as a rule for the decision of questions regarding civil rights when they abstemiously forbore for half a century to establish any tribunal wherein such a system could be administered. 28

A similar view was expressed in 1827 by the Court in Wood v. Leeming. 29 The plaintiff buyer requested specific enforcement of a contract for the sale of land he had made with a sheriff on the grounds that because the sale was made by an officer of the court, it was sufficiently within the Court's purview "to authorize an equitable interference, particularly as there was no court of Chancery in this country to which O'Hara could apply." Not surprisingly, the application was refused.

However, there were frequent attempts to mitigate the injustice that could result from the absence of an equitable jurisdiction. What the courts were unable to do officially, they were sometimes prepared to do covertly, and the common law courts of Upper Canada began to practice their own variety of equity cloaked in the language of the common law. 30 In addition to the court action, the Legislature often intervened. In some cases of blatant unfairness, the Legislature passed specific acts granting equitable relief to needy individuals and groups. At other times, general remedial acts were passed to permit the common law courts to fill the void created by the lack of a court of equitable jurisdiction.

In Ancient Law, 31 Sir Henry Maine wrote that the law "is brought into harmony with society" through the use of three different devices — legal fictions, equity and legislation. The experience in Upper Canada confirmed Maine's analysis. Since equity was unavailable, legal fictions and legislative enactments were used to circumvent the strict doctrines of the common law, to ensure that justice was not denied.

In order to understand this process more fully, one must take a closer look at the areas in which the lack of an equitable jurisdiction created the greatest difficulties. The absence of equitable jurisdiction had been acutely felt with respect to the law of real property. In 1806, Henry Allcock wrote to Sir George Shee:

Whilst I sat in the court of King's Bench, there many verdicts were obtained against Defendants, contrary to the Equity of the case, in which a court of law could not afford any relief, particularly in Ejectment cases. 32

The problem created by mortgages was a simple one. At common law, a mortgagor conveyed conditional title to his land to a mortgagee in return for a sum of money. If the money was not repaid by a certain date, the mortgagee's title would become absolute. Default occurred quite frequently in Upper Canada and no relief was expected from a court of common law. 33 On the other hand, equity early recognized that the conveyance to the mortgagee was

28 (1847), 2 O.S. 629 at 652.
29 (1827), Taylor 463.
31 See text accompanying 39-65, infra.
33 E.g., Doe ex Dem Dunlop v. McDougal (1827), Taylor 464 (C.A.).
made simply to secure the loan so that an equity of redemption in the mortgagee would permit him to repay the money after the due date and have his land reconveyed to him. To protect the mortgagee, equity also recognized a right of foreclosure whereby the mortgagee could "cut short" the equity of redemption and gain absolute title to the land if the money was not repaid within a period specified by the court. 34

At common law, neither an equity of redemption nor a right of foreclosure was recognized, although a British statute 35 did provide limited protection for both parties. The statute permitted the mortgagee to apply to a court to have the money repaid. If this was not done within a certain time period, the mortgagee was entitled to bring an action for the ejectment of the mortgagor, and to receive legal title to the land. However, the statute could not provide relief in many cases as it applied only where the amount of debt was settled and no other issues were in dispute.

When the mortgagor could not claim protection of the statute, he could be ejected by the mortgagee and lose all rights to his land. Similarly, the mortgagee was concerned about his title to the land as, "[h]e had no means of guarding against the equity of redemption which slumbered in the minds of solicitors familiar with English books or to which effect might possibly be given under an equitable jurisdiction to be created in the future." 36

Thus, both parties to the transaction were eager to see a court of Chancery established so that their rights could be determined. As early as 1801, Allcock wrote to the Secretary of State to say that merchants were demanding a court of equity:

for they have considerable sums of money due them upon Mortgages of Lands in this Province and the Debtors knowing that there is no jurisdiction in which these mortgages can be foreclosed avail themselves of that circumstance and will not pay those debts or take any other step that Justice requires. 37

As it turned out, the mortgagees were correct in assuming that a court of Chancery would recognize an equity of redemption in mortgagors even after they had lost legal title to their land. Section 43 of the 1834 Act revising the law of real property placed a twenty-year limitation period on claims for an interest in land. The section, however, also provided that:

in respect to persons now entitled to an Equity of Redemption or to any Legacy, the right to bring an action or to pursue a remedy for the same shall not be deemed to be extinguished or barred by lapse of time until the expiration of five years from the time that an equitable jurisdiction shall be established in this Province, and in the exercise of its powers; Provided that shall happen within ten years of the passing of this Act. 38

Three years later, a court of Chancery was indeed established and section 11 of the Act specifically dealt with mortgages. It stated that:

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35 1734, 7 Geo. 2, c. 20 (U.K.).
36 Falconbridge, Law and Equity in Upper Canada (1914), 63 U. Pa. L. Rev. 1 at 7.
37 Chief Justice Henry Allcock to Secretary of State P.A.C., Series Q. Vol. 290 at 88 and supra note 11, at 147.
38 1834, U.C. 4 Wm. 4, c. 1, s. 43.
from the want of an equitable jurisdiction it has not been in the power of Mort-
gagors to foreclose, and Mortgagors being out of possession have been unable to
avail themselves of their equity of redemption. Therefore, the Chancellor was given power:

in all cases of Mortgage, where before the passing of this Act the estate has become
absolute in Law, by failure in performing the condition, to make such an order
and decree in respect to Foreclosure or Redemption and with regard to Compensa-
tion for Improvements . . . as may appear to him just and reasonable under all the
circumstances of the case.

The law of mortgages was only one area of real property law wherein the
court was not within their power. In the case of Doe dem. Nellis v. Matlock a
father conveyed land to his first son and then reconveyed it to his second son
who wisely registered the deed. The second son knew of the earlier conveyance
to his brother and the Court admitted that father and son were apparently try-
ing to defraud the other brother. Nonetheless, the Court held that it was
bound to apply the strict wording of the statute. Chief Justice Robinson stated
that even though the second son had notice, that fact could not “avail in a
court of law, whatever ground it might lay for relief in equity.”

In a similar case in 1831, Sherwood J. stated:

The court is not clothed with authority to modify the strict rule of law, established
by the words of the Registry Act, although the equitable circumstances of the case
might possibly be found, upon an examination by an equitable tribunal, to war-
tant such a measure. In all such instances resort must be had to a court of equity.

This position is quite anomalous when compared with other cases of
fraud where the court was less reluctant to intervene. In particular, the Court
was often willing to interpret broadly the Statute of Frauds requirement for a
written memorandum witnessing a contract for the sale of land. In Rochleau v.
Bidwell, the defendant had gained both title and possession of the land, and
the plaintiff had acknowledged receipt of part of the purchase money although
there was no document signed by the defendant attesting to the agreed price.
The plaintiff had in his possession a letter, written by the defendant offering to
purchase the land, and a bond specifying the purchase price, which he had at-
ttempted to give to the defendant. The Court held that the two papers could be
treated as one document for the purpose of satisfying the Statute of Frauds.
Given the strict wording of the statute, this was clearly an inadequate
memorandum, but Robinson C.J. stated:

39 1837, U.C. 7 Wm. 4, c. 2.
40 Id.
41 1795, U.C. 35 Geo. 3, c. 5. — Registry Act.
42 (1832), 2 O.S. 521.
43 Id. at 523.
44 Supra note 25, at 475.
45 (1831), Draper 345.
I do not at present admit, that in the total absence of evidence as to any particular agreement, it is in the power of the other party to retain the estate without paying for it, urging the Statute of Frauds as an objection to the possibility of recovery.\textsuperscript{46}

In other words, he was simply applying the equitable doctrine that the \textit{Statute of Frauds} cannot be used to cloak a fraud.

Another case achieved the same result, though it was even more apparent that the statutory requirements had not been met. The court found that although a contract had not been signed by the defendant, "his acceptance of the bond, and receiving under it the full benefit he stipulated for, ought to be taken as equivalent to his recognising it by his signature."\textsuperscript{47} The Court used the same equitable doctrine that it had used in \textit{Rochleau v. Bidwell}.\textsuperscript{48} Chief Justice Robinson justified his decision by saying:

\begin{quote}
if under such circumstances as these, the statute were to preclude a recovery in a court of law, any country which like this has not a Court of Equity, would, in my opinion, be much better without a Statute of Frauds.\textsuperscript{49}
\end{quote}

In some cases, however, the courts were clearly unable to grant relief so the Legislature was asked to provide it. For example, in 1828, the Legislature passed \textit{An Act for the Relief of Elisa Thompson and Elisa Anne Eleanor Chute}.\textsuperscript{50} Mrs. Thompson's husband had purchased land from his uncle thirty years earlier, but had never received a deed. The Crown was attempting to seize the land because the uncle had fought on the American side in the War of 1812. Since there was no court of equity to examine the claims of the parties, the Legislature authorized the Commissioners of Forfeited Estates to study whether the uncle "had conveyed or intended to convey the said land to the said Timothy Thompson, having been either wholly or in part satisfied for the same." If they were satisfied that he had, they were empowered to grant Mrs. Thompson a deed.

In England, jurisdiction over cases involving fraud was usually reserved for the Court of Chancery. Although English common law courts had some jurisdiction over fraud, in Upper Canada before 1837, that jurisdiction had been extended until it was almost co-extensive with that of equity. Judges in Upper Canada frequently admitted that cases involving fraud would normally be decided by a court of Chancery. However, the judges justified their decisions by saying that English common law courts could do the same if they so chose. In one case,\textsuperscript{51} Robinson C.J. stated:

\begin{quote}
We may in some cases interpose, where a court of common law in England, in the exercise of its discretion, merely would refer the party to another course — that is, we may do what they frequently may not choose to do; but we have no authority to do anything which they cannot do.\textsuperscript{52}
\end{quote}

He then proceeded to limit the exclusively equitable jurisdiction with respect to

\begin{itemize}
\item \textsuperscript{46} \textit{Id.} at 355.
\item \textsuperscript{47} \textit{Kilborn v. Forester} (1831), Draper 332 at 340.
\item \textsuperscript{48} \textit{Supra} note 45.
\item \textsuperscript{49} \textit{Supra} note 47, at 341.
\item \textsuperscript{50} 1828, U.C. 9 Geo. 4, c. 18.
\item \textsuperscript{51} \textit{Doe ex Dem. Jones v. Capreol} (1836), 4 O.S. 227.
\item \textsuperscript{52} \textit{Id.} at 237.
\end{itemize}
fraud largely to breaches of fiduciary duties. In the case of *Rowand v. Tyler* he made a similar comment:

> [We] have no more power than the court of King's Bench in England to break down the boundaries between legal and equitable jurisdictions; and whatever failure of justice may happen from there being no court of equity here, it is clear, not only that we are in no degree responsible for it, but that we should do more evil than good by casting off an adherence to principles. . . .

Despite this nod to legal convention, Robinson C.J. was prepared to stretch the common law. In *Doe Dem. Magher v. Chisholm* an illiterate testator wished to revoke his will. When he asked the beneficiary of the will to hand it to him, he was given a different paper which he destroyed, believing it to be his will. The Court concluded that the rules governing the revocation of wills were the same in law as in equity and proceeded to show that the testator had revoked his will, relying solely on cases decided in the English Court of Chancery.

The other major area with which Chancery was traditionally concerned was trusts. Though Taylor wrote that “trust estates are little known” in Upper Canada, it is clear that at least a few trusts were created prior to 1837. The common law courts were powerless to deal with trusts for they could not recognize a duality of interest in property. In *Doe ex. Dem. Boyer et al. v. Claus*, a father had left his property to trustees who were directed to sell enough of the property to enable them to pay $800 to both his wife and his daughter. They were then to convey the rest to his son. Before the trustees could act, the son conveyed the land to the defendant. A court of equity would have recognized the son’s beneficial interest in the land and, provided certain formalities were complied with, would have assumed that the son had sold his interest to the defendant. A court of law, however, was unable to recognize that the son had any interest in the land at all and thus held that he had been unable to convey any interest to the defendant.

Since the courts could not deal with express trusts, legislative intervention was necessary. In 1822, for example, the Legislature passed an act appointing new trustees to administer a trust for the establishment of a school after the originally named trustees became incapable of acting. In England, such appointments were made by the Court of Chancery.

One of the most remarkable statutes passed by the Legislature in Upper Canada was the 1831 Act appointing William Warren Baldwin a trustee of the estate of Laurent Quetton St. George, a French resident with extensive holdings in Canada. Baldwin, who had been a friend of the deceased, had supervised the estate while St. George was alive, and it was the widow’s request that Baldwin continue to do so. The Act appointing him trustee went on to provide a means whereby the trust could be enforced:

> [T]hat His Majesty's Court of King's Bench in this Province, shall and may from time to time, have and hold equitable jurisdiction in and over the trusts

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53 (1834), 3 O.S. 563 at 637.
54 (1830), Draper 216.
55 Taylor, *Reports of Cases Argued and Determined in the Court of Kings' Bench* (1828).
56 (1833), 3 O.S. 146.
57 1822, U.C. 2 Geo. 4, c. 22.
58 1831, U.C. 1 Wm. 4, c. 27.
hereby created, and shall have full power to make all such orders and decrees touching the same, or anything therewith connected, as any Court of Equity might or could do in the like case. 59

Since the courts were unable to deal with express trusts, one would not have expected them to recognize trust in other contexts. In most cases the courts did deny their capacity to recognize a trust relationship. For example, in Doe Dem. Daily v. Vankoughnet, 60 the plaintiff had transferred title to a piece of land to the defendant for no consideration, in order to protect it from his creditors. Fraud was not at issue in the case because the plaintiff had retained more than enough land to satisfy the creditors. However, the Court refused to allow his claim for damages for refusal to reconvey the land on the grounds that a common law court could not accept the argument that the defendant was merely a trustee for the plaintiff. It added that, "however little it may seem to comport with justice that the title of the defendant, acquired as it was, should be confirmed," 61 there was nothing that could be done.

On a number of occasions, however, the courts did recognize the existence of a trust relationship. In one case 62 the deceased had bought land and, before it was fully paid for, had conveyed it to the defendant. After his death, his executor paid the balance of the purchase price and obtained the title deeds. In an action to eject the defendant, the court held that since both parties had acquired title from the same person, the executor was estopped from claiming ownership because the land had been conveyed first to the defendant. The executor had stepped into the shoes of his testator and was thus to be treated as the testator would have been. Robinson C.J. held:

No doubt a court of equity might consider him only as a trustee holding for the benefit of Vanderlip, if they recognized any title in him under the circumstances; but it does not follow, because a court of equity would in this way prevent injury to Vanderlip, that a court of law must suffer its proceedings to be made the instrument of such palpable injustice, and that there can be no relief but in equity. 63

Consequently, the Court appears to have imposed a constructive trusteeship on the plaintiff.

In Doe ex Dem. Wilson et ux v. Wessels 64 the defendant had bought his sister's interest in some land, but title to the land continued to be registered in her name. The Court held that the instrument of sale created a trust in favour of the brother. There was no proof that a conveyance had actually been made, but because the sister, as vendor and trustee, would have been obliged to convey the land, the Court assumed that she had done so. Ignoring the letter of the law, the Court decided that title must lie in him whom equity would assume to have it.

Finally, in Yates v. Carney and Griswold 65 the Court held that a father who had bought stocks in his son's name had a right to resell them for his own gain. The presumption of advancement was rebutted by the father's actions

59 Id. at s. 4.
60 (1834), 5 O.S. 246.
61 Id. at 248.
63 Id. at 87.
64 (1834), 5 O.S. 282.
65 (1833), 3 O.S. 31.
and, therefore, the son was assumed to have held the stocks only as a trustee for his father. In most of these cases, the Court did not even mention the lack of an equitable jurisdiction and instead proceeded as if the trust were a well-recognized doctrine of the common law.

In addition to trusts established by private individuals and those found by the Court, there was also the problem of how to deal with fiduciary relationships where groups were given full or quasi-corporate status to permit them to hold land for socially useful purposes. Included in this category were directors of corporations and trustees of churches and schools. It was generally recognized that their fiduciary obligations should be governed by the rules of equity, unfortunately unavailable at that time in Upper Canada. This was made abundantly clear in Bank of Upper Canada v. Widmer, where the Court could only decide a very narrow issue of the case; that is, whether directors had the legal right to release a man from his surety without using their corporate seal. On the broader issue of whether the directors had breached their trust in so doing, Robinson C.J. could only say:

I have before stated my opinion that that does not necessarily affect the legal validity of the act. It is the common case with all trusts, and the general principle is, that the relief is in equity, not that the abuse cannot be perfected in law.

A similar problem arose in Doe ex Dem. Methodist Episcopal Church Trustees v. Bell where two groups of trustees were fighting over control of a church. The Court was restricted to a consideration of which group held legal title to the church. Robinson C.J. recognized the inadequacy of this approach:

As we have unfortunately nothing but this court of common law jurisdiction, and are without the aid of a court of equity, which can control trusts, direct their proper execution, and restrain actions when they are brought for purposes contrary to the intention of the trust, such cases as the present are in this province peculiarly embarrassing. I doubt whether the question before us can receive its solution quite satisfactorily by the judgment of a common law court.

He suggested that the members of the church could seek equitable legislative relief, but concluded that only a court of Chancery had the procedural resources and the equitable jurisdiction to provide an adequate settlement of the matter.

Finally, in two other areas of traditional equitable jurisdiction, the partition of land and the guardianship of infants, legislation was enacted to enable the common law courts to deal with these matters effectively. It was already possible to apply to the common law courts for the partition of land but the procedure was cumbersome and the results unsatisfactory. The applicant had to prove not only his own title, but also that of his co-owners. Furthermore, a common law court was bound to follow strict legal rules in dividing the land and could not take such things as improvements to land into account. For these reasons, the Court of Chancery had acquired almost exclusive jurisdiction over the partition of land in England by the eighteenth century.

66 (1831), 2 O.S. 275.
67 Id. at 282.
68 (1836), 5 O.S. 344.
69 Id. at 368.
70 1833, 3 & 4 Wm. 4, c. 27, s. 36 (U.K.).
An Act was passed in 1833 to facilitate partition actions in the common law courts. It adopted the equitable rule that the applicant need only prove his own title and it empowered the jury to divide the land, "as will be most advantageous and equitable, having due regard to the improvements, situation and quality of the different parts." The legislation was only partially successful because the practice in the common law courts did not provide a procedure whereby the respective claims of the parties could be adequately examined.

Problems had also arisen with respect to the guardianship of infants, and Allcock, writing to the Secretary of State in 1800, noted, "Infant Children have been much injured . . . for want of the Protector which a court of this kind would afford them." To remedy the situation, an act respecting the appointment of guardians was passed in 1827, giving authority to the Probate and Surrogate Courts to appoint and remove guardians, and to require a guardian to account for his administration of an infant's property. Compared to the powers of the English Court of Chancery, the powers conferred upon the courts were very limited, for they were not equipped to provide the continuous supervision available from a court of Chancery.

The Chancery Act of 1837 put an end to many of these problems by creating a court of broad equitable jurisdiction. Although nominally headed by the Lieutenant-Governor as Chancellor, all judicial powers were to be exercised by a judge known as the Vice-Chancellor. That the Court should have been granted broad jurisdiction is surprising, for during the previous twenty years, many had favoured the granting of a fairly limited jurisdiction that could be extended as necessary. It had always been recognized that the need for a court of Chancery was particularly acute in certain areas, such as the foreclosure of mortgages and obtaining specific performance of contracts for the sale of land. With respect to courts of equitable jurisdiction, Taylor wrote in 1828:

The principle advantages which the colony would derive from such an establishment would arise from possessing the powers of investigation, by the oaths of the partie litigant — of decreeing the specific performance of contracts in specie, and a compelling of executors and trustees to account upon oath.

He favoured the establishment of a court of Chancery, "upon a moderate scale, as being adequate to the present exigencies of, and most correspondent to, the habits of the people of the colony." John Beverley Robinson, later Chief Justice of the province, also favoured a limited equitable jurisdiction because a broad jurisdiction "might not be suitable in all respects to the condition of the province." It is not clear why Taylor and Robinson favoured such a narrow role for the Court but they may have hoped to avoid the terrible expense and delays associated with the English Court of Chancery.

71 1833, U.C. 3 Wm. 4, c. 2.  
72 Id. at s. 3.  
73 Supra note 6, at 148.  
74 1827, U.C. 8 Geo. 4, c. 6.  
75 1837, U.C. 7 Wm. 4, c. 2.  
76 Supra note 6, at 147.  
77 Supra note 55.  
78 Id.  
79 Supra note 36, at 11.
Nevertheless, in 1837, the Court was granted wide jurisdiction. A partial explanation may be that Upper Canada was developing into an increasingly sophisticated society requiring a court with a full range of equitable powers. However, a more fundamental reason for conferring broad jurisdiction on the Court was the concern over the tendency of the courts in the past to blur the distinction between common law and equity if it was the only way to ensure that justice would be done. To the legal mind of the day, law and equity were two distinct systems, rather than mere components of a larger system of justice and it was considered essential that they remain separate.

This concern was articulated in 1847 by John Godfrey Spragge, later Chancellor of Upper Canada, in a pamphlet entitled, "A letter on the subject of the courts of law in Upper Canada addressed to the Attorney-General and Solicitor-General." Spragge maintained that the creation of a court of equity had been necessary to "preserve the Common Law" in Upper Canada. Since application of the common law, if not tempered with equity, could lead to manifest injustice, the common law courts in Upper Canada had often seen fit to stretch the bounds of the common law in order to arrive at a just result. Spragge added:

What was called the equitable jurisdiction of the court was not unfrequently appealed to as absolutely necessary, in the absence of a Court of Equity, to correct the rigour of the common law; a more dangerous doctrine could scarcely be broached, or one calculated to subvert the common law itself . . . . Thus by degrees, the common law would cease to be what it is and ought to be — a system of law built upon precedent and authority so that a man may, with reasonable certainty, know what the law is and govern himself accordingly; but it would degenerate into an uncertain hybrid system, neither common law nor equity, but an incongruous compound of both, so that no man could tell what his rights were, inasmuch as they would in so great a measure, depend upon the half-legal, half-equitable view which the judge or judges might take of them.

In short, the law was in danger of becoming the measure of the length of the judge's foot. Precedent and certainty, the twin pillars of the common law, were being undermined by the Court's attempts to see justice done. By establishing a legal system which mirrored that of England, the Legislature may have hoped to restore the division between law and equity.

Instead of simply providing that the Court had powers identical to those possessed by its English counterpart, the 1837 Act enumerated specific subject areas that were to be within its jurisdiction. Nonetheless, the Court was given broad jurisdiction over most of the matters dealt with by the English Court. One notable exception was the authority to order the partition of land, presumably because the Legislature had recently expanded the powers of the common law courts in this area. This was later reconsidered and, in 1850, the Court of Chancery was granted jurisdiction in partition matters. The Chancery Act also gave the Court authority to deal with lunatics, idiots and persons of unsound mind. In the 1840s, doubts were expressed as to the jurisdiction of the Court in this matter, for in England such jurisdiction was conferred on the Lord Chancellor by a commission from the Crown, and was

80 Supra note 1.
81 Id. at 11.
82 1833, U.C. 3 Wm. 4, c. 2.
83 1850, Can. 13 & 14 Vict., c. 50.
not part of the inherent jurisdiction of the Court. Consequently, in 1846 legislation confirming the authority of the Court in this area was passed.\(^{84}\)

After 1837, the jurisdiction of the Court was gradually increased. In 1857, an act was passed giving the Court "the like power, authority and jurisdiction as the Court of Chancery in England possesses, as a Court of Equity, to administer justice in all cases in which there may be no adequate remedy at Law."\(^{85}\) The jurisdiction was further extended in 1865 when the Court received "the same equitable jurisdiction in matters of revenue as the Court of Exchequer in England."\(^ {86}\)

The Court of Chancery in Upper Canada was also given power to deal with matters that would have been handled by the ecclesiastical courts in England. Thus, the Court was authorized to award alimony\(^ {87}\) and, in 1850, to try the validity of wills and testaments.\(^ {88}\) The English laws relating to bankruptcy had specifically not been introduced into Upper Canada in 1792.\(^ {89}\)

In 1843, however, the province passed its first bankruptcy act, making Chancery the Court of Review for bankruptcy cases.\(^ {90}\)

Unless expressly altered by provincial statute, the Court was to be governed by the laws of the English Court of Chancery as of March 4, 1837. This apparently included any British statute passed between 1792 and 1837 to the extent that it affected Chancery, notwithstanding that in other cases, British statute law passed after 1792 was not applicable to Upper Canada.\(^ {91}\)

It appears that, despite the misgivings of the population, the Court immediately began to attract business. A report from the Registrar’s Office in Chancery shows that between June 12, 1837 and June 12, 1838, forty-three suits were initiated.\(^ {92}\) For the same period in the following year, the number was 118. The projected estimate for 1839 to 1840 was 182.

Nonetheless, the new court was not very popular with lawyers or the general population. In the 1840s, the Court’s costs, delays and inefficiency convinced many that it was no better than its English counterpart. This concern was voiced in the following letter in The Globe:

> Not alone a whole community, but the whole Legal Profession, are eagerly looking for a change. We find the most important public interests involved, patriotism shocked, and the reputation and interests of the Equity practitioner well nigh blasted. The Court is looked at as a sleeping monster. . . . No professional man can, as matters at present stand, practice with credit or satisfaction to himself or common safety to his clients.\(^ {93}\)

The opposition was not directed towards equitable jurisdiction so much as

\(^{84}\) 1846, Can. 9 Vict., c. 10.
\(^{85}\) 1857, Can. 20 Vict., c. 56.
\(^{86}\) 1865, Can. 28 Vict., c. 17, s. 2.
\(^{87}\) 1837, U.C. 7 Wm. 4, c. 2, s. 3.
\(^{88}\) 1849, Can. 12 Vict., c. 64, s. 10.
\(^{89}\) 1794, U.C. 32 Geo. 3, c. 1, s. 6.
\(^{90}\) 1843, Can. 7 Vict., c. 10, s. 68.
\(^{91}\) Supra note 36, at 16.
\(^{93}\) The Globe (Toronto), Oct. 6, 1847.
towards the actual workings of the Court itself and, in particular, towards the man who ran it.

Throughout the 1840s, there was much criticism of the Vice-Chancellor, Robert Jameson. Many Upper Canadians thought that Jameson was a failure at his job, as evidenced by a letter to The Globe in 1845:

[It is generally allowed, that the gentleman now occupying the Woolsack, is totally unfit for the proper performance of his judicial duties, and to this, and to his peculiar indolence and want of interest in his Court, can be fairly ascribed, the chief of the evils of which you so justly complain. This feeling is a professional as well as a public one, and has been so freely expressed for the last few years, that my only surprise is, under such a pressure from without, that gentleman has not thought fit to withdraw from the bench.]

Staunch supporters of the government, such as Toronto's The British Colonist, also reported that Jameson, "if there be any truth in the general rumour regarding him, is so lamentably, so grossly incompetent, so universally known to be so, that it is impossible for any to be ignorant that such is the fact, impossible for any who have had any opportunity of judging, not to have perceived it." Even those in high places conceded that he had been a poor choice. Sir George Arthur, former Lieutenant-Governor of Upper Canada, found him, "an amiable, kind and inoffensive person but I can never think he is the man for the office he holds.

There was a large backlog of cases in the Court, and one Globe correspondent stated that he knew of occasions when the parties had waited twelve months for judgment after the case had been heard. Jameson frequently pleaded illness as an excuse for his failure to keep up, but others attributed it to sheer idleness and incompetence. He was also a slave to precedent, which is not surprising in a follower of Lord Eldon, and this added to the expense and delay.

Jameson's judgments were often questioned and lawyers, as a matter of course, considered appealing any decision from Jameson. Many of his judgments were appealed to the Executive Council sitting as a court of appeal where they were overturned and, as one contemporary noted, "but for the expense there would be more."

Dissatisfaction over Jameson's performance gave rise to a more theoretical debate: was one judge sufficient or should the Court of Chancery, like the Court of King's Bench, be presided over by several judges? In 1837, there appears to have been some confusion as to how many judges would be appointed. In a letter to his mother, John Macaulay wrote, "We are to have a
Court of Chancery, with a Vice-Chancellor, and two new Judges which will make three places for the lawyers.’’ However, financial constraints and the fact that only one judge presided in the English Court of Chancery led to a decision to appoint only one judge. Major debate soon erupted over this issue. Critics of the existing system included Spragge who argued that, ‘‘the judge is left to his own unassisted judgement upon every question, however difficult and important, which may arise before him; whereas in England although the judges in equity do not sit together, yet there are several of them and they have the advantage of consulting together if they think proper to do so.’’

In response to the argument that Upper Canada could not afford to support three equity judges, Spragge said it was, ‘‘the duty of the State to make proper and sufficient provision for the due administration of justice; and that it is the worst economy to grudge what is necessary for such a purpose.’’

A critic writing for The Globe noted:

We cannot see the reason why only one Judge sits in that court, and five Judges are set apart to the Law Court, while it is notorious that the property litigated in the former is much greater in amount — and the points involving the right to such property more important and complicated than in the latter.

A great shortage of equity practitioners in the province rendered the problem more difficult. Even in 1847, there were only ‘‘some two or three distinguished chancery lawyers.’’ Since each side in a case required one drafter and one pleader, this meant that either the same men were grossly overworked or that many who appeared in Chancery were neither well-qualified nor highly regarded! One disgruntled correspondent to The Globe complained:

Your correspondent says, too, that the dignity of the Court is not properly sustained. Gentlemen with the ‘long robe’ are rarely to be seen within its walls: but pleaders in ‘pea-jackets’ and ‘sporting coats’ are plentiful as unsound judgments and grotesque exhibitions.

These were illustrative of the complaints made by members of the legal profession and others who came into frequent contact with the Court. Laymen, however, knew of Chancery primarily for its expense and delays. Procedure in the Court was a problem from the beginning. Jameson might be replaced, and expertise might be developed, but procedural reform of the Court was much more difficult. During the 1840s, exorbitant costs and cumbersome procedure came close to destroying the Court.

The 1837 Act set out the maximum costs that could be taxed. Complaints were soon heard that these were extravagant; so, in the following year, an act was passed allowing the Vice-Chancellor to set fees, provided that none was higher than those established by the original Act. Jameson tried to lower the fees substantially, but the complaints, rather than abating, grew louder.

102 Supra note 1, at 21.
103 Id. at 26.
104 The Globe (Toronto), Dec. 24, 1844.
105 The Globe (Toronto), Oct. 6, 1847.
106 The Globe (Toronto), Jan. 14, 1845 (Emphasis is original.).
108 In one unreported case from the early 1840s, William Lyon Mackenzie records that it cost a suitor £558 12s 7d to obtain an injunction against the creditors of his father’s estate. Mackenzie-Lindsey Papers, supra note 92.
Costs were considerably higher in Chancery than in the Court of Queen’s Bench. Although this was partly due to the nature of the matters within equitable jurisdiction, even the practitioners admitted that the costs were exorbitant compared to the amounts in dispute. They maintained, however, that the answer was not further reductions in taxed costs, for these had already been cut to the bare bone, but rather the simplification of the cumbersome procedure of the Court. The problem had been inevitable. As an editorial in The Globe suggested, in 1837 there had been no experienced Chancery practitioners in the province and, therefore, no one capable of suggesting improvements to English practice. 109

The 1837 Act made the Vice-Chancellor responsible for promulgation of rules and orders of the Court and this was completed by July of that year. Unfortunately the orders were “virtually identical to contemporary orders in England as given by Beames and Edwards, the standard authorities.” 110 Chancery procedure in England was notorious for its complicated maze of procedure through which the solicitor was forced to pick his way. However, at least the English court was supplied with sufficient officials to keep it running. The Upper Canadian court had only a Vice-Chancellor, a Registrar, one Master (although the 1837 Act made provision for two), an Accountant and a Sergeant-at-Arms. (In addition there were local Masters and Examiners in the various districts.) This small and inexperienced group faced the formidable task of maintaining and improving the Court. It became apparent as early as 1840 that the Court was foundering, so an act was passed permitting the Governor to issue a commission to the Vice-Chancellor and two or more common law judges to make rules and orders to improve the practice of the Court. 111 At first glance it seems anomalous that, under this Act, the common law judges could, in effect, gain control of the practice in the Court of Chancery, but Riddell suggests that this was done because Jameson’s views on practice and costs were too strict, “and the regulating hand of the wise Chief-Justice was desired at the helm.” 112

So great were the problems that litigants began to seek ways to avoid the whole process. Rather than subject themselves to a full-scale Chancery battle, parties were having their cases decided by arbitrators and then obtaining consent judgment from the Court. 113 This horrified members of the legal profession who insisted that litigants ought to be guaranteed a full hearing. Even worse, many were choosing to avoid recourse to the courts entirely, preferring to live with grievances rather than submit to the vagaries of Chancery. One lawyer wrote, “[B]usiness was rapidly leaving the Court — it was impossible longer to endure the ill — the profession itself halted, and taught clients to pause, in the hope that a safer, more impartial and speedier administration of Equity would be arrived at.” 114

Indeed it seems that by the mid-1840s, not even the Court of Queen’s Bench had much respect for the Court of Chancery, theoretically its superior. In 1844, a supposed creditor of a St. Catharines firm applied to the Court of

109 The Globe (Toronto), Dec. 12, 1846.
110 Supra note 7, at 187 n.
111 1840, U.C. 3 Vict., c. 1.
112 Supra note 7, at 187.
113 The Globe (Toronto), Feb. 16, 1848.
114 The Globe (Toronto), Oct. 6, 1847.
Queen's Bench to have a Commission of Bankruptcy issued against the firm.\textsuperscript{115} In turn, the firm applied to Chancery to have the proceedings stayed. Once the stay was granted, the Court of Queen's Bench refused to acknowledge it, claiming that Chancery had exceeded its jurisdiction. An application was then made to the common law court for a Writ of Prohibition ordering Chancery not to proceed with the matter. The case, which could have become a re-enactment of the classic struggle between Coke and Ellesmere,\textsuperscript{116} was dropped when the firm was shown not to be indebted to the supposed creditor. Although no ultimate confrontation took place, the incident illustrates the disrepute into which the Court of Chancery had fallen.

Given the poor reputation of the Court, it may seem surprising that no real reform took place until 1849 despite an active campaign for change that had begun several years earlier. A petition of the legal profession requesting the return of the Court to Toronto from Kingston in 1842 focused the attention of the Legislature on the problems of the Court.\textsuperscript{117} Accordingly, a commission, composed of Chief Justice Robinson, Vice-Chancellor Jameson and the three most prominent Chancery practitioners, was appointed to investigate and to make recommendations for its improvement. In April 1844, the Commission presented an interim report suggesting several new rules that were later adopted by the Court. The final report, presented to the Legislature on March 4, 1845, contained additional new rules and a recommendation for legislation sanctioning a procedure whereby major changes could be made to the rules.\textsuperscript{118}

The Commission was officially ordered to deal primarily with the reform of the practice and procedure of the Court. Accordingly, it recommended numerous reforms of the orders because:

\begin{quote}
It is only by such alterations as we can venture to recommend with the view of shortening the pleadings and simplifying the proceedings, that we can hope to remedy in any great degree, what we believe to be justly complained of as a great and almost intolerable evil, namely, the expense which attends the prosecution and defence of suits in that Court, even of the most ordinary character.\textsuperscript{119}
\end{quote}

Although the delays were as much a source of dissatisfaction as were the costs, the Commission spent very little time on the subject, claiming that for the most

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\textsuperscript{115} See Riddell, "When the Courts of Queen's Bench and Chancery Strove for Supremacy" in Riddell, \textit{supra} note 6.

\textsuperscript{116} Although there had always been rivalry between the common law courts and Chancery, it reached a head in 1616 during the reign of James I when Sir Edward Coke, Chief Justice of the Court of King's Bench and Lord Chancellor Ellesmere battled one another for the supremacy of their respective courts. The crisis arose when the Court of Chancery granted relief against certain judgments of the Court of King's Bench; Coke then declared this interference to be illegal. The matter was settled for all time when King James decided in favour of Chancery.

\textsuperscript{117} In 1840, after the union of the Canadas, Jameson was named speaker of the Legislative Council which sat at Kingston. Consequently, the Court of Chancery was moved to Kingston thereby greatly inconveniencing the legal profession for whom Toronto otherwise remained the centre of legal activity. In November 1842, the Law Society petitioned the Governor-General, requesting that the court be returned to Toronto. Fortunately, in 1843, Jameson resigned as speaker when the seat of government was moved to Montreal and the Court was returned permanently to Toronto.

\textsuperscript{118} \textit{Journals of the Legislative Assembly of the Province of Canada}, 1844-45 at 319 and Appendix J.J.

\textsuperscript{119} \textit{Id.}
part these were unavoidable given the nature of Chancery suits. A less charitable explanation might be that Jameson, who may have been responsible for much of the delay, was a member of the Commission. Since the Commission could not give serious consideration to the matter without attacking one of its own members, it chose to avoid the issue entirely.

The Commission noted, no doubt at Jameson's insistence, that the Vice-Chancellor had followed changes to the English rules and had even introduced a few original rules of his own. Nonetheless, the Commission was obliged to admit that there was "a very prevailing feeling that the Tribunal on its present footing, is not suited to the circumstances of this country." It concluded that fees could not be directly reduced since they were already low and that the only solution was to streamline the procedure. With modesty and deference, the Commission confessed its reluctance to meddle with English procedure:

[It] is a matter of great difficulty and delicacy to attempt making any extensive changes in it, without running the risk of disturbing most inconveniently, if not fatally, a system, whose beauty and efficiency in a great measure consists in that completeness, consistency and coherence of all its parts, which could only have resulted from attentive observation, during a very long course of experience.

Nevertheless, the Commission did note that property amounts in dispute were usually far smaller than in England and, therefore, the disparity between the grievance and the cost of remedying it was much greater. "It is plain to us, that no Court can long stand under the odium that such a disproportion between the costs and the remedy must inevitably give rise to."

Consequently, the Commission cautiously, and with great deference, recommended certain major reforms. Pleadings were to be confined to a statement of the case that the party wanted to make, and a prayer for relief if applicable. Written interrogatories were to be replaced by viva voce examination of the parties before a judge, and, for the first time, the defendant would be permitted to examine the plaintiff as to his case.

In the Commission's eyes, these changes constituted such a radical departure from the English practice that they could not be instituted without legislative confirmation of a procedure for implementing and adjusting them. Accordingly, a draft bill was attached to the report. However, no action was taken by the Legislature and the reforms were not adopted.

This failure of the Legislature to act was, in part, the result of a general malaise affecting the administration of justice in the province. Members of the legal profession had begun to call for fundamental reforms, arguing that the Court of Queen's Bench was overworked, Chancery was in a state of complete confusion and there was no satisfactory court of appeal in the province. Proposals for the total overhaul of the system were made by many members of the profession, led by William Hume Blake, a leading Chancery practitioner.

In June 1844, a petition calling for reform was presented by several members of the profession to the Governor-General. When this was ignored, a second petition was presented, this time to the Legislature, demanding the

\[120\] Id.
\[121\] Id.
\[122\] Id.
creation of a second superior court of common law, the reform of Chancery to provide it with three judges and the establishment of a Court of Appeal to be composed of the six common law and the three Chancery judges that this reform would create. In this proposal, the transformation of Chancery was only one component. Blake outlined his position in a letter to Robert Baldwin, leader of the Reform party in the Legislature:

'It has been hinted to me since Mr. Draper's arrival, that if Mr. Baldwin would refrain from taking up the question touching the administration of justice as a party measure, the Government would assent to a committee . . . for the purpose of inquiry. But with the understanding that the inquiry shall be restricted to the necessity of changes in the Court of Chancery.

But fully alive as I am to the importance of some change being made in the Equity Court, I cannot forget that the evils arising from the position of our Court of Common Law, are of much more serious moment.'

In rejecting this and similar opportunities, Blake in effect delayed the reform of the Court of Chancery. Blake's son was no doubt correct in contending that, "Jameson actually owed the prolongation of this unhappy tenure to the Reformers' refusal to deal piecemeal with the reorganization of the judicial system." 124

In 1845 the Legislature considered a motion to abolish the Court of Chancery and confer its jurisdiction on the Court of Queen's Bench. However, it did not proceed with the matter. 125 A similar motion was brought in 1846, and the House debated at length before deciding not to act. 126 In that debate, John Sandfield Macdonald recommended abolition of the Court for two or three years until it was decided how best to proceed. 127 Others demanded a committee of inquiry to produce a detailed plan for reform. 128

Although Spragge suggests that some were calling for the outright abolition of equitable jurisdiction within the province, 129 it appears that most accepted that equity was necessary; therefore, the debate was concerned mostly with how it could best be administered. A growing faction favoured simply granting equitable jurisdiction to the Court of Queen's Bench. 130 However, the legal profession was not yet ready to see the "beauty and efficiency" of the English system tampered with in such drastic fashion. 131

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124 Id. at 45.
125 Supra note 118, at 279.
126 Journals of the Legislative Assembly of the Province of Canada, 1846 at 267.
127 Id.
128 Both motions were brought chiefly for political purposes and the feelings of many members were voiced by one member who stated that his "impression in voting in favour of the motion was that it merely invoked an expression of opinion respecting the Court of Chancery so that the Government would see the necessity of taking early action towards correcting the abuses of that Court." Debates of the Legislative Assembly of Upper Canada, Part II. 1846 at 1579.
129 Supra note 1, at 4.
130 The Globe (Toronto), June 28, 1848.
131 "It may be said that the Profession at large viewed the proposition of a single Court administering Law and Equity with alarm as revolutionary and destructive of sound principles." Riddell, supra note 7, at 186.
Many arguments were advanced for rejecting the fusion of law and equity. The Commission of 1843 stated that when the Legislature had sought to reproduce the English system in 1837:

[T]hey secured to us besides, as regards Equity, the advantage which they preserved to us in respect to the Common Law Courts, of that entire and close resemblance, both in constitution and principles, to the corresponding jurisdiction in England, which enables Judges, Practitioners and Suitors, to avail themselves of the treasure of wisdom, and experience accumulated during many generations, by the decisions of the greatest Judges, with such means of observation, deliberation and trial, as can only be presented in the course of many years, even in a country whose population and commerce equal those of England.\(^\text{122}\)

Adam Smith’s views on the division of labour were also invoked to support the continued separation of law and equity:

The objections to this plan arise from the known advantages of a judicious division of labour, and the certainty that a man or a Court assuming the exercise of too many functions, is likely to perform them all with a less degree of success and perfection than by a constant practice in one branch of the multiform science of the law.\(^\text{133}\)

Many people refused to believe that any system could be an improvement over the trusted British model. Even those who did not hold this view were discouraged by the seemingly insurmountable practical difficulties involved in developing a uniform procedure to be used in a court dispensing both law and equity. To have created a workable, orderly amalgamation in the 1840s would have required more skilled people and funds, as well as a great deal of time to develop since no functioning prototype was yet in existence. Any hasty attempt at fusion would probably have resulted in chaos.

The experience in Nova Scotia is instructive in this regard.\(^\text{134}\) During the 1840s and 1850s, there was much agitation to abolish Nova Scotia’s Court of Chancery and to give the common law courts equitable jurisdiction. This was done in 1855\(^\text{135}\) but so much confusion resulted that eight years later it was necessary to re-establish a separate court of equitable jurisdiction. In Nova Scotia, as in Upper Canada, the problem was procedure. The Nova Scotia Act abolishing the Court of Chancery had made a few provisions for procedure. In the main, however, it simply directed that common law practice was to be used unless it could not apply, in which case the old Chancery procedure was to prevail. Such a gem of imprecision led to utter confusion. There is no reason to believe that the experience in Upper Canada would have been any different.

Rejecting such radical innovations, the Legislature of Upper Canada chose instead to adopt Blake’s proposal for the reform of the legal system. In the elections of 1848, the Reformers ousted the Tories and the new government immediately set about the reform of the administration of justice in the province. In 1849 the Legislature passed two statutes to institute the new system. The first established a second superior court of common law and created a new

\(^{122}\) Supra note 118, at Appendix J.J.

\(^{133}\) The Examiner, Oct. 11, 1848.

\(^{134}\) See Townshend, History of the Court of Chancery in Nova Scotia (Toronto: Carswell, 1900).

\(^{135}\) 1855, S.N.S. 18 Vict., c. 23.
Court of Appeal. The second statute reorganized the Court of Chancery which was to be headed by a Chancellor assisted by two additional judges of Vice-Chancellors. The Legislature gave the new judges power to make any rules and orders they felt necessary and adopted most of the reforms proposed by the Commission in 1845. The Acts came into force January 1, 1850 and resulted in an immediate improvement in the calibre of the court’s judiciary. The removal of Vice-Chancellor Jameson had been impossible, since under the Act of 1837, he held office during good behaviour. However, the two new appointees were of the highest quality. Blake was named Chancellor and James Palmer Esten, an eminent Chancery practitioner, became the second Vice-Chancellor. Jameson resigned shortly thereafter to be replaced by the highly respected Chancery lawyer, John Spragge.

The passage of the 1849 Act did not end the hostility towards the Court, and throughout the early 1850s, demands for its abolition continued to be heard. The most persistent opponent was William Lyon Mackenzie. Mackenzie’s attitude stemmed, in part, from his conviction that Blake and Baldwin were political traitors who had abandoned reform. However, he also truly hated the very idea of a court of Chancery which he felt stood in the way of making justice available to the poor but honest man.

One incident, an unreported case from the early 1840s, seems to have particularly infuriated him. In a dispute over £50 between the owner of a destroyed building and an insurance company, Jameson finally found for the plaintiff-owner three years after the proceedings had been initiated. On appeal, the Executive Council overturned the decision and declared that the case must either be settled in the common law courts or by arbitration. The proceedings cost both parties $2,800. Mackenzie was not satisfied with the knowledge that the man who had made the error no longer occupied the Bench. To his mind, it was proof of the iniquities of Chancery.

Mackenzie did accept that a court with equitable jurisdiction was essential; however, he wanted that jurisdiction to be bestowed on the common law

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137 1849, Can. 12 Vict., c. 64.  
138 The appointment of the new judges was not without its problems. Since Blake was a close friend of Baldwin and had been Solicitor-General in the government which passed the 1849 Act, his appointment as Chancellor was vigorously attacked by political opponents. The Globe stated in its November 16, 1870 obituary of Blake: "There were not wanting political opponents who declared that Mr. Blake had created the office that he might fill it." As to Blake’s qualifications for the office, however, there seems to have been little doubt. Even William Lyon Mackenzie, his most vigorous political opponent, noted "Blake — invariably admitted to be the fittest man that could be appointed — no better equity man." Supra note 92.  
140 Supra note 92.  
141 Viewed from another perspective, however, the case is quite remarkable. The Globe, in an editorial, reported "this is the only case in the experience of the Court of Chancery, as we are given to understand in which the question in dispute went off upon the point of jurisdiction." The Globe (Toronto), July 5, 1851. Given the inexperience of the legal profession during the early years of the Court’s existence, it is surprising that there were not more.
courts and cited the example of New York where this had recently been done. 142

During the 1850s, the various factions for reform battled one another in the Legislature. Mackenzie and his supporters often joined with the Tories in opposing the incumbent Reform government, and the new Court of Chancery was a favourite target. This issue led to Baldwin's resignation in 1851. Mackenzie had proposed a resolution to abolish Chancery and confer its jurisdiction on the common law courts. 143 The majority of the Upper Canadian members voted with Mackenzie and it was only the votes of the Lower Canadian members that saved the Court. Baldwin, deeply upset, resigned several days later, 144 complaining that the new court had been in operation for less than two years and had not been given a fair trial. 145

In 1853, Mackenzie brought another motion for a special committee to draft a bill to abolish the Court, but again the motion was defeated. 146 Several petitions requesting the abolition of the Court of Chancery were also delivered to the Legislature. 147 However, for the most part, the opposition of the early 1850s was either political in nature or simply residual hostility to the pre-1849 Court. Many Upper Canadians were disposed to give the new Court a chance to prove itself. 148

The new Court very quickly showed that such confidence was not misplaced. A Globe editorial in 1851 stated:

No man can be found to defend the Court of Chancery as it formerly existed — it was a den of iniquity. But the system has been altered — the costs are cut down, the delays greatly shortened; the new Court in giving satisfaction — not a complaint is heard; and until something better is found, it is the very spirit of madness to tear it down. 149

Even taking into account the fact that The Globe was a highly partisan supporter of the incumbent government, the sentiments seem to have reflected those of a growing number of people.

The reform of Chancery procedure had been given top priority by the new judges who realized that if the Court was to survive it must prove that ruinous expense and delays could be avoided. Soon after their appointment, the judges set to work on new orders that were completed by May 1850. It was reported in

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142 He wrote "There are 30 States in the Union — of these 15 have no separate Chancery Jurisdiction. Lower Canada never had it. France never had it." Glibly ignoring the rather essential differences in legal systems, Mackenzie took this as proof that Upper Canada could well do without it too. Supra note 92.
143 Journals of the Legislative Assembly of the Province of Canada, 1851 at 117.
144 Id. at 123.
145 Debates of the Legislative Assembly of Upper Canada, Part X 1851 at 606.
146 Journals of the Legislative Assembly of the Province of Canada, 1852-53 at 843.
147 Id. at 105; Journals of the Legislative Assembly of the Province of Canada, 1850 at 29, 48, 52.
148 In June 1850, Colonel Prince withdrew a notice he had given of a bill to abolish the Court of Chancery, stating that he had "carefully examined the new rules of Court, and was disposed to give them a trial." The Globe (Toronto), June 17, 1850.
149 The Globe (Toronto), June 29, 1851.
the Legislature that they had abolished 112 of the old rules and enacted ninety new ones. The Court and the Legislature also tried to bring Chancery practice and procedure closer to that used in the common law courts. For example, an 1850 Act allowed the Court to appoint local Masters and Deputy Registrars if it appeared necessary for the more efficient operation of the Court. In 1857, the Legislature directed Chancery judges to go on circuit as did common law judges.

The continued improvement of procedure was given such high priority by the judges that by January 1869, twenty-nine different sets of orders had been passed. The Canada Law Journal remarked that:

the fertility of resource and untiring energy of the learned judges of the Court seemed equal to any emergency in providing for the settlement of 'new points'. The occasion for further directions in matters of practice and procedure appeared to be so constantly arising, that the practitioner at length came to expect a new 'batch' every month, with nearly the same certainty as he might expect his number of the Law Journal.

Chancellor Blake was exactly what the Court required — energetic, enthusiastic and firmly committed to proving that the Court could work efficiently. In fact, some came to feel that he was almost overzealous in his efforts to improve the Court. Lawyers complained that it was impossible to establish any settled practice, "with such shifting sands to build upon." Although the three judges were committed to raising the Court of Chancery in the public esteem, they were not afraid to risk public disfavour if the proper interpretation of the law so required. Under a number of orders promulgated soon after the Court was established, it had been the practice of Vice-Chancellor Jameson to decide cases even though the defendant had not appeared and was, in fact, absent from the province. Normally the court would have had no jurisdiction to act under these circumstances and nothing in the wording of the orders actually conferred such unusual jurisdiction. Although scores of cases had been decided on this basis, the new court declared the practice to be invalid. The Court of Appeal upheld the decision, stating:

It must have been by inadvertence, I think, that such an effect was given to the 75th order, in the first instance, for there certainly is nothing in the language of the

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151 1850, Can. 13 & 14 Vict., c. 50, s. 1.

152 1857, Can. 20 Vict., c. 56, s. 6. The Canada Law Journal reported approvingly that "the court of Chancery in Ontario has departed widely from English precedent, though it has acted in conformity with the common law mode of distributing business." (1872), 8 Canada Law Journal (N.S.) at 266.

153 (1886), 4 Canada Law Journal (N.S.) at 245.

154 (1869), 5 Canada Law Journal (N.S.) at 28.

155 In an undated letter found among the Blake Papers, one John Langton records — "I have had several spats with the Chancellor and he does not bully me as he does the rest, and if he does a little sometimes I submit to it because he really is a first rate man and a strong hand at the helm is much wanted." He was also something of a tyrant. Langton describes him as "one of the most opinionative and over-bearing men I know, who rules the Court of Chancery with a rod of iron and has converted the two Vice-Chancellors into lay figures." Blake Papers, A.O. MU 137, A-1-e.

156 Journals of the Legislative Assembly of the Province of Canada, 1850, at 238.
order itself that seems to sanction so essential a departure from the general principles of practice.\textsuperscript{157}

The orders were immediately recast, but it was also necessary to pass legislation confirming the defective decrees.\textsuperscript{158} In the short term, this decision of the Chancery judges did little to increase their own popularity or to encourage public confidence in their Court. However, it was a welcome indication of courage and competence — two qualities which had been in short supply before the 1849 reform.

The Court also departed from Jameson's old practice of slavishly following English precedent arguing that if Chancery was to serve its proper function in society, the Court had to adapt the law to meet the needs of the province. The judges were even prepared to follow American precedent if it reflected the needs of Upper Canada more accurately than English precedent. They refused to adopt English decisions if they seemed inappropriate. Chancellor Blake stated:

But were we to apply the rule to be deduced from some of the English cases which were cited, especially some of the latter cases, upon the subject of delay, without reference to the totally different social condition of this country, we should not only produce great practical evil and injustice, but should also, in my opinion, very much misapply a doctrine which in England would never had been laid down under the circumstances in which we are placed.\textsuperscript{159}

Nevertheless, Chancery was ever to prove a difficult court to manage. Once procedure was under control and equity jurisprudence was developing in accordance with the needs of the province, a new problem surfaced — administration of the court offices. The causes of the problem were numerous. In part, it may be attributed simply to the type of cases that fell within Chancery jurisdiction, since they often required the extensive involvement of court administrators. The rapidly increasing case load also contributed to the difficulty; in 1869, 1,335 bills were filed in the Court and by 1875 that number had risen to 2,071.\textsuperscript{160} Chancellor Spragge noted in 1870, "The funds of the Court were very small and easily managed for many years, though they have now increased to a considerable amount and the amount is constantly increasing with the increasing wealth of the Country, and with, if I may be permitted to add, the growth of Public Confidence in the Court."\textsuperscript{161}

Government parsimony was also a major factor. Officials were either not appointed until long after the need for them was first felt, or they were not appointed at all. The Act of 1849, for example, made provision for an accountant, but one was not named until 1865.\textsuperscript{162}

\textsuperscript{157} Hawkins v. Jarvis (1849), 1 Grant 257 at 259 per Robinson C.J. A member of the Legislature was perhaps more honest when he stated that he felt "the irregularities connected with the decrees in question arose from the imbecility of the Vice-Chancellor."\emph{Montreal Gazette}, July 17, 1850.
\textsuperscript{158} 1851, Can. 14 & 15 Vict., c. 113.
\textsuperscript{159} O'Keefe v. Taylor (1851), 2 Gr. 95 at 99.
\textsuperscript{160} Journals of the Legislative Assembly of the Province of Ontario, 1877, Sessional Papers, No. 14.
\textsuperscript{161} Letter from Chancellor Spragge to J.S. Macdonald, Mar. 1870, \emph{Buell Papers}, A.O., MU 308.
\textsuperscript{162} Id.
The greatest problem, however, seems to have been the incompetence of the officials themselves. The majority of complaints during the 1850s and 1860s concerned the Master, A.N. Buell. In September 1849, when he became Registrar of the Court of Chancery, he wrote, "I cannot but think it was a bad move to require me to take the Registrarship in Chancery, when I knew nothing of its duties beyond a vague impression they were various and perplexing, which I have found to be the case."

Nonetheless, the next year Buell was promoted to the position of Master in Chancery and remained in that post for the next twenty years, despite complaints from various solicitors about his incompetence. Buell himself blamed the rapidly increasing caseload and the inconsideration of the lawyers themselves for most of the problems.

A taxing officer was appointed to relieve the Master of some of his more onerous duties, but by 1870, the practitioners were again voicing, "great complaints as to the way in which the responsible duties pertaining to the various offices of that Court have been performed; and that many needless delays and much consequent expense have been occasioned to suitors, as well by reason of the shortcomings of the officers." A petition was presented to the judges by the lawyers, demanding a reform of the court administration. By 1870, the Court had quite simply outgrown its administrative structure and its administrators.

A further difficulty arose when the leader of the opposition, Edward Blake, declared in the Legislature that certain duties assigned to the judges’ Secretary were judicial in nature and therefore could not legally be exercised by him. The Secretary had been appointed in 1866 to help relieve the judges of their heavy workload. Chancellor Spragge believed that the Secretary was not acting *ultra vires*, but because he wished to avoid any question of the legality of the Secretary’s decisions, he requested the appointment of a second Master to replace the Secretary. In 1871, the administration of the Court was finally reorganized. A Referee in Chambers was appointed to replace the Secretary, and legislation was passed to confirm the validity of the decisions of the former Secretary.

Yet the Court’s problems with its officials were not at an end, and the Government’s reluctance to spend money was once again a large part of

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164 Letter from A.N. Buell to Chancellor Blake, June 16, 1858, *id.*, MU 305.
165 (1870), 6 Canada Law Journal (N.S.) at 29.
166 This situation was made worse by the fact that the officials running the Court were aged. In a letter to J.S. Macdonald in March 1870, Vice-Chancellor Spragge reported, of the Accountant, "for some time past, Mr. Turner from age and increasing infirmities has become unequal to the satisfactory discharge of the duties assigned to him." Letter from Vice-Chancellor Spragge to J.S. Macdonald, *supra*, note 161.
167 Journals of the Legislative Assembly of the Province of Ontario, 1870-71, p. 20.
168 *Id.*, Sessional Papers, No. 31.
169 S.O. 1870-71, 34 Vict., c. 10. Buell was elevated upstairs to the new position of Accountant-General and promised his own clerk. When the government proved reluctant to provide him with one, he complained bitterly, writing "J. Sandfield Macdonald professes his desire to meet my wishes but his great habit of economy, and I may add *sub rosa* the probable fear of losing his prestige in the Legislature should he show any liberality have defeated my desire." Letter from A.N. Buell to Wife Oct. 27, 1870. *Supra* note 161.
the problem. In 1875, the Premier of Ontario, Oliver Mowat, complained to the Minister of Justice in Ottawa that the present Referee was not working out well but it was impossible to get a competent man without increasing the salary.170 Ontario claimed that the Referee was really a judge and therefore should be paid by the federal government. Reluctant to ask his own legislature for the money, Mowat appealed to Ottawa for the funds.

By the end of the 1850s, attitudes towards the Court of Chancery had changed dramatically. Although complaints about procedure and administrative officials continued to be heard from time to time, the Court itself no longer excited controversy. Indeed, in many ways, the Court had become eminently respectable. Its judges were highly regarded, and both expense and delay had been greatly reduced. But the Court of Chancery was still not safe from criticism, for, in the mid-1850s, serious interest in the fusion of law and equity began to grow. Rather than simply abolishing Chancery and conferring its jurisdiction on the common law courts, it was now usually suggested that an entirely new court should be established, joining the two jurisdictions in an administration that combined the best characteristics of each court.

No longer was it suggested that this could be done overnight at the whim of the Legislature, for all agreed that developments in New York and England must be carefully studied before any action was taken. However, even the most conservative members of the legal profession confessed that, upon occasion, the existence of two separate court systems was not in the best interests of their clients. In 1857, the Canada Law Journal printed a long letter from someone calling himself "A City Solicitor" who stated, "I would make each of these Courts of co-extensive and universal law and equity jurisdiction, proceeding by the same rule; and I would give each of them a more perfect system of judicature than together they have now."171 Such ideas, however, still struck most Upper Canadians as rather radical.

The New York experiment was noted, but as The Globe explained, "we prefer that it should be tested before we adopt it — that the way should be pioneered for us — that we should look before we leap."172

Indeed, the Upper Canadians did not feel themselves in any way qualified to make decisions of such major importance.173 In a speech to the Legislature, one member stated that his primary concern was with the appropriate procedure to be used in a court administering both law and equity. Since the English had not yet informed the province which position it should take, Upper Canada would be best advised to sit back and wait for the oracle to speak.174

While the province awaited the English pronouncement on the fusion of law and equity, many were concerned that litigants were being harmed by the

170 Letter from Oliver Mowat to Edward Blake, Min. of Justice, Nov. 20, 1875, supra note 155, at B-4-m, MU 158.
171 (1857), 3 Upper Canada Law Journal at 228.
172 The Globe (Toronto), June 24, 1851.
173 The Globe stated: "We are supported further by the experience of England, where all that is necessary to the administration of justice is known at least as well as in any other country." The Globe (Toronto), Feb. 12, 1850.
174 The Globe (Toronto), May 26, 1853.
current state of affairs. Consequently, the Legislature began to make changes to render the jurisdiction of the courts of law and equity more co-extensive. To this end, two approaches were adopted. The first and less popular means was to provide the law and equity courts with jurisdiction over the same matters. Presumably, litigants could then choose which court was more appropriate in the circumstances. Thus, in 1850, jurisdiction over partition was returned to Chancery so that the issue could be determined in either court.\textsuperscript{175} Five years later, both courts were given jurisdiction over custody of infants.\textsuperscript{176}

The more popular approach was simply to grant each court the power to use the doctrines and remedies available in the other court when deciding certain cases. Although this method was applied only to a very limited number of cases in the beginning, eventually the principle was extended until each court could make deep incursions into the territory of the other when necessary.

In 1853, equitable jurisdiction was granted to the County Courts for the first time.\textsuperscript{177} They were given the same powers as a Court of Chancery, subject to certain monetary restrictions, in cases of partnership accounts, debts of deceased persons, legatees and foreclosure and redemption of mortgages. Injunctions to restrain waste could also be granted. This reform sought to answer complaints that smaller claims went unsatisfied because Chancery had priced itself out of the reach of most people. Naturally, fears were expressed that the County Court judges did not know enough equity to ensure that justice was done, but the Act provided that cases could be transferred to Chancery if necessary. Commendable though the reform was, it is easy to sympathize with Mackenzie's frustration when he declared in the Legislature that he, "did not see why, when equity powers were being given to the small County Courts, they should not be given to the higher courts as well, the judges of which might be supposed to be better able to exercise jurisdiction in equity than the judges of the County Courts."\textsuperscript{178} Although it is unclear how successful the experiment was, it is probable that the procedural hurdles proved too great, because in 1869 this jurisdiction was taken away from the County Courts.\textsuperscript{179}

A more successful breakthrough occurred in 1856 with the passage of the Canadian version of the \textit{Common Law Procedure Act}.\textsuperscript{180} Much of the success must be attributed to the fact that the English had first laid the groundwork by their Acts of 1852 and 1854,\textsuperscript{181} and many sections of the Canadian statute were taken almost \textit{verbatim} from their British counterparts.

The 1856 Act granted only very limited equitable jurisdiction to the common law courts. Defendants were allowed to plead equitable defences in actions of replevin, and the courts were given the power to grant injunctions and

\begin{itemize}
\item \textsuperscript{175} 1850, Can. 13 & 14 Vict., c. 50.
\item \textsuperscript{176} 1855, Can. 18 Vict., c. 126.
\item \textsuperscript{177} 1853, Can. 16 Vict., c. 119.
\item \textsuperscript{178} \textit{The Globe} (Toronto), May 26, 1853.
\item \textsuperscript{179} S.O. 1869, 32 Vict., c. 6, s. 4. The County Courts were given full equitable jurisdiction in 1881 in the \textit{Judicature Act}, S.O. 1881, 44 Vict., c. 5.
\item \textsuperscript{180} \textit{Common Law Procedure Act}, 1856, Can. 19 Vict., c. 43.
\end{itemize}
to order specific performance. The following year, the Act was amended to allow equitable defences in all actions at law. In 1866, the Act was again amended to provide that if a defendant pleaded an equitable defence at law and failed in an action, "such judgment shall be pleadable as a good bar and estoppel against any bill filed by such defendant in equity against the plaintiff or representative of such plaintiff at law, in respect to the same subject matter which has been brought into judgment by such equitable defence at law." This amendment ran contrary to the traditional doctrine of the supremacy of the Court of Chancery over the common law courts. It may also have worked grave injustice in view of the narrow interpretation given to the Common Law Procedure Act by the common law courts. Whether it was actually allowed to do so is uncertain.

Immediately after the Common Law Procedure Act was passed, the common law judges set about narrowing its scope by following the precedents established by the English courts. British judges had not totally welcomed the opportunity to mix law with equity, and their example was faithfully followed by Canadian judges. Many equitable defences failed either absolutely or with the admonition that the defendant had best take himself off to Chancery. How this meshed with the 1866 Act making unsuccessful equitable defences a bar to equity suits is unclear. The rule devised in England and adopted here was simply that, "the provision with regard to equitable defences only enables the defendant to plead by way of equitable defence such facts as would entitle him to absolute and unconditional relief in a court of equity." A later case explained the rationale behind this: "If upon such a plea we were to give judgment in bar of the action all legal remedy would be gone, although the defendant admits that upon a certain contingency he would be liable to the plaintiff on this bond." Since the common law courts were not equipped to balance all the equities and give judgment doing justice to all parties, the judges seemed to believe they would do more harm than good in cases where something more than a simple judgment was required. This position offended many who felt that the courts ought to be attempting to meet the spirit of the Act by giving it a more liberal interpretation. The experience with the Common Law Procedure Act only served to confirm that the fusion of law and equity was impossible while two separate court systems and sets of procedure existed.

Another reason for the courts' reluctance to give a broad interpretation to the Act was the fear that it might be abused by artful plaintiffs. In Hickey v. Anchor Insurance Co., the plaintiff made an equitable replication to the defendant's equitable defence. Concluding that the plaintiff's claim was purely equitable, the Court refused to act, saying:

[A] plaintiff whose case is questionable would much rather keep back the facts of his case, and spread out merely what, upon the face of it, might be said to be a

182 1857, Can. 20 Vict., c. 57, s. 11.
183 1866, Can. 29 & 30 Vict., c. 42, s. 3.
187 (1872), 8 Canada Law Journal (N.S.) at 130.
legal demand, and reserve the remaining facts to be given by way of an equitable
[sic] replication, so as to obtain his case to be tried by jury rather than be decided
upon by judges.\(^{188}\)

It became increasingly apparent that the provisions of the Common Law
Procedure Act were inadequate. Few doubted that its aims were laudable, but the
simple truth was that the Act had not eliminated the need to resort to two
courts to resolve matters in dispute. In the case of Shier v. Shier, Gwynne J.
said:

Speaking for myself, it is, I think, much to be regretted that the Courts of Law
have, as I think they have, taken too limited a view of what the intention of the
Legislature was in allowing equitable defences to be pleaded to actions at common
law. If, however, the rules which have been established exclude these pleas from
the consideration of a Court of Law, we must abide by the decisions, however hard
in the particular case the application of the rules may appear to be.\(^{189}\)

There, in a nutshell, was the problem. The Act had been given a narrow inter-
pretation in the beginning and the common law courts were powerless to
change it. If any new ground were to be broken, it must be done by the
Legislature.

By the early 1870s, discontent with the continued distinction between law
and equity jurisdiction was growing. The Canada Law Journal wrote:

When one looks at the Common Law Procedure Act, and observes in how many
points the systems of law and equity touch, and when one looks at the reports, and
observes in how many cases litigants have been prejudiced because courts of law
and equity have not had co-ordinate jurisdiction, — one cannot but wish that
some scheme were devised whereby the vexacious lines of demarcation might
disappear and (in the language of a well-known pleader, who now adorns the
bench of one of the common law courts) 'the course of justice flow
unobstructed'.\(^{190}\)

Chancery itself was no longer regarded as evil; the great injustice was that
 equitable relief was generally available only from that court. In fact, the com-
mon law courts were blamed for the situation rather than Chancery, for they
had refused the opportunity to make equity available to litigants at common
law.

The investigations of the Law and Equity Commission in England were
noted in Ontario. In 1871, Edward Blake proposed a resolution in the
Legislature, stating that the existence of two separate court systems, "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 amendments."\(^{191}\) As a result, the government of John Sandfield
Macdonald promised a commission to investigate the problem. In September
1871, a law reform commission was officially formed to study the constitution
and jurisdiction of the courts of law and equity in the province. Its generally
accepted purpose, however, was to consider the advisability of fusing law and
equity and to suggest a scheme for so doing.

\(^{188}\) (1859), 18 U.C.Q.B. 433 at 439.
\(^{189}\) Shier, supra note 184.
\(^{190}\) Supra note 187, at 266.
\(^{191}\) Supra note 167, at 77.
In August 1872, the Commission was abolished by the new Mowat government despite the fact that by that time it had produced, "about 16 galleys of printed matter prepared in the form of a Bill not, it is true, completed, but in an advanced state, which is under the consideration of the Commission." The official reason given for this termination was that the task had simply been too great for the Commissioners, all of whom were either judges or lawyers with many other duties. A more likely explanation was that the new government did not like the direction in which the Commission was headed. This much was admitted in the Legislature by Mowat who stated that his government favoured, "a measure [tending] in the direction of fusion," whereas the Commission had intended to recommend complete fusion. Though Mowat personally favoured the eventual fusion of law and equity, he felt that such a radical change should be implemented gradually. Most agreed with Mowat that complete fusion was premature. When the Commission was named, the Canada Law Journal warned:

It may be a question, however, how far it is advisable for the Commission to mature and scheme for the consolidation or alteration of any of the Courts as at the present existing until some decided step has been taken in England, where a similar subject has received the careful attention of a most intelligent and learned Commission for some time past.

The desirability of fusion was accepted by many in theory, but it was still feared in practice. Few underestimated the enormous effort required to make the change and fewer still believed that Ontario should be the one to take the first step. One member of the Legislature expressed the hope that nothing would be done until "we saw how they worked in England." Another worried that, "supposing that the courts should be amalgamated, our court could not adopt the decisions of the courts of England unless these courts were amalgamated like our own." The danger of losing valuable English precedents was sufficient reason in itself to wait until the English acted.

Most lawyers probably also did not relish the idea of being forced to learn a whole new way of practising law. Some felt that the advantage to be gained was worth the sacrifice, but many more felt that, if it must come, the transition should be made as slowly as possible.

In the meantime, however, the government proposed an interim measure which resulted in partial fusion. In early 1873, Mowat introduced his compromise, the Administration of Justice Act, which he called a "transition scheme." Although it was not complete fusion, he argued it, "would give us the advantage to be gained by absolute fusion, and prepare the way for that

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192 Journals of the Legislative Assembly of the Province of Ontario, 1873, Sessional Papers, No. 26 at 6.
193 Id. at 7.
194 The Globe (Toronto), Jan. 24, 1873.
195 Biggar, Sir Oliver Mowat Vol. 1 (Toronto: Warwick Bros. & Rutter, 1905) at 47.
196 1871, 7 Canada Law Journal (N.S.) at 233.
197 The Globe (Toronto), Jan. 24, 1873.
measure if it were thought desirable.’’ The Act was to give the province the best of both worlds; issues could be fully resolved in one court and yet the separate courts would be permitted to retain their own practice and procedure. No doubt, many sincerely hoped that the Act would be the end of the whole matter. By ensuring the one court could settle a dispute in its entirety, they hoped it would mean that there would be no need to worry about the devilish problem of actually fusing the courts. Mowat told the House:

It must be remembered that the judges in both courts were perfectly familiar with the present system, as well as the lawyers, and to introduce an entirely new system would be attendant with considerable difficulty and expense. It was therefore desirable to make as few changes as might be consistent with the object involved . . . . The effect of absolute fusion would be to change the whole practice for the sake of avoiding difficulties which very infrequently arose.

The compromise pleased most people. Even those who agreed that it must be only a temporary measure felt that all would benefit if the legal profession were permitted to accustom itself gradually to the new system. The Canada Law Journal encouraged its readers to welcome the gradual transition in order that they might be prepared for the day when complete fusion was effected. It called the Act, “not a revolutionary measure, but a safe reform, educating for a more complete change.”

The aim of the Act was set out in section 1:

The courts of law and equity shall be, as far as possible, auxiliary to one another respectively, for the more speedy, convenient and inexpensive administration of justice.

Although one would have thought that this was always supposed to have been the case, past experience had shown the courts to be less than enthusiastic about the proposition. The use of the word “auxiliary” was interesting, reinforcing the idea of the separation of the courts, regardless of how the Act changed their jurisdiction.

As far as the Court of Chancery was concerned, there was virtual fusion, for the Court was given jurisdiction to deal with purely legal matters although it could also order a case to be transferred to the common law courts. The common law courts received a more limited jurisdiction; they could deal with equitable claims involving purely money demands, but all other equitable claims still had to go to Chancery. As under the Common Law Procedure Act, defendants could raise any defence acceptable in a court of equity. In an attempt to undo the mischief created by the judges’ narrow interpretation of the Common Law Procedure Act, section 3 of the new Act specifically stated that the Court might accept an equitable defence, “although such facts may not entitle such party to an absolute, perpetual and unconditional injunction in a court of equity.” Once again, provision was made for the transfer of a case to Chancery should this be necessary.

The Legislature was still concerned that this liberality might be abused by devious plaintiffs, and, therefore, section 48 stipulated that should a party

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200 The Globe (Toronto), Mar. 4, 1873.
201 Id.
202 1874, 10 Canada Law Journal (N.S.) at 5.
bring a case in the less appropriate court, he would be unable to recover costs in excess of those that would have been incurred in the more appropriate court. In such cases, an opposing party was permitted to set off his excess costs against any he might owe the other.

Section 49 provided that, "No proceeding either at law or in equity shall be defeated by any formal objection"; Riddell notes that this was "the embryo, fairly well developed, of the Judicature Act of 1881." In fact, the idea expressed in section 47 is at the core of the debate over the fusion of common law and equity. Over the course of the century there was a gradual shift of emphasis from procedure to substantive justice. Where once the problem had been twisted to fit the available procedure, it was now the prevailing view that the procedure should be flexible enough to conform with the requirements of substantive justice. Once this new approach to litigation became the dominant one, it was only a matter of time until complete fusion was brought about.

An Act of the following year took another step toward fusion by making common law and equity judges, in effect, interchangeable. In addition to the convenience and efficiency of the measure, it also provided a gradual introduction of the judges to the system with which they were less familiar. Cooperation of the judiciary was essential to the success of fusion, as was shown in England, where many of the difficulties experienced were directly attributable to the hostility of the judges to the Judicature Acts of 1873 and 1875.

The Administration of Justice Act was fairly well received by the legal profession. Indeed, the most frequent criticism was that it did not go far enough, because the common law courts still lacked jurisdiction to hear most equitable cases. This was perceived by some as sheer favouritism, part of a dangerous trend towards giving preference to equity over common law courts. One common law lawyer wrote that it was "very clear that our Legislature has thus treated the Court of Chancery as a fond mother would treat her own child, by giving it, if not all it wants, at least all she thought it wanted." The government’s justification, however, was that it was easier for equity judges to learn common law than vice versa. The "favouritism" of the 1873 Act was also the result of the inflexibility of the common law procedure which simply could not accommodate the needs of much equitable litigation.

The courts were generally enthusiastic about the new Act and interpreted it broadly. That there was no British equivalent of the Act was an advantage since the judiciary was able to interpret it without restrictive British precedents. Possibly the judges hoped that a liberal construction of the Act would obviate the need for any more radical changes. On the whole, however, Ontario judges were less hostile to the idea of fusion than their British counterparts. Whether this was due to their awareness of the success of fusion in New York, or whether the legislative scheme of gradual immersion was simply viewed as a success, is not clear. What is apparent is that the judges grasped the spirit of the Act quickly and were determined to apply it whenever possible.

201 Supra note 7, at 219.
204 S.O. 1874, 37 Vict., c. 7.
205 1873, 36 & 37 Vict., c. 66 (U.K.); 1875, 38 & 39 Vict., c. 77 (U.K.).
206 (1878), 14 Canada Law Journal (N.S.) at 135.
In particular, the Court of Chancery welcomed the opportunity presented to it. There were numerous cases where the Court refused to restrain an action at common law, on the grounds that the whole matter could be justly disposed of in those courts. In one case,207 the Court refused to grant an injunction stating:

[It] is plain the object of the Act for the better administration of justice was to prevent the necessity of coming to this Court for the purpose of modifying or restraining proceedings at law. The power given to the Common Law Courts enables them in such a case as the present to do complete justice, firstly by making such an order of reference as this Court would grant, using the officers of this Court to carry out the reference; or secondly, if the Common Law Courts think it better, to transmit the whole case here.208

Vice-Chancellor Samuel Blake also said, "I think, any interference under the circumstances presented to me in this cause would be invading the spirit if not the letter of the Act."209

Multiple proceedings were not tolerated, and the rule was soon established that the whole case must be heard in the court in which it was initiated.210 The Court could deal severely with those who abused the spirit of the legislation. In one case, a plaintiff succeeded in an action at common law, then obtained another decree in Chancery. The defendant refused to pay the plaintiff's costs in the Chancery suit, claiming that the second proceedings had been unnecessary. Spragge agreed, stating, "I incline to think that there would be not only very much less expense, but also less difficulty in working out the rights of all parties in one suit than in several."211 The plaintiff was ordered to pay the defendant's costs in the Chancery suit, even though his claim had been successful.

Unnecessary suits were also discouraged. In one case where executors sought the assistance of the Court in administering an estate because the debts of the deceased exceeded the amount of the personal estate, the Court refused the application on the grounds that intervention at that time was unnecessary. If the executors were sued by the creditors in the common law courts all they needed to do was to plead deficiency and obtain the same administration from that court.212

The Court was willing to assume jurisdiction over almost any case that came its way, even where no equitable claim was made. In one case it was stated:

This recent legislation gives to the subject, with some few exceptions, that choice of forum which before was the prerogative of the Crown, and it is quite clear that a suit for an account, analogous in its nature to that which is the subject of this information, might now be brought either in a common law Court or in this Court.213

207 *Kennedy v. Bown* (1874), 21 Gr. 95 at 96.
208 Id. at 96.
209 Id.
210 *Knox v. Travers* (1876), 23 Gr. 41 at 43.
211 *Merchants Bank v. Sparkes* (1880), 28 Gr. 108 at 111.
212 *Re Shipman* (1876), 24 Gr. 177.
213 *A.G. v. Walker* (1877), 25 Gr. 233 at 239.
In a similar manner, the common law courts were quite willing to act on equitable matters within their jurisdiction. In *Bank of Hamilton v. Western Assurance Co.*, Harrison C.J. said:

Suitors, when in pursuit of simple justice, are no longer like shuttlecocks to be needlessly tossed from Courts of law to Courts of equity or vice versa. The spirit of modern legislation is as much as possible to enable each Court in the particular case to administer all the justice, called law or equity, which the case demands. Judges should, as far as in their power, consistently with rules of law, act in a similar spirit.214

The common law courts were unsure of themselves in equitable matters and seem to have frequently transferred cases to Chancery.215 One judge plainly remarked:

I may add that we should have been glad if the gentlemen who argued this case, and who are well informed in Chancery matters, had aided us by a reference to those works and decisions which each of them was so certain were so much in his favor. It is a practice and system of law with which we are necessarily not very familiar, and in which we require all the assistance which can properly, and should properly, be given to us.216

Such remarks confirm the wisdom of the Legislature's decision to restrict the jurisdiction of the common law courts in equitable matters. Since the common law judges lacked expertise in the rather complicated doctrines of equity, they required more time to gain experience in dealing with them.

However, the system created by the *Administration of Justice Act* was not perfect, and sometimes the courts found themselves unable to provide the necessary relief. In *Kavanagh v. Corporation of the City of Kingston*, the judge determined that the plaintiff's equitable claim was not a purely money demand and consequently stated:

I have no power to entertain the case, nor to transfer it under that section to the Court of Chancery, for it is only in cases of a purely money demand that such power is given.217

Cases such as *Kavanagh* illustrate the futility of trying to pretend, as some no doubt did, that the *Administration of Justice Act* was an acceptable substitute for complete fusion. As long as similar cases could recur, it was clear that the system was defective.

Though most people accepted the wisdom of gradually introducing the change, proponents of complete amalgamation were frustrated by the reluctance of the Legislature and the legal profession to complete the process. A frequent correspondent with the *Canada Law Journal* on this subject was the anonymous "Q.C." who wrote:

214 (1876), 38 U.C.Q.B. 609 at 616.
217 *Kavanagh v. Corporation of the City of Kingston* (1876), 39 U.C.Q.B. 415 at 418. Many were pleased with the way the Act had worked. *The Globe* reported that the "Act has been in most successful operation for 5 years, and everyone at all acquainted with the workings of our Courts must have been struck with the almost universal disposition manifested by our own Superior Court Judges to go as far as the law allowed in the common sense direction." *The Globe* (Toronto), Jan. 27, 1880.
It is however difficult for us to understand how any section of the profession or the public can really be benefitted by preventing (even if they could) a final and complete settlement of what is at present all doubt, dissatisfaction and uncertainty, neither fused nor distinct, and without any certain or intelligible lines of demarcation between what is and what is not fused.218

One reason for the reluctance of many lawyers to urge the completion of the process was the chaotic state of practice and procedure which had followed fusion in England in 1875. In response, defenders of fusion maintained that the experience in Ontario would be different because the Administration of Justice Act had permitted the legal profession to familiarize itself with the idea of fusion and as such, had paved the way for a more comprehensive measure.219 Some even suggested that it would not be necessary for Canada to adopt the English Acts word for word. Many improvements could be made, if only the Legislature had the courage to modify the English statutes. "Q.C." wrote of his distress:

that Mr. Mowat should thus place so low an estimate upon his own abilities and those of the rest of the profession, as to take it for granted none of them at this day can do more than hunt up and copy some English statute, changing the word 'England' into 'Ontario', wherever it occurs; and that if every English statute fails through even such apparent and easily avoided deficiencies to attain its object, that failure while it lasts must estop every one in Canada from attempting, even in the proper way which ensures success, anything similar.220

Proponents of fusion even optimistically proposed that procedure after fusion would run more smoothly. "Q.C." wrote:

[I]t is impossible to have any settled intelligible system of practice or pleading in any court; whereas, as soon as we shall do so, all will immediately be settled and become certain and intelligible, and we will not be compelled, as we now are, without any remuneration, to learn and keep ourselves up in two dissimilar antagonistic systems of practice, pleading and procedure, instead of only one system.221

Though "Q.C."'s optimism was to prove unfounded, as subsequent events showed, there was a certain amount of truth in the assertion that the whole system was unsettled and the piecemeal changes were annoying.

For all proponents of fusion, the major issue was the procedure that the new system should adopt. Legal and equitable doctrines had been shown to mesh well; the problem now was to amalgamate the procedure. By the 1870s, the earlier position had been reversed, and Chancery procedure was usually considered to be far superior to that used in the common law courts. The old common law procedure was too rigid; it could not cope with the complexities of many cases that consequently had to be arbitrated. Of course, common law and Chancery practitioners tended to prefer the system with which they were most familiar and dreaded the idea of adopting the more notorious of the other's practices. Nonetheless, it was also true that over the last twenty years, practices in the two courts had grown much more similar as they were modified by statute or amended by rules incorporating the most useful aspects

218 (1878), 14 Canada Law Journal (N.S.) at 131.
219 The Globe (Toronto), Feb. 10, 1881.
220 (1887), 13 Canada Law Journal (N.S.) at 331.
221 Id. at 333.
of the other. In the final analysis, however, the scales seemed to be tipping in favour of Chancery. On the subject of the best procedure to accompany complete fusion, the Canada Law Journal said:

Now the simpler and more direct mode of procedure is the most suitable for modern times. For this reason, other things being equal, the writer would prefer, where the 2 modes of procedure are so inconsistent that they cannot be amalgamated, that the practice as settled by the general orders and decisions of the Court of Chancery, should prevail over the practice of law, which has been mainly imported from England, and the great triumph of which was to simplify considerably time-honoured complexities of practice. The equity judges have been astute to frame orders from time to time adapted to the wants of the country and the requirements of suitors. The consolidated orders as they embody the results and sagacity of many eminent judges, who were obliged, from the position of the Court of Chancery, to adapt its procedure to the special circumstances of this province.222

Common law practice was rigid and had failed to evolve to meet the changing needs of society and litigants. On the other hand, Chancery practice, inherently more flexible, had been constantly adapted to the needs of the province.

It was only a matter of time until Ontario followed the English lead. In January 1880, a bill was introduced consolidating the superior courts of law and equity and establishing a uniform system of pleading.223 The introduction of the Bill was unexpected and there seems to have been little preparation. No commission had been formed to investigate what was clearly a major reform, involving many complex and detailed issues.224 Many proposals had been advanced during the previous ten years, but no systematic effort was ever made to determine which proposal was the most suitable. The sudden introduction of the Bill aroused much feeling among the legal profession. Even the Canada Law Journal, which strongly supported the intent of the Bill, begged the Legislature to give the profession a year to study it and propose amendments.225

In introducing the Bill, Mowat told the House:

A uniform system of pleading and practice was not adopted in the Administration of Justice Act for 1873, for various reasons. That such a system would be adopted in England was certain, though it was doubtful, when, and it was desirable that we should have the benefit of the discussions and legislation which would take place on the subject there.226

Therefore, it appears that Mowat, although favouring the theory, had wanted to see how fusion worked in practice before introducing it into the province. He does not appear to have been deterred by the English experience, believing that Ontario was better prepared for the change and that the province could learn from the mistakes of the English. The Globe reported that Mowat told the Legislature:

No one imagined that we were permanently to continue the two systems of common law and equity practice permanently [sic], and the only question was when the

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222 (1872), 8 Canada Law Journal (N.S.) at 267.
223 Journals of the Legislative Assembly of the Province of Ontario, 1880 at 44.
224 The Globe (Toronto), Feb. 4, 1881.
225 (1880), 16 Canada Law Journal (N.S.) at 49.
226 The Globe (Toronto), Jan. 15, 1880.
change should be made. We had now four years' experience of the working of the English system, and after considering the whole matter, he had felt that he would not be justified in further delaying the adoption of that system, with such modifications and improvements as might be necessary for this country.227

Certainly, the perpetuation of the old system was precisely what some segments of the legal profession wanted. More opposition to the proposed change came from the common law camp; older lawyers were often less favourably disposed to the legislation than were younger lawyers, and rural areas opposed the change more strongly than did their urban counterparts. Limited available data precludes meaningful categorization of opinions beyond these general observations, but a sampling of views culled from various newspapers and journals indicates the types of sentiments expressed at the time.

Many newspapers and journals supported the measure, stating that it was long overdue. However, the newly established Canadian Law Times was bitterly opposed, writing, "No one cried out for law reform. The public were not dissatisfied and the Profession found things working admirably under the Administration of Justice Act."228 The journal concluded that the advantages to be gained were not worth the time, expense and confusion that would inevitably be involved.

The Bill was primarily a procedural one for Ontario since the 1873 Act had already merged the jurisdiction of the courts significantly. The Canadian Law Times feared that the confusion that followed amalgamation in England would be repeated in Ontario. It wrote:

[A]fter seven years experience of the same system, amendments and new rules are still the order of the day; we can hardly hope for better results here. In the meantime, solicitors will be paid for their work, and suitors will in course of time pay for the interpretation of the Act and Rules, and for the settling of a practice they fondly thought the Legislature had perfected for them in the measure which it had placed upon the Statute book.229

Some individual lawyers also came out strongly against the Bill. The Globe quoted one barrister who claimed that the Act would create, "one huge Chancery machine, with Toronto as its headquarters."230 This complaint seems to have stemmed from the desire of many lawyers outside Toronto to see decentralization of the administration of justice. The Globe also reported:

It is stated that a meeting of the profession in Hamilton has been, or is about to be, called by a leading barrister there, whose opinions are said to be adverse, and it is known that at least one of the Chief Justices has inveighed against the change in vigorous style.231

There was, however, a substantial faction that favoured immediate adoption of the Bill. They pointed to the success of the New York experiment, where after thirty years, everything was running smoothly.232 They denied that the English experience would be repeated in Ontario, for the circumstances

227 Id.
228 1 Canadian Law Times at 593.
229 Id.
230 The Globe (Toronto), Jan. 27, 1880.
231 Id., Jan. 20, 1880.
232 Id., Jan. 27, 1880.
were completely different. Finally, and most significantly, it was pointed out that, "By making our laws correspondent with those in England, we give our suitors the advantage of English decisions." 233 The same argument that had been advanced in the 1840s for maintaining separate courts was, in the 1880s, being used to justify their amalgamation.

Despite the desirability of the scheme, there is little doubt that the measure was introduced primarily because Ontario wished to follow the British example; it was still unthinkable for the province to consider diverging from the English model. Had Mowat not been so personally committed to the measure, the province might have waited a few more years until the British had further perfected the system. Mowat, however, was eager to complete the process his government had begun. In his obituary, the Canadian Law Times wrote in 1903 that in introducing fusion, Mowat, "loyally followed the lead of the mother country." 234 The journal's tone had mellowed since 1880 when it raved that the Legislature had, "dared to think for themselves in introducing the Administration of Justice Act." 235 Now, "As if unconscious of their discovery, they show so little confidence in their own judgement that the adoption of a different course by the English Parliament had caused them to waver," 236 Although the journal identified one of the prime motives behind the Bill, it mistook the direction in which the government had been heading in 1873. Whatever some members of the legal profession may have thought and hoped, the Government had never seen the Administration of Justice Act as the full solution to the problem. Complete fusion had always been the ultimate goal.

In response to the demands, the Legislature took no further action on the matter in that session. However, in 1881, a new bill was introduced. The Legislature debated for several days, but in the end, it appears that even the Opposition did not demand many serious changes. 237

The details of the Judicature Act of 1881 238 are beyond the scope of this paper. Generally, the old courts were abolished and replaced with a single Supreme Court of Judicature, although within that Court, the three old courts remained as divisions of the High Court of Justice. Ontario had to wait until 1913 for the final amalgamation. As was to be expected, most of the provisions were taken directly from the English Acts. 239 About five hundred new rules of court, based on the English system, were introduced at the same time as the Act. However, many of the old rules and orders remained in force. The Act provided that, when in doubt, the "most convenient" practice was to be followed. Chaos ensued, and in 1888 a whole new set of rules was enacted, but it was to take many years before the procedure of the new court was settled.

One could say that the Judicature Act of 1881 was the final vindication of the Court of Chancery. According to the Act, in the case of conflict between

233 Id., Jan. 21, 1880.
234 23 Canadian Law Times at 177.
235 Supra note 228, at 155.
236 Id. at 156.
237 The Globe (Toronto), Feb. 4, 1881.
238 S.O. 1881, 44 Vict., c. 5.
239 1873, 36 & 37 Vict., c. 66 (U.K.); 1875, 38 & 39 Vict., c. 77 (U.K.).
law and equity, equity was to prevail, as it had always done in the past. As to the new procedure, it was based largely on the procedure developed by the Court of Chancery. This victory for equity may account in part for the hostility of the old common law lawyers who well remembered when the Court of Chancery had been synonomous with expense and delay.

The procedural chaos following the 1881 Act indicates that the wisest course of action for Ontario would have been to delay passage of the Bill until a commission had been appointed to investigate and recommend a complete new set of rules. The fact that Ontario did not take this route illustrates the complete faith of the colonial legislature in the "wisdom" of the Mother Country.

Despite the confusion and controversy surrounding the Judicature Act the final word on the subject was surely said by a correspondent to the Canada Law Journal:

There will be in Ontario as there has been in England, trouble enough at first; old lawyers will not much like it, but all will come right, and the new generation will wonder how we bore the reproach so long.\(^{240}\)

\(^{240}\) (1881), 17 Canada Law Journal (N.S.) at 164.