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LAW AND EQUITY IN UPPER CANADA.

"We ought not to think of common law and equity as of two rival systems. Equity was not a self-sufficient system, at every point it presupposed the existence of common law. Common law was a self-sufficient system. I mean this: that if the legislature had passed a short act saying 'Equity is hereby abolished,' we might still have got on fairly well; in some respects our law would have been barbarous, unjust, absurd, but still the great elementary rights, the right to immunity from violence, the right to one's good name, the rights of ownership and possession would have been decently protected and contract would have been enforced. On the other hand had the legislature said, 'Common law is hereby abolished,' this decree if obeyed would have meant anarchy. At every point equity presupposed the existence of common law. Take the case of a trust. It's of no use for Equity to say that A is a trustee of Blackacre for B, unless there be some court that can say that A is the owner of Blackacre. Equity without common law would have been a castle in the air, an impossibility."¹

The supposititious equity-less England suggested by Maitland to his students in the foregoing words has an actual and curious parallel, of special interest to the student, in the history

¹F. W. Maitland, *Equity and the Forms of Action*, Cambridge (1909), p. 19.

of the old province of Upper Canada, the inhabitants of which for nearly fifty years "got on fairly well" with the common law of England—and never a chancellor to be appealed to 'for the love of God or in the way of charity.'

The Upper Canadian Statute of 1792 which introduced the laws of England as the rule for the decision of all matters of controversy relative to property and civil rights, also 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 the province, should be regulated by the rules of evidence established in England.²

Although the word "equity" occurs in the statute, there was no indication of any intention on the part of the legislature to recognize equity as a rule for the decision of any question of property and civil rights, nor was the legislature, when it established superior courts for the administration of justice, in any haste to confer equitable jurisdiction upon them.

Mr. Chief Justice Robinson wrote in 1846:³

"Courts of Request" were organized for the trial of small causes, on the same principle as the courts of conscience in England; and these were not held to the strict rules of the common law; but with this exception, if it can be called one, there was absolutely no court whatever authorized to proceed otherwise than according to the common law. No court of

² 32 G. 3, c. 1. Under the authority of the Statute 31 G. 3, c. 31, of the British Parliament, commonly known as the Constitutional Act of 1791, the old Province of Quebec was divided into two Provinces known as Upper Canada and Lower Canada respectively. Upper Canada comprised what is now the southerly portion of the Province of Ontario. The statute referred to in the text was the first statute passed by the first parliament of Upper Canada at its first session, held at the provincial capital Newark (now Niagara) in 1792. Its effect was to supersede the French Canadian law which had theretofore been the rule for the decision of matters of controversy relative to property and civil rights, and to substitute the English law as of the 15th of October, 1792.

³ Simpson v. Smyth (1846), 1 U. C. E. & A., at pp. 57, 66.

⁴ These Courts of Requests were originally established by the Upper Canadian Statute 32 G. 3, c. 6. Each Court was to be held by two or more justices of the peace, who were directed to decide "as to them shall seem just in Law and Equity." They were afterwards superseded by Division Courts—the predecessors of the present courts of that name. The judge of a Division Court may "make such order or judgment as appears to him just and agreeable to equity and good conscience." In England the Court of Requests was a minor court of equity which flourished during the Tudor and early Stuart period. See Holdsworth's History Eng. Law, Vol. I, p. 207.

equity was created, and no provision made for the exercise of an equitable jurisdiction, in regard to any one matter that belongs peculiarly to equity, nor any assurance held out by the legislature while they were introducing the English law, in the year 1792, nor for more than thirty years afterwards, that there ever would be a court in Upper Canada authorized to administer what in England is called equity.

"It was well known that in the British West India Islands and some other ancient British possessions, there were courts of equity exercising their authority on no other foundation than that the governor was by common law chancellor, in virtue of his custody of the great seal; but it seems to have been generally conceded that since the Bill of Rights, 1 Wm. and Mary, the Crown cannot by the exercise of its prerogative merely, erect any jurisdiction with power to judge, otherwise than according to the course of the common law; and it has not of late years been attempted to do so. Even in this province the Governor had, as to some purposes, been considered as invested with the authority and jurisdiction of chancellor in consequence of his custody of the great seal, but never in regard to the exercise of any equitable jurisdiction."⁸

The Provincial Act of 1794 which established the Court of King's Bench for Upper Canada,⁹ conferred upon it a jurisdiction equivalent to that then possessed by the Court of King's Bench, the Court of Common Bench, or in matters which regarded the King's revenue, by the Court of Exchequer in England, but there was no mention of any equitable jurisdiction. Until 1837 the King's Bench remained the only superior court in the Province, and in the reports of cases decided by it there is to be found comparatively little suggestion of the existence of any such thing as equity.

Obviously no application was to be made to the King's Bench for any relief of a distinctively equitable nature. There was no jurisdiction to enforce trusts, to grant injunctions, to decree specific performance, to compel discovery or to give relief against

⁸ Mr. Justice Riddell has drawn my attention to the fact that in 1823 William Dummer Powell, C. J., against whom one Alexander Wood had obtained a verdict, actually applied to the governor in his capacity as chancellor asking him to issue a writ directing the judge of assize to seal a bill of exceptions. The jurisdiction of the chancellor being questioned, Powell withdrew his application.

⁹ 34 G. 3, c. 2: an Act to establish a Superior Court of Civil and Criminal Jurisdiction and to regulate the Court of Appeal.

legal proceedings prosecuted contrary to equity and good conscience, nor any machinery to take accounts or to supervise the administration of estates.

In 1827 in a case in which a purchaser at a sheriff's sale sought to have the sale and the covenant for payment of the purchase money set aside on the ground that the sale was unfair and that a good title could not be made, it was unsuccessfully argued on the applicant's part that the sale, having been made by an officer of the court, was sufficiently under its control to authorize an equitable interference, particularly as there was no court of chancery to which the purchaser could apply.⁷

In *Doe dem. Pell v. Mitchener*,⁸ A being seised of real estate conveyed to B and died, and A's heir conveyed the same premises to C who, when he purchased, had notice of B's deed. C's deed was registered before B's deed. It was held that B's deed was invalid as against C's deed under the provincial act 35 G. 3, c. 5, s. 2. By this act it was provided in effect that after the confirmation of land to any person by grant from the Crown under the great seal of the province, a memorial of any deed or conveyance of such land might be registered, and that any deed or conveyance made after a memorial was so registered, of any part of the land contained in such registered memorial, should be adjudged fraudulent and void against a subsequent purchaser or mortgagee, for valuable consideration, unless a memorial thereof should be registered in the manner prescribed by the act, before a memorial of the deed or conveyance under which such subsequent purchaser or mortgagee claimed, should be registered. The effect of the statute was to vest the legal estate in the subsequent purchaser whose deed had been registered first. Plainly, however, the prior purchaser would have been entitled to relief in equity against the subsequent purchaser with notice, as indeed has been held in later cases under a similar statute,⁹ but in the absence of equitable jurisdiction the court could not refuse to give effect to the legal title.

⁷ *Wood v. Leeming* (1827), Taylor, 463. The grounds of the application are differently stated in the headnote and in the body of the report respectively.

⁸ (1831) Draper, 47.

⁹ See *Rose v. Peterkin* (1885), 13 Can. S. C. R. 677, at pp. 704 ff.

It appears from some other cases reported in Draper's Reports that the court was sometimes embarrassed in the border land between equity and law by the lack of equitable jurisdiction. In one case where a sale of land had been partly performed, the court succeeded only with difficulty in finding a sufficient memorandum in writing under the Statute of Frauds, there being no jurisdiction to give effect to the equitable doctrine of part performance.¹⁰ In another case decided in the same year the court was at great pains to find common law as distinguished from equitable authority to show that the Statute of Frauds is not to be allowed to be used as a cloak for fraud.¹¹

The judgments in the case of *Doe dem. Jones v. Capreol*,¹² contain an interesting discussion of the circumstances in which a court of law and a court of equity respectively may relieve against fraud. Robinson, C. J., said:¹³

"It is most important for us, much more than it can be in England, to ascertain as clearly as possible what are the cases which a court of law can take cognizance of—and what the cases which can receive no relief except in equity—and for this plain reason, that we are absolutely without the means of exercising an equitable jurisdiction, having no court of equity of any kind or for any purpose. Those frauds, therefore, which equity alone can relieve against, must be successful; and consequently if this court of common law, when it has the power to relieve against frauds, were to decline the exercise of that power, and upon the ground merely that equity is the more proper or more usual or more convenient jurisdiction in such cases, then it would follow that justice would be denied, and for an insufficient reason, because if a suitor can legally receive redress at our hands, it would be illegal as well as vain to refer him, upon any ground of expediency or usage, to a tribunal which does not exist.

"This will not be disputed on the one hand, and it must be as readily conceded on the other that a court of common law, confined as this is expressly to the power and jurisdiction of the superior courts of common law in England, cannot legally go one step further than those courts have the power to go upon

¹⁰ *Rochleau v. Bidwell* (1831), Draper, 345.

¹¹ *Kilborn v. Forester* (1831), Draper, 332.

¹² (1835) 4 U. C. O. S. 227.

¹³ *Ibid.*, at pp. 236, 237.

any pretence of hardship, or in consequence of any defects of our judicial establishments. 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.”

The law of mortgage afforded the most conspicuous illustration of the inconvenient result of the absence of any court with equitable jurisdiction. The relation of mortgagor and mortgagee was governed by the common law as modified by statute. By the common law if the mortgagor did not perform the condition of the mortgage the estate of the mortgagee became absolute. If the mortgagor gave up possession the mortgagee obtained at least a good possessory title which there was no law to disturb.¹⁴ The mortgagor could not file a bill to redeem and the mortgagee was free to deal with the land as his own. If the mortgagor refused to give up possession the mortgagee was driven to an action of ejectment, a power of sale not being usually provided for. In such an action the British Statute 7 G. 2, c. 20, had provided that the mortgagor might pay or bring into court the principal, interest and costs, and become entitled to a reconveyance of the mortgaged estate. So long as the mortgagor remained in possession this statute afforded to him to some extent the same protection as a court of equity could have given him. The bringing of the action operated as effectual notice that the mortgagee insisted upon either his money or his estate. If the mortgagor did not take advantage of the statute and pay the money, the mortgagee would get possession and practically the same status at law as if he had foreclosed in equity, the possible difference being that he got a speedier remedy than he would have got in equity. The statute could, however, be taken advantage of only if there were no accounts to be investigated and no disputed payment, and might therefore not cover some cases of hardship. If the mortgage debt was not paid on the day, the mortgagee could bring an action of ejectment and then the mortgagor could get back his estate

¹⁴ *Smyth v. Simpson* (1859), 7 Moo. P. C. 205, 5 Grant, 104.

only if he admitted the sum to be due which the mortgage was given to secure and paid or brought into court that sum.¹⁵

On the other hand the inability to get any judicial declaration of title on the mortgagor's default was doubtless a source of perplexity to the mortgagee. He 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. It seems to have been not unusual for the mortgagee, after the mortgagor's default, to obtain judgment on the covenant and cause the mortgagor's interest in the land to be sold under a writ of *feri facias*.¹⁶

This ill advised attempt to sell under legal process an interest which in the absence of equitable jurisdiction had no real existence, and which in any case was not recognized at common law and therefore could not be affected by legal process, was at an early date held to be inoperative, but so late as 1846 it formed the subject of an elaborate argument,¹⁷ and the attempt was doubtless due to the desire of the perplexed mortgagee to give to his title the sanction of some judicial proceeding. The sale under writ of *feri facias*, however inoperative as a legal transfer of a supposed equity of redemption, might plausibly be urged as a circumstance

¹⁵ Doe dem. McKenzie v. Rutherford (1844), 1 U. C. R. 172. A hard case, because it appeared that the mortgage debt had probably been paid, but the accounts were disputed.

¹⁶ The right of a creditor in Upper Canada, in place of issuing a writ of *elegit*, to issue a writ of *feri facias* against the lands of his debtor was based upon the British Statute 5 G. 2, c. 7, entitled "an Act for the more easy recovery of debts in his majesty's plantations and colonies in America," by which the real property of a debtor became liable to be seized, extended, sold or disposed of in the same manner as personal estate. The result was that lands became assets in the hands of an executor for the satisfaction of debts, so that to a plea of *plene administravit* the plaintiff might reply lands. See Gardiner v. Gardiner (1832), 2 U. C. O. S. 554; in the judgment the earlier cases are reviewed, and at page 581 the practice in the Province in the case of an execution, either against the original debtor or against his personal representative, is explained. It was in early days irregular to issue a *feri facias* against lands until after the return of the execution against goods, Doe dem. Spafford v. Brown (1833), 3 U. C. O. S. 92, but this rule was changed by the Statute 31 V., c. 25. It was doubtful whether the right to the remedy by *elegit* was not taken away, and the *feri facias* did not bind the land until the delivery of the writ to the sheriff, Doe dem. McIntosh v. McDonnell (1835), 4 U. C. O. S. 195. The land could not be sold within less than twelve months after the delivery of the writ to the sheriff.

¹⁷ Simpson v. Smyth (1846), 1 U. C. E. & A., at pp. 41 ff.

in the mortgagee's favour in the event of the mortgagor's afterwards endeavoring to redeem if a court should be established with equitable jurisdiction, or might be regarded as a sale by the mortgagee for the benefit of the mortgagor with a view to realizing the encumbrance and returning the excess to the mortgagor.¹⁸

In the year 1834 the first allusion was made in the statutes of Upper Canada to a mortgagor's equity of redemption. The Statute 4 W. 4, c. 16, contained a provision for giving to a certificate of payment of the mortgage money, when registered, all the effect of a release of the mortgage and of a reconveyance of the estate, and it was thought prudent to add a proviso that such certificate, if given after the expiration of the period within which the *mortgagor had a right in equity to redeem*, should not have the effect of defeating any title other than a title remaining vested in the mortgagee or his heirs, *executors and administrators*. By this the legislature seems to have apprehended that otherwise a mortgagee, after acquiring an estate which ought to be held absolute in equity as well as at law and after transferring such estate to some other party, might, by receiving the mortgage money and giving a certificate, defeat the estate of the purchaser.¹⁹ In the same year the legislature passed the Act 4 W. 4, c. 1, adopting with some modifications many of the improvements in the law of real property which had lately been made in England upon the recommendation of commissioners. In this act mention is made in several clauses of equitable interests and estates as distinguished from legal estates, and there are provisions in respect of each, corresponding with those contained in the English legislation. The limitation of twenty years is adopted with regard to any *suits in equity* as well as in actions at law, with a proviso (Section Thirty-Five) such as the English statute contains, "that nothing in this Act contained shall be deemed to interfere with any rule or jur-

¹⁸ *Ibid.*, at page 192. After the establishment of a court of equity the law was amended by 12 V., c. 73, so as to render an equity of redemption saleable under execution. Before the amendment if the mortgage was merely for a term of years—even one thousand years—the reversion might be sold and would carry with it the equity of redemption. *Wightman v. Fields* (1872), 19 Grant, 559, 565.

¹⁹ Robinson, C. J., in *Simpson v. Smyth* (1846), 1 U. C. E. & A. 57 ff.; cf. pp. 61, 90-91, 181.

isdiction of Courts of Equity, in refusing relief on the ground of acquiescence or otherwise, to any person whose right to bring a suit may not be barred by virtue of this Act." The section of the English act respecting the limitation of time for the assertion of a mortgagor's rights is very closely followed, and at the end of the Forty-Third Section, in which provision is made limiting the time for suing at law or in equity for any mortgage money or for any legacy, there is a proviso, "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 from the passing of this Act."²⁰

In 1837 the legislature passed a statute authorizing the appointment of two additional judges for the Court of King's Bench.²¹ In the same year was passed the statute commonly known as the Chancery Act,²² which for the first time afforded the means of enforcing equitable rights in Upper Canada for any purpose or to any extent.

The subject-matter of these two acts had already been before the legislature for some years. The following is an extract from a despatch dated the 9th of April, 1827, from the Secretary of State for the Colonies to Sir Peregrine Maitland, Lieutenant-Governor of the Province:

"The rapid growth of the population, and the consequent increase in the number of commercial and other transactions in the province, must be met, not only by a proportionate increase in the number of the Judges, but perhaps also by an enlargement of their jurisdiction. I understand that at present there is no tribunal in the country discharging the functions of a Court of Equity, and that there is consequently a failure of justice in those numerous and most important cases which belong exclusively to courts of that nature. In the probable advance

²⁰ The italics are not in the original statute.

²¹ 7 W. 4, c. 1. The court had theretofore consisted of the Chief Justice of Upper Canada and two *puisne* judges.

²² 7 W. 4, c. 2.

of this province, the want of a tribunal competent to execute trusts, and to protect the property of infants, must be felt as an extreme inconvenience. It has therefore occurred to me as a subject highly deserving attention, whether the judicial office of Chancellor, under the title of Master of the Rolls, or Vice-Chancellor, might not advantageously be committed, for the present, either to the Chief Justice, or to one of the inferior judges of the Court of King's Bench. An arrangement of this nature might, if necessary, form the basis of some systematic arrangement in future times.

"Your Excellency is aware that a similar measure has been adopted in Nova Scotia,²³ and that under a recent act of Parliament, a system very similar has been introduced into the Court of Exchequer in England.

"You will consider, and report to me whether this measure, or any modification of it, could be conveniently adopted in Upper Canada."

The foregoing, together with some later despatches on the same subject and the reports thereon by the judges, the Attorney-General and the Solicitor-General of the Province, were laid before the legislative assembly on the 19th of February, 1828.²⁴ Two of the three judges of the King's Bench (Campbell, C. J., and Sherwood, J.) expressed themselves in favour of the erection of a new court with general equitable jurisdiction under a separate judge who would give his whole time to the administration of equity, but, if it should be thought desirable that equitable jurisdiction should be exercised through the existing Court of King's Bench, they considered it preferable that there should be conferred, not upon one but upon all the members of the court, a limited equitable jurisdiction, that is, a jurisdiction confined to specified subjects comprised within the general jurisdiction of the English Court of Chancery.

One of the judges made a separate report unequivocally favouring the complete separation of the courts of law and equity respectively. This was John Walpole Willis, a member of the English equity bar, who in 1827 had been the bearer of the des-

²³ For a full account of the Court of Chancery in Nova Scotia, see a series of articles by Charles J. Townsend in 20 *CANADIAN LAW TIMES*, pp. 14, 37, 74, 105 (Jan.-April, 1900).

²⁴ See *JOURNAL LEG. ASS. U. C.* (1828), pp. 55 ff., where the despatches and reports are printed.

patch above mentioned as well as of a royal warrant directing his appointment as a judge of the Court of King's Bench, in the expectation that he would later be appointed to preside over the new court of equity when it should be established, and who by letters patent under the great seal of the Province, dated the 27th of September, 1827, had been appointed to the King's Bench.²⁵

The Attorney-General, John Beverley Robinson, agreed that if a large equitable jurisdiction was to be exercised, especially if it was to include the administration of trusts, it would be preferable to confer such jurisdiction upon a judge in equity sitting in a distinct court and having no connection with any other court. He was in favour, however, of introducing equity only to a limited extent rather than of creating a general equitable jurisdiction which might not be suitable in all respects to the condition of the province.

No action was taken by the legislative assembly in 1828 on the proposal for the creation of an equitable jurisdiction beyond the adoption of a resolution that owing to the pressure of other business it was impracticable during the present session to bestow upon the subject the mature consideration which its importance demanded.²⁶ The proposal was discussed at subsequent sessions, but no statute was passed on the subject in the interval between 1828 and 1837.

In the event Mr. Justice Willis was not destined to become the head of a court of equity in Upper Canada, and the circumstances under which his judicial career in the Province came to an end tended to complicate the consideration of the question of the establishment of the court. The new judge was very soon in open conflict with the Attorney-General on the subject of the institution and conduct of criminal prosecutions. In June, 1828, he refused to sit in a court composed of himself and

²⁵ Not many years after this the British government ceased to issue warrants for the appointment of judges or other officers connected with the administration of justice in Upper Canada.

²⁶ JOURNAL LEG. ASS. U. C. (1828), p. 100. Notwithstanding the urgent need of a court of equity, there was in fact a good deal of opposition to its establishment, which is not disclosed by the official records.

the senior *puisne* judge of the King's Bench, because he contended that under the Statute 34 G. 3, c. 2, the court was not legally constituted in the absence of the chief justice.²⁷ By letters patent dated the 26th of June, 1828, he was summarily dismissed from office, the only reason given being expressed concisely in the recital:

"Whereas for good cause, we have found it necessary to amove the said John Walpole Willis from the said office."²⁸

On the 23rd of December, 1832, a select committee made a report to the assembly, appending to its report a draft bill for the establishment of a court of chancery.²⁹ The committee stated that the chief cause of the delay in the establishment of the court had been the apprehension which was felt as to the heavy expense which the court would entail, but after enumerating the many classes of cases in regard to which the lack of an equitable jurisdiction amounted to a denial of justice, the committee urged the immediate creation of a separate court of equity, recommending that in the first instance its jurisdiction should be limited to cases of obvious and paramount necessity,

²⁷ The statute provided that "His Majesty's Chief Justice of this Province together with two *Puisne* Justices, shall preside in the said Court." The Privy Council ultimately decided that Willis was wrong in his law. Some account of Willis can be found in an article by Mr. Justice Riddell in 49 CANADA LAW JOURNAL, 126 (March, 1913).

²⁸ The proceedings relating to the amoval of Mr. Justice Willis are set out in detail in a report made by a select committee to the assembly on the 2nd of March, 1829 (JOURNAL, appendix, page 20). In March, 1828, the assembly had already adopted an address to the King asking that the chief justice of the Province should cease to have a seat in the executive council and that the judges should be rendered independent by being appointed during good behaviour instead of during the pleasure of the Crown. To this address an unsatisfactory answer was made at the session of 1829 (JOURNAL, page 16). Meanwhile the general question of the terms of the tenure of judicial office had become involved with the particular case of Willis, and on the 14th of March, 1829, the assembly by a vote of twenty-nine to twelve adopted an address to the King, couched in terms of earnest remonstrance, on the subject of the administration of justice in the Province, asking for the reinstatement of Willis in addition to the reforms already asked for in the address of 1828 (JOURNAL [1829], page 60). At the session of 1830 the Lieutenant-Governor merely stated that this address had been laid before the King. A select committee on the administration of justice referred in its report to the "extraordinary and unexpected facts" that the persons who had been most active in the removal of Willis had meanwhile been elevated to higher offices—the Attorney-General promoted to the office of chief justice, executive councillor, legislative councillor and speaker of the legislative council, an executive councillor promoted to a judgeship, the

and that it should be left to the legislature to add to the powers of the court from time to time as experience should show to be safe and necessary. The committee reported against the alternative proposal which has been already mentioned, namely, that the King's Bench should be invested with equitable jurisdiction, on the ground that in a few years the blending of legal and equitable powers might be found to be inconvenient, and that it was better to provide from the first for a separate court on a permanent basis. In the light of subsequent statutes which in Ontario culminated in 1881 in the complete fusion of the administration of law and equity in one court,³⁰ it is of course easy to criticise the legislators of Upper Canada for not being wiser than those of England, but it is clear now that an obvious opportunity was lost of anticipating the great reforms of procedure which in later days on both sides of the Atlantic have to a large extent abolished the artificial separation of courts of law and courts of equity.

Some light is thrown upon the conditions under which an equitable jurisdiction was introduced in Upper Canada by a pamphlet, now scarce, written in 1847 by John Godfrey Spragge, afterwards Chancellor of Upper Canada, entitled "A Letter on the subject of the Courts of Law of Upper Canada addressed to the Attorney General and Solicitor General." There was at that time some talk of abolishing the equitable jurisdiction, which had been in existence for about ten years. The following

Solicitor-General to the office of attorney-general, and Mr. Justice Hagerman, who had replaced Willis on the bench, to the office of solicitor-general (JOURNAL [1830], page 196). On the 5th of March, 1830, the assembly adopted an address to the Lieutenant-Governor requesting him to call the attention of the Secretary of State for the Colonies to the address of the preceding session. In 1831 a more gracious answer was received in the form of a message from the Lieutenant-Governor that he had received the command of the King to propose a bill declaring that the commissions of the judges should be granted during their good behaviour. In 1834 the statute 4 W. 4 c. 2, to this effect, was passed. The Governor also informed the house that no judge would in future be appointed as a member of the executive or legislative council, with the exception of the Chief Justice of Upper Canada. This solitary exception disappeared after 1840 (Robinson, C. J., having already voluntarily ceased to exercise his rights in this respect).

³⁰ JOURNAL LEG. ASS. U. C. (1832-3), page 66, and appendix, page 79.

³¹ The Ontario Judicature Act, 1881, was an adaptation to Ontario of the English Judicature Acts of 1873 and 1875.

paragraphs from the pamphlet may be appropriately quoted here:

"There are those who say we may safely abolish equitable jurisdiction, for we did very well without it before the Court of Chancery was established. I take leave to deny both the conclusion and the premises. The want of equitable jurisdiction was much felt, and considering the many cases in which remedial justice is administered in equity, it is impossible that it could be otherwise. No stronger evidence is needed of the want of such a jurisdiction having been felt than the circumstance of an act being passed to introduce it, as a part of the law which without it was imperfect, and in many instances worked injustice. It was from no love of a Court of Chancery that it was introduced, but in spite of many and strong prejudices.

"Its introduction was necessary for another reason, *viz.*, to preserve the common law. The common law was never meant, nor is it calculated, by itself to form the jurisprudence of a country. Without being tempered by equity law, it would often work injustice, and in its actual operation the application of its rules did work injustice, until a language began to be used in our Court of King's Bench which would have sounded strangely in the ear of a common lawyer in England. 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 more calculated to subvert the common law itself. There are judges whose *bent* of mind would incline them to strain the common law rather than that a flagrant injustice should be committed, by applying its rules in their integrity to the case before them—'to do a great good, do a little wrong.' The temptation to do so flowing from a love of justice and a hatred of wrong, would not always be resisted. Thus, by degrees the common law would cease to be what it is and ought to be—a system of law built up 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.

"The law would soon deserve a reproach such as Selden applied to the Court of Chancery in his time: 'In law we have a measure, and know what to trust to. Equity is according to the conscience of him that is Chancellor; and as that is larger or narrower so is equity. 'Tis all one, as if they should take the

standard for the measure, the Chancellor's foot. What an uncertain measure this would be! One Chancellor has a long foot, another a short foot, a third an indifferent foot. It is the same thing with the Chancellor's conscience.' For the word equity, substitute law, and for the word Chancellor, substitute judges, and you have a quaint but forcible and true description of what our law would become."

By the Chancery Act,³¹ passed on the 4th of March, 1837, there was established a court of equity to be known as The Court of Chancery for the Province of Upper Canada, of which the Governor should be chancellor, and for the better administration of justice in the said court it was enacted that the judicial powers thereof, both legal and equitable, should be exercised by a judge to be known as "the Vice-Chancellor of Upper Canada."

It was provided (by Section Two) that the said court "shall have jurisdiction, and possess the like power and authority as by the laws of England are possessed by the Court of Chancery in England, in respect of the matters hereinafter enumerated," that is to say, in all cases of fraud; in all matters relating to trusts, executors and administrators, and mortgages; in all matters relating to infants, idiots and lunatics, and their estates, except where special provision had been made or might thereafter be made with respect to them by any law of the Province; in all matters relating to awards; to compel the specific performance of agreements; to compel the discovery of concealed papers or evidence, or such as might be wrongfully withheld from the party claiming the benefit of the same; to prevent multiplicity of suits and to stay proceedings in a court of law prosecuted against equity and good conscience; to decree the issue of letters patent from the Crown to rightful claimants; to institute proceedings for the repeal of letters patent erroneously or improvidently issued; to stay waste; in all cases of accident; in all cases of account; and in all cases relating to co-partnership.³²

It was further provided by Section Six that the rules of decision should be the same as governed the Court of Chancery in

³¹ 7 W. 4, c. 2, an Act to establish a Court of Chancery in this Province.

³² See the Revised Statutes of Ontario (1897), c. 51, s. 26, in force as of the date of the original act, the 4th of March, 1837.

England, and that the court should possess full power and authority to enforce and compel obedience to its orders, judgments and decrees to the same extent as was possessed by the Court of Chancery in England, in respect of all matters within its jurisdiction, except when otherwise provided by the laws of the Province.³³

The effect of this act was to introduce the rules of the English Court of Chancery as of the 4th of March, 1837. If these rules had been affected in England by any statute passed in the interval between 1792 and 1837, such statute was apparently brought into force in Upper Canada to the extent to which it affected the rules of the Court of Chancery, notwithstanding that in other respects only so much of the British statute law was in force in the Province as had been enacted in England prior to the 15th of October, 1792, and as was supposed to be suitable to the then condition of the Province.³⁴ For instance, in *In re Hodges*,³⁵ an order directing a conveyance of mortgaged premises by an infant heir was made by the Court of Chancery in Upper Canada by virtue of an enabling statute passed in England in 1830. This statute having been passed in England since the introduction of the law of England into Upper Canada would have had no force in the Province apart from the Chancery Act of 1837.

Provision was also made by the Chancery Act for appeals from the Court of Chancery to the existing appellate court consisting of the governor or chief justice and any two or more members of the executive council of the Province, with further right of appeal to the King in council, as in the case of judgments of the Court of King's Bench.³⁶ The vice-chancellor was declared to be a member of the court of appeal (Section Thirteen), and, in the case of appeals from the vice-chancellor

³³ Cf. R. S. O. (1897), c. 51, s. 27.

³⁴ Subject, of course, to the provisions of any statute passed in England and made applicable by its terms to Upper Canada, and subject to provincial legislation since 1792.

³⁵ (1850) 1 Grant, 285.

³⁶ Section 16.

the *puisne* judges of the Court of King's Bench were added as members.³⁷

With regard to mortgages the legislature added to the general grant of equitable jurisdiction the following provision:³⁸

"And whereas the law of England was at an early period introduced into this Province, and has continued to be the rule of decision in all matters of controversy relative to property and civil rights; while at the same time, from want of an equitable jurisdiction, it has not been in the power of mortgagees to foreclose, and mortgagors, being out of possession, have been unable to avail themselves of their equity of redemption; and, in consequence of the want of those remedies, the rights of the respective parties, or of their heirs, executors, administrators or assigns, may be found to be attended with peculiar equitable considerations, as well as in regard to compensation for improvements, as in respect to the right to redeem, depending on the circumstances of each case, and a strict application of the rules established in England, might be attended with injustice; *be it therefore enacted by the authority aforesaid*, That the Vice-Chancellor of the said Court shall have power and authority 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 order or decree in respect to foreclosure or redemption, and with regard to compensation for improvements, and generally with respect to the rights and claims of the mortgagor and mortgagee, and their respective heirs, executors, administrators or assigns, as may appear to him just and reasonable under all the circumstances of the case, subject however to the appeal provided by this Act."

The leading case on the section just quoted is that of *Smyth v. Simpson*.³⁹ This was a suit for the redemption of a mortgage brought in 1840 by the devisees of the mortgagor against the successors in title of the mortgagees. The mortgage was made in 1810 and came due in 1811. Nothing was ever paid on account of the mortgage, and in 1819 judgment was recovered for the mortgage debt. In 1825 the mortgagor was still in possession, but about that time, the land having been put up for sale

³⁷ Section 17.

³⁸ 7 W. 4, c. 2, s. 11.

³⁹ (1859) 7 Moo. P. C. 205, affirming (1847) 1 U. C. E. & A. 172.

⁴⁰ Even in this the vice-chancellor was wrong. There is no absolute rule that a mortgagor is entitled to redeem in equity if the circumstances render it inequitable that he should be allowed to redeem, even though the statutory period of limitation has not expired.

by the sheriff under a writ of execution, the mortgagor gave up possession to the defendants, whose title thereupon became absolute at law. Prior to the filing of the bill for redemption the defendants, treating the land as their own, had made many sales of parts of the land and had improved other parts.

The vice-chancellor, before whom the case came on for hearing in the first instance, was of opinion, notwithstanding all the circumstances adverse to the plaintiffs' claim, that under the statute of 1837 the court had no jurisdiction to refuse redemption, it being a case in which the mortgagor would be entitled to redeem in England,⁴⁰ and that the only discretion conferred was that of imposing terms of redemption different from those that would have been imposed in England. In placing this construction upon the statute, the vice-chancellor overlooked, however, the special circumstances which were recited as the very inducement to the enactment and which made it impossible to say that any case could have arisen in England in regard either to foreclosure or to redemption where the circumstances were similar, because no English chancellor, since equities of redemption were first talked of, had ever had to decide what it might be just to do in a case of mortgage where many years had elapsed after forfeiture without a court of equity to which application might be made.⁴¹ On appeal, the opinion of the vice-chancellor received the support of two out of four members of the court of the governor and council,⁴² but after reargument before a court differently constituted the decree was reversed, the court being unanimously of the opinion that although twenty years had not elapsed since the mortgagor went out of possession, there was jurisdiction to refuse redemption in the discretion of the court and that under the circumstances the plaintiffs ought not to be allowed to redeem.⁴³ A further appeal to the Queen in council was dismissed.⁴⁴

⁴⁰ 1 U. C. E. & A., at p. 71.

⁴¹ (1846) 1 U. C. E. & A. 9; 2 U. C. O. S. 162; *sub nom.* Simpson v. Smyth.

⁴² (1847) 1 U. C. E. & A. 172; 2 U. C. O. S. 629.

⁴³ (1859) 7 Moo. P. C. 205; 5 Grant, 104.

In the meantime the constitution of the Canadas had undergone an important change. By a statute of the United Kingdom commonly known as the Union Act of 1840,⁴⁵ the Queen in council was authorized to declare by proclamation that the two Provinces of Upper Canada and Lower Canada should form one Province under the name of the Province of Canada. A proclamation was issued for this purpose and the union took effect on the 10th of February, 1841.⁴⁶

By the Union Act there was constituted one legislative council and one legislative assembly for the Province of Canada, by the advice and consent of which the Queen was authorized to make laws for the peace, welfare and good government of the province.⁴⁷ Until otherwise provided by act of the new legislature, the judicial authority formerly vested in the governor and executive council of each of the separate provinces was vested in the governor and executive council of Canada.⁴⁸ In other respects and except in so far as they were inconsistent with the changes made by the act, all existing laws, statutes and ordinances remained in force, and all courts of civil and criminal jurisdiction continued in the exercise of their powers, as if the two provinces had not been united, subject to alteration by statute of the legislature of Canada.⁴⁹

By statutes of the Province of Canada passed in 1849 the superior courts of law and equity in Upper Canada were reorganized.⁵⁰ In place of the provision of the statute of 1837 under which the judicial powers of the Court of Chancery were exercised by a single vice-chancellor it was enacted that the court should be presided over by a chief judge to be called the Chan-

⁴⁵ 3 & 4 V., c. 35, an Act to re-unite the Provinces of Upper and Lower Canada, and for the Government of Canada.

⁴⁶ The names Upper Canada and Lower Canada continued to be used in reference to the parts of the new Province formerly bearing those names respectively, although in some of the statutes of the Province of Canada the term "Canada West" was used in reference to Upper Canada.

⁴⁷ Section 3.

⁴⁸ Section 44.

⁴⁹ Sections 46 and 47.

⁵⁰ In this year 1849 the county system was substituted for the old district system in Upper Canada, the county thus becoming the centre for the inferior courts and for other judicial purposes.

cellor of Upper Canada who was to have rank and precedence next to the Chief Justice of the Court of King's Bench, and that there should be two additional judges to be called vice-chancellors.⁵¹

A new court to be called the Court of Common Pleas was also established, consisting of a Chief Justice with rank and precedence next to the Chancellor of Upper Canada and two *puisne* justices.⁵² Upon this court was conferred a jurisdiction identical with that possessed by the existing Court of Queen's Bench, and it was provided that in the first instance two *puisne* judges should be transferred to the new court from the Court of Queen's Bench, which was thus reduced to a chief justice and two *puisne* judges, as originally constituted.⁵³

The total number of judges having been increased by the statutes above mentioned from six to nine, advantage was taken of the opportunity to establish a new "Court of Error and Appeal" which it was considered would afford a more satisfactory appellate tribunal than the old court of the governor and council.⁵⁴ All the judges of the three superior courts of law and equity were constituted members of the new appellate court, which was to be presided over by the Chief Justice of the Court of Queen's Bench, or in his absence by the judge who should be next entitled to precedence,⁵⁵ and appeals were authorized to be brought from any of the three superior courts, with a right of further appeal in certain cases to the Queen in council.⁵⁶

By a statute commonly known as the Dormant Equities Act, passed in 1855,⁵⁷ restrictions were placed upon the right to disturb existing legal titles by the assertion of equitable claims re-

⁵¹ 12 V., c. 64, ss. 1 and 2.

⁵² 12 V., c. 63.

⁵³ By 7 W. 4, c. 1, as already noted, two *puisne* judges had been added to the Court of King's Bench. In 1837, on the accession of Victoria to the throne, the name of the court was changed to "The Court of Queen's Bench."

⁵⁴ 12 V., c. 63, §§ 37 and 38.

⁵⁵ *Ibid.*, §39.

⁵⁶ *Ibid.*, §§ 40 and 46.

⁵⁷ 18 V., c. 124, an Act to amend the law as to Dormant Equities. The terms of the statute are not clear, but of course it has long since spent its force.

lating to real estate arising prior to 1837, in the absence of fraud on the part of the legal owner, and a discretionary power was given to the Court of Chancery to give effect to any other equitable claim arising prior to 1837 provided suit was brought within twenty years from the time when the equitable claim arose.

On the 10th of June, 1857, an act⁵⁸ was passed "for further increasing the efficiency and simplifying the proceedings of the Court of Chancery." By the first section it was enacted that the court should thereafter:

"possess 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; provided always that nothing herein shall be held to impair or diminish the jurisdiction heretofore conferred by law on the said court."

On the 18th of March, 1865, it was enacted⁵⁹ that:

"the Court of Chancery in Upper Canada shall have the same equitable jurisdiction in matters of revenue as the Court of Exchequer in England possesses."

The Court of Chancery in Upper Canada had thus acquired a complete equitable jurisdiction, and all the superior courts of original jurisdiction had assumed the form under which they continued until the Judicature Act of 1881. Long before the last mentioned date, however, some equitable powers had been conferred on the courts of common law and some powers formerly peculiar to courts of common law had been conferred on the court of equity. The process by which the jurisdiction of the courts of common law and that of the court of equity became to an increasing extent concurrent, and which ended in the consolidation of all the superior courts in one Supreme Court of Judicature for Ontario administering both common law and equity, is not within the scope of this paper.

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⁵⁸ 20 V., c. 56.

⁵⁹ 28 V., c. 17.