A

LETTER

TO THE

HON. ROBERT BALDWIN,

FROM

WM. HUME BLAKE, A. B.,
PROFESSOR OF LAW IN THE UNIVERSITY OF KING'S COLLEGE,

UPON THE

ADMINISTRATION OF JUSTICE

IN

WESTERN CANADA.

TO WHICH IS APPENDED THE PETITION ON THE SAME SUBJECT NOW BEFORE THE LEGISLATURE.

TORONTO:
PRINTED BY GEORGE BROWN, YONGE STREET.
1845.

A

LETTER

TO THE

HON. ROBERT BALDWIN,

FROM

WM. HUME BLAKE, A. B.,
PROFESSOR OF LAW IN THE UNIVERSITY OF KING'S COLLEGE,

UPON THE

ADMINISTRATION OF JUSTICE

IN

WESTERN CANADA.

TO WHICH IS APPENDED THE PETITION ON THE SAME SUBJECT NOW BEFORE THE LEGISLATURE.

TORONTO:
PRINTED BY GEORGE BROWN, YONGE STREET.
1845.

LETTER, &c.

My Dear Friend,

I am not confident that the liberty which I have taken in addressing you in this public manner, may not be considered as the abuse, rather than the just use, of the friendship with which I would fain believe myself honoured. But deeply impressed as I have long been, with the absolute necessity of some alteration, in the constitution of the superior courts of justice, in the portion of this Province wherein we reside; and having had frequent experience of that zeal for the public good, which is not to be deterred, by considerations of a personal character, from undertaking whatever has a tendency to promote the general welfare, I have persuaded myself, that even those weak and ill-digested thoughts, which had occurred to me, on a subject so important as the administration of justice, would not be regarded by you, as altogether impertinent.

The petition with which I took the liberty some time since to trouble you, and which will

be found printed in the appendix to this letter, points to two particulars, in which our system of judicature, is radically defective. In the one particular, we have plainly departed from the spirit of English practice. For, in that country the due administration of the law, by all courts, is carefully secured by the right of appeal, which pervades their whole system; while we, by a strange oversight, have neglected to provide any appellate tribunal within the Province, before which, the validity of the judgments of our Court of Queen's Bench could be tested. And this state of things, for the continuance of which during so long a period, I am unable, considering the love of liberty so generally prevalent amongst us, satisfactorily to account; has led to the startling result, that the whole body of law, civil, as well as criminal, is at present administered by that court without controul. Its decrees are, for all practical purposes, absolute. In the other particular, we have indeed followed the letter of English practice, in establishing a Court of Equity presided over by a single judge; but in doing so, we have been altogether unmindful of our social condition, and thus our literal adoption of the English institution, has, I very humbly think, betrayed us into serious error. It need hardly be stated, that the reform of these abuses

is of vital, practical, importance to the community at large. Their present existence can only be attributed, to the unpardonable remissness of professional men, in neglecting to press the matter upon the attention of the Legislature.

It may possibly seem strange to you, Sir, that the mode of petitioning the Legislature, should have been adopted, in preference to an application, to the Head of the Government. But this course has not been pursued, without some hesitation, and a good deal of delay ; for a petition was presented to his Excellency the Governor-General, so far back as the month of June last, numerously signed, by gentlemen connected with the profession of the law, by which the subject was brought under his Excellency's notice, in very respectful, but at the same time very urgent terms. And it is only in consequence, of the entire silence of the Ministers of the Crown upon the subject, that the present course has been found unavoidable. Were the matter one of ordinary interest, possibly it might have been allowed to share the fate of other abuses, which having been cherished for a season, have only been redressed when the magnitude of the evil, become apparent to the mass of the people, has *obliged* the adoption of some remedy. But the evil, to which it is desired to

point the attention of the Legislature, has this peculiarity; that although in itself a grievance of the most pressing kind, it is yet brought to the notice of the people at large only by slow degrees. Its weight indeed is felt every now and then, with overpowering force; but it falls on isolated individuals, scattered through the community, and consequently fails to produce simultaneous and general opposition; and it is that alone, which seems to arouse the attention of those who govern. The origin too, of the ill consequences pointed at, is for the most part concealed from the view of men in general; it is felt, and produces its natural result, discontent; but the public generally, want that familiar acquaintance with the subject, and that opportunity and leisure, for observation and reflection upon it, which is requisite to enable them to trace it to its source. Professional men, on the other hand, have these abuses and their causes, daily, and painfully forced upon their attention, and it has therefore seemed to me a peculiar and sacred duty, which *we* owe to our fellow-countrymen, to be ever forward in advocating such reform as may be found expedient, to preserve in its purity and efficiency, that system of judicature, by which property, liberty, life, is designed to be protected.

But, apart from the consideration of any

peculiar duty due from our profession, the subject itself has seemed to me of such vital importance, as not to admit of delay, consistently with any tolerable degree of prudence, or justice to the country. For one may, I think, say, viewing the subject in the most practical light, and without any disposition to theorize, that the able and impartial administration of the law, is the greatest boon of civilized life. But for the attainment of this object, it is not only necessary, that our Courts of Justice should be filled with able and impartial judges, but it is also of the utmost importance, that those dignified magistrates should feel that they act in the presence of an observing people, and an independent bar, *who are permitted at every step to bring their decision under review.* If, Sir, the able and impartial administration of justice, in a country so densely populated, and so wealthy as England, where a free press closely watches, and strictly, sternly scrutinizes the conduct of all public men,—in a country which enjoys the inestimable privilege, of possessing an independent, upright, and learned bar, which fills so large a space in the public eye; and whose judges enjoying, for the most part, ample fortunes, are further raised above the possibility as it were of temptation, by the exalted dignity of their station,—If the facility of appeal, is yet felt to

be requisite to the able and impartial administration of justice, in a country so circumstanced, how absolutely indispensable must it be, in a community so peculiarly situated as this colony. For every one, how little conversant soever he may be with human nature, must see that the discharge of the judicial duty, in a society so narrow as our own, and so peculiarly constituted, must be liable to disturbances, which, in England, could be hardly appreciated. Not only the counsel and attornies, the agents by whom business is conducted in our courts, but in truth the principal inhabitants of the country, a great proportion of those whose affairs are under adjudication, are more or less, *personally* known to the judges. It is hardly possible, under such circumstances, but that numerous occasions must occur, in which a suspicion at least may arise, that political bias, or personal feelings, have intruded themselves into the judgment seat. Neither must we flatter ourselves into a belief, that such suspicions are so wholly groundless, as to entitle us to treat them with entire disregard. If an eloquent and learned lord, in speaking of that august court, which decides in the last resort, in England, could remark with truth, "That even the noble judges of that high tribunal are clothed beneath their ermine with the common infirmities of human

nature," *we* should certainly condescend to the frailties of those, who yield to some slight suspicion concerning men, who are sometimes selected, (or at least supposed to be selected,) for the important trust of administering the law, not from any peculiar fitness for the discharge of that duty which has been discovered in them, but because their political opinions happen to coincide with those of the governor of the day.

It is hardly necessary for me to guard myself against the imputation, of intending any disrespect to the distinguished judges, who at present fill the Court of Queen's Bench, to which court I now particularly refer. They, I feel confident, discharge the various duties of their stations, with all the impartiality which the country could desire. And I am no less confident, that my character is sufficiently well known to every member of that court, to prevent them from entertaining the thought, that I could for a moment be unmindful, of the debt of gratitude which we all owe them, for the faithful discharge of their most arduous duties. Possibly I may not be exposed to the charge of any unworthy motive, when I declare that I cannot contemplate the distinguished individual who presides over that court, consecrating the great and varied powers of his mind to the

service of his country, after the highest point of ambition has long been attained, without feelings not only of admiration, but surprise.

But when I find the Commissioners, appointed in England to inquire into the abuses which had crept into Courts of Justice, holding to His Majesty language which I take leave to cite, I feel that my remarks cannot be liable to misconstruction. They observe in their first Report:—"*No person can visit the same* "*counties twice every year for any length of time,* "*without acquiring that sort of acquaintance with* "*some of the principal inhabitants, and those* "*feelings and impressions with respect to particu-* "*lar practitioners, which are calculated to excite* "*a suspicion, however unfounded, of partiality,* "*as often as any causes in which such persons* "*happen to be concerned are presented to the* "*Court.*" And again, after some comments on the impropriety of the same Judges uniformly attending the same Circuits in Wales, they remark:—"The same objection "may be said to arise in England, where the "same Judges sometimes elect the same "circuits successively. But this is no neces- "sary consequence of the English system, "and we think it highly desirable, that such an "arrangement should be made in the election "of circuits by the Judges, as to prevent its "frequent recurrence."

When the distinguished men who composed that Commission, all of whom, then eminent in their profession, were, without exception I believe, subsequently elevated to the Bench,—when they felt it to be their duty to point to such abuses in the very front of their first report; is it not a just conclusion, that if there be any thing fitted to raise the character above those party prejudices and personal feelings, mists which are, alas! but too apt to rise up and obscure the purest virtue, if aught able to purify the soul, and exalt it as it were above itself, we in this country are especially bound to promote its establishment?

But, Sir, instead of pursuing a course so plainly dictated by wisdom and sound policy, we have felt warranted in discarding every help to the due and impartial administration of justice; as if the virtue of public men here were so pure, and the probability of complaint amongst the people so remote, that no measures could be required to promote the one, or obviate the other. And in consequence it is to be presumed, of this so happy state of society, the judgments of the Court of Queen's Bench, which decides upon whatever Her Majesty's subjects in this Province hold most dear, are placed beyond controul. It is true that an appeal is permitted to the Governor in Council; but that proceeding is so palpably

an idle, unmeaning form, that it is not referred to, even by the most unthinking, without a smile of contempt. And, indeed, the appeal to Her Majesty in Council is, for all practical purposes, equally unavailing. For in the first place, it is only permitted when the matter in dispute exceeds £500 st'g; and even then, the cause becomes so totally removed out of the controul of those interested, the remedy itself is so ruinously expensive, and requires for its completion so great a portion of time, that it amounts in effect to a total denial of justice.

Now, Sir, I ask you, can it be considered that a system, which renders the primary decision of the Court of Queen's Bench, in matters of less value than £500, *practically* conclusive; and which clogs the right of appeal, in matters of greater value, with attendants so cumbrous as to render it available to hardly one in a thousand,—can it be said that such a system is based in wisdom or justice? For, assuming that Court to be filled with men of the greatest ability, guided in their administration of the law by the purest and most impartial virtue, yet the *power to appeal* would be no less expedient. How often do we find the judgments of the superior courts in England, (and it may not perhaps be too much, to assume the Judges of those courts at least on a par with our own)—how often do we find

judgments even there, reversed in the Exchequer Chamber. But laying out of view the probability of reversal upon appeal; taking it for granted that all the judgments of our court would stand such a test; (although I must candidly confess that such an assumption would bespeak a strange ignorance of the mind of man, and an utter unacquaintance with the nature of those difficulties which legal questions present;) still, even on such false hypothesis, the *power* of calling in question those primary decisions is indispensable, in order to the maintenance, by Courts of Justice, of a character for ability and impartiality. Because when suitors, conscious of the integrity of their motives, have further imbibed from their agents strong impressions upon the law of their case; and when Counsel have, after the most mature deliberation, confirmed such impression by their opinion; how can it be expected that either the one class or the other, should rest satisfied with judgments, pronounced upon grounds either wholly new, or as they think, plainly fallacious, *while they are deprived of all means of bringing such judgment again under discussion?* To tell such a suitor that "the question is upon the record, and he may take it to England," is, as I have shown, little better than a mockery. Such a system can never continue for any

great length of time, without the production of a most injurious and painfully prevalent impression, that there is a want, either of purity or ability in the administration of justice.

But although the rehearing of causes before Her Majesty in Council, were shown to be a more efficient remedy than I am able to regard it; still the determination in such a manner, so removed from the observation of those interested, would deprive the right of appeal of its great moral effect, which is indeed one of its principal advantages. For, it is to little purpose that we render those magistrates, who discharge the important function of administering the law, independent of the Crown, unless we also subject all their acts to public scrutiny. It is in truth public opinion, brought fairly to bear upon the matter, which has rendered the purity and ability of the English bench so eminent; and the principal benefit derived from the act rendering judges independent of the Crown, is to be found in the free operation thereby given to public opinion; which would otherwise have been much impeded, had those, upon whom it was intended to operate, felt, that notwithstanding the public voice, the continuance or discontinuance of their office, did still depend on the *mere will* of the Sovereign. Let us reflect upon that disgraceful solicitation of judges in the reign

of James I., which has fixed a deeper stain on the memory of Bacon, than even the subsequent corruption for which he was disgraced. A passage in the life of that great man, which, as it cannot be referred to without the deepest pain and humiliation, so an adequate idea of its nature, can hardly be conveyed except in his own words. His letter to the King, still extant, is the record of this transaction too lamentably true. I subjoin an extract:—"For "the course your Majesty directeth and com- "mandeth *for the feeling of the judges of the* "*King's Bench*, their *several opinions, by dis-* "*tributing ourselves and enjoining secresy;* we "did first find an encounter in the opinion of "my Lord Coke, who seemed to affirm, that "such particular, and as he termed it, *auricular* "*taking of opinions*, was not according to the "custom of this realm; and seemed to divine "that his brethren would never do it. But "when I replied that it was our duty to pursue "your Majesty's directions, and it were not "amiss for his Lordship to leave his brethren "to their own answers; it was so concluded. "And his Lordship did desire that I might "confer with himself; and Mr Sergeant Mon- "tague was named to speak with Mr. Justice "Cloke; Mr. Sergeant Crew with Justice "Houghton; and Mr. Solicitor with Justice "Dodderidge. *This done, I took my fellows*

"*aside, and ordered that they should presently*
"*speak with the three judges, before I could speak*
"*with my Lord Coke for no doubt of infusion;*
"and that they should not in any case make
"any doubt to the judges, *as if they mistrusted*
"*they would not deliver any opinion apart,* but
"speak resolutely to them, and only make
"their coming to be to know what time they
"would be attended with their papers. This
"sorted not amiss; for Mr. Solicitor came to
"me this evening, and related to me that he
"had found Judge Dodderidge very ready to
"give an opinion in secret."

But the details are too painful; what has been already cited explains the nature of this *auricular taking* of opinions; by which the *law* was made for the case; and the deep iniquity of Peacham's conviction, for which the *facts* were wrung from an aged minister undergoing the torture, through the instrumentality of the same Crown Officer, is written in characters too indelible, to need any mention of mine, in order to recall it to the memory. When we reflect on those shameful passages in our legal history, (for Peacham's case does by no means stand alone), or turn to the still more disgraceful scenes enacted by a Chief Justice of the same court, in the reign of James II., of which Sir James MacIntosh has left us so vivid a picture, we cannot help asking ourselves

how the English bench has been purified, and elevated to its present rank? Can such a change be attributed merely to the Statute rendering the judges independent of the Crown? By no means: for the desire of further promotion, the debasing power of corruption, the undue influence of party or personal feeling, the damning sin of ignorance, may all operate as powerfully and as banefully for the subversion of public justice, where the judges are *legally* independent of the Crown, *if public opinion be suppressed.* The punishment of such offences, in England, has, since the Act rendering judges independent, been handed over to the people, instead of remaining with the Sovereign; *and it is the instant, hopeless disgrace, to which public opinion would consign men guilty of such conduct, that has raised the character of English judges to its present high standard of ability and purity.*

But, we in this Province, have *practically* dispensed with the tribunal of public opinion; and the profession, and the public, quietly look on, as if it required only independence on the Crown, to render public men *here*, both able and upright. For, Sir, before public opinion can form a public tribunal for the correction of the abuses pointed at, there must exist some court, before which, the purity and soundness of the decision complained against, can be

tested. Without this, the mass of the people want a sure basis upon which to form their estimate; and the judgment of the profession must be equally unavailing, from the absence of a similar criterion. Distrust, and discontent, will indeed spring up under our present system, but then they will be generated slowly and separately in individual minds; and although such a state of things must result, in an utter scepticism, regarding the integrity and efficiency of our courts, it will yet, obviously fail to operate as a present corrective; and will consequently lead to, instead of obviating, that most pressing evil, a universal distrust in the administration of justice. Nor should the court before which the primary decisions are to be tested, be a court situated in another country, at a distance of some thousand miles, where the cause, conducted by different agents, different counsel, at an enormous cost, is instantly stifled; or, if heard of again, it is only at such a distance of time, and in such a way, as to deprive the proceeding of all moral effect. It must, *in order to its forming the basis of public opinion*, be a tribunal situated within the Province: before which the matter may be tested under the eye of the same agents and counsel, who conducted the cause before those judges whose decision had been

appealed from, and in presence of the people affected by such decisions.

By this alteration we should ensure, to a great extent, that patient deliberation, and that laborious research, which are so indispensable to sound legal judgment; and we would raise up an almost impassable barrier against the silent, dangerous inroads of impurity. Without it we may indeed, for aught I know, enjoy all those advantages which the most careful provisions regulating appeals, have secured to the people of England; but, Sir, you may rest assured that this result is no necessary consequence of our institutions; it must flow exclusively from the superior integrity, and ability of our public men.

When we turn our attention from the Court of Queen's Bench to the Court of Chancery, we shall, I apprehend, discover anomalies equally startling; for, while those questions calling for determination in the former Court, receive the united consideration of the *five Judges* who sit there, all decisions in the latter proceed upon the unassisted reasoning of the *Vice Chancellor alone.* Now, any person, guided by plain common sense, would, I presume, upon hearing this statement, at once conclude, either that the matters in controversy in the Court of Chancery are insignificant in point of value, or that the questions to

be there settled, are of a nature more simple, than those about which Courts of Law are conversant. But the truth is precisely and remarkably the reverse. For, while the machinery constituting a Court of Equity, is of too costly a character to warrant its employment about matters of small value; every body, at all acquainted with the subject, knows that the amount of property in litigation in that court, is vastly greater in proportion, than in the Court of Queen's Bench.

With respect to the difficulties encountered, it can, I should think, hardly admit of question, that the duty devolved upon the Equity Judge, is incomparably the more arduous. Because, leaving out of view the points arising out of the technicalities of pleading, all those who practice in our Courts of Law are aware, that the vast majority of cases depending there, arise upon the commercial law; a system which, having sprung up in an enlightened age, is based on principles so plain and so consonant to reason, that they cannot fail to commend themselves, with almost intuitive ease, to the judgment. The greater simplicity of our law of real property, the absence of complication in titles, the form of our conveyances and wills, so simple as hardly to present any complexity, the condition of our society in short, have reduced the number of

questions touching real estate, which so much engross the attention of Courts of Law in England, to a mere fraction. The Equity Judge, on the other hand, has frequently to deal with complicated questions of fact; while the refined and abstruse doctrines of equity, which have called forth the highest powers, and taxed the deepest learning of the most enlightened minds, are thrown open to him in their whole circle; with the additional complication, that he is called upon to apply those doctrines to states of society, and conditions of property, having no parallel in England; and the extent of the applicability of such doctrines, is consequently very frequently matter of difficult determination. I am at a loss therefore to conceive any ground of reason, upon which we should persist in committing this arduous duty to the Vice Chancellor alone; while the united wisdom of five Judges, is thought necessary for the due execution of the more simple task, assigned to the court of common law. Reasons may, no doubt, be conceived for this established difference between the two jurisdictions; and difficulties may be suggested. in the way of increasing the number of Judges in our Court of Equity; but I apprehend that no conceivable reason, or supposable difficulty, would have led to the establishment with us of this

anomaly, had we not found, in the example of England, a precedent for our guide. Yet, when justly considered, this example ought not to deter us from exercising, on this important subject, an unbiassed judgment. For a slight acquaintance with the judicial history of England, will discover to us many clews by which to account for the origin and continuance of such a system in that country; none of them however rooted in, or necessarily arising from the nature of the thing. But, although we were unable to trace the origin of this custom amidst the obscurity of antiquity, or to account for its continuance upon any other ground than its essential fitness to the end proposed; still its establishment can not be properly considered a sufficient ground for *our* adoption of it, unless our condition, in this particular, so far resembles that of England, as to render the cases, at least somewhat analogous. Nothing, however, short of the grossest self-deceit, and the most arrogant self-complacency, can deceive us into a belief, that our condition resembles that of England in any degree at all sufficient, to render her example on this point useful as our guide. For, although it may be very possible to select from the distinguished bar of that enlightened country, individuals able to cope with, and overcome the difficulties which

surround an Equity Judge—men who, after twenty, thirty, or forty years of professional eminence, approach, on their subsequent elevation to the Bench, every subject, as one might say, with the singular advantage of having had either the same, or analogous difficulties, argued and unfolded by the greatest lights of the day; although that may be possible in England, who can flatter himself that we in this country are, or can hope for years to have arrived, at the same degree of perfection? Amidst a bar, pressed forward into active life, with hardly an initiation into the rudiments of law as a science; and whose members, during their professional career, seldom bestow the same amount of labour, or acquire the same extent of professional experience, required from, and treasured up by an English Barrister in a single year of practice: from a Bar so constituted, and in some respects necessarily so constituted, by reason of the youth and peculiar circumstances of our country, we cannot hope to be enabled to select men, whose single unassisted judgments, would prove satisfactory.

Such, Sir, is a brief sketch of some few of those consequences, which necessarily result from our present ill-advisd system; the argument, you will have remarked, proceeds upon general principles, unsustained by reference to

particular examples occurring in practice: such omission, however, was designed; because it was thought that any reference to cases of individual hardship, might give to this letter an invidious character, which it was most especially desired to avoid. The matter, beside, seemed so plain upon general reasoning, as hardly to admit of illustration, by the minutest scrutiny into the practical working of the system. And it may, I think, be affirmed without hesitation, that the state of things just pointed out, is such as no wise government would suffer to continue; unless compelled by the most imperious necessity. The disorder is so violent, and the seat of the disease so vital, as to warrant the adoption of even a desperate remedy. But that suggested by the petition, which you will find subjoined to this letter, while open to no just objection, seems fitted to lead to the most happy results.

The division of our present Court of Queen's Bench into two jurisdictions, either possessed of co-ordinate powers, or with such a distribution of business as the Legislature may deem expedient, is a step so little liable to objection, on principle, that its soundness would not require to be much reasoned, even though we were wholly without precedent; but English practice has so completely fortified us in this part of the proposed change, that

I do not feel it necessary to guard it by a single observation. The project of creating three judges to preside over our Court of Equity, is confessedly more open to the charge of innovation. Although neither is that step without precedent; for such was the constitution of the Court of Exchequer in England; which was a Court of Equity, filled by the same number of judges as the common law courts. But, even assuming this change to be wholly unprecedented; it yet seems so much forced upon us by our social condition, that we can hardly be considered as having been left an option. For in as much as our Canadian bar, and that is, I presume, to be regarded as the nursery of our judges, in as much as we must, for long, want that profound learning, and ample experience, the inestimable advantage of witnessing those displays of ability and learning which are of daily occurrence in the Courts at Westminster; how can we reasonably hope to find amongst us, men, whose single unassisted judgments will command the respect, either of the profession or the public. To impose upon a single individual, the arduous duty of unfolding the complicated facts, and applying the refined and abstract doctrines of equity, in the important causes which frequently depend in that court; does seem to me to bespeak either an unbounded stretch of self-

complacency, or an unpardonable ignorance of our actual condition. Whereas, by bringing the united wisdom of three judges, to bear upon the matters in controversy, in the equity, as in the common law court; the after conferences of these men, by which, the applicability of precedents, and the validity of arguments, would be closely sifted, and severely tried, would inevitably result in decisions commanding the respect of both the suitors and the bar. Thus, without impairing the efficiency of the common law jurisdiction, or rendering the primary judgments there justly liable to cavil; we should add to our Equity decrees all that additional weight, which they would receive in consequence of the judge presiding there, (who might, perhaps, with propriety be termed the Chancellor) being assisted by two associates. While the assemblage of these several judges, in a court, to be termed the Court of Exchequer Chamber, would furnish us with an efficient appellate jurisdiction, within the Province, in which every question of difficulty might be submitted to the decision of six new judges. Under such a system, a new class of litigation would, no doubt be originated, in the form of appeals from the common law courts to the Exchequer Chamber; but the new power of appeal thus conferred, is such, as has been already demonstrated to be absolutely neces-

sary to the ends of justice; and at the same time, the frequency of those ruinously expensive cases of Chancery, would be proportionably diminished. But I do not feel it necessary to demonstrate, by any lengthened argument, that the change which I have been advocating would operate beneficially; for I have never found a reflecting person to hesitate on that point: although a sense of the *imperious necessity* of the alteration, does not seem to have as yet impressed itself upon the public mind. Indeed, so far as I have been able to ascertain, the learned judges who preside over both courts, view with favour the proposed alteration, which would divide the arduous duties, at present imposed on the Equity Judge; and would relieve the common law tribunal of its heaviest responsibility, which arises out of a sense of the finality of its judgments.

But, Sir, it is argued, by those who heartily concur in the prayer of the petition; that the Legislature will never consent to the additional tax of £3,000 per annum, necessary to defray the expense of the increased establishment; that the proposed change will be attributed by the people at large, not to any desire for the attainment of equal justice, but to a love of aggrandizement, said to be very generally prevalent amongst the members of our profession; and that upon these grounds we cannot

hope, that our petition will meet with a favourable reception.

I cannot however persuade myself that such reasoning can prevail, except with the most unthinking. For, assuming this £3,000 to be what it certainly is not, an *additional* tax; will any reasonable man consider this paltry pittance of any moment, when weighed against the evils resulting from our present ill-advised system? Do the people of this Province expend annually hundreds of thousands, upon objects in which they have but a remote interest; and shall it be considered reasonable in them to pause, and parsimoniously enquire whether they will expend six, or nine thousand pounds, to attain an object which comes home to every man's door—the able and impartial administration of the law? Would any member of the Legislature feel, that he had given a satisfactory answer to one complaining, that his rights were absolutely concluded by a hasty, ill-advised judgment of the Court of Queen's Bench, when he informed him, that to afford redress by the establishment of a Court of Appeal, would cost the country nine, instead of six thousand pounds per annum? Could any statesman satisfy his own mind, when informed that those for whom he is called to legislate are obliged, under the present system, to abide by unsound decrees in Equity, unless

they happen to be fortunate enough to be able, and courageous enough to be willing, to encounter the ruinous costs of an appeal,—could any statesman, I ask, satisfy himself of the propriety of continuing such a state of things by reflecting, that to render the primary decisions of that court satisfactory, would entail upon the Province, an additional annual burthen of three thousand pounds!! The mere statement of such a proposition is its clearest refutation. If the premises be true, and I have not yet heard any man deny them; if it be undoubted that our present system is vicious, and I cannot help regarding it as such to an alarming extent; then the conclusion is inevitable, the best interests of the people demand an instant change.

But I argue this question under serious disadvantages, in assuming that the proposed alteration would, in truth, impose an additional burthen. The proposition may be specious, but is certainly untrue. No doubt the three thousand per annum would, under the new regime, be borne by the Province, in a way imperceptible by any, instead of falling with ruinous weight on the shoulders of a few; but could we sum up the *amount* paid in the most grievous way by individuals, under present circumstances, we should, I apprehend, find it vastly to exceed the required amount. To

instance but one particular, the costs of cases out of Chancery, now depending before the Court of Appeal at this moment sitting, can not fall short, I should think, of £2,000. Now, laying out of view the dangerous consequences to liberty, which cannot but result from placing the administration of the law practically beyond controul; though I should consider that subject entitled to the gravest attention; still, waiving all consideration of it for the present; the coldest and most self-interested calculator would, I presume, willingly pay his quota of the *general* burthen, rather than run the risk of being obliged, at some unlucky turn, to sustain that unjust and insupportable taxation, which by the present state of things, is made to fall ruinously on individuals. He would regard that inconsiderable portion of the general tax which he would be called to bear, as the small annual premium, which prudence never refuses to pay, as an insurance against possible misfortune and ruin. The observation just made, will equally serve to demonstrate the futility of the notion, that the proposed plan would tend to the aggrandizement of the profession. No doubt, every man who has the interest of his clients at heart, would gladly change his present doubts and difficulties for the almost absolute certainty, which would result, of being able

to obtain justice. And the improvement suggested, would open the door to distinction somewhat wider. This latter effect must be regarded as highly desirable. It would tend to the growth of those honourable feelings, the importance of which, considering the implicit confidence necessarily reposed in those gentlemen who practice the profession of the law, can hardly be over-estimated. But, in a pecuniary point of view, these changes, tending as they would on the whole to put an end to needless litigation, could not fail to produce a considerable diminution in the emoluments of the profession. The Province would bear a slight additional burthen, but individuals would be spared, and the profession would lose, the large amount at present expended in fruitless litigation.

But in the narrowest way of viewing the subject; on the assumption that the proposed change would entail an additional charge of £3,000 per annum; and that the most rigid economy is expedient, in such a matter as the administration of justice; still all this is far from leading to the conclusion, that the Legislature would be justified in allowing the present state of things to continue. For there exists an obvious mode in which the expense of the new system may be gradually decreased, upon the death, or resignation of those, at

present filling offices connected with the administration of law. And it is presumed that a slight temporary burthen would hardly weigh with the House, regard being had to the magnitude of the object proposed. It is generally believed, that the income at present received by the Master of the Court of Queen's Bench is very considerable; and the office of Master and Registrar of the Court of Chancery, will no doubt, ere long, prove exceedingly lucrative. Now, were the future incumbents of those offices paid by a fixed salary, (say £500 per annum,) and the fees derived from those two sources, converted into a fee fund, it is confidently asserted by those best acquainted with the matter, that the surplus arising from this fee fund, would more than defray the additional charge. Beside the saving thus effected, there is another retrenchment which I would suggest, though with some diffidence, in consequence of its not having met with general approval; I mean the reduction of the salaries of future judges. Were the emoluments of the Chiefs reduced to £1,000, and those of the puisne judges to £800, a saving under the new system of £2,000 per annum, would be effected without any loss, as I apprehend, being sustained by the public. I am aware that this proposition is regarded with great disfavour. It is said

that the income is too small; and that the efficiency of the Bench, the very object which we profess to seek, will be thus diminished; and did it appear to me that the proposed reduction would tend, even in a remote degree, to such a result, I should at once reject it. But I cannot help regarding the present salaries as unreasonably large. And the most careful consideration which I have been able to give to the subject, has convinced me, that the scale suggested, would be much better proportioned to the resources of the country, as well as to the average emoluments of the profession.

It is asserted, however, that the reward of professional skill, will be so much larger than the judicial salary which I have named, that no person will be found to relinquish the one for the sake of the other; and I readily admit that the average profit of successful professional labour, does exceed the sum fixed. But it must be remembered, that by far the largest share of that profit arises, not from the labour of the professional man as Counsel, but as Attorney, or Solicitor. I much question whether any Barrister in the Upper Province, does now derive from his mere Counsel business, an annual income of £800. And this brings me to the last point, to which I would beg to direct your attention—the

separation of the professions. Because, if there be any foundation for the opinion, that the union of Barrister and Attorney can not longer continue, consistently with the interests of the public; then the objection that the judicial income would not bear a fair proportion to the professional, would cease; the duty discharged in the character of Attorney, affording, as has been remarked, by far the largest share of professional income. And, I must confess, that the more I have reflected upon the matter, the more perfectly I have been convinced that this separation has now become unavoidable. For, to consider the subject with reference only to the increased skill, which the great augmentation of business within the last ten years has rendered necessary; who can expect the same individual to fill, with any tolerable degree of credit, the different characters of Attorney at Law, Solicitor in Chancery, in Bankruptcy, Nisi Prius Lawyer, Practitioner at Common Law and in Equity, Draftsman, and Conveyancer. To sustain any one of these characters respectably, would require a life of study and practice. To acquire even a passable proficiency in all, would be well nigh impossible. The necessary qualification for the due discharge of these various duties, can only be secured by that division of labour, which would be

brought about by the separation of the professions: a step which the public interest imperatively demands. But, apart from all consideration as to the difficulty of acquiring a competent degree of skill; there is wanting altogether, under existing circumstances, that stimulus to diligent, unremitting study, so indispensable in order to the attainment of excellence in any science; but especially in a science so extensive, and complicated, as our municipal law. So long as business continues to be the fruit, of unbecoming personal solicitation, and not of professional eminence, so long we may expect to find our Bar, characterized by those mental qualities best calculated, to secure that peculiar mode of advancement; but we must not look for that zeal after knowledge, and consequent learning, or those high and honourable feelings, which so eminently distinguish the Bar of England. Place between the Barrister and his Client, the intelligent Attorney; prompt and zealous in the advancement of his cause, and sufficiently skilled, to recognize and appreciate professional acquirements, and new springs of action are at once put into operation. Extensive knowledge, a high sense of honour, and manly independence, which under existing circumstances, do but clog men's advancement, would then form the staple commodities of

the Barrister. And this state of things, so desirable in itself, would moreover ensure that confidence, and good understanding between the Bench and the Bar, so essential to the maintenance, in the minds of the people, of a respect for the judicial institutions of the country, the importance of which it would be impossible to overrate. This change would, no doubt, diminish greatly the income of some persons; but that is an evil which must be encountered at one period or other: and no professional gentleman would, I apprehend, resist a change calculated to effect a great public good, on that ground. Beside fortune in this, as in most other conditions of life, would then spread her blessings on the right hand and on the left, so as to leave just room for complaint to none. Each would have it in his power, to pursue the walk best suited to his genius and his taste: either selecting that branch which would confer present affluence, or the one which, while affording at first but a moderate income, would eventually open the doors, to the highest honours of the profession.

I am fully sensible, my dear Sir, that these thoughts, ill-digested as they are, and written amid the hurry of business, will stand in need of your most indulgent consideration. But finding that either leisure or inclination

was wanting, to those who would have discussed the subject much more satisfactorily than myself; I did not feel justified in refraining longer, to express what had occurred to me on a matter too long neglected; and which, in my conscience, I believe to be of the most vital, practical importance to my fellow-subjects in this Province. If the thoughts which I have ventured to set down, though with much diffidence, shall have the effect of producing inquiry on this subject in the Legislature, they will have fully answered the end of,

My dear, Sir,

Your faithful friend,

WM. HUME BLAKE.

TO THE HONOURABLE THE LEGISLATIVE ASSEMBLY, OF THE PROVINCE OF CANADA, IN PROVINCIAL PARLIAMENT ASSEMBLED:

The Petition of the undersigned, Members of the Legal Profession,

HUMBLY SHEWETH:

That your Petitioners, regarding the due administration of the Law to be a matter of paramount importance, beg leave respectfully to invite the attention of your Honourable House, to the present constitution of the Courts of Justice within the limits of Upper Canada.

There exists here but one Superior Court of common law-jurisdiction, from the judgments of which there is, in effect, no appeal, except to Her Majesty in Council; a remedy at once so dilatory and expensive, as to render the decisions of the Court here, practically conclusive upon the rights of suitors.

The Court of Chancery, on the other hand, is presided over by a single Judge, to whose unassisted judgment are thus conceded, matters of the utmost nicety and the greatest importance, whilst his decisions are only to be relieved against, by an application to a Court composed of the Judges of the Court of Common Law,—a remedy inefficient in itself, and at the same time so costly, as to render acquiescence in the primary judgment, in most cases, an evil of less magnitude than even a successful appeal.

The state of things thus pointed out is, in the estimation of your Petitioners, ill calculated to secure that due

deliberation which the ends of justice so imperatively demand; and still less fitted to inspire the minds of suitors with that confidence, in the wisdom and integrity of legal decision, the maintenance of which is of such paramount importance.

Your Petitioners are aware that some of these evils are incident to the infant state of the Province; but they very respectfully submit, that the alteration, which they take the liberty to suggest, would obviate those of them which are felt to be most pressing.

Your Petitioners would propose that two Superior Courts of Common Law Jurisdiction should be erected, in lieu of the one which now exists, in each of which three judges should preside; and that the Court of Chancery should also be presided over by three judges. This simple alteration would be attended with but little expense to the public. It would, indeed, in our estimation, result in a saving to the public, regard being had to the extent of litigation which would be thereby avoided. Possibly your Honourable House will be enabled, to combine these advantages with such other alteration, as may render the plan on the whole, effectuate a retrenchment.

The effect of this alteration, in the estimation of your Petitioners, would prove beneficial to all classes of suitors. They would thus have a choice of Common Law Courts in which to institute proceedings, and in a Court of Equity would not be compelled, to rest upon the opinion of asingle Judge. The primary decision would then in each case be rendered more satisfactory to the suitors; whilst, by the combination of all the Judges, your Honourable House would be enabled to constitute a Court of Appeal so efficient and unexpensive, as could not fail to produce the most valuable result. Though we have respectfully suggested to your Honourable House a remedy for the evils of which we have complained, yet we do not wish it

to be understood, that it is the only remedy that can be proposed; but if your Honourable House, in your wisdom, shall adopt any other course, to accomplish the objects your Petitioners have in view, your Petitioners will have obtained all they desire.

Your Petitioners, therefore, humbly pray the attention of your Honourable House to the premises, and that your Honourable House will be pleased to provide for the evils of which your Petitioners complain, such remedy as to your Honourable House, in its wisdom, may appear most fit.

And your Petitioners, as in duty bound, will ever pray.