Macquarie University

LEGAL ARGUMENT AND THE SEPARATENESS OF EQUITY IN NEW SOUTH WALES, 1824-1900

Justine Eloise Rogers

LAW514 Legal Research Project

BA LLB

Second Semester 2002

Introduction

When New South Wales was on the verge of adopting a judicature system by the *Supreme Court Act* 1970 (NSW), Jacobs J described the move as 'a great leap forward to 1875,'[1] referring to the year that England had adopted the last of its *Judicature Acts*.[2] The judicature system is defined as the 'system of administration of common law and equity...under which common law and equitable matters may be heard by the same court.'[3] England introduced this system in 1873 in order to, amongst other things, end the system of separate courts of common law and equity.[4] The merits for the change were that consolidation would put an end to all conflicts of jurisdiction, and no suitor could be defeated for commencing a suit in the wrong court.[5] Thereafter, the administration of justice passed to a single court, the High Court of Justice.[6]

But why did New South Wales even need to introduce a Judicature Act in 1972?[7] Back in 1823, the Supreme Court of New South Wales was vested by the *New South Wales Act* (Act 4 Geo IV c 96) with jurisdictions both at common law[8] and in equity.[9] According to certain measurements, the circumstance of a single court with both

---

[1]Cited by C A F Cahill, 87 NSWPD (1969-70) 42nd Parliament 3rd session, 16 September 1970, Supreme Court Bill Second Reading, 5883-5910, 5884.
[2]*Judicature Act* 1873 (UK) 26 & 37 Vic c 66; *Judicature Act* 1875 (UK) 38 & 39 Vic c 77.
[3]P E Nygh and P Butt, *Butterworths Concise Australian Legal Dictionary* (1997) 224.
[4]Peter Goodrich, *Reading the Law* (1986) 83
The Lord Chancellors and the Court of Chancery from the fifteenth century onwards *de facto* exercised a jurisdiction separate from that of the common law although it was only in 1616 that the two jurisdictions were formally separated, a separation that lasted until the Judicature Acts of 1873 and 1875.
[5]The Cairns-Hatherly Commissions Report, cited in 'Reform of the Legal Procedure', *Sydney Morning Herald*, 8 September 1906, 6.
[6]Peter Radan, Cameron Stewart and Andrew Lynch, *Equity and Trusts* (2001) 14.
[7]*Supreme Court Act 1970* (NSW) provides for the concurrent administration of common law and equity; it was brought into operation on 1st July 1972.
[8]Act 4 Geo IV c 96 s 2.
[9]Act 4 Geo IV c 96 s 9.

jurisdictions meant that New South Wales possessed the unified system that would be achieved in England fifty years later. The simple explanation is that in the Supreme Court of New South Wales, at some point between 1824 and the end of the nineteenth century, there commenced a practice akin to England's separate courts scenario. Equity moved away from common law. The practice developed and was entrenched despite the vast reform in the mother country. Assuming the words of the *New South Wales Act* 1823 promulgated a judicature system, if the overall judicial practice followed a different course, how was the practice justified? In other words, if there was a cleft between law as a piece of legislative text and law as procedure, tradition or custom, was it legitimate?

Two Views of Legitimacy

In the High Court case of *McLaughlin v Fosbery*,[10] Griffith CJ, a Queenslander, (Barton J concurring) showed no tolerance for New South Wales' procedural past.[11] He employed a strictly textualist approach to affirm that, 'as the one court exercised both law and equity, the administration of these jurisdiction was also unified.'[12]

> The Supreme Court of New South Wales is one court, having under its original constitution all the power which the Courts of Chancery and the Common Law and Ecclesiastical Courts had in England ... the Full Court ... when so sitting, has all the powers of that Court conferred on it by the Statues conferring its jurisdiction, taken collectively ... the jurisdiction of the Court, *qua* Court, is single.[13]

This contrasts with the dissenting judgement of O'Connor J, a New South Welshman, who relied on a more customary, proceduralist approach. He stated:

> It is true that there is only one Supreme Court invested with all these powers, but *ever since* the establishment of the Court under the Charter of Justice its powers in Equity and its powers at common law have been exercised by separate divisions of the Court ... The separation of jurisdictions exists, not as a mere matter of form or headings, but as a substantial separation of different systems of jurisprudence, and so long as it does exist the Supreme Court could not, and would not, apply in the exercise of the one jurisdiction the principles of the other ... It may be that there is nothing in the Statutes which would

---

[10](1904) 1 CLR 546.
[11]Graham in 'The Life of Sir Samuel Griffith' (Macrissan Lecture, 1938) 62-3 describes what he calls as the 'first shock administered by Griffith to the procedure fanatics of New South Wales' cited in Alex C Castles, *An Australian Legal History* (1982) 181.
[12]M L Smith, 'The Early Years of Equity in the Supreme Court of New South Wales' (1998) 72 *Australian Law Journal* 799, 808.
[13](1904) 1 CLR 546, 568-569.

prevent that course being taken if the Supreme Court thought fit to make so radical a change in its procedure. But where the separation of jurisdictions has from the establishment of the Supreme Court been strictly followed, where separate systems of pleadings and procedure have been founded on this separation—systems themselves regulated in many particulars by Statutes—where under the body of practice so constituted the rights of the suitors have been invariably presented and investigated, and where such body of practice violates in no respect the Statutes establishing the Court, *it may well be said that the practice of the Court is the law of the Court*. (emphasis added). [14]

A similar conflict of interpretation is evident in the High Court case of *Maiden v Maiden*[15] where Isaacs J, a Victorian, concurring with Griffith CJ, stated:

> [T]he Supreme Court of New South Wales is, under the State Constitution, one Court—and that the questions which formerly arose in England with regard to the exclusive jurisdiction of the Court of Chancery...are not applicable to the Supreme Court of the State. It is one Court having every kind of jurisdiction, and it is a mere matter of internal arrangement as to the exercise of it.[16]

Justice Higgins, also a Victorian, gave a dissenting judgment that mirrors O'Connor J's approach.[17] He pointed out that there were two separate codes that prescribed different modes of procedure for common law and equity[18] and, he referred to our English legal origins, saying '[i]t would be interesting to watch the fact of Lord

---

[14]Ibid 575.
[15](1908) 7 CLR 727.
[16]Ibid 743.
[17]In *McLaughlin v Fosbery* (1904) 1 CLR 546.
[18](1908) 7 CLR 727 at 745; namely the *Common Law Procedure Act* 1899 and the *Equity Act* 1901.

Chief Justice *Coke* if he heard of the Lord Chancellor giving judgment in ejectment.'[19]

Even though a couple of years later, in *Turner v The New South Wales Mont de Piete Deposit and Investment Co Ltd*,[20] all the members of the High Court conceded that this separation was the historical position in New South Wales, it did not escape criticism. Justice Isaacs described it as 'the antiquated separation of legal procedure which invited such technical expense and protracted litigation ... which might very easily lead to a gross miscarriage of justice.'[21]

While both O'Connor and Higgins JJ (extracted above) bolstered their arguments with statutes, neither attempted to justify the initial discrepancy (which is, at any rate, debatable) between the words of the *New South Wales Act* 1823 and the practice of the court. As O'Connor J explained, it was a case of 'ever since.' It is not surprising that they struggled here. Blackshield explains that this type of reasoning was not as prevalent by the end of the nineteenth century.[22] Justice O'Connor's 'ever since' argument is reminiscent of the common law tradition of Coke, Hale and Blackstone – a type of legal reasoning that had fallen out of favour.

However, these arguments are significant for the present discussion because they had been favoured by Blackstone, 'whose four volumes accompanied the colonial

---

[19]Ibid 744.
[20](1910) 10 CLR 539.
[21]Ibid 554.
[22]A R Blackshield, 'The Legitimacy and Authority of Judges' (1987) 10 *University of New South Wales Law Journal* 155, 164.

judges across the British world.'[23] Blackstone saw the source of law as 'dictated by God himself;'[24] its validity being contingent upon its concordance with an unwritten ideal.[25] In this tradition, common law or unwritten law (*leges non scripta*) is defined as custom derived from time immemorial, from time to time evidenced 'in the records of the several courts of Justice, in books of Reports and judicial decisions, and in the treatises of learned sages of the profession.'[26] That 'there shall be four superior courts of record, the chancery, the king's bench, the common pleas, and the exchequer' is provided by Blackstone as an example of unwritten law.[27] Written law (legislation) is accorded a secondary role, 'not only because it is seen to post-date the common law but also because it is not infrequently seen by the judiciary as a substantively inferior source of law.'[28] Legislation is to fulfil a limited role as 'either declaratory of the common law or remedial of some defects therein.'[29] Even its declaratory function is circumscribed by the view that it is only if the enactment improved the 'wisdom of the ages,' that is, only if it was really contrary to the common law, was it to serve as a restriction. Kercher says 'it was the common law that gave statutory law its validity, not the reverse.'[30] Blackstone concluded, '[w]e may take it as a general rule, that the decisions of courts of Justice are the evidence of what is common Law: in the same manner as in the Civil Law, what the Emperor had once determined was to serve as a guide for the future.'[31] According to this tradition, the Supreme Court custom of

---

[23]Bruce Kercher, 'Judges and the Application of Imperial Law in Australia 1788-1836: Resistance and Reception' (Paper presented at the workshop Law and the Enlightenment; The British Imperial State at Law, Canberra, September 2001) 3, citing W Blackstone, *Commentaries on the Laws of England* (first ed, 1765, 1979) Introduction, section 3.
[24]William Blackstone, 1 *Commentaries on the Laws of England* (first published 1765-69, 1966 ed) 41.
[25]Peter Goodrich, *Reading the Law*, above n 4, 8-9
[26]Blackstone, above n 24, 63-4.
[27]Ibid 68.
[28]Goodrich, *Reading the Law*, above n 4, 41.
[29]Blackstone, above n 24, 86.
[30]Kercher, 'Resistance and Reception', above n 23, 3.
[31]Blackstone, above n 24, 71.

insisting on a division between the jurisdictions of common law and equity is valid law because the judges decided it so.

In contrast, Griffith CJ and Isaacs J elevated the *New South Wales Act*[32] far above the supposed 'mere matter of internal arrangement'.[33] The use of this approach is consistent with Blackshield's thesis. In fact, the two approaches have been pitted against each other in an old quarrel.[34] The argument against the common law gained its most dramatic exposition around the late eighteenth century, with one of its main opponents, Jeremy Bentham. For him, that all law derived from the sovereign was a logical truth; judge-made law was merely the indirect or 'tacit' expression of the sovereign.[35] Therefore, customary or unwritten law was an act of judicial usurpation of the function of the legislator. A century later, this once heretical view was orthodox as the High Court majorities show. According to this view, the practice of the Supreme Court was not legitimate because it contradicted the command of the legislature, and it therefore ought not to have been sustained.

These Benthamite sentiments are prevalent in the writings of the Australian legal historian, J M Bennett.[36] He argues that the two jurisdictions became two courts by a type of judge-made legal fiction.[37] In this way, the Supreme Court practice was, according to Bennett, 'almost a conspiracy to defeat the clear intentions of an Imperial

---

[32]The true reference is to the *Australian Courts Act* 1828 (Act 9 Geo IV c 83) that replaced the *New South Wales Act* 1823.
[33]*Maiden v Maiden* (1908) 7 CLR 727, 743 (Isaacs J).
[34]eg, Coke v Hobbes; Coke v Hale; Austin v Maine; Blackstone v Bentham, Charles Warren Everett, Introduction to Jeremy Bentham, *A Comment on the Commentaries* (1976) 15.
[35]Goodrich, *Reading the Law*, above n 4, 150.
[36]J M Bennett is undoubtedly the expert in this particular area of legal history and without his diligence I could not have written this legal research project.
[37]J M Bennett, *The Separation of Jurisdictions in the Supreme Court of New South Wales 1824-1900* (MA thesis, Macquarie University, 1963) 180.

Statute.'[38] Bennett has written extensively on the relationship between the common law and equity jurisdictions in New South Wales over forty years. Having perused his prolific body of work, a few other dominant themes arise. Bennett regards the New South Wales system pre-Judicature Act as a major shortfall – indeed, a failure. He said in 1962, '[a]lmost alone of the British Dominions has New South Wales failed to adopt or follow the reconstitution of Court and practice effected by the Judicature Acts.'[39] He not only sees the practice and precedent of treating the jurisdictions as separate, in other words, regarding the Supreme Court as 'losing its unity,'[40] as responsible for 'the perseverance of such a monument of artificiality and oppression,'[41] but, more importantly for present purposes, he sees it as 'historically unjustified';[42] having 'no historical authority.'[43]

Bennett's argument is that, in accordance with the *New South Wales Act* 1823, the

> Supreme Court established in 1824 was, and has been ever since, a single Court with plenary powers ... the continued existence in the Colony of a single Court necessitated that all its departments administer one law, and so the early assumption that the Supreme Court sitting in Equity could not grant remedies at Common Law was erroneously founded on a supposed identity between the colonial Equity Court and the High Court of Chancery in England.[44]

---

[38]J M Bennett, *A History of the Supreme Court of New South Wales* (1974) Ch 5 footnote 11, 279.
[39]J M Bennett, *Equity Law in Colonial New South Wales 1788-1902* (Legal Research Project, Sydney University, 1962) 406.
[40]J M Bennett, *The Separation*, above n 37, 4
[41]Ibid 180.
[42]Ibid 4.
[43]J M Bennett, *Equity Law*, above n 39, 406; Bennett describes O'Connor J's reasoning in *McLaughlin v Fosbery* (1904) 1 CLR 546 as 'the less fundamental and *less historical* authority of the court's practice' (emphasis added), JM Bennett, *A History*, above n 38, 60.
[44]J M Bennett, *Equity Law*, above n 39, 406-7.

In short, this assimilation was a 'false analogy'.[45] He calls the development from specialisation necessary for convenient administration to a refusal to hear cases that ought to have originated in another jurisdiction a 'fallacious extension'.[46] There should have been one Court applying one law.[47] His 'complete reliance' is placed on the judgment of Martin CJ that

> by the 11th section of the New South Wales Act, 9th Geo, IV. c.83, the Supreme Court has jurisdiction in criminal, common law, equity and ecclesiastical matters. There are not all separate Courts presided over by separate judges, but one and the same Court sitting in its several jurisdictions.[48]

Bennett argues that a litigant who was refused either damages before an equity judge or an injunction before a common law judge 'might well have enquired on what historical basis he could thus be denied justice.'[49] As he describes this period, 'New South Wales, which bore much of the responsibility for importing the English separation of common law and equity jurisdictions, remained loyal to its historical error'[50] so, by the beginning of the twentieth century, the benefits of a unified system were forgotten.[51] In 1963, he stated that a Judicature Act was not historically necessary,[52] because our legislation provided for a judicature system, and, later, he explained the 'leap' as 'an easy way of restoring the *status quo*.'[53] Using this Benthamite or positivist reading (which I will argue later is an inappropriate approach

---

[45]J M Bennett, *The Separation*, above n 37, 5.
[46]Ibid 179.
[47]J M Bennett, *Equity Law*, above n 39, 321.
[48]*Brown v Patterson* (1883) 4 NSWR Eq (A) 1 at 10, ibid, 330.
[49]J M Bennett, *The Separation*, above n 37, 179.
[50]J M Bennett, 'Historical Trends in Australian Law Reform' (1969-1970) 9 *Western Australian Law Review* 211, 231.
[51]Ibid 231.
[52]J M Bennett, *The Separation*, above n 37, 180.
[53]J M Bennett, 'Historical Trends,' above n 50, 228.

to history), Bennett argues that, as the legislative text was the most superior and authoritative source of law, then the Supreme Court was wrong in adopting the course they chose. Curiously, Bennett did say in 1974 that '[i]t was *as if* the Colony had been granted a judicature system'[54] (emphasis added). This represents a departure from the rest of his logic because it is less certain about what the *New South Wales Act* 1823 intended.

Some legal historians argue that other sources of law were and remain of value in the common law tradition. Professor Simpson criticises Bennett's type of legal history as a rather artificial inquiry.[55] He says that this doctrinal legal history concerns itself with certain judicial decisions and with certain statutes;[56] 'since the past is even more obscure than the present, [so] a great deal of effort will be devoted to the task of establishing just what rules were "in force" (not *enforced*) at any given time.'[57] Simpson's approach to history emphasises that the common law is an example of a particular type of legal culture or tradition and so his focus is on particular ideas and institutions, rather than on particular rules and their evolution.[58] In other words, he values the particular law-making context over the words of a statute.[59] Simpson affirms that legislation has, in any event, almost completely retained its historically ancillary character, Blackstone's remedial function, which is integral to the common law.

---

[54]J M Bennett, *A History*, above n 38, 32.
[55]A W B Simpson, 'The Survival of the Common Law System' in *Then and Now 1799-1974* (1974) 51, 52.
[56]Ibid.
[57]Ibid.
[58]Ibid 54.
[59]Ibid.

> By light of nature one might expect that the rise of legislation would bring about the extinction or at least radical modification of the common law system. This indeed was precisely what Bentham hoped and expected ... There is indeed something quite paradoxical in the almost complete lack of impact upon the vitality of the common law system.[60]

According to Simpson, the institutional reason for the clout of the common law can be found in the status of the higher judiciary.

> Once it is seen how the interpretation of texts generates law, it is plain that to achieve the codifier's ideal one must attempt to prevent the evolution of any form of authoritative gloss; in the context of the common law this would mean in the first instance the deliberate reduction in the status of the higher judiciary.[61]

In his view, in the face of legislative material, the courts have simply behaved as before,

> applying to it their traditional methods – the hotchpotch of so-called principles of statutory interpretation, the rambling of judicial opinion, the citations of precedents and the use of analogies [even false ones] drawn from earlier material. Legislation has been absorbed into the system, and this development has gone hand in hand with the preservation of dominance by the upper echelons of the judiciary.[62]

---

[60]Ibid 59.
[61]Ibid 61.
[62] Ibid 61-2.

Holdsworth also states that the common law has been victorious over law as legislative action.[63] Gava reminds us that 'notwithstanding the aims of its creators any piece of legislation still remains to be interpreted by the courts. And, of course, the resulting interpretation may bear little relationship to the original aims.'[64] Although it will be debated whether the original judicial interpretation was indeed contrary to the Act, and indeed whether the practice was really even causally related to the Act so as to engage in gap analysis, this common law feature can be useful in explaining the history of the colonial court.

Goodrich provides a 'lee-way of choice'[65] that can also be set-up to conflict with those of Bennett. He values the sources of law elicited by Simpson, highlighting that the legal community is more than a technical qualification, but a 'way of life and a mode of belonging- a set of habits, beliefs and values'.[66] Cover explains that the rules and formal institutions of the law are but a small part of the normative universe that ought to claim our attention[67] since '[n]o set of legal institutions or prescriptions exist apart from the narratives that locate it and give it meaning.'[68] According to Cover, in the end, the interpretive commitments determine what the law means and what the law shall be.[69] Since the judges committed to an English-style interpretation of the relationship between equity and the common law, the practice of double suits was meaningful and expounding law. These arguments correlate to a more Blackstone-style approach. The judges of the Supreme Court of New South were entitled to

---

[63] Sir William Holdsworth, *A History of English Law* (first published 1903-1966, Vol 10 1966) 4.
[64] John Gava, 'The Revolution in Bankruptcy Law in Colonial New South Wales' in Ellinghaus, M P and Bradbrook A J and Duggan A J (eds), *The Emergence of Australian Law* (1989) 210, 220.
[65] Professor Julius Stone, A R Blackshield, above n 22, 170.
[66] Goodrich, *Reading the Law*, above n 4, 145.
[67] Robert Cover, 'The Supreme Court 1982 Term Foreword: Nomos and Narrative' (1983) 97 *Harvard Law Review* 4.
[68] Ibid.
[69] Ibid 7.

develop a practice that was perhaps in retrospect an inefficient interpretation of the original statute because they were the judiciary.

The New South Wales Act 1823

The *New South Wales Act* 1823 (Act 4 Geo IV c 96) provided[70] that the Supreme Court of New South Wales would have jurisdiction 'as His Majesty's Courts of King's Bench, Common Pleas, and Exchequer in England'[71] and would have the 'power and authority to administer justice, and to do, exercise and perform all such acts, matters and things necessary for the due execution of such equitable jurisdiction, as the Lord High Chancellor of Great Britain can or lawfully may within England.'[72] To this these last words were added in 1828[73] 'and all such acts matters and things as can or may be done by the said Lord High Chancellor within the realm of England in the exercise of the common law jurisdiction to him belonging.' [74]

Using a literalist construction, one could agree with Bennett that the Act stipulated a judicature system as it established one court with the power to administer both common law and equity. However, Meagher, Gummow and Lehane bring Bennett's assertions to a halt. According to them, in order to have a Judicature system it is necessary to have:

(i) One Court administering law and equity and

(ii) One set of procedural rules regulating both jurisdictions.[75]

---

[70]The Court was also a creature of the royal prerogative. Legislation authorised the court to be constituted; and letters patent (The Third Charter of Justice for New South Wales, 12 October 1823) brought it into being under the King's prerogative powers. JM Bennett, *A History*, above n 38, 30.
[71]Act 4 Geo IV c 96 s 2.
[72]Act 4 Geo IV c 96 s 9.
[73]Section 45 of Act 4 Geo IV c 96 meant that it was to continue in force 'until the first day of July [1827], and from thence until the end of the next Session of Parliament'. It was continued in operation by 9 Geo IV c 83 (the *Australian Courts Act* 1828). The *Australian Courts Act* was renewed by annual legislation until it was made permanent by 5 & 6 Vic c 76 (the *Australian Constitution Act* 1842). M L Smith, above n 12, endnote 13.
[74]*Australian Courts Act* 1828 (Act 9 Geo IV c 83) s 11.
[75]Meagher, R P, Gummow, W M and Lehane, J R F, *Equity Doctrines and Remedies* (3rd ed, 1992) [130].

They say that New South Wales always had the former, but, until 1972, never had the latter.[76] Applying this twin test, they see the original situation in the colony as essentially the same as England before 1873, 'where one set of courts administered equity and another set of courts administered law';[77] the colonial court commenced as a mirror of the English separate court system.

The opposition of these two views can be traced to two different definitions of 'judicature system'. Bennett relies on a jurisdictional test chiefly based on the explicit words of the statutes, while Meagher, Gummow, and Lehane add a procedural prong. Holdsworth also underlines the adjectival law component. He says, '[i]t is significant that Blackstone found that the most essential difference between law and equity consisted in the different modes in which they administered justice—"in the mode of proof, the mode of trial and the mode of relief."'[78] He also says that one of the three results of the English *Judicature Acts* was a uniform code of procedure and pleading.[79] Parkinson and Smith also see separation as implicit in the *New South Wales Act* 1823 because there were important differences in procedure.[80] There are, therefore, several theorists who use separate procedure to show that New South Wales was never granted a judicature system.

However, it would not do justice to Bennett's expertise to stop here in the obtuse. Bennett demonstrates a richer and more accurate knowledge of the New South Wales statutes than the above theorists and he engages with the history of the New South

---

[76]Ibid.
[77]Ibid.
[78]Sir William Holdsworth, *A History of English Law* (first published 1903-1966, Vol 9 1966) 335.
[79]Sir William Holdsworth, *A History of English Law* (first published 1903-1966, Vol 15, 1965) 128.
[80]Patrick Parkinson, *Tradition and Change in Australian Law* (2nd ed, 2001) 157; Smith, above n 13, 800.

Wales Supreme Court practice in a far more meaningful way than they do. Bennett finds support for his understanding in the intention of the legislation. He points to the proposals of Judge-Advocate Ellis Bent to have one Supreme Court with concurrent jurisdiction years earlier.[81] He draws on Currey, [82] who found that it was expressly stated by Sir John Richardson, whose opinion was sought by the Colonial Office,[83] that, as the Act contemplated 'only one Court...they (the Judges) would not so divide themselves, as to hold two Courts concurrently at the same time.'[84] Bennett also finds support in the liberal stance of its principal draftsperson, James Stephen Jr, who became legal adviser to the Colonial Office in 1813 and later became Under Secretary in the Colonial Office from 1836 to 1847. He did not encourage an exact transplant of the British judicial model.[85] In other words, he claims that the legislature assumed that the judges sitting together would exercise both its equity and common law jurisdiction.

The problem with an intentionalist approach is that it was rarely evident in the common law tradition of 1823. It is important to recall what was said above that the legislation was seen as a restatement or correction of the common law in the context of an established body of law. 'Continental lawmakers think out their laws in terms of broad intention'[86] while in our tradition 'written law may be deliberately vague, it may be archaic, it may not deal with relevant local issues. Its role, in short, may be

---

[81]J M Bennett, *Equity Law*, above n 39, 34.
[82]C H Currey, *Chapters on the Legal History of New South Wales 1788-1863* (unpublished manuscript, 1929) 109-110.
[83]Ibid.
[84]HRA IV/I, 639 cited by JM Bennett, *The Separation*, above n 37, 3.
[85]Paul Knaplund, *James Stephen and the British Colonial System 1813-1847* (1953) 259 cited by JM Bennett and J R Forbes, 'Tradition and Experiment: Some Australian Legal Attitudes of the Nineteenth Century' (date) 7 *University of Queensland Law Journal* 172, 183.
[86]Goodrich, *Reading the Law*, above n 4, 52.

one of enunciating principles and of stipulating the general scheme of desirable social relationships.'[87] Blackstone provided a guide for the interpretation of statutes:

> The fairest and most natural method to interpret the will of the Legislator, is by exploring his intentions at the time when the Law was made, by signs the most natural and probable. And these signs are either the words, the context, the subject-matter, the effects and consequence, or the spirit and reason of the Law.[88]

And, according to Castles, 'the spirit of the reforms of 1823 ... emphasised, virtually without question, that English-style courts were both suitable and desirable for the administration of justice in Australia.'[89] Blackstone said that where the common law and statute differ, the common law gives place to the statute only where they really are contrary.[90] As Forbes CJ understood, '[w]hat the Act clearly directs, or authorises, may be done in virtue of the Act, without being retrained in its operation by the common law.'[91] It is difficult to quantify how different the *New South Wales Act* 1823 was to the common law, that is, to establish whether it was truly contrary to English customary law, which upheld barriers between the various courts. It is unclear from the outset how prescriptive the Act was in terms of intending a judicature system.

Despite this, Castles says that under the terms of the Act of 1823, the Supreme Court was placed in a position to avoid overlapping functions,[92] which brings his

---

[87]Ibid 61.
[88]Cited in Jeremy Bentham, *A Comment on the Commentaries: Introduction and Notes by Charles Warren Everett* (1976) 100.
[89]Alex C Castles, above n 11, 151.
[90]Blackstone cited by Jeremy Bentham, above n 88, 145.
[91]Bruce Kercher, 'Resistance and Reception,' above n 23, 13.
[92]Alex C Castles, above n 11, 181-2.

argument closer to Bennett's by suggesting that there was a period where unification could have taken root.

The Supreme Court Practice and Chief Justice Forbes

The period refers to the term of the first Chief Justice of the New South Wales Supreme Court, Sir Francis Forbes, who was sworn in on 17 May 1824 and resigned in 1837. Forbes was joined by John Stephen, the first Puisne Justice, in 1825. Bennett pronounces, '[t]he early Judges of the Court knew of no Equity Court…there was a single tribunal in which all branches of law were entertained;'[93] '[a]ll authority conferred by Act and Charter was administered in the one court, at first by Forbes alone as Chief Baron, Lord Chancellor and Chief Justice rolled together'.[94] He says that it was only after 1837,[95] and Castles says that it was 'a little more than a decade,'[96] that the separation of equity along traditional English lines occurred. These claims need to be tested, that is, whether there was a fused system in operation and, if so, for how long.

Neither Bennett nor Castles provide any cases to illustrate the operation of this fused system of the early Court.[97] Recall that separation for them chiefly means that a litigant who entered the equity jurisdiction of the Court could not rely on common law rules or seek common law remedies (and vice versa). Meagher Gummow and Lehane do not provide any early cases either because fusion for them requires one set of procedural rules. Since they simply say that there was no common procedure, they, rather unsatisfactorily, do not to provide any cases.

---

[93]J M Bennett, *The Separation*, above n 37, 3.
[94]Bennett, *A History of the Supreme Court*, above n 38, 32.
[95]J M Bennett, *The Separation*, above n 37, 4.
[96]Castles, above n 12, 182.
[97]Bennett does provide ten 'cases in equity', but none of them demonstrate that the Court entertained common law matters in the same suit. J M Bennett, *Equity Law*, above n 39, 37-39.

If one values the procedural element as intrinsic to judicature, one could point to Forbes CJ's observations in Court on December 1824 that the 'Supreme Court…has jurisdiction over matters that could possibly come before it; and that on the equity, as well as the plea side of the Court, the practice should be assimilated to that of England, after the end of the present Term'[98]to show that Meagher Gummow and Lehane's second requirement was not satisfied. That is, the two jurisdictions did adopt two sets of procedural rules.[99] This is supported by Forbes' Rules.[100] Among them was Rule 2:

> It is further ordered that the proceedings of the said Supreme Court within its several and respective jurisdictions as aforesaid [those of King's Bench and Exchequer, and the High Court of Chancery, and the Ecclesiastical Court within the diocese of London, commonly called the Consistory Court], be commenced and continued in a distinct and separate form.

Smith also claims, although he does not provide any cases to substantive this, that, under Forbes CJ, law and equity were administered as discretely as if they had been vested in separate tribunals.[101]

---

[98]Supreme Court of New South Wales Practice Note, Forbes CJ, 13 December 1824, <http://www.law.mq.edu.au/scnsw/html/practice_note__1824.html>at 15 August 2002.

[99]Note, however, that Chief Justice Forbes was no 'unthinking traditionalist,' Alex C Castles, above n 11, 188. Forbes' unprecedented simplification of procedure brought common law and equity procedure more closely together, which might serve as an indication of a unified system. Justice Therry later said of Forbes' Rules that, '[i]n many of them he anticipated the legislation of modern times by simplifying pleadings and dispensing with the costly course of procedure then prevalent in the Courts at Westminster.' Justice Therry cited by C H Currey, above n 82, 335.

[100]Rules and Orders of the Supreme Court, 1825. The rule-making power could be conferred on the Chief Justice by the King under Act 4 Geo IV c 96 s 17; the power was invested in Forbes by a royal Order in Council of 19 October 1824. Rules 1 to 8 took effect from 22 June 1825. Bennett, J M and Castles, Alex C (eds), *Australian Legal History Source Materials from the Eighteenth to Twentieth Centuries* (1979) 58.

[101]M L Smith, above n 12, 800.

But, for Bennett, it is the ability to entertain all matters in one suit that is the hallmark of a judicature system, not procedural uniformity. Although Bennett does not cite *Mills v Rowe*, 1828[102] it could be used to support his belief that Forbes' Court did exercise a judicature system. Here, the Full Court upheld the validity of a deed of separation between husband and wife at common law, having also considered trusts, an equitable interest. Despite the plaintiff's argument that if the defendant were entitled to any relief it was in equity, but not in law,[103] the Court said, in a judgment drawn up by Forbes CJ, that

> [t]he cases cited afford sufficient precedents for this Court, conforming it [sic] proceedings strictly to those of the common law Courts at Westminster; but they acquire an additional force when it is considered that this Court is invested with an equitable jurisdiction; and whenever it can, without breaking in upon any rule of law, enlarge a particular course of proceeding, so as to afford an easier and less expensive, and at the same time, an equally beneficial remedy to the parties concerned, it is in *the spirit* of the constitution of the Court that it should do so (emphasis added).[104]

This is an example of the Supreme Court entertaining both matters in a single suit that was possibly invited by the words or at least the spirit of the original statute. The only problem with relying on this case is that what helped the Court to entertain both matters was its reliance on English precedent which demonstrated that the English Courts of both common law and equity had also recognised these particular interests simultaneously.

---

[102](Unreported, Supreme Court of New South Wales, Forbes CJ, Stephen and Dowling JJ, 13 September 1828) <http://www.law.mq.edu.au/scnsw/Cases1827-28/html/mills_v_rowe__1828.htm> at 15 August 2002.
[103]Ibid.
[104]Ibid.

It is difficult to endorse Bennett's claim about Forbes' unified system because he does not provide any pertinent examples. Moreover, assuming that such a system did exist, according to Bennett's measurement, it is questionable whether it is suitable to reflect with nostalgia on Forbes' unified system when it wasn't really appreciated as one. One could explain any concurrent administration of equity and common law in the early days as an obvious practical feature of a one-man (then two-man) judicial set-up in a penal colony[105] that possessed only two barristers and six solicitors.[106] Castles explains:

> [T]he conditions in New South Wales, particularly in its early years, militated strongly against the introduction of many of the complex features of the English legal system as it related to non-criminal matters. It was hardly likely, at least in the beginning, for example, that highly sophisticated methods for dealing with large property transactions and matters like this would be needed in the colony. Just as importantly, much of English civil law at the time was capable of being applied only by trained judges and lawyers. Even thirty years after the establishment of the colony there was still only a handful of lawyers of the colony who were able to do this.[107]

The other consideration that takes away from the supposed glory of the original system was that Forbes was a common law man. He did not encourage equity. As he said, '[i]n an early stage of Society, there is comparatively but little occasion for

---

[105]'the system of convict transportation was often a strong and sometimes a predominant influence in moulding the character of Australian society.' Alex C Castles, above n 11, 32.
[106]Davidson *The Invisible State: The Formation of the Australian State* (1991) in Andrew Fraser (ed) *Macquarie University School of Law: Law 112 Readings in the History and Philosophy of Law* (vol 4, 1997) 301.
[107]Alex C Castles, above n 11, 89.

resorting to a Court of Equity.'[108] Even Bennett says, 'the Act and Patent inaugurated the most barren period in the history of the Colony's equity law.'[109] Justice Therry commented that that in 1829 'half a dozen days in the course of a year would dispose of all the Equity business.'[110] In 1832, the Office of the Master in Equity was abolished because there was not enough work to occupy him. So even if there had been a practice that accorded to Bennett's measurement of fusion, it is questionable whether there were enough equity decisions being made to render this unification meaningful.

Indeed, in his later work, Bennett is more critical of Forbes. Whereas before he understood Forbes to have exercised a judicature system in accordance with his innovative flare, in 1974 Bennett traced the 'pretence that the Supreme Court was a loose amalgam of several courts, rather than a unified court'[111] to Forbes' Rules, particularly Rule 2 cited above; a rule that continued in effect throughout the period.[112] One can relate this to the introductory discussion about the legitimacy of judge-made law. Forbes' rules in the Bentham tradition are duly regarded as secondary sources of legislation. More importantly, Bennett describes them as pretentious; Forbes was wrong:

---

[108] Chief Justice Forbes to Governor Darling 15th December 1827, HRA Series I (Vol 13, 1920) 681.
[109] J M Bennett, *Equity Law*, above n 39, 35.
[110] 'Parliament of New South Wales: Legislative Council', *Sydney Morning Herald*, 27 August 1857, 3 cited in J M Bennett, *Equity Law*, above n 39, 36.
[111] J M Bennett, *A History*, above n 38, 63.
[112] After the Administration of Justice Act 1840, Rule 1 stated '[t]hat all the proceedings shall be commenced and continued in the Master's Office, and kept in a distinct and separate form; and shall be entitled in the Court, and its jurisdiction in which they shall be so commenced...' J Gurner, *The Equity Rules of Practice in the Chancery and Exchequer Jurisdictions of the Court* (1840).
After the *Equity Act* 1880 Rule 1 stated that '[a]ll proceedings shall be commenced and continued in the Equity Office, and each suit or matter shall be there kept in a distinct and separate form, entitled "In the Supreme Court of New South Wales In Equity." W Gregory Walker and G E Rich, *The Practice in Equity Being the Equity Act of 1880 and the Rules of Court Issued Thereunder* (2nd ed, CF Maxwell (Hayes Bros), Sydney, 1891), 94.

> Forbes, writing to the Colonial Office in March 1827, summarised the effects of the Act and Charter with a flourish. "I consider it as a given point", he said, "that, since the passing of the New South Wales Act, ... the laws of England are essentially the laws of New South Wales; that the government is essentially an English government; and that the Courts are essentially the Courts at Westminster." Though founded in truth, the assessment was extravagant ... At common law its Westminster paternity was plain; but, in all other significant respects, the Supreme Court was as different from the English tribunals as one could imagine.[113]

He sees it as paradoxical that Forbes would say this when the 'essential affinity' of the Supreme Court to the courts at Westminster was at its weakest point.[114] This is an example of Bennett's tendency to criticise early judges for not seeing their world in positivist terms.

Even with his ambiguous stance on Forbes CJ, Bennett maintains that it was the subsequent Supreme Court practice that defeated the clear intentions of an imperial statute by smothering 'the initial spirit of innovation.'[115] Bennett says that it was the advantages of the initial situation that the successive judges forgot about.[116]Castles and Currey also see Forbes' 'before his time' approach as thwarted by his brethren and successors.[117] It is curious to think that Forbes CJ, who co-drafted the *New South Wales Act* 1823, would have allowed our next two judges, Dowling and Burton, to subvert his lead if the intention of that Act had been to initiate a judicature system.

---

[113] JM Bennett, *A History*, above n 38, 31.
[114] Ibid 32.
[115] Ibid 33.
[116] J M Bennett, 'Historical Trends,' above n 50, 231.
[117]C H Currey, above n 82, 109-110.

The next part of the paper looks at the influence of these two judges on the duration of our possible (here presumed) judicature system.

The Supreme Court Practice - Justice Dowling and Justice Burton

Bennett emphasises the distinctly English and conservative mood that accompanied the arrival to the Bench of Sir James Dowling, in 1828,[118] and Sir William Burton, in 1832, but he maintains that these judges, joining Forbes CJ, upheld unity within the Court prior to 1837, that is, that his key feature of a double suit was not present in this period.

There is evidence to directly counter Bennett's belief that the Supreme Court pre-1837 did not institute separation. In *Doe Rem Harris v Riley*, 1832,[119] the Full Court held that

> this being an action of Ejectment, it must be determined strictly according to the rules of law, and we are precluded in the present mode of proceeding from any equitable considerations arising of out of the case. Whether a court of Equity upon a full disclosure of all the circumstances of the case, would afford the deft any relief is another matter, but in the present state of this case, being constrained to dispose of it according to the strict rules of law, we have no alternative but to give the Plf judgment according to law.[120]

The judges debarred the plaintiff from relying on equitable matters in a common law suit. This approach is consistent with *Castles v Bucknell*, 1837.[121] Here the defendant sought a common injunction on the 'equity side of the court'. For substantive reasons

---

[118]Bennett describes Sir James Dowling's 'judicial demeanour and perceptions as thoroughly English' in J M Bennett, *Lives of the Australian Chief Justices: Sir James Dowling* (2001) 3.

[119]*Doe Rem Harris v Riley*, 1832 (Unreported, Supreme Court of New South Wales, Forbes CJ, Stephen and Dowling JJ, 12 October 1832) <http://www.law.mq.edu.au/scnsw/Cases1831-32/html/doe_dem_harris_v_riley__1832.htm> at 15 August 2002.

[120]Ibid.

[121] *Castles v Bucknell*, 1837 (Unreported, Supreme Court of New South Wales, Dowling ACJ and Burton J, 24 June 1837) <http://www.law.mq.edu.au/scnsw/Cases1836-37/html/castles_v_bucknell__1837.htm> at 15 August 2002.

it was denied the remedy—its remedy at law being adequate. So, while this isn't an example of sending away a suitor, it is significant because it demonstrates that the treatment of the Court was as two 'sides'. This shows that at least as early as 1832, the practice in New South Wales aligned to the English separate courts system. This finding represents a major blow to Bennett's argument because it further reduces the importance of the early Court of proto-judicature by shortening the length of its existence to a maximum of eight years.

On the other hand, there remained inconsistencies. In *Thorpe v Smith*, 1834,[122] the Court said it was 'desirable to assimilate proceedings in the Court of Equity as much as possible with those of the Courts of Law',[123] which unsettles Meagher Gummow and Lehane's procedural prong. However, the Chief Justice also spoke of different 'sides' of the Court and the case was reported as 'In Equity.'[124]Bennett's test appears to have been satisfied in *Steven v Brigstock*, 1833.[125] In this case, the Full Court dealt with both common law and equitable remedies.[126] While the equitable remedy was refused, it was not on the basis that the applicant had come to the wrong court, but on the basis that there was no equity in the case. These features could indicate that the Court did exercise a fused system.

---

[122] *Thorpe v Smith*, 1834 (Unreported, Supreme Court of New South Wales, Forbes CJ, Dowling and Burton JJ, 8 March 1834) in *Decisions of the Superior Courts of New South Wales* <http://www.law.mq.edu.au/scnsw/Cases1834/html/thorpe_v_smith__1834.htm>at 15 August 2002.
[123]Ibid.
[124] Ibid.
[125] *Steven v Brigstock*, 1833 (Unreported, Supreme Court of New South Wales, Forbes CJ, Dowling and Burton JJ, 1 June 1833) <http: //www.law.mq.edu.au/scnsw/Cases1833-34/html/stephen_v_brigstock__1833.htm> at 15 August 2002.
[126]Ne exeat (equity) and replevin (common law).

This amalgam could be explained as evidence of Forbes' influence beginning to wane.[127] However, it would be misleading to suggest that it amounted to a conscientious and uniform reversal of court practice from a fused system to a separate one. Justice Dowling understood the *Australian Courts Act* 1828, which had replaced the Act of 1823, to mean that 'all the Judges of the Supreme Court have Equitable Jurisdiction collectively, and are supposed, unitedly, to administer the functions of an Equity Court.'[128] This suggests that Dowling did not necessarily regard the legislative directive as signifying that both common law and equitable matters could be heard at any time in any proceedings because all the judges were invested with both jurisdictions, but, rather, that all the judges were supposed to sit together as a distinct Equity Court. Therefore, refusal to entertain matters arising in the wrong 'Court' or jurisdiction may have been a logical inference from the Act. This may mean that the Court's practice of sending suitors away was not, as Bennett explains, a direct result of a 'fallacious extension' of the specialisation of the Court that occurred after 1837 with Willis J's arrival.

A major problem again is that neither of these judges were great equity lawyers.[129] For this reason, it is still difficult to assert anything of much certainty about the precise relationship between the two jurisdictions since fusion may have been by default. Chief Justice Dowling wrote, '[b]efore the arrival of Mr. Justice

---

[127] J M Bennett, *The Separation*, above n 37, 189.
[128] V&P (1842) 279 at 280 cited in JM Bennett, *A History*, above n 38, 279 footnote 11.
[129] This was the response in the *Australian* to Dowling CJ's acceptance of the position as Primary Judge in Equity in 1840: 'We believe that His Honour the Chief Justice never practised as an Equity lawyer, and that he understands about as much of the principles of legal Equity as one of out printers "devils."' J M Bennett, *Lives of the Australian Chief Justices*, above n 118, 124-5.

Willis in 1837 there were few practitioners who were conversant with that branch of the jurisdiction.'[130]

At this time, the Acting Puisne Judge during Forbes CJ's leave of absence, Dr Kinchela, remarked:

> the equity and Chamber business of the Court would even now occupy nearly the entire time of a Judge ... there are now in the equity side of the Supreme Court 157 cases, about 20 only of which have been decided, and the remaining number now remain in various Stages for the opinion and final decision of the court.[131]

As Smith says, '[i]t became obvious that the court needed "an Equity Judge so called, a man brought up to that branch of the profession."[132]

[130]C H Currey, above n 82, 240.
[131]HRA Series I, Vol 18, 376 cited in M L Smith above n 12, 801.
[132]V&P (1846) 405 cited in M L Smith above n 12, 801.

The Supreme Court Practice and Justice Willis

Enter Justice John Walpole Willis. The Englishman arrived in Sydney on 3 November 1837 to fill the vacancy that had been left by Forbes' retirement and Dowling's appointment to Chief Justice. Justice Willis is a key figure in the history of the Supreme Court of New South Wales and he is crucial to Bennett's argument. Bennett states that 'suggestions of dissecting the Court do not seem to have been made before the arrival of Mr. Justice John Walpole Willis.'[133] That is, it was Willis who instigated equity's English-style separateness. It has been shown that the view that the Supreme Court had hitherto maintained a unified system according to the demands legislation is a misleading simplification. It is not only questionable that the legislation stipulated such a system, but it has already been shown that cases indicating separation had occurred five years before his arrival.

Willis and Dowling had a notoriously dysfunctional, acrid relationship, for the most part, a result of Willis' personality. Bennett describes how Willis was 'high-handed, egotistical, "overspeaking", and suffering from a "functional derangement of the liver", which shortened his temper and warped his judgment, Willis was a complete misfit as a judge.'[134] He had been a 'troublemaker, a quarrelsome boy'[135] during his school years and he came to New South Wales having just been amoved from the King's Bench of Upper Canada after a mere nine months of service. While Dowling was reading a judgment, Willis would call out loudly such comments as

[133] J M Bennett, *The Separation*, above n 37, 4.
[134] J M Bennett, *Lives of the Australian Chief Justices*, above n 118, 111.
[135] H F Behan, *Mr Justice J W Willis* (1979) 3.

'[d]id you ever hear the like?'[136]When Willis sat alone, he parodied Dowling's 'curious sense of humour.'[137] Governor Gipps observed:

> It certainly did appear to me that on more than one occasion Mr. Justice Willis had, without any absolute necessity for them, made observations from the Bench, which could not be otherwise than offensive to the Chief Justice; and that he had sought, rather than avoided, opportunities for making known the little respect which he entertained for the Head of the Court.[138]

Bennett provides a vivid account of the unfolding drama between the two, which included backstabbing, trickery and a physical altercation in the judges' robing room,[139] climaxing in a quarrel over the Equity Justiceship position in 1840.[140]

As contemptuous as he was, Willis was 'one of the best known, if not the leading'[141] English chancery barrister and was well published in the field. [142] He accordingly regarded himself as the exclusive authority on equity in New South Wales and he condemned the administration of the equity side of the Court.[143]

> He confided to the Governor "it is true that I have had much more practical experience than my colleagues in (equity) matters" and he took this as sufficient justification to enquire "was it to be wondered then that being brought up and practising for the most part of a long professional life, in Courts of Equity and Civil Law, I should have discovered

---

[136] Bennett, *Lives of the Australian Chief Justices*, above n 118, 111-112.
[137] Ibid.
[138] Gipps to Lord John Russell, 3 January 1841, HRA Ser 1 Vol 21 160, 161-162.
[139] Ser 1 Vol. 21 HRA 160 at 161.
[140] J M Bennett, *Lives of the Australian Chief Justices*, above n 111, 111-120.
[141] H F Behan, above n 135, ix.
[142] Eldershaw, P R, 'Willis, John Walpole (1793-1877)' in Pike, Douglas (ed), *Australian Dictionary of Biography: 1788-1850* (vol 2,1967) 602, 603.
[143] J M Bennett, *Equity Law*, above n 39, 368.

flagrant errors in the proceedings of those who had never been previously accustomed to this Branch of Judicature and therefore could not be expected to know the principles and practice of this *science* ... by Inspiration? Was it surprising then that I found pleadings of the most adverse nature signed by *one* and the same Counsel that the suits were for the most part defective for want of proper parties, or that under the presidency of Chief Justice Dowling, in the case of "Sparks versus Weller" (the last case in Equity that came on for hearing before me) the Court appears to have acted in total ignorance of the difference between a *common* and a *special Injunction*.[144]

Unless one agrees with Bennett that the judges were merely humouring Willis,[145] it seems that it was because of his expertise[146] that an informal arrangement arose such that 'he was, in practice, the Judge in Equity.'[147] Gipps wrote, 'Mr. Justice Willis has, ever since his arrival in the Colony, been accustomed almost exclusively to hear Equity cases.'[148] Gipps describes the adjustment as a 'natural sort of arrangement...(though a private one).'[149] This meant that while formally one Full Court, or all the judges, were vested with the equity jurisdiction, in practice, one judge, primarily Willis, and then later other judges, sat by themselves to hear equity suits. This arrangement means that Meagher, Gummow &Lehane's summary that up to the *Administration of Justice Act* 1840 (Act 4 Vic No 22) 'the Court in banco had heard and disposed of equity matters'[150]is grossly inaccurate. Moreover, it marked a decisive shift towards English separateness as the division of labour meant that the equity jurisdiction operated like a separate court.

---

[144]Ibid 369 (citation omitted).
[145]J M Bennett, *Lives of the Chief Justices*, above n 118, 111.
[146]Stephen wrote to the Chief Justice that while he was experienced at Law, he had no confidence 'in a Court of Equity here.' JM Bennett, *Equity Law*, above n 39, 370.
[147]C H Currey, above n 82, 240.
[148]Gipps to Lord John Russell, 3 January 1841, HRA Ser 1 vol 21, 163.
[149]Ibid.
[150] Meagher, Gummow & Lehane, above n 75, [126].

Bennett accounts that Willis did not desire a mere informally specialised equity jurisdiction. He wanted this division of labour to be backed by legislation creating a separate equity court with one of the judges presiding as 'Chief Baron in Equity.'[151] Willis expressed this wish to Gipps.[152]Chief Justice Dowling and Alfred Stephen AJ (appointed during Burton J's leave of absence in 1839) did not support him. Bennett says this was in part because of his malicious character, but mainly due to costs.[153] Stephen pointed out that 'the necessary additional expence [sic] will be out of proportion to the expected advantage. There must be separate Officers and Salaries. Again, there will be produced by such a system, a clashing of interests, and of decisions, every way undesirable.'[154] He was certain that there would be not enough equity business to occupy the exclusive attention of one judge. Dowling also thought that a separate court would entail 'expensive machinery.'[155]He was satisfied with the present private arrangement and his main objection to Willis' plan was that there would be no appeal, except to England. With these arguments Gipps agreed.[156] In any event, both the other judges saw that the need was for a further puisne judge, not for another court. This led to Willis' insistence on a rotation arrangement between the judges.

The cases illustrate Willis J's desire for a specialised, separate equity jurisdiction. In *Blackman v Challinor*, 1838,[157] Willis sat 'In Equity'[158] and there is no evidence to

---

[151] V&P 1840, 169 cited by JM Bennett, *The Separation*, above n 37, 4.
[152] Gipps to Lord Russell, 3 January 1841, HRA, Ser 1 (Vol 21, 1924) 164.
[153]J M Bennett, *Equity Law*, above n 39, 39.
[154] Ibid.
[155]Ibid 369.
[156]CH Currey , above n 82, 241.
[157]*Blackman v Challinor*, 1838 (Unreported, Supreme Court of New South Wales, Willis J, 22 June 1838, <http://www.law.mq.edu.au/scnsw/Cases1838-39/html/blackman_v_challinor__1838.htm>at 15 August 2002.

suggest that he entertained any other matters besides the bill of foreclosure pertaining to infancy, that is, besides equitable matters. Willis met complaints about equity's notorious prolixity by adding, 'that if the Equity Rules lately promulgated be strictly acted upon, much time and money will probably be saved. Henceforth, any unreasonable delay cannot be attributable to the Court'. In *Russell v Jones*, 1838,[159] Willis J, sitting in banco, observed 'with much warmth' that the irregularities of proceedings, namely the request for leave to amend a bill which had been filed on the equity side of the Court, 'almost amounted to a contempt of Court.' He also criticised the solicitors for conducting themselves in both capacities as common law and equity 'officers'. The other judges concurred. This case exemplifies that the Court operated as separate 'sides' and that Willis strongly encouraged a divided profession to match. Willis exercised the equity jurisdiction separate from the other judges and, as both cases show, he insisted on a procedure more closely affiliated with England, even England of earlier times (a more strict separation).[160]

Nonetheless, it has already been demonstrated that he was not the first to institute double proceedings—these had occurred before the internal arrangement originated—which suggests that just because equity was separated within the Court, it does not mean that the judges consequently began refusing, for the first time, to entertain suits

---

[158]Ibid.

[159] *Russell v. Jones*, 1838 (Unreported, Supreme Court of New South Wales, In banco, Dowling C.J., Burton and Willis JJ, 26 March 1838) <http://www.law.mq.edu.au/scnsw/Cases1838-39/html/russell_v_jones__1838.htm> at 15 August 2002.

[160]In *Blackman v Challinor* , 1838, Willis J expressed his reluctance to follow previous proceedings of the Court that appeared to follow certain English cases, that he asserted were 'not the practice'. 1838 (Unreported, Supreme Court of New South Wales, Willis J, 22 June 1838, <http://www.law.mq.edu.au/scnsw/Cases1838-39/html/blackman_v_challinor__1838.htm>at 15 August 2002.

In *Russell v Jones* , 1838, he said that he knew that operating for both common law and equity offices was the practice in some instances in England; it was one, however, which he reprobated, and which as far as he was concerned, he should never permit to be adopted. (Unreported, Supreme Court of New South Wales, In banco, Dowling C.J., Burton and Willis JJ, 26 March 1838) <http://www.law.mq.edu.au/scnsw/Cases1838-39/html/russell_v_jones__1838.htm> at 15 August 2002.

brought in the 'wrong' court. So, contrary to Bennett's claim, there may not be a direct connection between Willis J's division of labour and the commencement of the refusal to entertain both common law and equity in the one suit. It is likely, however, that Willis' contribution to equity, as Bennett argues, led New South Wales onto a course that rendered the maintenance of our supposed judicature system less likely, although Bennett does not provide any cases until 1850 to fairly illustrate his impact. It is possible that Willis may have merely accelerated an already existing practice.

The Administration of Justice Act 1840

The New South Wales legislature recognised the informal arrangement through the creation of the office of 'Primary Judge in Equity' by section 20 of the *Administration of Justice Act* 1840.[161] The section allowed to Governor of New South Wales to appoint the Chief Justice 'or if he shall decline' one of the other puisne judges to sit 'without the assistance of the other judges' to determine 'all causes and matters at any time depending in the said Supreme Court in Equity.' Gipps wrote that the Act 'vests the Equity Jurisdiction of the Supreme Court in Sydney in one Judge; with a right of appeal to the Judges in banco ... It revives the office of Master in Chancery ... The Equity business of the Court having of late considerably increased.'[162]

Despite the statutory recognition of the separateness of equity by the designation of one judge,[163] Bennett maintains that the Supreme Court retained its unity for a number of years.[164] His basis for this rests heavily with the avenue for appeal. While the decrees and orders of such a judge were to have the same validity as if pronounced by the Full Court,[165] an appeal to the other judges of the Court could be made within fourteen days.[166] Bennett says that *McLaughlin v Little*[167] represents the view that appeals to the Full Court were not so much appeals as rehearings. It soon became necessary to amend the statute to allow the other judges to exercise the powers of the

---

[161] Act 4 Vic No 22.
[162] Gipps to Lord John Russell, acknowledged 8th July 1841, HRA, ser 1 vol 21,155.
[163] See also M L Smith's description of the Act; 'In effect, the Act merely gave legal recognition to the exercise of the equity jurisdiction of the court by one judge, rather than the Full Bench, an arrangement which was already in place,' above n 12, 803.
[164] J M Bennett, *The Separation*, above n 37, 6.
[165] *Administration of Justice Act* 1840, s 20.
[166] *Administration of Justice Act* 1840, s 21.
[167] *Stephen's Practice*, 281, ibid.

Primary Judge when he was ill or absent from Sydney. Appeals were no longer to be heard by the other two Judges, but by the Full Court.[168]

On another very technical note, Bennett says that the legislation did not vest the entire jurisdiction in one judge, but only delegated the jurisdiction to him (assuming there was no subsequent appeal).[169] In this way, the Full Court was not divested of its equitable jurisdiction. Stephen stated that only a limited part of the jurisdiction was delegated: 'the powers incident to the office of Lord Chancellor such as the issuing of commissions in lunacy and the administration of estates of idiots and lunatics, were left with the Court.'[170] Bennett says that this 'did not achieve what Willis and Kinchela had hoped – the appointment of a separate Judge to concentrate on Equity business. It merely modified the original basis of the Court's jurisdiction whereby the Full Court was the proper body to entertain all Equity matters.'[171]Bennett explains that the division 'was in no sense a separation of Equity from Common Law so that two Courts existed where only one had been before.'[172] Overlooking Meagher Gummow and Lehane's pronouncement that there was an analogous English separate court system in New South Wales from 1824, Bennett's theory is supported by evidence of Gipps. He explained:

---

[168]*An Act for the Better Advancement of Justice* (Act 5 Vic No 9) passed in September 1841
[169]J M Bennett, *The Separation*, above n 37, 24.
[170]*Stephen's Constitution and Practice of Supreme Court*, 281 cited by CH Currey, above n 82, 241.
[171]Bennett, *The Separation*, above n 37, 17.
[172]Ibid 17.

> Mr Willis urged the appointment of a separate Equity Judge, whom he proposed to call Chief Baron. The other Judges did not think that the Equity business was sufficient to give exclusive appointment to a Judge; and, as I coincided in this opinion, the Bill, which I introduced, did not propose to create a separate Equity Jurisdiction.[173]

For Bennett, the Act was not fatal to the fusion of the Court system in practical terms either. Indeed, he sees the way it operated as undermining any efficacy it could have had so far as an equity court was concerned.[174] While the common law judges did not take equity work, the Primary Judge in Equity still had to hear common law matters.[175] He says in practice the appeal avenue was crucial. When Milford, the Master in Equity, was asked in 1846 whether the public were generally satisfied with the decisions of the Equity Judge, he replied that it was 'difficult to say, but they abide the chance of having the decision altered by going to the three Judges.'[176]Another piece of evidence Bennett uses to show that the separateness of equity was not real is the new Office of Master.[177] He argues that it was not really a revival of the old Office since it was not confined to the chancery side of the court, but was a Master of the Court.[178] In short, Bennett says that all the Act did was make a division in the function of the Court into a specialist unit.[179]He also says, however, that this Act marked the beginning of an uncertain and imprecise relationship between the common law and equity jurisdictions.[180] In this way, with the designation of the equity jurisdiction to one judge, as long as that judge had common law powers and there was an appeal to the Full Court, the situation in New South Wales, according to

---

[173]Gipps to Lord John Russell, acknowledged 8th July 1841, HRA, ser 1 vol 21, 164.
[174]J M Bennett, *The Separation,* above n 37, 16.
[175]3 NSW V&P (1879-1880) 21, 24 (Hargrave J).
[176]NSW V&P (1846) 404 cited in JM Bennett, *The Separation*, above n 37, 26.
[177]*Administration of Justice Act* (1840) s 22.
[178]J M Bennett, *The Separation*, above n 37, 19.
[179]J M Bennett, *Equity Law*, above n 39, 43-44.
[180]Ibid 45.

Bennett, remained technically a fused system.

Supreme Court Practice after the Administration of Justice Act 1840

Bennett says that the Act signified that litigants sought remedies for the first time not from *the* court, but in a particular jurisdiction of the court.[181] He refers to the 1850 case of *Australasia v Murray* as the first formal declaration by the judges that they were incapacitated from administering equity in the common law jurisdiction, and vice versa.[182] The Full Court deemed itself to be the Queen's Bench, and Stephen CJ (who had become Chief Justice in 1844 after Dowling's death) announced that a plaintiff had 'no right to come into this court, seeking equitable relief.'[183] It has been shown that this judicial practice had commenced almost twenty years earlier, which undermines Bennett's connection between the concessions of the 1840 Act and an 'unruly' judiciary sending people away if they had come to the wrong court. Also, Currey argues that Bennett's point that only part of jurisdiction was delegated may have been the theory, but it did not work out in practice. The Primary Judge soon enough assumed the entire jurisdiction.[184]

---

[181] J M Bennett, *A History*, above n 38, 97.
[182] See also Bruce Kercher, *An Unruly Child* (1995) 96.
[183] *Australasia v Murray* (1850) 1 Legge's Reports 612, 614.
[184] C H Currey, above n 82, 241.

Historically Unjustified?

Assuming Bennett's account of history is accurate, that is, that the words of the Act instructed a judicature system, but that this intention was subverted by the informal arrangement of the judges (that was then partially recognised by the legislature), it is necessary to address his 'historically unjustified' argument. That is, it is necessary to inquire whether the transplantation of English customary law through the New South Wales judicial practice was an error or unwarranted. Bennett is unforgiving: 'The Supreme Court of 1823 had found no difficulty in performing its role as a single court with "fused" jurisdictions until the troublesome J.W. Willis came out to serve as puisne judge.'[185] Indeed, Bennett sees Willis as 'blatantly disingenuous'[186] in his efforts to mimic English separation, which was 'at the expense of public duty.'[187] He says:

> The Colony had never hitherto had much need for a "Chancery" side to the Supreme Court ... Nor was Willis' timing felicitous as the Colony was already drifting into the deep financial depression of the 1840s that would not conduce to the refinements and delays of Chancery litigation.[188]

He sees the motivation of the other judges in acceding to this 'strictly speaking'[189] unlawful course as simply to humour Willis so he could focus on matters more

[185]J M Bennett, 'Historical Trends,' above n 50, 231.
[186]J M Bennett, *Lives of the Chief Justices,* above n 118, 122.
[187]Ibid.
[188]Ibid.
[189]Ibid.

suitable to his temperament.[190] This supports Isaacs J's claim that this arrangement was not legitimate authority, but a 'mere internal arrangement'.[191]

Kercher is less single-minded about Willis J's role. He says that

> Willis was not the only one who wished to turn this preference for Englishness into institutional form. The New South Wales judges proposed in 1843 that there should be three separate courts, Queen's Bench, Equity and Exchequer, to reflect the structure in England, but nothing came of it.[192]

In fact, from 1840 until around 1870, the judges of the Supreme Court became increasingly more vocal about the need for a formally and completely separate equity jurisdiction. This began with the suggestion by the Bench for a fourth judge, an equity judge, with the title of 'Chancellor' to hear solely equity, ecclesiastical, insolvency and vice-admiralty matters.[193] In 1855, Dickinson J further proposed that 'the Court (should) sit in different buildings, so that there (might) be a distinct Bar to each.'[194]But, Kercher also says that the Court's self-created limitations that it would not entertain matters of common law and equity in single hearings could not be justified by reference to administrative convenience;[195]'it was simply a copy of an English division, which itself would be abolished twenty years later. The judges took a simple structure and made it complex.'[196]

---

[190]Ibid.
[191]*Maiden v Maiden* (1908) 7 CLR 727, 743.
[192]Bruce Kercher, *Unruly Child*, above n 182, 96.
[193]Chief Justice Dowling and the two puisne judges to Lord Stanley, cited by C H Currey, above n 82, 242-3
[194]V&P 1855(1), 690; 'I have always felt that the variety of jurisdictions entertained by the Supreme Court to be very distracting', he wrote in 1856 JLC (1) 204.
[195] But see J M Bennett, *A History*, above n 38, 97, where the arrangement is described as a 'convenient practice'.
[196]Bruce Kercher, *Unruly Child*, above n 182, 96-7

The main reason why this 'copy of an English division' was the justified or deserved course was the reception of English law. Castles says that through the law of empire English style courts and English-based law took root.[197] He also points to James Stephen Jr's encouragement that the colonies break away from English law and legal procedures,[198] but, unlike Bennett, he understands that the shortage of trained colonial personnel and the tendency of the European colonists, no matter what their political persuasion,[199] to look 'home' to the mother country for their ideas as doing little to create a context for innovations more appropriate to colonial needs.[200] Several normative and institutional aspects of the profession heavily biased an English-style legal system. As late as 1856 there were only 31 practising barristers and in 1896, when 144 were at the bar, only 63 made it to the bar picnic.[201] And it was English. Justice Therry observed that the New South Wales bar in the 1860s was 'a faithful reflect of the Bar in England.'[202]These features suggest that the situation wasn't about words of a statute that the judges were allegedly resisting, but about the everyday interactions of a small group of British men. It was not possible for colonially trained barristers to be appointed to the Supreme Court until after 1861.[203] Even then, Castles says that there were many instances where locally-trained lawyers showed greater

---

[197]Alex C Castles, above n 11, 18
[198]Ibid, 122.
[199]'When William Charles Wentworth [considered a radical agitator for colonial rights] wrote his poem Australasia in 1823 it was hardly surprising that he looked to his native country as one which would "float with flag unfurl'd, a new Britannia in another world.'
Ibid.
[200]Ibid.
[201]Alistair Davidson, above n 106, 301.
[202]Andrew Fraser (ed), *Macquarie University School of Law: Law112 Readings on the History and Philosophy of Law*, (vol 4, 1997), 326.
[203]By the *Supreme Court Act* 1861 cited by Alex C Castles, above n 11, 343.

enthusiasm for adopting and maintaining the judicial traditions of the mother country than some judges and lawyers who had come from Britain.[204]

Bennett explains the cases where separation was enforced as the judges and the growing number of practitioners arriving from England 'incorrectly assuming the existence of a division as rigid as to which they were accustomed.'[205] However, Simpson says that in 1800 the centralised judiciary and Bar in Westminster Hall 'was hardly larger than it had been in the fifteenth century'[206] and that 'remarkably little time was devoted to the consideration of matters of law.'[207]This enhances the justifiability of our English course since it undermines the feasibility of the colonial judges adopting an entirely novel system, which would mean losing these precious few English decisions, let alone the feasibility of a member of this small profession asking the colonial judiciary upon what 'historical' basis did they adhere to English forms.[208]The sentiment is evident in Dickinson J's comment in 1847: 'It appears to me that a colonial Court should always follow in the footsteps of the English judges along the paths they have indicated.'[209] In effect this meant a 'sometimes almost blind,'[210] 'almost slavish'[211] adherence to English court models and their legal procedures on the part of the colonial legal profession, but surely it was entitled to these English traditions and sensibilities. Even Forbes, whom is revered for his innovative colonial spirit, said that it appeared to him

---

[204]Ibid, 344.
[205]J M Bennett, 'Historical Trends', above n 50, 231.
[206]A W B Simpson, above n 55, 55.
[207]Ibid 56.
[208]J M Bennett, *The Separation*, above n 37, 179. Bennett may not have meant this to be taken literally.
[209](1847) 1 Legge's Reports 389, 391
[210]Alex C Castles, above n 11,122.
[211]Ibid.

> that this Colony has been designated by Providence to extend and perpetuate the language and literature, the laws and social institutions of England over the Australian world and to become an everlasting monument of glory to that country from which we are descended.[212]

Willis, no doubt, took this self-righteousness Englishness into his crusade to remedy the equity jurisdiction in the way he saw appropriate at the time. The view that New South Wales' historical path was incorrect becomes less compelling if these other sources of law are validated.

It is necessary to inquire whether it is suitable, as Bennett does, to judge the early judges by reference to the notion that legislation, rather than judicial practice and precedent, is commanding law.[213] Certainly, in England, the Reform Bill of 1832 and its successors precipitated a crisis of judicial legitimacy. Holdsworth says that Bentham's principles had gained an ever-increasing measure of acceptance in England at this time.[214]

> One [of the objectives of the Benthamite reformers in their redrawing of the United Kingdom's parliamentary map] was to replace the English tradition of judge-made common law – in which legal change (as Bentham saw it) was achieved by indirection, by fiction, and sometimes even by accident – with a rational program of legal reform by conscious enactment through Parliament.[215]

---

[212] C H Currey, above n 82, 200-201 (citation omitted).
[213] A R Blackshield, above n 22, 157.
[214] Sir William Holdsworth, *A History of English Law* (first published 1903-1966, 1966) 259.
[215] A R Blackshield, above n 22, 164.

However, the crises of judicial 'legitimacy' and 'authority' did not mean the same thing in early nineteenth century Colonial New South Wales as it did in England at the time, let alone in the mid-late 20th century when Bennett was writing. The New South Wales colony began when the dominant intellectual characteristics in England were concepts such as 'natural' or customary law; the political power of the Crown and the ruling aristocracy;[216]reform through a legalistic appeal to history and precedent.[217] At that time, England was not ready to receive Bentham's ideas on codification, the reduction of the power of the undemocratic 'Judge & Co' and parliamentary supremacy.[218] Hartz explains how a colony such as New South Wales, a fragment of England, 'loses the stimulus toward change that the whole provides. It lapses into a kind of immobility;'[219] A fragment cuts short the process of intellectual warfare and so it fixes at the point at which it left its mother country.[220] This suggests that New South Wales froze, as it were, clinging to the values of eighteenth century England. There were not the same pressures to allow New South Wales to foster the new ideas about legislative sovereignty that sprang in nineteenth century England. This is substantiated in the significant responsibility placed on the judges:

---

[216]Justice Dickinson promoted its establishment in NSW. He wrote,

> The existence of social distinctions and the transmission of hereditary honors are congenial to the inclinations of Englishmen, who do not change their dispositions by emigrating to Australia. The natural disparity of mankind in mental capacity, in bodily strength, and in continuous perseverance, must everywhere produce inequality in social condition. And they who possess superior social advantage will in the long run acquire political superiority; and the spirit of aristocracy will ever exist in society, and influence the action of government.

Dickinson, John Nodes, 'A Letter to the Honorable Speaker of the Legislative Council on the Formation of a Second Chamber in the Legislature of New South Wales' (WR Piddington, Sydney, 1852) 12.

[217]Sir William Holdsworth, above n 63, 8-23.

[218]Ibid, 12.

[219]Louis Hartz, *The Founding of New Societies* (1964) 3.

[220]Ibid 9.

> The all-important question of how much of English law should be established in a colony interested [James] Stephen a great deal. Generally speaking, he held that this must vary with time and place, and that the judges rather than the legislators should decide on this point.[221]

This role was magnified because there was no responsible government in New South Wales until early in the second half of the nineteenth century. Chief Justice Stephen was strongly of the opinion that any reform could be more satisfactorily implemented by Rules of Court than by Acts of Parliament.

> Judges possess this advantage over the Legislature in such matters...The one and the same power initiates, matures, watches over and from time to time alters, as experience dictates, or wholly abrogates, that code of procedure which it peculiarly devolves on the Court to observe, and which, if it could be altered by the Council, might, in the meantime, produce very great mischief, or, if subject to discussion there only, might lead to very perplexing conflicts of opinion and possibly hasty changes equally undesirable.[222]

It is inappropriate for Bennett to question the legitimacy of the practice of the judges using arguments about legislative command, if these arguments were not appreciated at the time. The judiciary was given the responsibility to apply English law, which led to the English-style separateness of equity in accordance with the professional climate of colonial New South Wales. Whatever the explanations, surely the analogy of the New South Wales judiciary with England, far from being 'false,' is correct because it was the judicial commitment expressing the dominant view of law.

---

[221] Paul Knaplund, *James Stephen and the British Colonial System 1813-1847* (1953) 231.
[222] Stephen to Deas Thomson, 28 May 1850, cited by C H Currey, above n 82, 459-460.

1850s Reform

Legislation was enacted during the 1850s based on English reforms,[223]which went some way towards 'bridging the gap between the administration of law and equity in the court.'[224] Two statutes passed in 1852[225] and 1853[226] introduced major changes in the equitable jurisdiction.[227] Proceedings in equity were to be commenced more simply without the use of parchment.[228] The Primary Judge in Equity was also empowered to determine some common law issues arising in equitable proceedings without sending a litigant off to the common law jurisdiction.[229] Castles states that these procedural changes served to make it easier to adopt the Judicature Acts.[230] Baker also describes the reform as effecting assimilation and so 'fusion was a relatively slight step.'[231] However, Brown says these reforms served to confirm that the fusion of law and equity was impossible while two sets of procedure existed,'[232]which seems to support Meagher, Gummow & Lehane's thesis.

However, overlooking Meagher, Gummow & Lehane's two-step test, New South Wales in terms of its legislation technically stood somewhere in between England's court system pre-*Judicature Acts* and a court of complete jurisdiction; in a hybrid-

---

[223]Namely the *Common Law Procedure Acts* of 1852, 1854 and 1860; *Chancery Procedure Act* 1852; *Chancery Amendment Act* 1858; *Chancery Regulation Act* 1862 cited by Alex C Castles, above n 11, 350-1.
[224]M L Smith, above n 12, 804.
[225]*Equity Claims Act* 1852 cited by Alex C Castles, above n 11, 352.
[226]*Equity Practice Act* 1853. Ibid.
[227]Changes were also introduced in the common law jurisdiction when New South Wales adopted the basic features of the first two British *Common Law Procedure Acts*. It became possible for injunctions to be issued on occasion in relation to proceedings at common law. Equitable defences could also used in the common law jurisdiction of the Supreme Court: *Common Law Procedure Act* 1853; *Common Law Procedure Act* 1857 Ibid.
[228]*Equity Practice Act* 1853, s 1, Ibid.
[229]*Equity Practice Act* 1853 s 49, Ibid.
[230]Ibid 353.
[231]J H Baker, *An Introduction to English Legal History* (3rd ed, 1990) 131.
[232]Elizabeth Brown, 'Equitable Jurisdiction and the Court of Chancery in Upper Canada' (1983) 21 *Osgoode Hall Law Journal* 275, 303.

fusion. While in its everyday operation, the Court appears to have been closer to hybrid-separation or akin to England's separate court system. Foster, one of the lawyer members of the Legislative Council, described the situation: 'we had…one Court called the Supreme Court, which exercised jurisdiction at common law and in equity, but our court was divided as completely as if the Judges were totally distinct in the exercise of their jurisdiction.'[233]

[233] 1 NSWPD (1879-80) 472, 476.

The Judicature Acts

Beginning in the 1870s, England and then the Australian colonies, except New South Wales and Tasmania,[234] introduced major changes in the organisation of civil court proceedings.[235]These were the Judicature Acts.[236] Bennett's central argument does not include an inquiry into why New South Wales, which had the 1850s reform in place, did not take the 'slight step' to become a court of complete jurisdiction. He does not need to since it is outside his parameters that include only the enactments that were in force. Furthermore, it would strain his logic that there was a judicature system all along. There was, however, a debate in New South Wales about whether it should adopt a judicature system and it is important to understand why it did not follow the English lead.

Indeed, there is evidence to show a marked shift in opinion against the separate 'courts,' as they were now generally perceived, at this time. As early as 1870, Owen, 'barrister-at-law'[237]and Council member, said that he had no doubt 'as to the benefits of the amalgamation of the administration of the law into one jurisdiction'[238] and Allen, also a member of the Council, firmly stated that he would have preferred to see a Bill to 'do away with what was now a nuisance—the Court of Equity'.[239] The press distinctly stated what would become primary Bennett's criticism regarding New

---

[234] Tasmania did not introduce a judicature system until 1932.
[235] Alex C Castles, above n 11, 353-4.
[236] The judicature system (based on the English *Judicature Acts* of 1873 & 1875) was introduced in Queensland in 1876, Western Australia in 1880 and Victoria in 1883. South Australian anticipated the English reforms in its own legislation of 1853 and 1866. It adopted the English legislation in 1873.
[237] 3 NSW V & P (1879-80) 21 at 59.
[238] 'Common Law Procedure Bill', *Sydney Morning Herald*, 1 April 1870, 2.
[239] Ibid.

South Wales' failure to exploit the potential of the *New South Wales Act* 1823. In 1870, for example, the Sydney Morning Herald inquired:

> Why cannot the judges do with greater simplicity and promptitude in one court, what they do more cumbrously and with greater delay by the operation of two courts? ... if we had not been so wedded to English traditions—if we had not suffered from the prejudice that it is impossible to acclimatize all that is best in English jurisprudence without importing at the same time the weeds that have grown up round it—we should not in these young colonies have planted distinctions which ... have nothing whatever to do with Australian development ... We have only encumbered ourselves for years with a duplicate machinery which even the old country is beginning to get weary of. In each of these colonies we began with one judge; our jurisprudence would have gained much, and we should have set an example to the old country ... if, when the judicial business compelled the multiplication of judges, we had abstained from dividing their functions.[240]

While the other parts of the British empire were introducing a judicature system, New South Wales initiated the *Equity Act 1880*.

[240] 20 September 1870, 4, cited by J M Bennett, *A History*, above n 38, 60.

Why didn't New South Wales introduce a Judicature Act in the 1870s-1880s?

There are five general reasons why New South Wales did not adopt a Judicature Act:

1. *Reception of English Law*

Castles says that English law became one of the chief sources of law in this country[241]so it is ironic that New South Wales did not, as it had hitherto, blindly copy the English reform. Bennett does consider the New South Wales stance in one of his later writings.[242] He sees it as an example of our critical rejection and 'independent spirit', in contrast with Western Australia's 'artless adoption of English precedent'.[243] He found that by the 1880s colonial lawyers were disinclined to follow England slavishly as the '[c]olonies had very nearly become absolute masters of their own legislative destinies.'[244]There remained, however, an element of subservience to England in so far as New South Wales intended to wait and observe how the novel practice settled in England. Parkes explained:

> In view of the conflicting opinions held as to the beneficial working of the Judicature Acts of England, and the many points in which those Acts are considered defective as increasing the delays and expense of litigation, it is deemed advisable to await the result of further experience before adopting the legislation referred to.[245]

---

[241]Alex C Castles, above n 11, 1.
[242]J M Bennett and J R Forbes, above n 85. This article does not pertain to his 'historically unnecessary' argument.
[243]Ibid 174.
[244]Ibid 180-1.
[245]5 NSWPD 437 cited by J M Bennett, 'Historical Trends', above n 50, 232.

As Brown says of the experience in Upper Canada, many lawyers were reluctant to urge the completion of judicature because of the chaotic state of practice and procedure that had followed in England in 1875.[246]

2. *Too Much Work/ Too Difficult*

The fusion of common law and equity was a huge task and, as it was not the only place where reform was deemed necessary, it was easily put off. The Legislative Assembly was of the opinion that there ought to be an Act to simplify proceedings in the Supreme Court in all its jurisdictions, except criminal and admiralty, and that such an act should abolish the distinctions between actions at law and suits in equity; distinctions between barristers and solicitors; all special pleadings; all variety of costs; and all Court vacations which delay or defer the business of the Court.[247] The New South Wales Law Reform Commission appointed in July 1870 had the purpose to propose such amendments, [248] but at the outset admitted that the preparation of any Bills with the object of consolidation 'is necessarily a work of time.' The matters of urgency were several and did not include a Judicature Act. [249]

Bennett's argument that the original statute was a ready made judicature system was raised. Parkinson, solicitor in equity, explained:

---

[246]Elizabeth Brown, above n 232, 310.
[247]1 NSW V& P (1869) 69, [16].
[248]2 NSW V&P (1870-1) 115 at 117.
[249] the following subjects appeared to us urgently to demand attention. These are the Laws affecting the treatment and care of the Insane and their property-the Insolvency and Jury Laws,- the several enactments affecting Procedure before Justices, in or out of Sessions,-and the Criminal Law; all requiring consolidation, and admitting if not calling for extensive amendment.
Ibid at 118.

> Really you have here what it took us years to accomplish, namely, the amalgamation in one Court of Law and Equity—you have it in theory; but by an Act of Parliament, and by rules made, you have practically severed the two Courts, and you have made them as distinct as the old Court of Chancery and our Common Law Courts. Nevertheless you have the one Supreme Court, and it requires a very slight modification to give all the Judges co-ordinate jurisdiction and to make rules and regulations analogous to our English procedure.[250]

But, it was unfathomable that any reversal could be this simple.[251] Most were discouraged, as they had been in Upper Canada, by the 'seemingly insurmountable practical difficulties involved in developing a uniform procedure.'[252] In fact, as Darley said, his Bill, that would become the *Equity Act 1880*, 'had nothing to do with the proceedings on the common law side of the Court.'[253] That it only addressed one side of Court made it impossible to effect extensive reform.

Even though the Darley Bill was viewed as a 'mere stop-gap, a temporary measure,'[254]part of the reason that it was passed was that it met the worst anomalies, the most obvious being the mode of answering;[255]The Master's Office having been described as 'a disgrace to the Colony.'[256] The other reason derived from the founded concern that if the initiative was not seized, the profession would have to wait for a number of years. This had been the experience of the Butler Bill, which was dropped

---

[250]3 NSW V&P (1879-80) 21-63, [298].
[251]Hence the Chairperson's response: 'That is, under the powers conferred by the present Act of Parliament the Judges could do what in England has been done by law?' Ibid [299].
[252]Elizabeth Brown, above n 232, 294-5.
[253]1 NSWPD (1879-80) 472, 479.
[254]3 NSW V&P (1878-80) 21, [310].
[255]Evidence had been taken before the Master rather than the judge.
[256]John Parkinson 3 NSW V &P (1878-80) 21, [281].

out of desire to bring about 'a more comprehensive measure'.[257] Owen expressed, '[i]f there was any chance of the Judicature Act passing in its entirety I would very much prefer seeing it adopted; but if we are to wait a number of years before that is introduced I should like to see this Bill of Mr. Darley's passed as soon as possible.'[258] Sir George Innes said that '[h]e was tired of hearing measures of reform objected to on the ground that they did not go far enough.'[259]

3. *Too Much Reliance on Individuals in the Face of Both Parliamentary and Legal Apathy to Reform*[260]

Chief Justice Stephen was the key individual when it came to reform, shouldering the Law Reform Commission's role of research and investigation. He produced one Bill to consolidate the criminal law, which was, in substance, later enacted, but interest in a Judicature Act lapsed.[261] This was in part due to lack of attention on the part of the legal profession. Few of the lawyer members of Council were even aware that the judicature systems had been adopted in other Colonies; few of them had read the English Act. As Johnson, attorney and solicitor of the Supreme Court, said, 'I have not had time to study the Judicature Act. When it is in force here it will be time enough for me to consider it.'[262] Owen observed that 'much depended upon the character and care of learned gentlemen who took charge of bills of this kind.'[263]

---

[257] 1 NSWPD (1879-1880) 472–480, 473.
[258] 3 NSW V&P (1878-80) 21, [609].
[259] 1 NSWPD (1879-80), 472, 479.
[260] J M Bennett, 'Historical Trends,' above n 50, 212.
[261] Ibid 213.
[262] 2 NSW V&P (1879-80) 21, [265].
[263] 'Common Law Procedure Bill', *Sydney Morning Herald*, 1 April 1870, 2.

'Parliamentary sloth'[264] was a major hindrance.[265] 'After Responsible Government, elective politicians thought legal procedure and jurisdictions of courts not to be vote-catching issues.'[266] Stephen described law reform as 'ungracious and unpopular,'[267]hence the failure of the Bill's predecessors to get through the legislature.[268] Bennett sums it up: 'No individual had the interest or the political strength to further the cause of the Judicature Acts. At the critical time the powerful influence of Stephen and Darley, and the antipathy of Parliament, outweighed all other forces.'[269]

4. *Awkwardness of the Current System*

England's *Judicature Acts* were not directly applicable to New South Wales. Their fundamental purpose was that the several Court of Chancery, Queen's Bench, Common Pleas, Exchequer, Admiralty, Probate, Divorce and Bankruptcy, be 'united and consolidated together' to form 'one supreme court of judicature.'[270] Furthermore, the Evidence of the Select Committee on the Equity Branch of the Supreme Court[271]suggests that the common law and equity jurisdictions were not separate enough to be perceived as analogous to England so as to warrant a Judicature Act. This was not merely based on legislative technicalities. The distance between courts

---

[264]J M Bennett, *Equity Law*, above n 39, 51.

[265] The role of the legislature in the prolixity of law reform cannot be overstated. For example, in 1858 a frustrated, even enraged, Therry J tried to make a deal with the Legislative Council that all the judges in the Legislative Council would vacate their seats in return for passing a bill for the appointment of an equity judge. 'Parliament of New South Wales: Legislative Council', *Sydney Morning Herald*, 16 December 1858, 4.

[266]J M Bennett and J R Forbes, above n 242, 174.

[267]1 NSWPD (1879-80) 472, 474.

[268]Owen's Bill had failed because he had no parliamentary sponsor. It was introduced into the Assembly twice by the late Mr Butler in 1873 and 1874, then taken up by Darley in 1879, but allowed to lapse by the Legislative Assembly. J M Bennett, 'Historical Trends,' above n 50, 231.

[269]Ibid.

[270]This was emphasised by Darley during the second reading of the Bill. 1 NSWPD (1879-80) 472, 473.

[271]3 NSW V & P (1879-80) 21-63.

in England was not an issue in New South Wales so there were less practical imperatives against demarcation. When Hargrave, Senior Puisne Judge of the Supreme Court and Primary Judge in Equity, was asked whether he would recommend the adoption of the Judicature Act he replied, '[n]o doubt the Judicature Act has brought the Common Law and Equity Judges into close contact ... and that has done a great deal of good. ... But we have that here already.'[272] He understood that the object of the Judicature Acts was not to bring about fusion between the administration of common law and equity, but to 'do what we have done—to create a new Court, and to subdivide its business.'[273] In Hargrave J's view, there wasn't any material difference between England post-*Judicature Acts* with one Court and several divisions and the situation in New South Wales. Similarly, Darley asserted that it was a mistake to think of the English reform as bringing about a complete fusion between law and equity; 'The Courts and Judges remained separate, as before'.[274] This relates to Stephen's oft-cited ' great bungle' perspective. While Stephen was now in favour of law and equity being brought into one system, he thought that 'there had been a great bungle...He could never conceive, and never heard a reason why the ancients courts should be abolished to have one court. The division remained as before.'[275]

Although they ignored the scope of the changes introduced by the reforms for the character of civil proceedings, particularly for the litigant,[276] it shows that New South Wales was in a peculiar position; in a half way house. It was not separate enough to

---

[272]Ibid [21].
[273]Ibid [47].
[274]1 NSWPD (1879-80) 472.
[275]Ibid 474.
[276]'The divisions of the High Court of Justice 'were in no sense separate "courts". A judge of one division might be required by the Chancellor to sit in another, and no injunction or prohibition was to issue from one part of the Supreme Court restraining or prohibiting proceedings in another.' Radcliffe and Cross, *The English Legal System* (5th ed, 1971) 289.

necessitate the English overhaul, but it was separate enough to maintain archaic complexities. It is almost as though NSW thought it had the best of both worlds in its hybrid fusion or hybrid separation since it had one Court with divisions (like England had obtained), but it had a specialist wall between these divisions.[277] Justice Kearney said in 2002 that a Judicature Act was thought not entirely necessary in New South Wales because there were not two courts, just a high barrier between two jurisdictions.[278]

5. *Equity Purists/ Fusion Fallacy*

Justice Hargrave's evidence embodies the fear that fusion would result in chaos in the application of substantive law. When he was asked whether the equity business could be carried on in the same mode as the common law, he replied:

> No ... The subject matter of a suit in Equity is totally different from that of a suit at Common Law: it relates, for instance, to the conduct of trustees ... Scores of things depend simply upon equity and fair dealing. There is not the stringency of the Common Law.[279]

He reiterated that it was not possible for there to be common procedure since '[y]ou cannot cut down Equity bills to a common form, the same as pleadings in an action for trespass or trover.'[280] He did not approve of the English course, commenting, '[w]ell, my impression is that the decisions of the English Courts will not be such

---

[277]Foster saw judicature reform as necessary because 'our court was divided as if the Judges were totally distinct in the exercise of their jurisdiction' 1 NSWPD (1879-80) 472, 476.
[278]Interview with Justice Kearney, *Supreme Court Equity Division 1978-1992*, (Sydney, 1 July 2002).
[279]3 NSW V & P (1879-80)21, [22].
[280]Ibid [40].

good expositions as hitherto; they will go more upon fact ... if that is the working of the Judicature Act I would rather keep where I am.'[281] 'The fusion of Law and Equity ... will introduce uncertainty.'[282] Similarly, Johnson described common law and equity being as distinct as the criminal law and civil law.[283] Equity was a specialty that needed to be preserved. He said, 'I think as a rule it would be much more advantageous to the community to have for a Judge in Equity a man who had devoted his time to Equity practice.'[284] Darley said that 'Equity required a peculiar class of mind.'[285] In his view, the assimilation of pleadings was a 'mistake, and there were those in England who held a like opinion.'[286] Opposition from the profession was not prevalent solely in New South Wales; it had occurred in England and in Upper Canada as well.[287]

---

[281]Ibid [113].
[282]Ibid [47].
[283]Ibid [245].
[284]Ibid [252].
[285]1 NSWPD (1879-80) 472, 473.
[286]Ibid.
[287]As Parkinson has described,

> The reform [in England] was not without its opponents. Indeed, serious concerns were expressed by Chancery practitioners. They feared that the existing equitable principles would be administered by judges trained only in common law rules, and that this threatened the very existence of a distinct equity jurisprudence.

Patrick Parkinson, above n 80, 70;
Brown said of the Canadian experience that common law and Chancery practitioners dreaded the idea of adopting the more notorious of the other's practices. Elizabeth Brown, above n 232, 310.

The Equity Act 1880

The *Equity Act* 1880 (44 Vic No 18) enabled the Governor to appoint one of the Supreme Court Judges as 'Primary Judge in Equity'[288] to exercise the jurisdiction of the Supreme Court in equity for the purposes of disposing of 'motions and matters in relation thereto'.[289] The Primary Judge's decisions were as valid and binding as if made by the Full Court.[290] Any other Supreme Court judge could exercise the jurisdiction in the absence or illness of the Primary Judge and it was also permissible for the Primary Judge to request that any two other judges of the Court sit with him to assist with difficult legal points.[291]

The *Equity Act* 1880 adopted the material provisions of the *Rolt's Act* 1862 (UK)[292] and *Lord Cairns' Act* 1858 (UK).[293] Section 4 provided that

> in any suit of proceeding in Equity wherein it may be necessary to establish any legal title or right as a foundation for relief the Court shall itself determine such title or right without requiring the parties to proceed at law to establish the same and whenever any question now cognisable only at law shall arise in the course of any proceeding before him the Judge shall have cognisance thereof as completely as if the same had arisen in a Court of Law and shall exercise in relation to such title right or question all the powers of the Supreme Court in its Common Law Jurisdiction and no suit in Equity shall be open to

---

[288]Changed to Chief Judge in Equity by 55 Vic. No 26 s 4 in 1892 .
[289]*Equity Act* 1880 s 1.
[290]*Equity Act* 1880 s 1.
[291]*Equity Act* 1880 s 5; W Gregory Walker and G E Rich, G E, above n 112, 4.
[292] Section 4 was based on 15 & 16 c 68 s 62 and 26 Vic c42 (Rolt's Act), s1. M L Smith, above n 12, endnote 132.
[293]Section 32 was based on Lord Cairns' Act 1858 (32 & 22 c 27), ibid, endnote 133.

objection on the ground that the remedy or appropriate remedy is in some other jurisdiction.[294]

Section 32 stated that

> in all cases in which the Court of Equity has jurisdiction to entertain an application for an injunction against a breach of any covenant contract or agreement or against the commission or continuance of any wrongful act or for the specific performance of any contract covenant or agreement it shall be lawful for the Court if it shall think fit to award damages to the party injured either in addition to or in substitution for such injunction or specific performance and such damages may be assessed in such manner as the Court shall direct.[295]

Bennett acknowledges defects that the Act overcame, namely,

> the impossibility of securing trial by jury with viva voce evidence, the inability to obtain damages in a suit seeking equitable relief, the lack of a satisfactory procedure by counter claim, the tedious and futile device of Interrogatories and the waste of time involved in Exceptions'[296]

and generally commends it as an improvement.[297] At the same time, Bennett regards the Act as reinforcing, even enhancing, New South Wales' historical mistake, since it made 'irretrievable the simple unification of the Supreme Court as constituted in

---

[294] W Gregory Walker and G E Rich, above n 112, 2.
[295] Ibid 29-30.
[296] J M Bennett, *Equity Law*, above n 39, 51.
[297] Ibid.

1823.'[298] The Act signified the legislature's acknowledgement of the judiciary's 'unjustified' conservation of separation. He says that the introduction of the Rolt's and Cairns' Acts 'accepted the separation of Law and Equity as axiomatic and then proceeded to afford some remedy by sections 4 and 32 for the litigant who would otherwise be obliged to seek relief in two Courts.'[299] In fact, he says the inclusion of these provisions was a direct result of the Full Court's insistence on separation.[300] Foster had also pointed out at the second reading of the Bill that the direct tendency of the Bill, despite intentions to the opposite effect, was to 'cause common law and equity to diverge more than they had diverged hitherto in this country.'[301]

Bennett maintains that formally there remained a unified system. He says at the outset the aim of the act was not to reunite two courts, but rather invest one jurisdiction of the Court with some of the powers of another jurisdiction.[302] The fused system was not lost since the Primary Judge, soon called the Chief Judge in Equity, maintained powers at common law. Bennett relies on the circumstance that in the 1880s the number of judges on the bench was so small that the Full Court would probably contain the same members whatever jurisdiction it sat as a practical indication that they were meant to be a single Court applying a single law.[303] He also says that the Supreme Court 'could only be described as having been dismembered. The sole reminder of its plenary authority lay in the direction of appeals from the several jurisdictions to the Banco Court.'[304] Smith says that '[l]ike the Acts preceding it, this Act did not divest the Full Court of its equitable jurisdiction at first instance,

---

[298] JM Bennett, *A History*, above n 38, 232.
[299] J M Bennett, *The Separation*, above n 37, 6.
[300] J M Bennett, *Equity Law*, above n 39, 323.
[301] 1 NSWPD (1879-80) 472, 476.
[302] J M Bennett, *Equity Law*, above n 39, 81.
[303] J M Bennett, *Equity Law*, above n 39, 323.
[304] J M Bennett, *The Separation*, above n 37, 179.

but merely empowered the Primary Judge … to exercise the equitable jurisdiction of the court sitting alone.'[305] Moreover, Bennett describes the Act as a prime example of colonial legislation that he characterises as having had little to do with the jurisdictional basis of the 'Equity Court', but, rather, its procedure.[306] This again relates to the different definitions of 'judicature system'.[307] Bennett's positivist view of history is represented as the 'proper' view of the Supreme Court saying, '[i]ndependent though the Equity Court had thus become, it could not properly be regarded as in any way severed from the Supreme Court of New South Wales. It was only, as it were, a functional limb of a developed and vital body.'[308]

Whatever the technical result of the Act and Bennett's stream of 'ought,' the judges at the time did not believe they had a judicature system to preserve. In fact, they interpreted the 1880 Act as a conscious decision not to adopt a judicature system.

---

[305]M L Smith, above n 12, endnote 131.
[306]J M Bennett, *The Separation*, above n 37, 35.
[307]See above, introductory paragraphs on *New South Wales Act* 1823.
[308]J M Bennett, *The Separation*, above n 37, 36.

The Supreme Court practice 1880 –1900

The judiciary upheld the separateness of equity through a very strict interpretation of the *Equity Act* 1880. Any belief that the Act paved the way for a court of concurrent administration rested in section 4 (cited above). In his *Equity Manual 1880*, Parkinson described this section 'as the most important and beneficial in the whole Act as tending to enable complete and sweeping justice to be done by the Judge in Equity suits unfettered by any question of jurisdiction, and untrammelled by technicalities.'[309] Primary Judge in Equity Owen first considered the section in 1888 in *Horsley v Ramsay*.[310] He explained that

> section 4 must be read in connection with section 32. The latter section only gives the Court a limited power to grant damages. If this Court, under section 4, had power to entertain suits in respect of breaches of contract in the same way as Courts of Common Law, it would have been unnecessary to have conferred the power under section 32. But as these powers are expressly given, and only to a limited extent, I think that the Court's jurisdiction as to damages must be measured by the limits under section 32, and not by the plenary powers under section 4.[311]

In other words, section 32 (cited above) was an implied limit on the scope of section 4, which meant that only suitors with a tenable equity could raise issues of law in the equity court.[312]

Likewise, in *Want v Moss* (1891),[313] he expounded that

---

[309]preface ii, cited by J M Bennett, *Equity Law*, above n 39, 78.
[310]10 NSWR Eq 41.
[311]10 NSWR Eq at 45.
[312]See also *Fell v NSW Shale and Oil Company* (1889) 6 WN 51.

if this were merely a cause of action at law, I should hold that it could not be tried before me as Primary Judge. To enable me to deal with questions of law it is not enough to allege an untenable equity in the statement of claim. If that were so, any action at law could be brought into equity by alleging some equity which was wholly untenable, but which was alleged only to give a colourable pretext for bringing the case before the Judge in Equity, instead of before a jury at law.[314]

A further statement[315] is contained in *Cameron v Cameron* (1891).[316]

Then it is said that under section 4 of the *Equity Act* this Court is placed in much the same position as the Courts of the Chancery Division in England. Section 4 does not make this Court a Court of law. The *Primary Judge* sits in this Court to exercise the jurisdiction of the Supreme Court in Equity, and it is only for that purpose that he can sit here, but under section 4 his powers in any suit or proceeding in equity are extended so as to enable him to deal incidentally with matters arising in an equity suit, which but for that section must have been dealt with by the common law courts. The equitable plea, therefore, that the defendant is a purchaser for value without notice is still a good plea in this Court notwithstanding the enlarged powers conferred on the Court by the 4th section.[317]

As far as section 32 was concerned, in *Griffen v The Tonkin Mining Company*,[318] decided shortly after 1880, it was held that where the 'Court of Equity' could not decree the specific performance of a contract, it had no power to grant damages under

---

[313](1891) 12 NSWR Eq.
[314](1891) 12 NSWR 135.
[315]See also *Ricketson v Smith* (1895) 16 NSWR Eq 221, *O'Rourke v The Commissioner for Railways* (1886) 7 NSWR Eq 67, *O'Connor v North* (1887) 9 NSWR Eq 88, *Merrick v Ridge* (1897) 18 NSWR Eq 29; *Crampton v Foster* (1897) 18 NSWR Eq 136.
[316](1891) 12 NSWR Eq 135.
[317]Ibid 141.
[318]Unreported, cited in *Horsley v Ramsay* 10 NSWR Eq 41, J M Bennett, *Equity Law*, above n 39, 327.

section 32. However, if the 'Court' found an initial equity it could award damages, though they were not sought in the statement of claim.[319] This standard Lord Cairns' jurisprudence was followed in *Weily v Williams*,[320] but here Owen CJ affirmed that section 32 did not invite an extension to the judicature system.

> No doubt the power of this Court is not the same as that of the Chancery Division in England in respect of damages, in as much as the Chancery Division has the same power of granting damages as a Court of common law ... In this colony there is not the same amalgamation of the jurisdictions. Here the only power of the Court of Equity to grant damages is under those sections of the Equity Act.[321]

[319] *Griffen v Mercantile Bank* (1890) 11 NSWR Eq 242.
[320] 'If the Court sees that a contract is one that the Court could not specifically perform...then the Court cannot grant damages' (1895) 16 NSWR Eq 190 at 195 (Owen CJ in Eq).
[321] Ibid.

Historically Unjustified?

It is certainly ironic that while the mother country adopted a judicature system, New South Wales raised the barriers around equity higher than they had ever been before.

However, Bennett says the 'long series of cases which followed [the *Equity Act 1880*] were...historically unnecessary'[322] since it said that the equity branch of the Supreme Court was bound to apply only equitable principles such that a suitor might be unable to secure relief on the ground that his redress lay in the other Court and '[n]othing could be more repugnant to the concept of a single Court of judicature in New South Wales.'[323] Echoing Bentham, he criticises the practice as a matter of chance for the suitors; justice depended on whether they approached the judges at an opportune time.[324] He states that the dictum that there was not the same amalgamation of jurisdictions in the Colony as there was now in England was 'the opposite of the truth'.[325]

> The fallacy in this judgement surely lay in the suggestion that the Primary Judge exercised the jurisdiction "of the Supreme Court in Equity". There was no historical justification for that proposition and at all times the Primary Judge, or Chief Judge in Equity, had power to exercise the jurisdiction of the Supreme Court. To suggest that the Primary Judge in that capacity was powerless to exercise other jurisdictions that the

---

[322] J M Bennett, *The Separation*, above n 37, 6.
[323] Ibid 5.
[324] Bennett said that in the Full Court decision of *O'Connor v North* (1887) 9 NSWR Eq 88
> 'the Court solemnly decided that a plaintiff could not obtain specific performance of a contract for sale of shares if he came before the Full Court "in Equity"; though, if he chanced to approach the Judges at some other time when they were sitting at Common Law, he was promised a more receptive hearing.'

J M Bennett, Equity Law, above n 39, 323.
[325] *Weily v Williams* (1895) 16 NSWR Eq 190, ibid 6.

equity jurisdiction was, in the present submission, a mistake of fact and one which begged the very question in doubt.[326]

Again, Bennett uses positivism to show that there was no historical justification for equity's rigid separateness.

Some of the justifications that can be used here to defend the New South Wales course overlap with those discussed earlier. In the latter half of the nineteenth century, there was still[327] the belief that the common law was supreme over legislation, unless expressly contrary. In this instance, separation was a practice that had 'been so bred into the bone of the legal profession ... that it wore the aspect of something declared by nature, something integral to the processes of civil justice.'[328] While justifications couched in terms of natural or customary law may have been less prevalent, unwritten law was still important. Johnson, when asked why NSW couldn't have common procedure, replied '[b]y reason of both the written *and* the unwritten law (emphasis added).'[329] Also, in the first edition of his *Equity Practice*, Walker had noted that section 4 should have had a narrow reading because the Court was not invested with any power to transfer suits 'and it may well enough be argued that the Act ought not to be construed as abrogating by implication, rather than by express words, a practice which at the date of the Act was firmly established.'[330]

---

[326]Ibid 327.
[327]Professor Simpson would argue that this belief remains integral to the common law tradition today, above n 55.
[328]Millar, *Civil Procedure of the Trial Court in Historical Perspective* (1852) 32, cited by Elizabeth Brown, above n 232, footnote 3.
[329]3 NSW V&P (1879-80) 21, [247].
[330]Cited by J M Bennett, *Equity Law*, above n 39, 79.

Another institutional feature that favoured separation was specialisation. The notion of specialisation was a mantra of the progressive era. Justice Kearney said in 2002 that separate administration was logically compatible with a profession that was divided into equity practitioners and common law practitioners. This meant that by the time lawyers got to the Bench they were versed in one *discipline* and were therefore happy to transfer cases to the other jurisdictions.[331] This is supported by Hargrave J who stated in 1879 that the branches of the profession were distinct.[332] In 1858, Isaacs argued:

> As it was, the absence of the fourth Judge for Equity business had been the cause of an enormous arrear of business. And it ought to be borne in mind that cases in Equity were not like those of Common Law, but required a separate train of ideas and train of thought. No judge could properly perform them when frequently distracted and interrupted by another class of ideas.[333]

Justice Therry met the argument that 'any Judge would do for an Equity Judge' of the Supreme Court by using the example of the Exchequer in England, which had for a long time common law and equity jurisdictions, explaining how

> [t]he equity business interfering with the common law business...and the decisions of a Common Law Judge not being satisfactory to suitors in equity; the equity jurisdiction of the Exchequer was abolished in an Act in 1841, and instead of thereof two additional Vice-Chancellors appointed.[334]

---

[331]Interview with Justice Kearney, *Supreme Court Equity Division 1978-1992*, (Sydney, 1 July 2002).
[332]3 NSW V&P (1879-80) 21, [119].
[333]'Parliament of New South Wales: Legislative Council', *Sydney Morning Herald*, 16 December 1858, 3.
[334]Ibid 4.

This shows that the NSW judges knew they had one Court with two jurisdictions, like Exchequer, but that they saw further compartmentalisation as the answer to the 'evil'[335] deficiencies of equity. Hence, a year earlier in 1857, Therry had explained cases where children who were entitled to large property were reduced to a state of destitution as *'from want of an Equity Court'*[336]not from want of a fused system. Chief Justice Stephen said that this was the universal opinion 'of all the Judges.'[337] He had roused the appointment of a Select Committee of the Legislative Council in August 1857 to report on the state of business in the Supreme Court.[338]Sir William Burton, the former judge and now its Chairman, submitted draft Bills in 1857 and 1858. Both Bills sought the establishment of a separate Court of Equity detached completely from the Supreme Court, but both Bills were defeated in the Legislative Assembly.[339] Not surprisingly, Bennett insists that these requests were really only 'suggestions for reallocations of duties.'[340] He says that 'specialisation was simply the result of growing litigation and had nothing whatever to do with any policy of setting up, in effect, a number of small courts in conflict with one another.'[341] The last statement may be true—it would be extreme to suggest that there was a conscious policy to initiate an inter court rivalry—but the ideology of specialisation was not solely about administration. It was about science. Again, it is unsuitable for Bennett to criticise the separateness of equity when, at the time, it was predominantly seen as a valuable

[335]Stephen, 'Parliament of New South Wales: Legislative Council', *Sydney Morning Herald*, 27 August 1857, 3.
[336]'Parliament of New South Wales: Legislative Council', *Sydney Morning Herald*, 16 December 1858, 3.
[337]'Parliament of New South Wales: Legislative Council', *Sydney Morning Herald*, 27 August 1857, 3.
[338]including whether it was expedient to establish 'a separate Court in Equity and Insolvency' ibid.
[339]JM Bennett, *The Separation*, above n 37, 29.
[340]Ibid 6.
[341]J M Bennett, *Equity Law*, above n 39, 330.

solution. It was not until late in this period that it was viewed by certain members of the legal profession with disdain,[342] as it would come to be viewed by Bennett.

At this time, however, the culture and ideology of the judiciary began to be seen as an insufficient reason for judicial legitimacy, particularly where its practice was neither functional nor commanded by the legislature. Bennett's textualism becomes more appropriate here to criticise the judiciary's maintenance of the strict division. Nonetheless, by this time, judicial history and tradition had found a new guise: the common law doctrine of precedent.

As mentioned, at the end of the nineteenth century, the height of the progressive era, 'the dominant model of intellectual activity was the sciences.'[343] In the legal sphere this translated into a rigid philosophy of 'strict and complete legalism,'[344] which was followed with 'almost superstitious reverence.'[345] The system of precedent was formalised by the notion that every judicial decision is authority for one correct 'rule'[346] on a strict hierarchical model.[347] Kercher says this heralded a change in judicial style whereby authority asserted itself over principle. 'What was once a search for principle, or a reasoned decision, now became a search for authority. Bad decisions were now as binding as good ones. Strict authority now ruled both kinds of law, statutory and judge-made'.[348] As Goodrich says, 'predictability and consistency of legal decision-making are accorded greater value than particular

---

[342]See above, section entitled The Judicature Acts.
[343]A R Blackshield, above n 22, 165.
[344]Sir Owen Dixon's Sydney speech, ibid, 166.
[345]Patrick Parkinson, above n 80, 71.
[346]'What lawyers call 'the *ratio decidendi* of the case,'" A R Blackshield, above n 22, 166.
[347]Ibid.
[348] Bruce Kercher, 'Resistance and Reception,' above n 23, 4.

justice.'[349] An example of this trend occurred when a group of lawyers tried to challenge the division of the profession rule of 1835 in the Supreme Court. Chief Justice Stephen held that the rule was ultra vires, but should be observed because it had been acted upon for some ten years.[350] In this way, the separateness of equity of the first half of the century was upheld by the judiciary in the second half through the doctrine of precedent.

The system of precedent tied to informal sanctions. Parkinson points out that

> Cohesion within the common law was achieved ... through informal mechanisms by which traditions are so often handed down. The law was the possession of a small, and tightly-knot group of practitioners and judges. Power and authority within that group resided within a gerontocracy, and advancement of younger practitioners depended upon the approval of those senior members of the profession.[351]

This relates again to the likelihood of one of its members asking the judges upon what historical basis rested their decision not to hear common law and equity in a single case.[352] These explanations are not necessarily justifiable unless the law is taken to legitimately include institutional law, that is, what lawyers 'recognise' as law.[353] This entails what Roscoe Pound calls mental habits, such as the doctrine of precedent, which 'derive their legitimacy from history and tradition.'[354] They cannot be explained by reference to the legislature. In fact, both Goodrich and Simpson say that

---

[349] Peter Goodrich, *Reading the Law*, above n 4, 71.
[350] *Sydney Morning Herald*, 1 September 1846, 2 cited by J M Bennett and J R Forbes, above n 55, 186.
[351] Patrick Parkinson, above n 80, 69.
[352] JM Bennett, *The Separation*, above n 37, 179.
[353] Peter Goodrich, *Reading the Law*, above n 4, 13.
[354] Roscoe Pound 'The Theory of Judicial Decision' (1923) 36 *Harvard Law Rev* 641 at 648 cited by A R Blackshield, above n 22, 158.

these habits flourished in direct response to the new democratic philosophy that all law emanated from the sovereign.[355]

[355]AWB Simpson, above n 55; Peter Goodrich, *Reading the Law*, above n 4, 105.

20th Century Legislative Developments and Further Attempts at Reform

The *Equity Act* 1901 was 'to a large extent, a consolidation of the *Equity Act* 1880 and a number of other enactments.' Smith says that this Act along with the *Supreme Court and Circuit Court Act* 1900 (NSW) (which allowed any judge of the Supreme Court to exercise the jurisdiction of the Chief Judge in Equity),[356]as amended from time to time, regulated the jurisdiction of the Supreme Court.[357] Bennett says that the *Equity Acts* of 1880 and 1901 'placed past recall' the union of the jurisdictions,[358] that is, the legislative intervention prevented the recollection that a type of fused system technically existed.

There were attempts to introduce the Judicature Act or Bills of similar intent in 1898, 1906, 1923, 1930, 1931 and 1932, but they were not passed.[359] Some of the reasons for their failure were old ones.[360] Nothing further was done until the Law Reform Committee took up its work on the subject in 1961.[361] Justice Kearney explained that 'by and large the practice really coped ... there was no great pressure through outstanding failures ... It worked with a bit of common sense really.'[362]

---

[356]*Supreme Court and Circuit Court Act* 1900 (NSW) s 15.
[357]M L Smith, above n 12, 808.
[358]J M Bennett, *A History*, above n 38, 60.
[359]New South Wales Law Reform Commission, *Report on Supreme Court Procedure*, No 7 (1969) 7, [5].
[360]In 1904 it was held that:

> The State is on the eve of a general election, and the minds of the public and of politicians are at present, and are likely for some time to be, too much occupied with matters of purely political concern, to warrant any expectation that they will give the necessary time or attention to a measure...fraught with no party advantage.

'The Reform of Legal Procedure' (II) (1904) 11 *Weekly Notes Covers* 97, 98; The old 'not enough reform' and 'stop-gap measure' arguments from the Council of the Bar of New South Wales prevented the 1832 Bill from coming into fruition. New South Wales Law Reform Commission, *Report on Supreme Court Procedure*, No 7 (1969) 7, [6].
[361]New South Wales Law Reform Commission, *Report on Supreme Court Procedure*, No 7 (1969) 7, [7].
[362]Interview with Justice Kearney, *Supreme Court Equity Division 1978-1992*, (Sydney, 1 July 2002).

The Supreme Court Act 1970

The *Supreme Court Act* 1970 (NSW) passed through Parliament in 1970, but its operation was postponed to 1 July 1972. Bennett perceived the reform as an easy way of restoring the status quo because it was legislative recognition of a judicature system that had always existed.[363] The most important change[364] was described:

> In all Divisions, the rules of common law and equity will be administered concurrently, and the whole jurisdiction of the Court may be exercised in any Division. The possibility of an action failing because it was begun in the wrong jurisdiction is eliminated. Perhaps more importantly, there will no longer be the limitation in the relief obtainable.'[365]

There is an interesting parallel between Bennett's belief that the Supreme Court practice had rested on a false analogy to England pre-1873 and some of the sentiments surrounding the introduction of the *Supreme Court Act* 1970 (NSW); that it too was a result of a false analogy to England post-1875.[366]

---

[363]J M Bennett, 'Historical Trends,' above n 50, 228.

[364]The actual significance of the change was debated. Justice Jacobs' (see Introduction above) remarks were described as flippant and misleading, 'Fusion in New South Wales' (1972) 46 *Australian Law Journal* 254. *Nassar v Barnes* (1954) 54 AR (NSW) 113; *Boyns v Lackey* [1958] SR (NSW) 395; *Craney v Bugg* [1971] 1 NSWLR 13 and *Satellite Estate Pty Ltd v Jaquet* (1968) 71 SR (NSW) 126 were cited as cases exemplifying the need for the reform, 'Practice (NSW)—Equity—Jurisdiction to Award Damages—Transfer to Common Law' (1972) 46 *Australian Law Journal* 43. However, it was also said that, '[n]o doubt the same judges will be sitting in the same court-rooms hearing very much the same cases as before,' 'Fusion in New South Wales' (1972) 46 *Australian Law Journal* 254.

[365]'Fusion in New South Wales' (1972) 46 *Australian Law Journal* 254.

[366]C A F Cahill described it as 'a disappointing bill ... [showing] little imagination' since the Act was made for England's multiplicity of courts, even courts competing for business and was therefore inappropriate, 87 NSWPD (1969-70) 16 September 1970, Supreme Court Bill second reading, 5883.

Conclusion

New South Wales took a long time to introduce a Judicature Act. Overlooking Meagher Gummow &Lehane's test for fusion, which was not satisfied until 1972, NSW appears to have been granted a judicature system in 1823. That this was the intention of the legislature may never be known, though it appears unlikely. It is also not clear whether Forbes CJ administered a concurrent system, but presumably practicalities would have demanded it. Even so, soon afterwards, at some point by 1832, the judicial practice mirrored a kind of English-style separation; suitors were being debarred from raising equitable matters in common law suits and vice versa. Again, the evidence of this practice is not without inconsistency. This inconsistency is matched by the awkwardness of the statutes that did not expressly disallow the rigidity of the barriers around equity. These peculiarities proved to be a significant hindrance to the introduction of a Judicature Act in NSW in the last part of the nineteenth century. It was ironic that, just as the mother country adopted a judicature system of its own, New South Wales rejected the reform and our judiciary insisted on the division more strongly than before. In 1972, it became the last of the former Australian colonies and one of the last in the British Commonwealth to adopt the system, maybe even by a circuitous route.

Bennett has also provided an explanation of the history of the separateness of equity. He argues that it was incorrect because the judiciary did not conform to the legislature's demands for a judicature system as pronounced in the words of certain nineteenth century statutes. Other sources of law, primarily elicited by Simpson, such as English judicial custom and tradition, ideologies, and institutional features,

including judicial supremacy and the common law doctrine of precedent can provide explanations for New South Wales' rigid division between the jurisdictions, but, for Bennett, they are not just, correct or warranted sources of law to which the colonial judges could legitimately adhere. Blackshield explains how, at the turn of the nineteenth century, judges could no longer legitimately justify their authority by reference to judicial practice and precedent alone.[367] The ideology climaxed in the mid-late twentieth century at the time Bennett was writing. This helps clarify why Bennett cannot tolerate the development of the relationship between equity and common law in New South Wales, which can only be justified by reference to English legal history and culture. As Sir Alfred Stephen wrote in 1881, 'no doubt the distinction between law and equity cannot be justified on any rational theory of law, though it can be explained historically.'[368]

However, Bennett's argument that another course 'ought' to have been followed is premised on gap analysis, which is inherently flawed, or, at least, now outdated. Hartog explains that

> Gap analysis rests on the presumed existence of a norm which in one way or another could have been enforced ... The idea of a gap only makes sense where there is some shared consciousness (some accepted structure of legitimation, a hegemonic order) that the law was the law, and therefore "ought" to be obeyed (since in gap analysis, law is a sphere of "oughts").

[367] A R Blackshield, above n 22.
[368] 'Reform of the Legal Procedure', *Sydney Morning Herald*, 8 September 1906, 6.

As discussed, it is not clear whether the early judges even looked at the *New South Wales Act* 1823 as a prescriptive judicature system, a restrictive norm, expressly overriding at first their English traditions and then their established line of precedent. In 1974, in what marked a departure from the rest of his arguments, Bennett described the proto-judicature system as 'a blessing neither understood not appreciated at the time'.[369] This weakens the rest of his argument since it serves as an acknowledgement of the inability of the early judges to value the Act in the way he does. Certainly, the discovery of a Supreme Court case in 1832 where the suitor was prevented from relying on equitable interests in a common law case shadows Bennett's picture of the early Court abiding by the legislature, practising a fused system, until Willis J's arrival in 1837. More importantly, this case reduces the relative significance of this proto-judicature system since it shortens its existence to a maximum of eight years and suggests that Willis may have merely accelerated a pre-existing tendency towards separation. Bennett's argument is then reduced to an insistence that the judges 'ought' to have seen their world in the same way he does, according to strict positivism. It is inappropriate to impose the ideology of positivism on the colonial judges of nineteenth century New South Wales because the framework does not fit around their world-view and their role within it. Even later in the period, when legal formalism was more prevalent, the judges had developed other institutional means of preserving their culture. It is anachronistic for an historian to describe something as 'historically unjustified' without applying the ideological models of the time. If positivism or legislative supremacy had been the superior ideology of the period, then certainly this area of law could be criticised as an unjust aberration. But it was not.

[369] J M Bennett, *A History*, above n 38, 32.

Bennett's use of phrases such as 'historically unjustified' and 'historically unnecessary' is misleading since he hasn't validated a broad picture of that history. Bennett's use of the technical words of the statutes to create a neat line of historical logic is, as Goodrich explains, a way of avoiding the difficulties of history, the domain of irrational subjectivity, since all norms can be reduced to the purely formal question of legal dogma, that is, whether they are internally valid.[370] Bennett has chosen to label all the history that did not accord to his view of the legislation as wrong, unlawful and void.[371] Perhaps he is being more lawyer than historian. Lawyers' legal history has tended 'to exhaust itself in the insular details of the legal system.'[372]

However, Bennett does (tirelessly) refer to other historical justifications, but, since they do not accord with his interpretive commitment, they are accorded less argumentative significance. Bennett concedes that New South Wales' equity specialists served to create a distinct and distinguished equity tradition. He says that the substantive achievements in equity 'gained much from the continuance and development of that special Equity Bench which had its origins in the *Administration of Justice Act* 1840.'[373] Even Willis J is attributed with providing 'the greatest stimulus to the growth of equity business.'[374] He affirms that when Owen presided as Chief Judge in Equity, '"the business increased by leaps and bounds. Everyone felt the utmost confidence in Sir William Owen's ... high capacity and training for the

[370]Peter Goodrich, 'The Rise of Legal Formalism; or the Defences of Legal Faith' (1983) 3 *Legal Studies* 248, 254.
[371]Robert Cover states that 'we constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void,' above n 67, 4.
[372]L M Friedman cited by GR Rubin and David Sugarman, David 'Towards a New History of Law and Material Society in England 1750-1914' in Rubin, G R and Sugarman, David (eds), *Law, Economy and Society 1750-1914: Essays in the History of English Law* (1984) 112.
[373]J M Bennett, *Equity Law*, above n 39, 104.
[374]Ibid 39.

work he had to perform,"'[375]despite the fact that the relationship between the legislation and the judicial practice under his model was at its least congruent. He appears to want the best of both worlds; he concluded in his 1962 thesis:

> Provided that the historical position of the Equity Court as a part of the Supreme Court with all its power is recognised, the conclusion of this paper is that the accident by which New South Wales retained a somewhat ancient practice and procedure in Equity has had many advantages.[376]

But Bennett can't have it both ways since it was the separateness itself, which in his model was 'unnecessary,' that created the context for our special equity tradition to flourish. In fact, Meagher, Gummow and Lehane say that the introduction of a judicature system has been for a price 'at a higher level of expense than that of administrative convenience'[377] because it has resulted in a distorted relationship between common law and equity by encouraging the fusion fallacy.[378] While the merits of the last observations will not be addressed here, they relate to the comments of an unnamed but 'very prominent' judge who explained the reluctance of New South Wales to adopt the judicature system as

> to some extent due to the experience of Victoria that adopted the new procedure quite early. They went in there for a complete fusion of Jurisdictions and so threw away all the benefit of specialisation that we get from having law and equity administered in separate courts.

---

[375]Justice Simpson, ibid 330.
[376] J M Bennett, *Equity Law*, above n 39, 407.
[377] R P Meagher, W M Gummow and J R F Lehane, above n 75, [255].
[378]'The fusion fallacy involves the administration of a remedy, available either at law or in equity, or the modification of principles in one branch of the jurisdiction by concepts which are imported from other and thus are foreign,' Ibid [221].

> That was a grave mistake. Judges who had never seen the inside of an Equity Court had to begin to learn, in their old age, all about trusts and equities and would spend days over a case that an Equity lawyer would have taken in his stride; and so with the Equity Judges who discovered for the first time what a Jury looked like.[379]

Bennett's positivism and these conceded advantages are logically incompatible within his history since any righteousness of the separateness of equity is wiped out by his 'unjustifiable' summation.[380]

Equity was separate in the Supreme Court of New South Wales soon after 1824 and became more rigidly separate by 1900. Bennett argues through a highly technical and textualist history that the colonial judges followed the wrong course. It is important to note that underlying Bennett's positivist methodology is a fierce condemnation of the injustices entailed by the complexities of equity. He calls it 'a monument of artificiality *and oppression*' (emphasis added).[381] The sentiment is, perhaps more aptly, embodied in a question that was posed late in the period: 'Is it not desirable in all legal proceedings that the great principles of truth and justice, independently of any technical ruling, should prevail?'[382] However, Bennett's methodology is, as Professor Stone calls it, one 'leeway of choice;' one, among many, interpretive commitments. As it was battled out in the legal sphere between the early members of the High Court, so too does this paper continue the 'old quarrel' between the legitimacy of law as custom and culture and, the authority of law as written text.

---

[379]Harney, *An Inquiry into the Procedure of the Supreme Court of New South Wales* (unpublished manuscript, 1938) 4 cited by M L Smith, above n 12, 809.
[380]I would be committing the same anachronism of which Bennett is here accused were I to now state that he *ought to* have argued that the Supreme Court practice was merely 'positively' unjustified!
[381]J M Bennett, *The Separation*, above n 37, 180.
[382]Chairperson, taking evidence of Select Committee on the Equity Branch, 3 NSW V&P (1879-80) 21, [254].

Bibliography

Articles/Books/Theses

Baker, J H, *An Introduction to English Legal History* (3rd ed, 1990)

Behan, H F, *Mr Justice J W Willis* (1979)

Bennett, J M, *Equity Law in Colonial New South Wales 1788-1902* (Legal Research Project, Sydney University, 1962)

Bennett, J M, *The Separation of Jurisdictions in the Supreme Court of New South Wales 1824-1900* (MA thesis, Macquarie University, 1963)

Bennett, J M, 'Historical Trends in Australian Law Reform' (1969-1970) 9 *Western Australian Law Review* 211

Bennett, J M, *A History of the Supreme Court of New South Wales* (1974)

Bennett, J M, *Lives of the Australian Chief Justices: Sir James Dowling* (2001)

Bennett, J M and Castles, Alex C (eds), *Australian Legal History Source Materials from the Eighteenth to Twentieth Centuries* (1979)

Bennett, J M and Forbes, J R, 'Tradition and Experiment: Some Australian Legal Attitudes of the Nineteenth Century' (1971) 7 *University of Queensland Law Journal* 172

Bentham, Jeremy, *A Comment on the Commentaries: Introduction and Notes by Charles Warren Everett* (1976)

Berryman, J 'The Specific Performance Damages Continuum: a Historical Perspective' (1985) 17 *Ottawa Law Review* 295

Blackshield, A R, 'The Legitimacy and Authority of Judges' (1987) 10 *University of New South Wales Law Journal* 155

Blackstone, William, *Commentaries on the Laws of England* (first published1765-69, 1966 ed)

Brown, Elizabeth, 'Equitable Jurisdiction and the Court of Chancery in Upper Canada' (1983) 21 *Osgoode Hall Law Journal* 275

Castles, Alex C, *An Australian Legal History* (1982)

Cover, Robert, 'The Supreme Court 1982 Term Foreword: Nomos and Narrative' (1983) 97 *Harvard Law Review* 4

Currey, C H, *Chapters on the Legal History of New South Wales 1788-1863* (unpublished manuscript, 1929)

Currey, C H, *Sir Francis Forbes* (1968)

Davidson, Alistair, *The Invisible State: The Formation of the Australian State* (1991)

Eldershaw, P R, 'Willis, John Walpole (1793-1877)' in Pike, Douglas (ed), *Australian Dictionary of Biography: 1788-1850* (vol 2,1967) 602

Forbes, J R S, *The Divided Legal Profession in Australia* (1979)

'Fusion in New South Wales' (1972) 46 *Australian Law Journal* 254

Gava, John, 'The Revolution in Bankruptcy Law in Colonial New South Wales' in Ellinghaus, M P, Bradbrook, A J and Duggan A J (eds), *The Emergence of Australian Law* (1989) 210

Goodrich, Peter, 'The Rise of Legal Formalism; or the Defences of Legal Faith' (1983) 3 *Legal Studies* 248

Goodrich, Peter, *Reading the Law* (1986)

Gurner, J, *The Rules and Orders of the Supreme Court of New South Wales* (published by the authority of the Chief Clerk of the Court, Sydney, 1840)

Hartog, H, 'Pigs and Positivism' [1985] *Wisconsin Law Review* 899

Hartz, Louis, *The Founding of New Societies* (1964)

Harvey, J M, *Service of Equitable Process being the Service of Equitable Process Act of 1897 and the Rules of Court Made Thereunder with Explanatory Notes and Index* (Hayes Bros, Sydney, 1898)

Holdsworth, Sir William, *A History of English Law* (first published 1903-1966, Vol 9 1966; Vol 10 1966; Vol 13 1966; Vol 14 1964; Vol 15 1965)

Kercher, Bruce, *An Unruly Child* (1995)

Knaplund, Paul, *James Stephen and the British Colonial System 1813-1847* (1953)

McQueen, Rob, 'Why High Court Judges Make Poor Historians: the Corporations Act case and Early Attempts to Establish A National System of Company Regulation in Australia' [1990] 19 *Federal Law Review* 245

Meagher, R P, Gummow, W M and Lehane, J R F, *Equity Doctrines and Remedies* (3rd ed, 1992)

'Men of Eminence in New South Wales' (1885) 2 *Sydney Quarterly Magazine* 308

Morison, W L, *The System of Law and Courts Governing New South Wales* (1984)

Nygh, P E and Butt, P, *Butterworths Concise Australian Legal Dictionary* (1997) 224

Parkinson, Patrick, *Tradition and Change in Australian Law* (2nd ed, 2001)

'Practice (NSW)—Equity—Jurisdiction to Award Damages—Transfer to Common Law' (1972) 46 *Australian Law Journal* 43

'Practice Note' (1972) 46 *Australian Law Journal* 300

Radan, Peter, Stewart, Cameron and Lynch, Andrew, *Equity and Trusts* (2001)

Radcliffe and Cross, *The English Legal System* (5th ed, 1971)

Rubin, G R and Sugarman, David 'Towards a New History of Law and Material Society in England 1750-1914' in Rubin, G R and Sugarman, David (eds), *Law, Economy and Society 1750-1914: Essays in the History of English Law* (1984)

Simpson, A W B, 'The Survival of the Common Law System' in *Then and Now 1799-1974* (1974) 51

Smith, M L, 'The Early Years of Equity in the Supreme Court of New South Wales' (1998) 72 *Australian Law Journal* 799

'The Reform of Legal Procedure' (I) (1904) 11 *Weekly Notes Covers* 93

'The Reform of Legal Procedure' (II) (1904) 11 *Weekly Notes Covers* 97

Walker, W Gregory and Rich, G E, *The Practice in Equity Being the Equity Act of 1880 and the Rules of Court Issued Thereunder* (2nd ed, CF Maxwell (Hayes Bros), Sydney, 1891)

Whitfield, L A, *Founders of the Law in Australia* (1971)

Case Law

Bank of Australasia v Murray (1850) 1 Legge's Reports 612

Blackman v Challinor, 1838 (Unreported, Supreme Court of New South Wales, Willis J, 22 June 1838, <http://www.law.mq.edu.au/scnsw/Cases1838-39/html/blackman_v_challinor__1838.htm>at 15 August 2002

Cameron v Cameron (1891) 12 NSWR Eq 135

Castles v Bucknell, 1837 (Unreported, Supreme Court of New South Wales, Dowling ACJ and Burton J, 24 June 1837) <http://www.law.mq.edu.au/scnsw/Cases1836-37/html/castles_v_bucknell__1837.htm> at 15 August 2002

Crampton v Foster (1897) 18 NSWR Eq 36

Doe Rem Harris v Riley, 1832 (Unreported, Supreme Court of New South Wales, Forbes CJ, Stephen and Dowling JJ, 12 October 1832) <http://www.law.mq.edu.au/scnsw/Cases1831-32/html/doe_dem_harris_v_riley__1832.htm> at 15 August 2002

Griffen v The Tonkin Mining Company (unreported, Supreme Court of New South Wales in Equity, Owen CJ cited in *Horseley v Ramsay (1888)* 10 NSWR Eq 41)

Horseley v Ramsay (1888) 10 NSWR Eq 41

Maiden v Maiden (1908) 7 CLR 727

McLaughlin v Fosbery (1904) 1 CLR 546

Merrick v Ridge (1897) 18 NSWR Eq 29

Mills v Rowe, 1828 (Unreported, Supreme Court of New South Wales, Forbes CJ, Stephen and Dowling JJ, 13 September 1828) <http://www.law.mq.edu.au/scnsw/Cases1827-28/html/mills_v_rowe__1828.htm> at 15 August 2002

O'Connor v North (1887) 9 NSWR Eq 88

R v Morley (1847) 1 Legge's Reports 389

Ricketson v Smith (1895) 16 NSWR Eq 221

Russell v. Jones, 1838 (Unreported, Supreme Court of New South Wales, In banco, Dowling C.J., Burton and Willis JJ, 26 March 1838) <http://www.law.mq.edu.au/scnsw/Cases1838-39/html/russell_v_jones__1838.htm> at 15 August 2002

Steven v Brigstock, 1833 (Unreported, Supreme Court of New South Wales, Forbes CJ, Dowling and Burton JJ, 1 June 1833) <http: //www.law.mq.edu.au/scnsw/Cases1833-34/html/stephen_v_brigstock__1833.htm> at 15 August 2002

Thorpe v Smith, 1834 (Unreported, Supreme Court of New South Wales, Forbes CJ, Dowling and Burton JJ, 8 March 1834) <http://www.law.mq.edu.au/scnsw/Cases1834/html/thorpe_v_smith__1834.htm>at 15 August 2002

Turner v New South Wales Mont de Piete Deposit & Investment Co Ltd (1901) 10 CLR 539

Want v Moss (1891) 12 NSWR (Eq) 101

Legislation

New South Wales Act 1823 (Act 4 Geo IV c 96)

Australian Courts Act 1828 (Act 9 Geo IV c 83)

Administration of Justice Act 1840 (Act 4 Vic No 22)

An Act for the further amendment of the Law and for the better advancement of Justice 1841 (Act 5 Vic No 9)

Equity Act 1880 (44 Vic No 18)

Equity Act 1901 (NSW)

Supreme Court and Circuit Courts Act 1900 (NSW)

Supreme Court Act 1970 (NSW)

Other Sources

A. Government Documents

1. *Series 1 Historical Records of Australia (abbreviated to* 'HRA'*)* (Library Committee of the Commonwealth Parliament, first published 1914-1925)

HRA, Series 1 (Vol 13, 1920) 681-683

HRA, Series 1 (Vol 21, 1924) 155-165

HRA, Series 1 (Vol 22, 1924) 810-815

2. *New South Wales Parliamentary Debates (abbreviated to* 'NSWPD'*)*

1 NSWPD (1879-80), Legislative Council, 27 November 1880, second reading of Equity Bill 1880, 472

1 NSWPD (1879-80), Legislative Council, 4 December 1879, 472–480

6 NSWPD (1881), Legislative Council, 31 August 1881, 860

87 NSWPD (1969-70) 42nd Parliament 3rd session, 16 September 1970, Supreme Court Bill second reading, 5883-5910

3. *New South Wales Votes & Proceedings (abbreviated to* **'NSW V&P'***)*

NSW V&P (1840), 'New South Wales Act, 9 Geo IV, c. 83 Despatch from the Most Noble the Marquess of Normanby to His Excellency Sir George Gipps, transmitting the Act of the Imperial Parliament, 2 & 3 Victoria, Cap. 70, for the amendment, and continuance for a year, of the New South Wales Act, 9 Geo. IV., Cap. 83; and Letters from their Honors the Judges, on the improvement of the Judicial and Legal Institutions of the Colony', 29 August 1839, 157-60

NSW V&P (1840), 'Extract from a Letter, addressed by His Honor Mr Justice Willis, to His Excellency the Governor, on the 15th December, 1838', 172-176

NSW V&P (1846), Legislative Council, Progress Report from the Select Committee on the Division of the Legal Profession Abolition Bill, 30 October 1846, 383

2 NSW V&P (1847) Legislative Council, Report from the Select Committee on Division of the Legal Profession Abolition Bill, 23 September 1847, 415

1 NSW V&P (1855) Legislative Council, 'Observations on the present and probable future wants of the Colony, in connexion with the Administration of Justice, 4 July 1855, 687

1 NSW V&P (1869), Legislative Assembly, 19 October 1869, 69-72

2 NSW V&P (1870-1) Legislative Assembly, First Report from the Law Reform Commissioners, 115

3 NSW V&P (1879-80) Legislative Assembly, Minutes of Evidence taken before the Select Committee on the Equity Branch of the Supreme Court, 21-63

4. *Law Reform Commission Reports*

New South Wales Law Reform Commission, *Report on Supreme Court Procedure*, No 7 (1969) 7

New South Wales Law Reform Commission, *Second Report on Supreme Court Procedure* No 14 (1971) 7

B. Newspaper Articles

'Legislative Council: Appeals in Equity', *Sydney Morning Herald*, 21 July 1847, 2

'Parliament of New South Wales: Legislative Council', *Sydney Morning Herald*, 27 August 1857, 3

'Parliament of New South Wales: Legislative Council', *Sydney Morning Herald*, 16 December 1858, 3

'Common Law Procedure Bill', *Sydney Morning Herald*, 1 April 1870, 2

'New South Wales Parliament: Legislative Assembly: Law and Equity Bill', *Sydney Morning Herald*, 13 May 1871, 4

'Reform of the Legal Procedure', *Sydney Morning Herald*, 8 September 1906, 6

'An Item of Law Reform' *Sydney Morning Herald,* 24 May 1910, 6

'Simplifying the Procedure', *Sydney Morning Herald*, 20 July 1910, 8

C. *Letters*

Dickinson, John Nodes, 'A Letter to the Honorable Speaker of the Legislative Council on the Formation of a Second Chamber in the Legislature of New South Wales' (WR Piddington, Sydney, 1852)

D. *Unpublished Papers Presented at Conferences*

Kercher, Bruce 'Judges and the Application of Imperial Law in Australia 1788-1836: Resistance and Reception' (Paper presented at the workshop Law and the Enlightenment; The British Imperial State at Law, Canberra, September 2001)

E. *Interviews*

Interview with Justice Kearney, *Supreme Court Equity Division 1978-1992*, (Sydney, 1 July 2002)