

## Fusion – Fission – Fusion

### Pre-Judicature Equity Jurisdiction in New South Wales 1824 - 1972

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#### Introduction

Here is a vivid account of the pre-Judicature Act system which prevailed in New South Wales at the end of the nineteenth century and its origins:

To the litigant who sought damages before an Equity Judge, a grant of Probate before a Divorce Judge or an injunction before a Common Law Judge, there could be no remedy. He had come to the wrong Court, so it was said. He might well have enquired on what historical basis he could thus be denied justice. It cannot be questioned that the Court required specialization to function properly and that a case obviously falling within one jurisdiction ought not to be heard by a Judge sitting in another jurisdiction. Yet from this the fallacious extension was made that a Judge sitting in one jurisdiction could not in any circumstances hear a case which ought to have originated in another jurisdiction.<sup>1</sup>

The words are those of the distinguished Australian legal historian J.M. Bennett. There is no doubt that the jurisdictions at common law and in equity came to be treated in many respects as if they were separate courts, despite the failure of sustained efforts to create a separate equity court; despite it being clear that there was a single Supreme Court of New South Wales with full jurisdiction at common law and in equity; and despite efforts by its first Chief Justice, Sir Francis Forbes, in the opposite direction. But was that a ‘fallacious extension’?<sup>2</sup> If that conclusion is to be drawn, it requires a careful assessment of incremental developments throughout the nineteenth [119] century – some of which were directed to separating common law from equity, but others to assimilating the two jurisdictions.

The historical position in New South Wales may be of some wider importance. Judicial and academic scholarship from New South Wales has been prominent in the efflorescence of equity in the decades

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<sup>1</sup> J.M. Bennett, “The Separation of Jurisdiction in the Supreme Court of New South Wales, 1824-1900”, thesis submitted for degree of Master of Laws, University of Sydney, 1963, 179.

<sup>2</sup> *Ibid.*, 179.

M Leeming, ‘Fusion-Fission-Fusion: Pre-Judicature Equity Jurisdiction in New South Wales 1824-1972 in J Goldberg et al (eds), *Equity and Law: Fusion and Fission* (Cambridge UP 2019), 118-143.

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after Bennett wrote the passage reproduced above. For example, the term “fusion fallacy” was created in the first edition of *Equity: Doctrines and Remedies*,<sup>3</sup> written in the early 1970s by three young practitioners in Sydney, all of whom became distinguished Australian judges.<sup>4</sup> Moreover, the idea – now widely accepted throughout the British Commonwealth<sup>5</sup> – that the Judicature legislation effected an administrative but not substantive fusion is associated with much academic and judicial contributions from New South Wales.

The principal purpose of this chapter is to explain how the fission of jurisdiction, effected during the nineteenth century but whose influence extends well into the twenty first century, came about. Much of the material on which the chapter is based is unpublished.<sup>6</sup> The chapter also offers an assessment of the influence of the pre-Judicature system in New South Wales – the only such system in mainland Australia after 1883 – in the wider Anglo-Australian legal system. Before addressing either of those matters, something should be said immediately of the English Judicature legislation and its context.

### **The Judicature legislation and its context**

The English Judicature legislation can be poorly understood, and for a number of reasons. It may be helpful to bear steadily in mind the following basal notions.

[120] First, by the ‘Judicature legislation’ is meant the Supreme Court of Judicature Act 1873,<sup>7</sup> and more particularly, the provisions which abolished many of the separate superior courts of law replacing them with the High Court of Justice with a complete jurisdiction at common law and in equity (and other discrete areas of law including admiralty) and a single procedure, subject to appeal to the newly created Court of Appeal.<sup>8</sup> It may be contrasted with the more substantial reforms associated with the Field Codes in the United States in the 1840s.<sup>9</sup>

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<sup>3</sup> R.P. Meagher, W.M.C. Gummow and J.R.F. Lehane, *Equity: Doctrines & Remedies* (Sydney: Butterworths, 1975), [220]-[222].

<sup>4</sup> Meagher became President of the N.S.W. Bar Association and a Judge of Appeal of the Supreme Court of New South Wales (1989-2004); Gummow became in turn a Judge of the Federal Court of Australia (1986-1995), a Justice of the High Court of Australia (1995-2012), and a Non-Permanent Judge of the Hong Kong Court of Final Appeal (2013-); Lehane became a judge of the Federal Court of Australia (1995-2001). See further below, text to n. 144.

<sup>5</sup> See generally S. Degeling and J. Edelman (eds.), *Equity in Commercial Law* (Sydney: Lawbook Co., 2005).

<sup>6</sup> In addition to Bennett’s thesis referred to above, I am especially indebted to that author’s ‘Equity Law in Colonial New South Wales: 1788-1902’ (Research Project 59/20(c), University of Sydney, 1962), J.P. Bryson, ‘Rules of Court in the Time of Chief Justice Francis Forbes’ (unpublished manuscript 2 March 2013), at [www.forbessociety.org.au/wordpress/wp-content/uploads/2013/03/NSW-Rules-of-Court-1823-1839.doc](http://www.forbessociety.org.au/wordpress/wp-content/uploads/2013/03/NSW-Rules-of-Court-1823-1839.doc); and J.E. Rogers, ‘Legal Argument and the Separateness of Equity in New South Wales, 1824-1900’ (Law514 Legal Research Project, Macquarie University, 2002), at [www.researchonline.mq.edu.au/vital/access/manager/Repository/mq:44076](http://www.researchonline.mq.edu.au/vital/access/manager/Repository/mq:44076).

<sup>7</sup> 36 & 37 Vict. c. 66.

<sup>8</sup> For details, see P. Polden, ‘The Judicature Acts’, in W. Cornish, J.S. Anderson, R. Cocks, M. Lobban, P. Polden and K Smith, *The Oxford History of the Laws of England: Volume XI, 1820-1914 English Legal System* (OUP, 2010), 757-784.

Secondly, the Judicature legislation was not just about equity. The Judicature legislation changed a small number of conflicting rules – for example, by permitting the Court of Admiralty’s ‘half-damages under the both-to-blame rule’<sup>10</sup> in collision cases to prevail over the common law’s complete defence of contributory negligence.<sup>11</sup> This had nothing to do with equity at all, but was made necessary when a single court was to determine all collision cases. The Judicature legislation also introduced a small number of significant innovations (for example, by authorising a general mode for the assignment at law of choses in action),<sup>12</sup> while confirming some long established rules (for example, that a trustee could not plead a limitation statute).<sup>13</sup>

Thirdly, it is at least arguable that the most important practical change was procedural – the assimilation of very different procedural rules between the common law and chancery courts.<sup>14</sup> Prior to 1 November 1875, every aspect of procedure was different. Before 1854, discovery could only be obtained in [121] equity (necessitating the filing of a separate bill), and even after a power was conferred on common law courts in 1854, evidence suggests it was not used to its fullest extent.<sup>15</sup> The mode of trial (with a jury at common law) was different, while appeals were much more widely available in equity. As the Judicature Commission said in 1869:

[T]he forms of pleadings are different, the modes of trial and of taking evidence are different, the nomenclature is different, the same instrument being called by a different name in different Courts; almost every step in the cause is different.<sup>16</sup>

<sup>9</sup> See P.I. McMahon, ‘Field, Fusion and the 1850s: How an American Law Reformer Influenced the Judicature Act of 1875’, in P.G. Turner (ed.), *Equity and Administration* (Cambridge University Press, 2016), ch. 22, and M. Lobban, ‘What Did the Makers of the Judicature Acts Understand by “Fusion”?’’, ch. 4 of this volume.

<sup>10</sup> See G. Bruce and C.F. Jemmett, *A Treatise on the Jurisdiction and Practice of the English Courts in Admiralty Actions and Appeals* (London: Maxwell & Son, 1886), 85-7.

<sup>11</sup> Supreme Court of Judicature Act 1873, s. 25(9).

<sup>12</sup> Modelled on 1867 and 1868 provisions permitting assignment of insurance policies: see *Lloyd v. Fleming* (1872) L.R. 7 Q.B. 299. For the other innovations, see M. Leeming, ‘Equity, the Judicature Acts and Restitution’ (2011) 5 J. Eq. 199, 211-212.

<sup>13</sup> Supreme Court of Judicature Act 1873, s. 25(2). See J. Brunyate, *Limitation of Actions in Equity* (Stevens & Sons, London, 1932), 56, and M Leeming, “‘Not slavishly nor always’ – Equity and Limitation States” in P Davies, S Douglas and J Goudkamp (eds), *Defences in Equity* (Oxford, Hart Publishing 2018), ch 14.

<sup>14</sup> There is a measure of simplification in this. The superior courts at common law had, until 1832, all themselves employed different originating process, until by the Uniformity of Process Act 1832 (2 Wm. IV c. 39) replaced by a single writ on which the form of action was required to be stated. It was said at the time that this was ‘to put to an end the *perplexity* and frequent errors occasioned by the great *variety* of process antecedently in use’: see J. Chitty, *The Practice of the Law in All Its Departments* (Sweet & Maxwell, London, 1836), vol. III, 59 (emphasis in original).

<sup>15</sup> See P. Polden, ‘Mingling the Waters: Personalities, Politics and the Making of the Supreme Court of Judicature’ [2002] C.L.J. 575, 580; cf P.I. McMahon, ‘Rediscovering the Equitable Origins of Discovery: The “Blending” of Law and Equity Prior to Fusion’, ch. 11 of this volume.

<sup>16</sup> United Kingdom, Judicature Commissioners, *First Report of the Commissioners* (London, H.M.S.O., 1869), 10.

M Leeming, ‘Fusion-Fission-Fusion: Pre-Judicature Equity Jurisdiction in New South Wales 1824-1972 in J Goldberg et al (eds), *Equity and Law: Fusion and Fission* (Cambridge UP 2019), 118-143.

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Fourthly, there was nothing radically new about the central tenet of ‘fusion’ – namely, vesting both common law and equitable jurisdiction in the same court. It had long been the case that the same appellate courts (the Judicial Committees of the House of Lords and the Privy Council respectively) heard and determined appeals from common law and equitable jurisdictions,<sup>17</sup> while the Court of Exchequer had possessed a full equitable jurisdiction, concurrent with that of the Court of Chancery, until abolished in 1841.<sup>18</sup>

Fifthly, there was no obstacle to the introduction of English statutory reforms in the Australian colonies. English statute law was received in the Australian colonies no later than 1836,<sup>19</sup> and thereafter colonial Attorneys-General attended to the legislation passed at Westminster with a view to advising what ought to be enacted by the colonial legislatures.<sup>20</sup> Thus it was that most of the mid- and late- nineteenth century procedural reforms (notably, [122] Sir John Rolt’s<sup>21</sup> and Lord Cairns’ Act<sup>22</sup> – see below) were more or less promptly enacted in the Australian colonies,<sup>23</sup> including in New South Wales, as were some of the substantive rules.<sup>24</sup>

One might think, then, that replacing the separate courts by a single High Court of Justice would be more easily and less controversially achieved in the Australian colonies. And so it was in the younger colonies of Queensland, South Australia, Victoria and Western Australia, where local equivalents of the English legislation of 1873 and 1875 were rapidly enacted.<sup>25</sup>

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<sup>17</sup> Not to mention Scottish appeals in the case of the House of Lords, and the “bewildering variety” of appeals in the case of the Privy Council: see D. Swinfen, *Imperial Appeal: The Debate on the Appeal to the Privy Council 1833-1986* (Manchester: Manchester University Press, 1987), 5.

<sup>18</sup> Administration of Justice Act 1841, 5 Vict. c. 5, s. 1. See below, text to n. 32.

<sup>19</sup> For details, see M. Leeming, *Resolving Conflicts of Laws* (Sydney: Federation Press, 2011), 36-37.

<sup>20</sup> Sir Roger Therry, writing in 1863, and who had been Attorney-General of New South Wales twenty years earlier, wrote:

A part of the duty of the Attorney-General (or at least it was so during my tenure of that office) is to attend to the Acts of each session of the British Parliament, and apprise the local Government of such measures as might advantageously be adopted and declared to extend to New South Wales.

(R. Therry, *Reminiscences of Thirty Years’ Residence in New South Wales and Victoria*, 2nd ed. (London: Low, Son & Co., 1863), 316.)

<sup>21</sup> Chancery Regulation Act 1862, 25 & 26 Vict. c. 42, s. 1, itself an elaboration of the Court of Chancery Procedure Act 1852 (15 & 16 Vict. c. 86), s. 62 (which had been enacted as section 49 of the Equity Practice Act 1853 (NSW) (17 Vict. No. 7)).

<sup>22</sup> Chancery Amendment Act 1858, 21 & 22 Vict. c. 27.

<sup>23</sup> eg in South Australia: Equity Act 1867 (SA) (30 Vict. No. 20), s. 141 (enacting Lord Cairns’ Act), ss. 142-143 (enacting Sir John Rolt’s Act). See the text to nn 100 and 101.

<sup>24</sup> For example, the assignment at law of choses in action was authorised by Supreme Court Act 1878 (SA) (41 & 42 Vict. No. 116), s. 6(6) and Conveyancing Act 1919 (NSW), s. 12.

<sup>25</sup> Judicature Act 1876 (Qld) (40 Vict. No. 6); Supreme Court Act 1878 (SA); Judicature Act 1883 (Vic) (47 Vict. No. 761); Supreme Court Act 1880 (WA) (44 Vict. No. 10).

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Why was it different in the case of the Supreme Court of New South Wales, one of the oldest continually existing superior courts in the common law world, which at all times has enjoyed full common law and equitable jurisdiction?

### **Equity jurisdiction in New South Wales**

One remarkable aspect of the Judicature legislation in New South Wales is that it was necessary at all. From 1824, there was a single Supreme Court with plenary jurisdiction at common law and in equity. Yet, as Bennett observed,<sup>26</sup> that did not stand in the way of the introduction and assimilation of the very features of the English legal system – the separation of common law and equitable jurisdictions – which were done away with by the judicature legislation. It is that process of fission, creating separate common law and equity jurisdictions within the same court, which gives rise to the title of this paper. This section describes how it occurred.

This section proceeds chronologically. It addresses the creation of the modern Supreme Court in 1824, the early period from 1824-1838, 1838-1841 (a tumultuous period associated with the tenure of Justice John Walpole Willis, the creation of the office of ‘Primary Judge in Equity’ and the first equity rules), the period 1841-1880 leading up to the enactment of the Equity Act 1880<sup>27</sup> and its interpretation, and the position in the mid twentieth century, before the Judicature legislation commenced in 1972.

#### **[123] *The creation of the Supreme Court of New South Wales***

The so-called ‘First Charter of Justice’ (in fact, letters patent of 2 April 1787) envisaged a civil court, presided over by the Judge-Advocate who sat with two ‘fit and proper persons’ taken from the (limited) free population, from which an appeal lay to the Governor. A new civil Court, confusingly known as the Supreme Court, was established in 1814 pursuant to the ‘Second Charter of Justice’ (letters patent of 4 February 1814). Reforms suggested by Commissioner Bigge led to the enactment of the New South Wales Act 1823,<sup>28</sup> authorising the issue of Letters Patent on 13 October 1823 establishing the Supreme Court of New South Wales<sup>29</sup> which exists to this day almost two centuries later.

Anticipating the Judicature legislation by precisely five decades, a wide civil jurisdiction at common law and in equity was conferred the Supreme Court of New South Wales over all matters excluding matrimonial causes.<sup>30</sup> The New South Wales Act provided (section 2) that the Supreme Court was to be a court of record with a complete common law jurisdiction defined by reference to the superior courts of law at Westminster, and (section 9) that the court should be a Court of Equity with all the power and authority of the Lord High Chancellor.

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<sup>26</sup> N. 1.

<sup>27</sup> 44 Vict. No. 18.

<sup>28</sup> 4 Geo. IV c. 96 (1823) (UK).

<sup>29</sup> The same letters patent established the Supreme Court of Van Diemen’s Land.

<sup>30</sup> By conscious design of the Colonial Office, there was no provision in the colony for relief in failed marriages, short of a private Act of Parliament, until 1873: see J.M. Bennett, *Sir Frederick Darley* (Sydney: Federation Press, 2016), 41-42, and the Matrimonial Causes Act 1873 (NSW) (36 Vict. No. 9).

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That Act made it clear beyond argument that equity was received in the colony.<sup>31</sup> And it could not have been plainer that here was created a superior court with full jurisdiction at common law and in equity. A contemporary example of such a court was the Court of Exchequer. Until 1841, that Court had a full equitable jurisdiction,<sup>32</sup> and in fact the preferred court for some ancillary [124] procedures,<sup>33</sup> such as discovery,<sup>34</sup> and whose common injunction was ‘universally understood, in the profession, to be more beneficially comprehensive than that which issues from the Court of Chancery’.<sup>35</sup> Accordingly, there was never a need to abolish existing courts and to create a single new court of common law and equitable jurisdiction; that existed from the beginning. What was ultimately necessary was legislation to override the lack of jurisdiction, initially merely perceived, later enshrined in law, limiting the common law ‘side’ of the Court from hearing and determining equitable claims and vice versa.

### ***The period from 1824 – 1838***

The first Chief Justice, Sir Francis Forbes, is widely and rightly known for simplifying the procedure in the Supreme Court in the young colony. He had not been burdened by a junior’s practice at the Bar, with its inevitable focus upon procedure. As John Bryson has pointed out, Forbes C.J. took considerable steps to simplify and assimilate equitable procedure in what was, in the 1820s and 1830s, a very minor part of the jurisdiction of the Supreme Court.<sup>36</sup> This was a reaction, in part, to unduly complex procedures introduced by Barron Field, which Forbes said the public ‘might be excused for believing, were not so operative in facilitating the ends of justice, as in filling the pockets

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<sup>31</sup> Cf B.H. McPherson, ‘How Equity Reached the Colonies’, in M. Cope (ed.), *Interpreting Principles of Equity: the W.A. Lee Lectures 2000-2013* (Sydney, Federation Press, 2014), 94 (pointing out that, absent statute, various difficulties accompanied the conclusion that equity was received in a colony).

<sup>32</sup> See H. Horwitz, *Exchequer Equity Records and Proceedings, 1649-1841* (London, Public Record Office, 2001); D.B. Fowler, *The Practice of the Court of Exchequer: Upon Proceedings in Equity*, 2nd ed. (London: Butterworth, 1817), 2 vols. Volume 1 commences (p. 1): ‘The Court of Exchequer at Westminster, with respect to its equitable jurisdiction, is a supreme, independent, Court of Equity, possessing a concurrent jurisdiction with the Court of Chancery, in all matters which are the subject of relief, and discovery, in that court’.

<sup>33</sup> Leeming, ‘Equity, the Judicature Acts and Restitution’, 201-202.

<sup>34</sup> M. Leeming, Commentary on “Seeking Documentary Evidence in Transnational Litigation: Problems and Pitfalls”, in K.E. Lindgren and N. Perram (eds.), *International Commercial Law, Litigation and Arbitration* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, Sydney, 2011), 90.

<sup>35</sup> *Rolfe v. Burke* (1827) 1 Y. & J. 404, 405; 148 E.R. 728, 729 (Knight *arguendo*). See H. Horwitz, ‘Chancery’s “Younger Sister”: the Court of Exchequer and its Equity Jurisdiction, 1649-1841’ (1999) 72 *Historical Research* 160, 175.

<sup>36</sup> For example, permitting witnesses to be examined *viva voce*, something which did not at that time occur in England: see Bryson, ‘Rules of Court in the Time of Chief Justice Francis Forbes’.

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of the practitioners’.<sup>37</sup> The steps were lauded contemporaneously.<sup>38</sup> Forbes’ rules of 1825 were said to have ‘anticipated the legislation of modern times, by [125] simplifying pleadings and dispensing with the costly course of procedure then prevalent in the Courts of Westminster’.<sup>39</sup>

Thus it is that it may said, at a high level, that it was only after Forbes C.J.’s departure that steps were taken to bring about a jurisdictional separation between common law and equity within the same court. The actual position is more nuanced.

In the first months of his tenure, Forbes C.J. preserved the procedure which had evolved under the Second Charter. However, he intimated in court on 13 December 1824 that he had received instructions 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’.<sup>40</sup> That reflected advance notice of the Order in Council conferring rule-making power upon Forbes C.J. That in itself was an innovation, which had been sought by the reform movement in England and America; New South Wales was the first colony in which such a grant was made.<sup>41</sup> However, the power was qualified by the requirement that:

such Rules and Orders ... shall be consistent with, and similar to, the Law and Practice of His Majesty’s Supreme Courts at Westminster, so far as the Condition and Circumstances of the said Colony will admit.<sup>42</sup>

Even in January 1825, the separate jurisdictions of the Supreme Court were reflected in the rules. Rule 2 was that:

the Proceedings of the said Supreme Court, within its several and respective Jurisdictions as aforesaid, be commenced and continued in a distinct and separate Form.

The reference to the same court having ‘several and respective Jurisdictions’ was a natural consequence of a rule-making power which required assimilation to English practice where there were

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<sup>37</sup> Letters: Catton Papers, Australian Joint Copying Project, Reel M791, quoted in note 3 to the Practice Note [1824] NSWSupC 23 (the Practice Note was originally printed in ‘Supreme Court’, *The Australian*, 16 December 1824, 3), n. 3; see also J. Bennett, *A History of the Supreme Court of New South Wales* (Sydney: Law Book Co, 1974), 62-64; C.H. Currey, *Sir Francis Forbes: the First Chief Justice of New South Wales* (Sydney: Angus and Robertson, 1968), 109-110.

<sup>38</sup> See the editorial in the *The Australian*, 7 October 1826, 3, summarised in S. Dorsett, ‘Procedural Innovation: the First Supreme Court Rules of New South Wales and New Zealand’ (2011) 35 Aust. Bar Rev. 128, 135.

<sup>39</sup> See Sir Roger Therry (writing in 1863), *Reminiscences of Thirty Years’ Residence*, 335.

<sup>40</sup> ‘Supreme Court’, *The Australian*, Thursday 16 December 1824, 3.

<sup>41</sup> See Dorsett, ‘Procedural Innovation’, 131.

<sup>42</sup> New South Wales, Supreme Court, Rules of the Supreme Court, 22 June 1825, Preamble. The rules were printed in the *Sydney Gazette and New South Wales Advertiser*, 23 June 1825, 1. Forbes had been pressing for a resolution of the problem of the lack of Rules and the absence of any power to make them. He had advised that it would be better if the power were delegated to himself, the Chief Justice, subject to the power of revocation in London: ‘pray do not fetter us too much, for be assured we can do the thing better here, than it can be done at home - you cannot command our local knowledge and experience, without which it will be next to impossible to legislate beneficially’: 14 August 1824, letter from Forbes to Wilmot Horton, quoted by Dorsett, ‘Procedural Innovation’, 130.

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separate courts. Hence rule 1 of the [126] rules made on 22 June 1825, described in Charles Clark’s influential practice book as perhaps the most important,<sup>43</sup> confirmed that the ‘rules and orders, forms and manner of practice and proceeding’ in, relevantly, the High Court of Chancery, shall ‘be adopted and followed’ so far as the circumstances and condition of the colony shall require and admit.<sup>44</sup> That was reflected in judgments. As Forbes C.J. put it:

The general rules of the Equity courts of England were in force here so far as they were applicable to the state of the Colony and its juridical establishment.<sup>45</sup>

The rule that proceedings in the court’s ‘several and respective Jurisdictions’ be kept distinct was continued as rule 2 of the 1831 rules and rule 14 of the 1834 rules. This had substantive, rather than merely procedural, consequences. In an action in ejectment to recover possession of land in Burwood in 1832, Forbes C.J., Stephen and Dowling JJ. said, anticipating the future separation of jurisdiction, that the matter ‘must be determined strictly according to the rules of law, and we are precluded in the present mode of proceeding from any equitable considerations’.<sup>46</sup>

### ***1838-1841 – John Walpole Willis and the Primary Judge in Equity***

The period from 1838-1841 was immensely important in leading to the fission of common law and equitable jurisdiction. The catalyst for change was a new judge, Justice John Walpole Willis.

Unlike his judicial brethren, Willis J. had practised extensively in equity at the English Bar. He was of considerable ability, and had published three textbooks on equity.<sup>47</sup> It was not surprising that he would take the lead in equity [127] business. With his arrival in February 1838, there seems to have commenced a process of specialisation. The Governor wrote in an official despatch that ‘Mr Justice Willis, having been in England at the Chancery Bar, has almost invariably up to the present time heard singly all cases in Equity’.<sup>48</sup>

It is necessary, in order to understand the legislative separation of jurisdiction which took place in 1840, to say something about the character of Willis J. He has been said to be ‘as troublesome a judge as could be imagined’.<sup>49</sup> He had been expelled from Charterhouse, his marriage to a daughter of the

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<sup>43</sup> C. Clark, *A Summary of Colonial Law, the Practice of the Court of Appeals from the Plantations, and of the Laws and Their Administration in All the Colonies &c.* (London: Maxwell and Stephens, 1834), 613.

<sup>44</sup> *Ibid.*

<sup>45</sup> *Lord v Dickson [No. 1]* (1828) N.S.W. Sel. Cas. (Dowling) 487.

<sup>46</sup> *Doe d. Harris v. Riley* (1832) 78 Dowl. Proc. Sup. Ct. 61, 67 (Sydney Herald, 18 October 1832). See Rogers, ‘Legal Argument and the Separateness of Equity’, 27. Other examples are given in Dorsett, ‘Procedural Innovation’, 146.

<sup>47</sup> J.W. Willis, *A Digest of Rules and Practice as to Interrogatories for the Examination of Witnesses &c.* (London: Phene, 1816); J.W. Willis, *Pleadings in Equity Illustrative of Lord Redesdale’s Treatise on the Pleadings in Suits in Chancery, by English Bill* (London: Phene, 1820); J.W. Willis, *A Practical Treatise on the Duties and Responsibilities of Trustees* (London: Phene, 1827).

<sup>48</sup> Sir George Gipps to Lord Russell, 1 January 1841, HRA 1/XXI 156.

<sup>49</sup> J. Bennett, *Sir James Dowling* (Sydney, Federation Press, 2001), 111. See also *Australian Dictionary of Biography* (Melbourne University Press, 1967), vol. 2, pp 602-604 (J Barry); J. McLaren, *Dewigged, Bothered,*

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Earl of Strathmore had been ended by Act of Parliament in 1833, he had been appointed to the Kings Bench in Upper Canada through the influence of his then father-in-law, but had been ‘amoved’ two years later under the Colonial Leave of Absence Act 1782,<sup>50</sup> following a series of disputes after the rejection of his proposal to establish a separate chancery court. The Privy Council affirmed the amotion, but the order was later set aside.<sup>51</sup> Willis then served as Vice-President of the Court of Civil and Criminal Justice of British Guiana, before being appointed to the Supreme Court of New South Wales.

General rules in equity were drafted by the newly arrived Willis J. in 1838. Consistently with the terms of the rule-making power, they commenced with the command that the rules and orders in Chancery were to be followed so far as local circumstances would admit.<sup>52</sup> Rule 5 made provision for injunctions for the stay of proceedings at law, and rule 22 authorised a petition for rehearing before all the judges ‘as prescribed by the English Rules of Practice for a petition of re-hearing by the Lord Chancellor of England, of a case previously heard and decided by the Master of the Rolls or Vice Chancellor in that Kingdom’. Thus from the beginning (filing originating process) until the end (appeals) the rules replicated the procedure in England, notwithstanding at all times the plaintiff was litigating in the Supreme Court of New South Wales.

[128] Just as he had in Canada, so too in New South Wales, Willis J. advocated the creation of a separate court, with himself at its head, as Chief Baron.<sup>53</sup> That was rejected by the other judges and the Governor, but led to the insertion of a section 20 in the Administration of Justice Act 1840,<sup>54</sup> which was the first legislative fission of the jurisdiction of the Supreme Court of New South Wales:

... [I]t shall be lawful for the Governor of New South Wales for the time being to nominate and appoint from time to time either the Chief Justice or if he shall decline such appointment then one of the Puisne Judges to sit and hear and determine without the assistance of the other Judges or either of them all causes and matters at any time depending in the said Supreme Court in Equity and coming on to be heard and decided at Sydney and every decree or order of such Chief Justice or of the Judge so appointed shall in any such cause or matter (unless appealed from in the manner hereinafter provided) be as valid effectual and binding to all intents and purposes as if such decree or order had been pronounced and made by the full Court.

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and *Bewildered: British Colonial Judges on Trial, 1800-1900* (University of Toronto Press, 2011), 74-87.

<sup>50</sup> 22 Geo III c. 75 (U.K.) (Burke's Act).

<sup>51</sup> See McLaren, *Dewigged, Bothered, and Bewildered*, 171. For a more sympathetic account, see J. Phillips, ‘Judicial Independence in British North America, 1825-67; Constitutional Principles, Colonial Finances, and the Perils of Democracy’ (2016) 34 *Law and Hist. Rev.* 689, 694ff.

<sup>52</sup> See *Government Gazette* 18 May 1838, 8-11.

<sup>53</sup> ‘Your Lordship will see that His Honor was desirous that a Judge should be appointed exclusively for Equity business, to whom he proposed to give the Title of Chief Baron’: Sir George Gipps to Lord Russell, 1 January 1841, HRA 1/XXI 156.

<sup>54</sup> 4 Vict. No. 22 (1840).

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Deficiencies in the drafting of section 20 soon became manifest. In the following year, the Advancement of Justice Act 1841<sup>55</sup> authorised judges other than the judge appointed to sit in Equity, in cases of his absence or illness, to ‘sit alone and hear and determine all causes and matters in Equity in like manner’,<sup>56</sup> and altered the appeal structure, so that appeals were heard by the three judges in Sydney (which is to say, including the judge at first instance).<sup>57</sup>

The legislation ‘made for the first time in the Colony’s legal history a division in the function of the Court’,<sup>58</sup> resulting in one judge of the Supreme Court, the Primary Judge in Equity, being at first exclusively, and then primarily, responsible for hearing and determining all proceedings of a particular subject matter otherwise within the jurisdiction of the Supreme Court.<sup>59</sup> Further, those proceedings were governed by different procedural rules,<sup>60</sup> not least as to pleadings and mode of trial. The judge’s orders and decrees were deemed to be those of the Full Court.

This was the first legislative formalisation of a split in the court’s jurisdiction. Litigation of a particular subject matter would not merely be governed by [129] different procedural rules. It would from 1840 ordinarily be determined by a particular judge, whose decision would have a different status.

Although drafted with Willis J. in mind, Dowling C.J. claimed the position of Primary Judge in Equity, following a series of slights between the men,<sup>61</sup> and Willis J. was relocated to Port Phillip (now, Melbourne), apparently at his own request.<sup>62</sup> From there, he also protested against changes to the Equity rules, including the innovation established by Forbes C.J. that witnesses in an equity suit

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<sup>55</sup> 5 Vict. No. 9 (1841).

<sup>56</sup> Section 12.

<sup>57</sup> Section 13.

<sup>58</sup> Bennett, ‘Equity Law in Colonial New South Wales’, 43.

<sup>59</sup> See above, nn. 5-5.

<sup>60</sup> Made under section 23 of the 1840 Act.

<sup>61</sup> ‘It is due to the Chief Justice to say that I believe he had not originally any intention of claiming the office, and that he has now done so, in consequence of what he considers the injurious statements of his want of ability to discharge the duties of it, which have been made by Mr. Justice Willis’. The disagreements between Dowling and Willis are described in detail by Bennett, *Sir James Dowling*, 114-131 and McLaren, *Dewigged, Bothered, and Bewildered*, 173-175, the latter describing what seemed to be ‘a calculated campaign to undermine Dowling’s position’ (p. 174). A more sympathetic account is given in M. Bonnell, *I Like a Clamour: John Walpole Willis, Colonial Judge, Reconsidered* (Sydney: Federation Press, 2017), ch. 18. The starting point was the claim (tersely rejected by the Colonial Office) that Dowling C.J.’s commission was forfeited by his acting as a judge of the Admiralty Court, followed up by the claim that an assignment of convicts to Dowling contravened an Order in Council prohibiting judges from owning slaves.

<sup>62</sup> ‘It is due to Mr. Justice Willis however to add that he has not only acquiesced in this arrangement, but that he himself proposed it’: HRA 1/XXI 165.

M Leeming, ‘Fusion-Fission-Fusion: Pre-Judicature Equity Jurisdiction in New South Wales 1824-1972 in J Goldberg et al (eds), *Equity and Law: Fusion and Fission* (Cambridge UP 2019), 118-143.

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give evidence *viva voce*, and many other matters.<sup>63</sup> Governor Gipps amoved him by order dated 17 June 1843.<sup>64</sup>

Justice Willis’ legacy included not merely the office of Primary Judge in Equity, whose jurisdiction and decisions were different from those of other members of the Court. In addition, and presumably with the intention of confining Willis J’s activities to the Port Phillip District, the Administration of Justice Act 1841 contained provisions vesting exclusive *geographic* jurisdiction in different judges of the Court. Section 1 conferred exclusive common law and equitable jurisdiction on the Resident Judge over ‘persons residing and property situate within Port Phillip’, with the Judges of the Supreme Court at Sydney having exclusive jurisdiction over persons residing and property situate elsewhere in the Colony. Section 4 created a concurrent jurisdiction in criminal and civil cases within 25 miles of the border. Those distinctions [130] disappeared after the colony of Victoria was carved out of New South Wales in 1851, although until then, the *exclusive* jurisdiction went beyond even the concurrent equitable jurisdiction then exercised by the palatine courts.<sup>65</sup> However, the recurring theme – that different judges exercised different jurisdictions within the same Court – may be seen as a further example of the process whereby at the same time English courts were being unified, their New South Wales counterpart was being divided.

#### ***1841 – 1880 – separate jurisdictions at law and in equity***

In England, the middle decades of the nineteenth century amounted to a period of almost continual reform, leading to substantial improvements in common law and chancery procedure.<sup>66</sup> The caricature described by Dickens in *Bleak House* was perceived *at the time* to depict a system that no longer prevailed.<sup>67</sup> However, in New South Wales, the Equity registry and the Primary Judge in Equity came close to grinding to a halt.

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<sup>63</sup> See Bennett, ‘Equity Law in Colonial New South Wales’, 101; Bonnell, *I Like a Clamour*, chs. 19-20; and, generally, McLaren, *Dewigged, Bothered, and Bewildered*.

<sup>64</sup> Once again, without notice to him, leading to another appeal to the Privy Council, which declared that he was entitled to notice, although there had been cause for his amoval: *Willis v. Gipps* (1846) 5 Moo. P.C. 379; 13 E.R. 536. He was not reinstated to any judicial office. He was described by the clerk in the Colonial Office responsible for New South Wales as ‘one of the weakest men I ever knew ... He has within my knowledge been ruined three or four times over by sheer vanity and an absurd self-importance’: CO 201/306, folio 446a, cited by Bennett, *Sir James Dowling*, 128.

<sup>65</sup> Notably the Court of Chancery of Lancaster and the Court of Chancery of the County Palatine of Durham, which had a concurrent jurisdiction with the court of Chancery, confined to persons residing within its geographical limits. See Lord Simonds (gen. ed.), *Halsbury’s Laws of England*, 3rd ed. (London: Butterworths, 1954), vol. 9, [1080]-[1094] and P. Polden, ‘Local Courts’, in Cornish et al., *Oxford History of the Laws of England: Volume XI*, 872-5.

<sup>66</sup> See M. Lobban, ‘Preparing for Fusion: Reforming the Nineteenth-Century Court of Chancery’ (2004) 22 Law and Hist. Rev. 389 (Part I) and 565 (Part II); Polden, ‘The Judicature Acts’; Polden, ‘Mingling the Waters’; McMahon, ‘Field, Fusion and the 1850s’, 424-462; Leeming, ‘Equity, the Judicature Acts and Restitution’; M.J. Leeming, ‘Five Judicature Fallacies’, in J.T. Gleeson, R.C.A. Higgins and J.A. Watson (eds.), *Historical Foundations of Australian Law* (Federation Press, 2014), vol. 1, 169, 171-177.

<sup>67</sup> See for example ‘The Court of Chancery As it Is’, in (1857) 8 Chambers’s Journal of Popular Literature Science and Arts 16:

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For one thing, there seems not to have been much work. Dowling said at the time that ‘the amount of [equity business] pending was very small compared with other branches of jurisdiction’.<sup>68</sup> The rules made on 28 October 1844 stated that the Primary Judge would sit in Equity on every Saturday during Term, save on the last Saturday, and every Tuesday during the Vacation. One judge sitting one day a week suggests that significantly less than [131] 10% of judicial resources were devoted to Equity. That is consistent with the provision made for appeals to be set down for the Friday and Saturday in the week preceding each Term (i.e., all appeals could be dealt with in no more than two days).

A snapshot of practice may be obtained from Alfred Stephen’s *Introduction to the Practice of the Supreme Court of New South Wales*, published in 1843.<sup>69</sup> The author, who was well placed to do so, described the nature of the 1840 and 1841 Acts as a *delegation* of jurisdiction, rather than a transfer, as follows:<sup>70</sup>

[W]ith respect to the Equity jurisdiction, that neither is this, strictly speaking, transferred from [the Judges]. It is delegated only. The Primary Judge decides, without the assistance of his Colleagues; but his Decrees have effect, as the Decrees of the Court. The consideration is important; because the question respecting the Appeal, whether it be or not in the nature of a Rehearing, mainly depends on it.

That reflected what the Full Court had said in *McLaughlin v. Little*:<sup>71</sup>

[H]ere, though the practice has been for the Primary Judge, alone, to sign the decrees and orders made by him, the Court is one and the same. There is no new Court created, nor is the one Court divided. Neither (as in [57 Geo. III c. 18 (1817),<sup>72</sup> s. 2], giving jurisdiction to one Baron of the Exchequer only) is there any provision vesting the *entire Equity jurisdiction of the Court in the one Judge*. That jurisdiction remains, it would seem, where the statute placed it. ... The Decrees of the single Judge, however, have no force given to them *as his*. The provision is so worded, apparently, as to admit of the inference, that he acts as representing the Court.<sup>73</sup>

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The Court of Chancery has been thoroughly reformed. The changes began in 1850; and in 1852 an entire revolution was effected in its mode of procedure. ... Works like Mr Dickens’s *Bleak House* still continue to gain credence, although written long ago, and before Chancery reform began...

<sup>68</sup> Letter from Dowling to Willis, 1 December 1840, CO 201/306 folio 375, cited by Bennett, *Sir James Dowling*, 125. The best way of confirming this proposition (something which I have not undertaken) would be to review Dowling’s note books, which are retained in State Records.

<sup>69</sup> A. Stephen, *Introduction to the Practice of the Supreme Court of New South Wales* (Sydney: Welch 1843). The work is of 364 pages with a 50 page appendix. The copy in the Joint Law Courts Library in Sydney includes typeset pages which date from 1845 or 1846.

<sup>70</sup> *Ibid*, 281.

<sup>71</sup> Seemingly reported only on p 2 of the *Sydney Morning Herald*, 7 February 1845; the extract in the text above is reproduced in Stephen’s volume in the Joint Law Courts Library.

<sup>72</sup> Court of Exchequer (England) Act 1817.

<sup>73</sup> *Sydney Morning Herald*, 7 February 1845, 2 (emphasis original).

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That reasoning did not prevent the establishment of a body of law holding that there were separate jurisdictions at law and in equity. Bennett states that:<sup>74</sup>

With a large recruitment to the colonial legal profession of practitioners accustomed to the strict Common Law/Chancery division in England, the Colony’s ‘equity division’ came to be regarded, without justification in terms of history or practice, as equivalent to the Chancellor’s Court.

[132] Typical of the mid-nineteenth century approach was the Full Court’s decision in *Bank of Australasia v. Murray*.<sup>75</sup> The Full Court (Stephen C.J., Dickinson and Therry JJ.) dismissed an appeal from Therry J., the Primary Judge in Equity. The Court said, of the defendant to the suit in equity:

He might, therefore, have been sued at law; and we can perceive no reason why he should not have been. So, if he be still liable, he is liable at law; and the resort to a Court of Equity was unnecessary.<sup>76</sup>

Similarly, in *Thompson v. Thompson*<sup>77</sup> in 1863, an equitable replication was struck out, Wise J. saying:<sup>78</sup>

there are limits to equitable replications. [The claimant] may have a right to redress in a Court of Equity; but I am of opinion that the facts spread out on these pleadings, afford no ground of action in a Court of Law; and we cannot enforce mere equitable grounds of action.

The decision turned on the Common Law Procedure Act 1857 (20 Vict. No. 31) (NSW), s. 50, which authorised equitable replications mirroring the English Common Law Procedure Act 1854,<sup>79</sup> but only where they would be a complete answer to the common law claim. Thereafter, from 1857 until 1958, in circumstances where an absolute verdict in favour of the party asserting the equitable plea or replication would be impossible (say, because equitable relief would only be available on terms), it remained necessary to seek a common injunction (just as it had in England between 1854 and 1875).<sup>80</sup>

### ***The enactment of the Equity Act 1880***

From around the middle of the nineteenth century, equity litigation declined. A number of causes appear to have contributed to this. Undoubtedly one was the procedural technicality and complexity (and accompanying expense and delay). Another was the perception that equity business always came last. Sir Alfred Stephen described Equity as ‘an unfavoured child – kicked, it might be said, from one

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<sup>74</sup> Bennett, *Sir Frederick Darley*, 59.

<sup>75</sup> (1850) 1 Legge 612.

<sup>76</sup> (1850) 1 Legge 612, 614. The Court went further, and regarded it as bad in equity.

<sup>77</sup> (1863) 2 S.C.R. (L.) 242.

<sup>78</sup> (1863) 2 S.C.R. (L.) 242, 251-2.

<sup>79</sup> 17 & 18 Vict. c. 125, s. 85.

<sup>80</sup> See J.D. Heydon, M.J. Leeming and P.G. Turner, *Meagher, Gummow & Lehane’s Equity: Doctrines and Remedies*, 5th ed. (Sydney, LexisNexis, 2015), [1-315].

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room to another until it ran the risk of being utterly neglected’.<sup>81</sup> A recurring theme in the evidence given to a Select Committee in 1857, including by judges and practitioners, was the delays and inefficiencies in the Primary Judge’s time being absorbed by other work – so [133] much so that all members of the Supreme Court urged the creation of a separate Equity court, in a separate building, so that “it would be impossible for Counsel to run from one to the other”.<sup>82</sup>

Sir Alfred Stephen accepted that a separate court would form “an additional difficulty in the way of a future amalgamation of [the] two branches”, but was firmly opposed to such a step: “I do not believe that a complete amalgamation of the two jurisdictions ever *will* take place; and I am one of those who think that it never *can*.”<sup>83</sup>

A third contributing cause may simply have turned on personalities. The appointment of Justice John Fletcher Hargrave (perhaps best known as the father of the aeronautical pioneer Lawrence) as Primary Judge in Equity in 1865 was controversial. His swearing in was boycotted by the local Bar and, remarkably, led to the resignation of the Attorney General (J.B. Darvall) and his return to England.<sup>84</sup> Hargrave J. served as Primary Judge in Equity from 1865 until he retired in 1881, and it was during his tenure of office that proceedings were said to have ground to a halt. Certainly, Sir Alfred Stephen had a very poor opinion of him, comparing him to Willis.<sup>85</sup>

In the late 1860s, there was awareness of overseas developments, and a move for law reform. On 30 June 1869, a barrister, T.J. Fisher,<sup>86</sup> urged in the *Sydney Morning Herald* a fusion of the systems of law and equity, citing developments in the United States, Canada and India and the recommendations of the English Judiciary Commission: ‘The distinction between actions at law and suits in equity should be abolished, and there should be but one form of action for the enforcement or protection of private rights, or the redress or prevention of private wrongs’.<sup>87</sup> In July 1870, the Law Reform Commission was [134] established by letters patent, comprising five distinguished lawyers under the

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<sup>81</sup> *Sydney Morning Herald*, 27 August 1857, 3 quoted in Bennett, *A History of the Supreme Court of New South Wales*, 98.

<sup>82</sup> Minutes of Evidence taken before a Select Committee of the Legislative Council, 21, 22, 23, 28 October 1857 JLC (1857) 151.

<sup>83</sup> *Id*, 21 October 1857, Answers 47 and 48.

<sup>84</sup> See H.T.E. Holt, *A Court Rises: the Lives and Times of the Judges of the District Court of New South Wales (1859-1959)* (Sydney: Law Foundation of New South Wales, 1976), 43.

<sup>85</sup> See ‘A Trio of Judges’ (Stephens papers, 1894, copy in Law Courts Library); see also K. Mason, ‘The Office of Solicitor General for New South Wales’ [Autumn 1988] *Bar News* 22, 24, who described him as habitually deciding against women suitors, apparently due to an ‘inability to forgive his wife for having committed him to a lunatic asylum in the mid 1850s’. Perhaps there is an element of over-reaction; Griffith C.J. regarded him as a distinguished equity lawyer: *Loxton v. Moir* (1914) 18 C.L.R. 360, 369, and see Holt, *A Court Rises*, 45-46.

<sup>86</sup> See J. Bennett, *Sir Alfred Stephen* (Sydney, Federation Press, 2009), 364.

<sup>87</sup> ‘Heads of Colonial Law Reform’, *Sydney Morning Herald*, 30 June 1869, 5. Details from Fisher followed in the next month: ‘Colonial Law Reform – No. 1’, *Sydney Morning Herald*, 9 July 1869, 3 (citing in detail the Field Code reforms of New York); ‘Colonial Law Reform – No. 2’, *Sydney Morning Herald*, 14 July 1869, 3.

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chairmanship of Stephen C.J. One of its purposes was to propose amendments with a view 'to the removal of the inconveniences arising from the separation of jurisdictions at Law and in Equity'.<sup>88</sup>

Although the Equity Act 1880 was often described as 'Darley's Equity Act', it was in fact a draft proposed by William Owen, a leading equity junior who supplied it to the Law Reform Commission in 1870. The bill was twice unsuccessfully introduced in 1870. It was enacted, in substantially the same form, a decade later, the position before the Primary Judge in Equity having deteriorated. Owen gave evidence in 1880 to a Select Committee of the Legislative Assembly that the Equity jurisdiction was 'ruinous to suitors and not in accord with the judicial progress of the age'.<sup>89</sup>

At the same time, Sir Alfred Stephen was a frequent correspondent of David Dudley Field.<sup>90</sup> Australian readers were kept well informed of English legislative developments; the *Sydney Morning Herald* of Saturday 10 May 1873 reported that:

Lord Selborne's Judicature Bill was read a second time on Tuesday, amid a perfect chorus of approval from all the legal personages in the House. Lord Hatherley concurred with Lord Selborne from beginning to end; Lord Chelmsford regarded the bill as a great and comprehensive measure; and Lord Romilly held it to be the first which had promised to be really effective.<sup>91</sup>

It is impossible to determine why it was decided to enact Owen's draft bill, rather than to follow the more extensive reforms enacted at Westminster.<sup>92</sup> One influence must have been the attitude of Sir Alfred Stephen. The former Chief Justice (then aged 77) spoke in the Legislative Council against adopting the English legislation; he considered that 'a litigant should be able to get [135] equity in a Court of law, and the redress of law in a Court of Equity', but regarded (consistently with his evidence in 1857) the merging of historically separate English courts as 'a great bungle'.<sup>93</sup>

### **The operation of the *Equity Act 1880***

The 1880 legislation was a success on many measures. The decade was one of sustained economic growth and foreign investment. It is unsurprising that litigation in the Supreme Court of New South Wales expanded, but what is dramatic is the extent to which equity litigation flourished. A crude measure may be seen in the series of New South Wales Reports which commenced in 1880: volumes

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<sup>88</sup> See J.M. Bennett, 'Historical Trends in Australian Law Reform' (1969) 9 U.W.A. L. Rev. 211, 213.

<sup>89</sup> See *Australian Dictionary of Biography* (1988), vol. 11, 114.

<sup>90</sup> Bennett, *Sir Alfred Stephen*, 370.

<sup>91</sup> 'The Judicature Bill', *Sydney Morning Herald*, 10 May 1873, 5.

<sup>92</sup> Bennett wrote:

Where in the 1830's complete reliance was placed on English precedent, it is found that by the 1880's colonial lawyers were disinclined to follow slavishly the extensive reforms of the English courts. It may never be known with certainty whether that disinclination was bred of sloth or of individualism.

(Bennett, 'Equity Law in Colonial New South Wales', 51.)

<sup>93</sup> New South Wales, Legislative Council, Parliamentary Debates, 4 December 1879, vol. 1, 474. See also n 82 above.

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1 and 2 had 362 and 407 pages devoted to cases at law, and only 85 and 82 pages on cases in equity. A decade later, volumes 11 and 12 in 1890 and 1891 had 489 and 337 pages on cases at law, and 335 and 329 pages on cases in equity, many with a distinctly commercial flavour. A less subjective approach may be seen from the relative growth in filings after 1881.<sup>94</sup>

That success is partly attributable to two distinguished equity judges: Sir William Manning and William Owen. On the resignation of Owen C.J. in Eq. in 1896,<sup>95</sup> it was said that he had ‘raised this Court to an eminence it had never before attained’.<sup>96</sup>

The Equity Act 1880 repeated the power to appoint one of the judges the ‘Primary Judge in Equity’ in order ‘to exercise the jurisdiction of the said Court in Equity’,<sup>97</sup> and then defined the ‘Court’ for the purposes of the Act ‘to mean the Court holden before the Judge so appointed’.<sup>98</sup> However, it also included provisions based on the mid-nineteenth century reforms, including, in sections 4 and 32, equivalents to Sir John Rolt's Act of 1862 (permitting the determination of legal titles and rights) and Lord Cairns' Act of 1858 [136] (authorising an order for damages in addition to or in lieu of an injunction or specific performance).

Three things may be seen in this legislation. The first to note is that the premise of those provisions was that there was an inhibition upon making findings of legal title in ‘any suit or proceeding in Equity’. To that extent, the section amounts to a legislative entrenchment of the limitations which had been held to attach to the separate equity court identified in sections 1, 2 and 3.

The second is that nowhere in the Equity Act 1880 was there a provision analogous to the Judicature provisions enacted in 1873, vesting all jurisdiction in a single court. That reflects in part the fact that although enacted in 1880, it had been drafted 10 years earlier. It may also reflect the scepticism of the (now retired) Stephen C.J., who still sat in the Legislative Council.

The third is that section 4 might be construed, if read literally, to prevent a suitor being struck out for commencing in the wrong jurisdiction. After some initial uncertainty,<sup>99</sup> a line of authority quickly

<sup>94</sup> See T.A. Coghlan, *NSW Statistical Register 1890 and Previous Years* (George Stephen Chapman (Acting Government Printer), Sydney 1891), table 33, 302, which shows enormous increases, and increases disproportionately larger than increases at common law, in originating processes and final decrees. For the years from 1876 until 1890, the register showed:

Petitions: 21, 48, 72, 65, 53, 33, 50, 41, 91, 69, 78, 87, 102, 131, 136.

Claims: 0, 0, 0, 0, 35, 87, 106, 153, 166, 162, 184, 218, 234, 218, 224 (a streamlined process introduced in 1880).

Decrees and orders: 152, 102, 115, 153, 166, 93, 96, 210, 289, 295, 294, 298, 441, 525, 644.

<sup>95</sup> His obituarist stated that the move was to avoid criticism of sons practising in jurisdictions where their fathers presided: *Truth*, 24 November 1912, 8.

<sup>96</sup> See Memoranda (1896) 17 N.S.W.R. ix.

<sup>97</sup> Section 1.

<sup>98</sup> Section 3.

<sup>99</sup> J. Parkinson, *The Equity Practice Procedure Act 1880* (Sydney: Government Printer, 1880) contributed to this. The preface stated:

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established the contrary. The leading decision was *Horsley v. Ramsay*,<sup>100</sup> in which Owen C.J. in Eq. held:

This section of the Act, which was passed after the *Judicature Act* in England, was certainly intended by the draftsman (for I drew the section myself), and presumably was intended by the Legislature, to give to the Court of Equity as wide and complete jurisdiction in all matters that came before it as the Court of Chancery had under the *Judicature Act*. The subsequent sections, 32 to 37, of the *Equity Act* are taken from the English Act, 21 and 22 Vic c 27 (known as *Cairns's Act*). Section 32 empowers the Court to grant damages in all cases in which the Court has jurisdiction to entertain an application for an injunction against a breach of contract or against the commission or continuance of any wrongful act, or for specific performance of any contract, either in addition to or in substitution for such injunction or specific performance. I think 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, [137] 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 those powers are expressly given, and only to a limited extent, I think 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.<sup>101</sup>

The same views were repeated in *Fell v. NSW Shale and Oil Company*<sup>102</sup> and *Want v. Moss*,<sup>103</sup> and in other cases.<sup>104</sup> Consequently, the distinguished authors of the 1902 *Practice in Equity*<sup>105</sup> wrote:

Decisions upon this section have imposed a limitation upon the apparent generality of its closing words. The section does not make the Court a Court of law, but only empowers the Court to decide common law questions incidentally arising in an equity suit. The plaintiff must establish some recognised equitable ground for coming to the Court, and then all questions, whether legal or equitable, arising in the suit can be determined ...<sup>106</sup>

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The old practice has been universally condemned and reformed years ago in England. The system established by this new Act will do much to assimilate the practice and procedure on the Equity side of the Supreme Court to that on the Common Law side. This alone is a beneficial reform, it being difficult to see any good reason for having two entirely different systems of procedure in two branches or divisions of the one Supreme Court. The Act goes far towards effecting a fusion of Law and Equity.

<sup>100</sup> (1888) 10 N.S.W.R. Eq. 41.

<sup>101</sup> (1888) 10 N.S.W.R. Eq. 41, 45-46.

<sup>102</sup> (1889) 6 W.N. (N.S.W.) 51, 52.

<sup>103</sup> (1891) 12 N.S.W.R. Eq. 101, 108.

<sup>104</sup> See *Cameron v. Cameron* (1891) 12 N.S.W.R. Eq. 135, 141 (point not affected by the appeal: at 142-3); *Ricketson v. Smith* (1895) 16 N.S.W.R. Eq. 221, 226; *Crampton v. Foster* (1897) 18 N.S.W.R. Eq. 136, 138-9.

<sup>105</sup> G.E. Rich, A. Newham and J.M. Harvey, *The Practice in Equity* (Sydney: Law Book Co., 1902). Rich later became a High Court judge; Harvey later became Chief Judge in Equity.

<sup>106</sup> *Ibid*, 7.

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Thus, if a suit were commenced in Equity, it was necessary for a plaintiff to ‘shew some equitable grounds for coming to this Court’. Conversely, as A.H. Simpson J. said in *Merrick v. Ridge*.<sup>107</sup>

[I]f a plaintiff’s suit is really a common law action disguised in the form of an equity suit, I am bound to give effect to the objection that he has not come to the proper Court for his relief.<sup>108</sup>

This paper does not chart the course of the ensuing decisions of the High Court, which ultimately accepted what had been established by the Supreme Court as to the separate jurisdictions at law and in equity.<sup>109</sup> At one time, it seemed that the High Court would dispel the fission which had developed between the common law and equitable jurisdictions of the Supreme Court, but that did not occur.

### **[138] *The position by the middle of the twentieth century***

By the middle of the twentieth century, the long serving Chief Justice, Sir Frederick Jordan, could write that ‘it is still of common occurrence for a Judge of the Supreme Court sitting in the exercise of its equitable jurisdiction to have occasion to grant an injunction restraining a party from proceeding at *nisi prius* before another Judge of the same Court’.<sup>110</sup> The same Chief Justice had, in *Coroneo v. Australian Provincial Assurance Association Ltd*,<sup>111</sup> dismissed a mortgagor’s complaint against the exercise of his mortgagee’s power of sale at a gross undervalue because it had been brought at common law. Conversely, in *Hawdon v. Khan*,<sup>112</sup> Street C.J. in Eq. said that a statement of claim seeking injunctions against the repeated trespass on land the plaintiff claimed to own was in substance ‘an action of ejectment triable, not on this side of the Court, but in its Common Law jurisdiction’, and upheld the defendant’s demurrer.<sup>113</sup>

One of the last legislative reforms prior to the adoption of the Judicature system occurred in 1957, when provision was made for orders that ‘the action be transferred into the jurisdiction of the Court in equity’, and, conversely, for an order that a suit or proceeding in equity be transferred into the

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<sup>107</sup> (1897) 18 N.S.W.L.R. Eq 29.

<sup>108</sup> *Merrick v. Ridge* (1897) 18 N.S.W.R. Eq. 29, 30. See also *Burnham v. Carroll Musgrave Theatres Ltd* (1926) 26 S.R. (N.S.W.) 372, 374.

<sup>109</sup> See *McLaughlin v. Fosbery* (1904) 1 C.L.R. 546, *Maiden v. Maiden* (1909) 7 C.L.R. 727, *Schnelle v. Dent* (1925) 35 C.L.R. 494 and *David Jones Ltd v. Leventhal* (1927) 40 C.L.R. 357.

<sup>110</sup> F. Jordan, *Chapters on Equity in New South Wales*, 6th ed. by F.C. Stephen (Sydney: University of Sydney Law School, 1947), 10; see also at 142. See for example *In re Graham’s Estate* (1901) 1 S.R. (N.S.W.) Eq. 69; *High v. Bengal Brass Company and Bank of New South Wales* (1921) 38 W.N. (N.S.W.) 65.

<sup>111</sup> (1935) 35 S.R. (N.S.W.) 391.

<sup>112</sup> (1920) 37 W.N. (N.S.W.) 131.

<sup>113</sup> (1920) 37 W.N. (N.S.W.) 131, 133. See also *King v. Poggioli* (1923) 32 C.L.R. 222, where a vendor who had sought specific performance in equity instead of damages for breach of contract recovered nothing, especially at 247 (Starke J.): ‘But the *Judicature Act* has not been adopted in New South Wales, and this case must be resolved on the law as it is settled under *Cairns’ Act*. We must therefore, in my opinion, first decide whether the plaintiff in this suit was entitled to a decree for specific performance. If he was, damages might properly be awarded for the loss occasioned by the delay in giving possession. If he was not, then damages cannot, as I understand the law in force in New South Wales, be awarded in this suit, whatever the position is at law’.

M Leeming, ‘Fusion-Fission-Fusion: Pre-Judicature Equity Jurisdiction in New South Wales 1824-1972 in J Goldberg et al (eds), *Equity and Law: Fusion and Fission* (Cambridge UP 2019), 118-143.

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Common Law jurisdiction of the Supreme Court if it appeared that there was ‘no jurisdiction’ in equity to deal with its subject matter.<sup>114</sup> This legislation had as its premise that there were separate ‘jurisdictions’ between which a matter could be transferred. It is inconsistent with anything other than a fission of jurisdiction.

There was also a *physical* fission between common law and equity, just as Stephen CJ had hoped in 1857, and as there had been before 1883 in England. The three judges who sat in Equity were located, from 1963, in the top three floors of Mena House on 225 Macquarie [139] St.<sup>115</sup> By 1974, when Street C.J. in Eq. resigned his office and Bowen C.J. in Eq. was appointed, there were four judges sitting in equity (the other three being Helsham, Mahoney and Holland JJ).<sup>116</sup> Holland J. had chambers in the Old Mint Building.<sup>117</sup>

The New South Wales Legislature ultimately enacted the remaining provisions of the nineteenth century Judicature legislation in the 1970s. The Supreme Court Act 1970 (NSW)<sup>118</sup> repealed the Common Law Procedure Act 1899 (NSW) and the Equity Act 1901 (NSW), and it became possible, for the first time, for there to be a single practice book for the procedure of the court. In particular, section 64 of the Supreme Court Act enacted section 25(11) of the Judicature Act 1873, but was repealed prior to its commencing,<sup>119</sup> no differently from parts of the 1873 Act. It was replaced by section 5 of the Law Reform (Law and Equity) Act 1972 (NSW), in order to avoid its being given a narrow construction by reason of its legislative context.<sup>120</sup>

### **Consequences of the delayed enactment of Judicature legislation in New South Wales**

One obvious consequence of the delayed enactment of the Judicature legislation in New South Wales was critical comment from appellate courts having to deal with what had become quite an unfamiliar legal system. Foremost of these was Higgins J., an early Justice of the High Court. For example, in *Perpetual Trustee Co Ltd v. Orr*,<sup>121</sup> Higgins J. said:

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<sup>114</sup> Equity Act 1901 (NSW), s. 8A, as inserted by the Supreme Court Procedure Act 1957 (NSW), s. 5(2)(b).

<sup>115</sup> See Anon., ‘Mena House Courts’ (1963) 6 N.S.W. Bar Gaz. 11, 11.

<sup>116</sup> See New South Wales, Supreme Court, ‘Report by the Chief Justice on Business of the Supreme Court’ (1974), 37 (copy in Joint Law Courts Library, Sydney).

<sup>117</sup> See New South Wales, Supreme Court, ‘Report by Chief Justice on Business of the Supreme Court for General Meeting of the Supreme Court Judges’ (20 November 1972), 11 (copy in Law Courts Library, Sydney). Part of the Mint Building had been used by courts since 1817: see C. Currey, *The Brothers Bent* (Sydney: Sydney University Press, 1968), 71-74.

<sup>118</sup> Section 5, Sched. 1.

<sup>119</sup> The 1970 Act was originally proclaimed to commence on 1 January 1972, but this was later postponed to 1 July 1972.

<sup>120</sup> The Law Reform Commission observed that ‘it may perhaps be open to argument that section 64 is confined to the rules to be applied in the determination of proceedings in the Supreme Court. Such an argument might be founded on the context provided by the Supreme Court Act generally’: New South Wales, Law Reform Commission, *Report of the Law Reform Commission Law and Equity* (Sydney: Government Printer, 1971) L.R.C. 13, [8].

<sup>121</sup> (1907) 4 C.L.R. 1395.

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I may be permitted to add that, in my opinion, fully one half of the time and labour which this case has involved could, in all probability, have been saved [140] to the Court and to counsel if, as under the English Judicature Acts, the same Court could deal freely with equitable and legal rights, so as to do justice once and for all between the parties litigating.<sup>122</sup>

Other judges expressed similar concerns.<sup>123</sup> Putting to one side those superficial comments, which seem to amount to expressions of irritation falling short of any substantive effect, strong arguments may be made for more significant consequences of the delayed introduction of Judicature legislation.

One commentator who is well-placed to express a view is Paul Finn. He wrote of the delayed introduction of judicature legislation as follows:

This almost century long New South Welsh exceptionalism had profound effects. It produced generations of practising lawyers, judges and educators who were masters of equity jurisprudence. I mention only Sir Frederick Jordan, Sir Frank Kitto, Sir Kenneth Jacobs, Sir Anthony Mason and Sir William Deane. The legacy of this in turn was that Australia alone of the Commonwealth countries was to have some number of large, well-known textbooks devoted to equity, or to specific aspects of it (to the exclusion of trusts and property law).<sup>124</sup>

Much could be written of the profound effects to which Finn referred. I shall identify four.

First, one consequence of the continuation of nineteenth century common law pleading was that New South Wales law, and, indirectly, the common law of Australia, was resistant to innovations based upon the abandonment of common law pleading. An example may be seen in the law of trespass to the person. It seems clear that it was the abandonment of common law pleading that led the English courts to alter the substantive law of trespass to the person. Following *Fowler v. Lanning*<sup>125</sup> and *Letang v. Cooper*,<sup>126</sup> it seems that a plaintiff who is struck by the negligent act of a defendant has a cause of action only in negligence, and must prove both breach of duty and damage. Both Diplock J.<sup>127</sup> and Lord Denning M.R.<sup>128</sup> justified a substantive change to the law of trespass in part by reason of the change in [141] the rules of pleading.<sup>129</sup> However, in Australia, it remains clear law that it was sufficient for a plaintiff to prove that the defendant had struck directly, with a blow or missile, and

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<sup>122</sup> (1907) 4 C.L.R. 1395, 1410. See also *Maiden v. Maiden* (1909) 7 C.L.R. 727 at 743 and *Davis v. Hueber* (1923) 31 C.L.R. 583 at 597.

<sup>123</sup> See *Turner v. New South Wales Mont De Piete Deposit & Investment Co Ltd* (1910) 10 C.L.R. 539, 542-543, 549, 554; *Loxton v. Moir* (1914) 18 C.L.R. 360, 370, 377. Contrast Rich J (who had had extensive personal experience with the New South Wales regime) in *David Jones Ltd v. Leventhal* (1927) 40 C.L.R. 357 at 384.

<sup>124</sup> P. Finn, ‘Common Law Divergences’ (2013) 37 M.U.L.R. 509, 516.

<sup>125</sup> [1959] 1 Q.B. 426.

<sup>126</sup> [1965] 1 Q.B. 232.

<sup>127</sup> *Fowler v. Lanning* [1959] 1 Q.B. 426, 434-5, 440-1.

<sup>128</sup> *Letang v. Cooper* [1965] 1 Q.B. 232, 238-240.

<sup>129</sup> Criticised by J. Jolowicz, ‘Forms of Action – Causes of Action – Trespass and Negligence’ [1964] C.L.J. 200.

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that a defendant has a valid answer if he or she can prove that the blow was neither intentional or negligent.<sup>130</sup>

Secondly, the separation of common law and equitable jurisdictions created an environment where the conflation of substantive doctrine was impeded. For example, a mortgagor’s complaint that a mortgagee’s power of sale was reckless or negligent was demurrable if brought as an action at common law.<sup>131</sup> Such an environment was ill-disposed to the innovations illustrated by *Cuckmere Brick Co Ltd v. Mutual Finance Ltd*.<sup>132</sup> It has been left to legislation to heighten the standards to which a mortgagee is required to adhere.<sup>133</sup>

Thirdly, and related to the foregoing, concerns as to some of the most prominent innovations consequential upon the adoption of the Judicature legislation led to the writing of *Equity: Doctrines and Remedies* and the coining of the “fusion fallacy” to describe and condemn a reasoning process to the effect that because the same court now had jurisdiction to determine both common law and equitable claims and to give common law or equitable remedies, there had been a substantive change in the law.<sup>134</sup> Those authors were critical of (for example) (a) the reliance on equity decisions in *Hedley Byrne & Co. Ltd v. Heller & Partners Ltd*<sup>135</sup> to sustain an action in negligence for damages for pure economic loss, (b) the reliance on common law decisions in *Cuckmere Brick Co. Ltd v. Mutual Finance Ltd*<sup>136</sup> to alter the law governing the exercise of a mortgagee’s power of sale, and (c) statements in [142] *Seager v. Copydex (No. 1)*<sup>137</sup> supporting the availability of damages for breach of an equitable obligation of confidence.<sup>138</sup> The consequences of that book were, in turn, considerable:

*Equity: Doctrines and [R]emedies* did as much as any book could do to guide judicial legislators towards legitimacy in the process of judicial legislation. Not the least of its

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<sup>130</sup> See *McHale v. Watson* (1966) 115 C.L.R. 199; *Stingel v. Clark* (2006) 226 C.L.R. 442, [47]; [2006] HCA 37; *Croucher v. Cachia* (2016) 95 NSWLR 117; [2016] NSWCA 132, [23]-[26], quoting (at [23]) Jacobs J.A.’s words, in *Timmins v. Oliver* (unreported, New South Wales Court of Appeal, 12 October 1972), three months after the commencement of the judicature legislation in New South Wales:

Nothing more has ever been required in an action based on trespass than an allegation of the battery and it is too late in the day to change this now. ... Can we as the curtain falls for the last time on declarations in trespass which have held the stage for centuries say that the play has all this time been played wrongly and according to a bad script? I think not.

<sup>131</sup> See especially *Coroneo v. Australian Provincial Assurance Association Ltd* (1935) 35 S.R. (N.S.W.) 391.

<sup>132</sup> [1971] Ch. 949.

<sup>133</sup> Conveyancing Act 1919 (NSW), s. 111A.

<sup>134</sup> Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies*, [220]-[257].

<sup>135</sup> [1964] A.C. 465.

<sup>136</sup> [1971] Ch. 949.

<sup>137</sup> [1967] R.P.C. 349.

<sup>138</sup> Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies*, [229]-[231].

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achievements in the age of fusion was its explanation of the true character of ‘fusion’ and its exposure of fallacies on that subject.<sup>139</sup>

Those criticisms, principally of decisions of the English Court of Appeal, which was highly persuasive but which did not bind Australian courts,<sup>140</sup> encouraged independence of thinking and discipline in the development of the law.

In the longer term, the book influenced Australian law schools, whose number was shortly to expand exponentially. As Dyson Heydon has put it:

[The work] arrested the decay of equity in university law schools. These grew rapidly in number and in population from the late 1960s on throughout the country. In the law schools there was massive pressure to reduce or keep compulsory courses to a minimum in order to accommodate a greater number of optional courses conforming to contemporary *quarante-huitard* tastes. Equity was a prime candidate for jettison or dismemberment. In places where equity was compulsory, *Equity: Doctrines and [R]emedies* caused it to remain compulsory; in places where it was optional, its status did not decline further. To some extent the subject was restored as a field of wide interest among academic lawyers, this being assisted by the writings of P.D. Finn, particularly *Fiduciary Obligations* (1977).<sup>141</sup>

The result in the twenty-first century is a legal environment in New South Wales where the teaching and practice of equity flourishes. Within the universities, as indicated in the passage reproduced above, in 1992 the Law Admissions Consultative Committee identified 11 areas, Equity being one, whose study was mandatory in order to obtain admission as a legal practitioner. That list now has statutory force.<sup>142</sup> Most law schools at Australian universities accordingly teach Equity as a compulsory undergraduate course. Within legal practice, two superficial measures of the vibrancy of equity may be noted. The first is that the database maintained by the New South Wales [143] Bar Association presently lists 569 barristers who claim to practise in ‘Equity’, from a total of 2,506.<sup>143</sup> The second is that a great deal of commercial litigation in Australia takes place in the “Commercial List” within the Equity Division of the Supreme Court of New South Wales.

It may readily be acknowledged that many other forces have been at work. However, the matters outlined above are at least indirect consequences of the delayed enactment of the Judicature legislation in New South Wales.

## Conclusions

The principal question addressed by this paper is *how* within New South Wales there was a fission of jurisdiction in the nineteenth century, in contrast with the fusion elsewhere in the world. Like most historical developments, it was the product of a series of small steps, the significance of many of which would not have been apparent at the time. With the utmost respect to Dr Bennett, it simplifies

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<sup>139</sup> J.D. Heydon, ‘The Role of the Equity Bar in the Judicature Era’ (2002 Winter) *Bar News* 53, 55.

<sup>140</sup> See for example *Sharah v. Healey* [1982] 2 N.S.W.L.R. 223, 227-8.

<sup>141</sup> Heydon, ‘The Role of the Equity Bar in the Judicature Era’, 55.

<sup>142</sup> See now the Legal Profession Uniform Admission Rules 2015 (NSW), Schedule 1 para. 7.

<sup>143</sup> See <http://archive.nswbar.asn.au/findabarrister/> (accessed 16 November 2018).

M Leeming, ‘Fusion-Fission-Fusion: Pre-Judicature Equity Jurisdiction in New South Wales 1824-1972 in J Goldberg et al (eds), *Equity and Law: Fusion and Fission* (Cambridge UP 2019), 118-143.

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matters to conclude that it was a ‘fallacious extension’. To answer the question *why* those steps came about would be to undertake a large and uncertain endeavour. One large element of the answer would be the growth in scale of litigation, coinciding with the economic development of the colony. Another aspect of the answer may lie in the influx of lawyers who had trained and practised in pre-Judicature courts in England and Ireland. But it would also appear that part of the answer to the question of why the New South Wales fission of jurisdiction came about turns on completely serendipitous considerations – the particular problems associated with Justice Willis between 1839 and 1841, and the happenstance that a law reform commission had produced an alternative draft bill in 1870.