Leeming, "The Primary Judge in Equity" (2016) 90 *ALJ* 783

THE PRIMARY JUDGE IN EQUITY[*]

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One of the oldest legal offices in Australia is the Chief Judge in Equity within the Supreme Court of New South Wales.[1] The office will have *officially* borne its current name for exactly 125 years on 31 March 2017,[2] but in truth the position is just over 175 years old. For its first 50 years, the office was known as the "Primary Judge in Equity". The seven colonial judges who served as Primary Judge in Equity are listed at the end of this note, as are their successors, the 17 Chief Judges in Equity.

Some aspects of the early history may be of interest. This note touches upon three colonial judges: the judge for whom the office of Primary Judge in Equity was created, the judge under whom equity business declined almost to a standstill, and the judge who sat as the first Chief Judge in Equity, who (as a barrister) had drafted what became the *Equity Act 1880* (NSW), and whose tenure coincided with a remarkable growth in equity business in the colony. Those events shed light upon a question of more general importance: how did a superior court with general jurisdiction at common law and in equity evolve so as to have separate "jurisdictions" at common law and in equity, such that proceedings commenced in the wrong jurisdiction would be dismissed?[3]

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[1] I am indebted to Ms Kate Lindeman and to the staff of the Joint Law Courts Library, especially Ms Larissa Reid, for assistance with the historical materials on which this note is based. The rules and decisions published in newspapers are all available electronically via the database maintained by the National Library of Australia (Trove).

[2] See n 42 below.

[3] This note draws upon a larger paper presented at the conference, Law and Equity: Fusion and Fission, held at the University of Cambridge in August 2016. I have benefited greatly from the analyses given by J Bennett ("Equity Law in Colonial New South Wales 1788-1902" (Research Project 59/20(c), University of Sydney, 1962)) and J Rogers ("Legal Argument and the Separateness of Equity in New South Wales, 1824-1900" (Law514 Legal Research Project, Macquarie University, 2002), as well as from the standard history in J Bennett, *A History of the Supreme Court of New South Wales* (Law Book Co, 1974).

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Creation of the Supreme Court of New South Wales

The Supreme Court of New South Wales in its present form was founded by Letters Patent in 1823,[4] with full jurisdiction over most matters, save matrimonial causes,[5] including at common law and in equity. Almost from the outset, the new court proceeded on the basis that, as the first Chief Justice, Sir Francis Forbes, 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 judicial establishment”.[6] That was not through local choice. To the contrary, the Order in Council conferring rule-making power upon Forbes CJ – who was the first Chief Justice who was given such a power[7] – mandated that:

> such Rules and Orders should 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 would admit.[8]

[784] Hence rule 1 of the rules made on 22 June 1825 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.[9] As John Bryson and Shaunnagh Dorsett have pointed out, Forbes CJ took considerable steps, notwithstanding the requirements to which he was subject, 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.[10]

Advancement of Justice Act 1840: “A division in the function of the Court”

The *Advancement of Justice Act 1840*,[11] among other things,[12] conferred power to vest equity jurisdiction in a single judge.[13] The orders and decrees of the judge exercising that

[4] Pursuant to 4 Geo IV c 96 (1823).

[5] 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 Bennett, *Sir Frederick Darley* (Federation Press, 2016), 41-42.

[6] *Lord v Dickson* (1828) *Dowling’s Select Cases* 487.

[7] See S Dorsett, “Procedural innovation: The First Supreme Court Rules of New South Wales and New Zealand” (2011) 35 Aust Bar Rev 128, 131.

[8] Reproduced in “Rules and Orders of the Supreme Court of New South Wales”, *Sydney Gazette and New South Wales Advertiser*, 23 June 1825.

[9] “Rules and Orders”, n 8, 4. This had been anticipated, before Forbes CJ had received official instructions, by a statement made in court on 13 December 1824 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”: *Australian*, 16 December 1824, 3.

[10] For example, permitting witnesses to be examined *viva voce*: see J Bryson, “Rules of Court in the Time of Chief Justice Francis Forbes”, 2 March 2013; http://www.forbessociety.org.au/wordpress/wp-content/uploads/2013/03/NSW-Rules-of-Court-1823-1839.doc; Dorsett, n 7.

[11] 4 Vic No 22 (1840).

[12] It also revived the office of Master in Chancery, authorised judges to conduct circuits in the growing colony, and provided for one judge to be based in Port Phillip.

[13] Section 20 provided in full: “It 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

jurisdiction were expressed to be of a different nature from orders made by a judge exercising common law jurisdiction: they were deemed to have been pronounced and made by the Full Court. An appeal lay to the other two Sydney-based judges.[14] There was thus a *legislative* division in the same court. The judge upon whom equity jurisdiction was vested was known, from the outset, as the “Primary Judge in Equity”.

The Colonial Office was concerned by the 1840 legislation, which had been drafted in Sydney. The Law Officers insisted that the matter be raised with the Executive Council, because as initially drafted, “a foundation is laid for pretensions and disputes”, and could give to the Equity judge a “virtual superiority over the Chief Justice”.[15] This is another example of the power exercised by the Colonial Office, palpable in its effect, although falling short of disallowance.[16] The *Advancement of Justice Act 1841*[17] 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”,[18] 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).[19]

[785] Dr Bennett observed in 1962 that the legislation “made for the first time in the Colony’s legal history a division in the function of the Court”.[20] Resources which are more readily available today suggest that conclusion may involve a slight exaggeration. For example, in an action in ejectment to recover possession of land in Burwood in 1832, Forbes CJ, Stephen and Dowling JJ said 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”.[21] Those statements seem to have reflected the *procedural* split between

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.”

[14] Section 21.

[15] Lord John Russell to Sir George Gibbs, 8 July 1941, *Historical Records of Australia* (HRA) I/XX1, 425, 426. The 1841 amending Act was passed before this despatch was received: see HRA I/XXI, 607.

[16] See A Twomey, *The Chameleon Crown* (Federation Press, 2006).

[17] 5 Vic No 9 (1841).

[18] Section 12.

[19] Section 13. The usual outcome was that the Primary Judge would maintain his views, albeit they were often in dissent; see, eg *William Walker & Co v ITE Flint* (1844) *Dowling’s Select Cases* 495; Dowling CJ, dissenting on appeal, had been the Primary Judge whose decree was reversed.

[20] J Bennett, “Equity Law in Colonial New South Wales 1788-1902” (Research Project 59/20(c), University of Sydney, 1962), 43.

[21] *Doe on the demise of Harris v Riley* [1832] NSWSupC 76 (*Sydney Herald*, 18 October 1832). See J Rogers, “Legal Argument and the Separateness of Equity in New South Wales, 1824-1900” (Law514 Legal Research Project, Macquarie

equity and common law. But it is true that after 1840 and 1841, legislation ensured that one judge of the Supreme Court, the Primary Judge in Equity, was 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. How did this come about?

Justice John Walpole Willis

The legislation of 1840 and 1841 was a direct consequence of Mr Justice John Walpole Willis. The office of Primary Judge in Equity was created at his instigation, and with the intention that he be appointed to it. However, he was never appointed to the office.

Justice Willis has been said to be "as troublesome a judge as could be imagined".[22] He had been expelled from Charterhouse, his marriage to a daughter of the 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,[23] 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.[24]

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, arriving in February 1838. History was about to repeat.

Willis was far from being without ability, and had published three textbooks on equity.[25] Following the same pattern seen in Canada five years earlier, once again, he sought higher status for himself in New South Wales through establishing a separate chancery court, with himself at its head. The Governor described it in his official despatch as follows:[26]

> 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; and, by the Printed Papers which are herewith enclosed, 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.

University, 2002) 27.

[22] J Bennett, *Sir James Dowling* (Federation Press, 2001), 111. See also J Barry, "Willis, John Walpole (1793-1877)" in *Australian Dictionary of Biography*, Vol 2 (MUP, 1967), 602; J McLaren, *Dewigged, Bothered and Bewildered – British Colonial Judges on Trial 1800-1900* (University of Toronto Press, 2011), 74-87.

[23] Pursuant to 22 Geo III c 75 (1782), (Burke's Act).

[24] See McLaren, n 22, 171.

[25] J W Willis, *Digest of Rules and Practice as to Interrogatories for the Examination of Witnesses* (1816); J W Willis, *Pleadings in Equity Illustrative of Lord Redesdale's Treatise on the Pleadings in Suits in Chancery by English Bill* (1820); *JW Willis, A Practical Treatise on the Duties and Responsibilities of Trustees* (1827).

[26] Sir George Gipps to Lord Russell, 1 January 1841, HRA I/XXI, 156.

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That was rejected by the other judges and the Governor, Sir George Gipps, and s 20 of the *Advancement of Justice Act 1840* was enacted instead, by way of compromise, at a time when the [786] Court was to be expanded. Although drafted with Willis J in mind, Dowling CJ claimed the position, following a series of slights by Willis J (who intimated that his Chief Justice was incapable of holding the position).[27] Willis J was relocated to Port Phillip, apparently at his own request.[28] A series of controversies followed,[29] until Governor Gipps amoved him by order dated 17 June 1843, once again without notice to him.[30]

THE MID-19TH CENTURY: JUSTICE JOHN FLETCHER HARGRAVE

The longest serving Primary Judge in Equity was Justice John Fletcher Hargrave. He had resigned in 1859 after 14 days in office as District Court judge in order to enter the Ministry as Attorney General. His appointment to the Supreme Court in 1865 was boycotted by the local Bar and was over the protest of the then Attorney General (J B Darvall), who resigned and returned to England.[31] He was disliked by Sir Alfred Stephen, who compared Hargrave with Willis.[32] He has been provocatively described thus:[33]

> Hargrave had a perverse streak as a judge, especially towards female suitors, not unconnected with his marital unhappiness and the inability to forgive his wife for having had him confined in a lunatic asylum in the 1850s.

It is difficult to assess objectively the strongly expressed opinions of the second half of the nineteenth century – a tumultuous time when Sir Julian Salomons felt obliged to resign as Chief Justice before he sat.[34] Sir Samuel Griffith regarded Hargrave J highly.[35] However,

[27] Gipps, n 26: "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 in Bennett, n 22, 114-131 and McLaren, n 22, 172-175, the latter describing what seemed to be "a calculated campaign to undermine Dowling's position". The starting point was the claim (tersely rejected by the Colonial Office) that Dowling CJ'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.

[28] "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 I/XXI, 165.

[29] See McLaren, n 22.

[30] This led 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 Sir George Gipps* (1846) 5 Moo PC 379. He was not reinstated to any judicial office.

[31] See HTE Holt, *A Court Rises* (Law Foundation of New South Wales, 1976), 43.

[32] See Stephen's letter to Cowper, 2 July 1872, *Cowper Correspondence* Vol 3 (ML A678), 377, cited in Bennett, n 5, 138. See also Stephen's late paper, "A Trio of Judges" (copy in Law Courts Library).

[33] K Mason, "Aspects of the History of the Solicitor-General in Australia" in G Appleby et al (eds), *Public Sentinels: A Comparative Study of Australian Solicitors-General* (Routledge, 2014), 28.

[34] See Bennett, n 5, Ch 7.

[35] See *Loxton v Moir* (1914) 18 CLR 360, 369 ("a distinguished equity lawyer and an accomplished Parliamentary draftsman").

it is clear that during Hargrave J's tenure as Primary Judge in Equity from 1865 until he retired in 1881, equity business collapsed.

It was during Hargrave J's time in office that the Law Reform Commission was constituted with one of its purposes being to inquire into "the removal of the inconveniences arising from the separation of jurisdictions at Law and in Equity".[36] An Equity Bill was drafted by the then leading junior, William Owen, but although introduced twice, it was not passed. In 1880, William Owen gave evidence to a Legislative Assembly Select Committee that equity jurisdiction was "dilatory, expensive, [787] ruinous to suitors and not in accord with the judicial progress of the age".[37] Ultimately, Owen's Bill was enacted as the *Equity Act 1880*.[38] By many measures, equity proceedings flourished under the new regime.[39]

The late 19th century: Justice William Owen

Section 1 of the *Equity Act 1880*[40] re-enacted the 1840 provision naming the Equity judge the "Primary Judge in Equity". So far as I can see, this was the first time that the office had been named in legislation, although the judge had, from the first, been so described in the law reports. It confirmed the legislative separation of jurisdictions within the same court.

The *Supreme Court (Judges Enabling) Act 1887*[41] permitted any other judge to hear and determine causes "depending in Equity" at the request of the Chief Justice or the Primary Judge in Equity. While so acting, that judge was to have "co-ordinate jurisdiction with and all the powers of the Primary Judge". Thus, for the first time, more than one judge was available on a regular basis to exercise the equity jurisdiction.

Both the short title and the substance of the 1887 statute are revealing. The premises of the Act were that:

(a) the same court contained different "jurisdictions"; and

(b) legislation was required to confer the powers of the Primary Judge upon another judge.

[36] See J Bennett, "Historical Trends in Australian Law Reform" (1970) 9(3) UWALR 211, 213.
[37] M Rutledge, "Owen, Sir William (1834-1912)" in *Australian Dictionary of Biography*, Vol 11 (MUP, 1988), 114.
[38] As he observed in *Horsley v Ramsay* (1888) 10 LR (NSW) Eq 41.
[39] One crude measure may be seen from the swift expansion of reported equity decisions in the *New South Wales Law Reports*: fewer than 5% of decisions reported in 1880-1884 were equity suits; a decade later, more than half of the decisions were equity suits. A less subjective approach may be seen from the relative growth in filings after 1881: see TA Coghlan, *NSW Statistical Register 1890 and Previous Years* (George Stephen Chapman (Acting Government Printer), Sydney 1891), 302, Table 33, 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.
[40] 44 Vic No 18 (1880).
[41] 50 Vic No 36 (1887).

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The *Judicial Offices Act 1892*[42] renamed the Primary Judge in Equity as the Chief Judge in Equity.

Justice William Owen was appointed in 1887, and from the outset was known as the Chief Judge in Equity.[43] He was said to have “a rare faculty of discarding the superfluous and unimportant issues” and his judgments were “regarded as classics”.[44] He later served with distinction at common law and as a royal commissioner.[45] On the resignation of Owen CJ in Eq in 1896,[46] it was said that he had “raised the Court to an eminence it had never before attained”.[47] A crude measure may be seen in the series of New South Wales law reports which commenced in 1880: Volumes 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.

[788] Thus two things may be attributed to the first Chief Judge in Equity for present purposes. The legislative entrenchment of the jurisdictional division between common law and equity was completed by the *Equity Act 1880*, drafted by Owen. And it was during his tenure as Chief Judge in Equity that the separate jurisdiction became highly attractive to suitors.

PRIMARY AND CHIEF JUDGES IN EQUITY

The holders of the office of Primary Judge in Equity were:[48]

1840 – Sir James Dowling

1845 – William a’Beckett

1846 – Roger Therry

1859 – Samuel Frederick Milford

1865 – Alfred Stephen (9 June until 16 November)[49]

[42] 55 Vic No 26 (1892), which commenced on 31 March 1892.
[43] See the front pages of Vol VIII of the NSWLR in 1888.
[44] Rutledge, n 37, 114.
[45] See G Lindsay, “Be Substantially Great In Thy Self”, http://www.forbessociety.org.au/wordpress/wp-content/uploads/2013/03/bean.pdf. Owen CJ in Eq’s son and grandson served on the Supreme Court of New South Wales, the latter also on the High Court of Australia.
[46] His obituarist stated that the move was to avoid criticism of sons practising in jurisdictions where their fathers presided: *Truth*, 24 November 1912, 8.
[47] See (1896) 17 NSWLR ix.
[48] Titles are in the form taken at appointment.
[49] See the front pages to 4 SCR.

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1865 – John Fletcher Hargrave

1881 – Sir William Manning[50]

The holders of the office of Chief Judge in Equity have been:

1887 – William Owen.[51]

1896 – Charles James Manning[52]

1898 – Archibald Simpson

1918 – Philip Street

1925 – John Harvey

1935 – Reginald Long Innes

1940 – Harold Nicholas

1947 – Ernest Roper

1958 – Charles McLelland

1972 – Laurence Street

1974 – Nigel Bowen

1976 – Michael Helsham

1985 – Thomas Waddell

1993 – Malcolm McLelland

1997 – David Hodgson

2001 – Peter Young

2009 – Patricia Bergin

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[50] See (1881) 2 NSWLR front page.

[51] William Owen was appointed "Chief Judge in Equity": see the memoranda to Vol VIII of the NSWLR in 1888, which distinguished between the resignation of Manning as the Primary Judge in Equity and the appointment of Owen as the Chief Judge in Equity, thereby anticipating the change in title made by statute in 1892.

[52] See (1896) 17 NSWLR memoranda.