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"The Separation of Jurisdictions
in the Supreme Court of
New South Wales"
1824 - 1900

A Thesis submitted for the
Degree of
Master of Laws

by

J. M. Bennett

1963
This thesis is only a fragment of the project which I originally planned. I had thought to write a history of the several jurisdictions of the Supreme Court of New South Wales excepting, because of its magnitude, that at Common Law. After acquainting myself more closely with the source material it became obvious that I could not, even over the course of many years, hope to write a serious history of so many jurisdictions in a compendious way. It also became apparent that no investigation had previously been made of the separation from the Supreme Court of its various jurisdictions and departments. With a sense of compromise I have restricted my study to this, seeking to explain how the specialist units of the Court came to take their place and at the same time to sketch what their utility and functions were. I have further limited the history to what I have loosely described as the "colonial" period by which, for the purpose of the thesis, I contemplate the period from 1788 to Federation not, as is more strictly correct in nomenclature, the period prior to responsible government.

Any student of Australian legal history cannot commence to consider the subject without incurring a considerable indebtedness to the basic research of Dr. C. H. Currey in his "Chapters on the Legal History of NSW". This regrettably unpublished work is like a lodestar in a sky of utter darkness. All other information must be wrested from a formidable array of primary documents which, for the greater part, afford no catalogue assistance. I mention this, not to luxuriate in the difficulties which have confronted me, but to emphasize that the likelihood of error is unavoidably increased. While I have endeavoured to verify the whole of my writing, it is inevitable that some factual deficiencies must occur. It is only by taking courage to venture the project with its mistakes that I can attempt to make somewhat easier the path to further research in this much neglected field.
I have received most generous assistance from the Librarians of the Mitchell, Parliamentary and Law School Libraries, which I wish thus inadequately to acknowledge.
ABBREVIATIONS AND ACKNOWLEDGEMENTS

The following abbreviations have been used in the notes to the text:

HRA : Historical Records of Australia.
HRNSW : Historical Records of New South Wales
Stephen's Practice : Alfred Stephen "The Constitution, Rules, and Practice of the Supreme Court of New South Wales" (1843) and Supplement.
V & P : Votes and Proceedings of the Parliament of New South Wales (Legislative Council prior to 1856, thereafter Legislative Assembly).

The usual abbreviations of Law Reports have been used (Legge's Cases being cited as "Legge"). The following references are made to Australian legal periodicals:

ALJ : The Australian Law Journal
SLR : The Sydney Law Review.

Original materials from the Mitchell Library collection of the Public Library, the State Archives and other sources are acknowledged in the annotations.
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THE JURISDICTIONS OF THE COLONIAL SUPREME COURT

The Supreme Court of New South Wales when established in 1824 was not the Colony's first Court, nor yet its first Supreme Court. It was, however, the first really comprehensive judicial tribunal applying British justice rather than the law of expediency.

On the foundation of the Colony in 1788, a Criminal Court was constituted under the authority of 27 Geo. III c. 2. This Court was composed of a military officer, styled Deputy Judge-Advocate, presiding over six military or naval officers selected by roster and summoned by precept from the Governor. The practice of the Court was summary in the extreme and its integrity was of the weakest order, many of the officers showing patent bias or intolerance at being called upon to join the tribunal. This virtual 'Judge and Jury' continued a notoriously inefficient existence until replaced by the Supreme Court in 1824. There also was provision made by the Letters Patent of 2nd. April, 1787, (the "First Charter of Justice") for a Civil Court to be established, but no enabling statute had ever been passed. The constitutionality of the Civil Court which was erected in the Colony on the authority of the Charter has consequently been doubted. This Court was also for many years presided over by the Judge-Advocate and consisted of two "fit and proper persons" selected from the fairly limited free population. From this Court an appeal lay to the Governor in person.

Ellis Bent, who came to Sydney as Judge-Advocate in 1810, was a trained lawyer of remarkable aptitude for his office. He it was who particularly proposed the establishment of a Supreme Court and the separation of law from military influence. Speaking of the inadequacy of the Civil Court to deal with the
needs of the Colony in its advancement beyond a penal settle-
ment, he said: "the civil functions ... have become extremely
burdensome, important, and of great responsibility, embracing
even more than the usual duties of a Judge, and requiring a
greater knowledge both of the theory and practice of the law
than it would become me even to think that I possess". Of the
Criminal Court he protested more strongly: "It seems that the
Governor considers me merely as a Subaltern Officer, a mere
cypher, a person sent out simply to execute his commands as
one of his staff"... I never did or could consider my appoint-
ment a military one ... such a supposition is incompatible
with the due performance of its functions.

In England it was decided by 1814 to remodel the civil
February (the "Second Charter of Justice") made provision for
a new hierarchy of Courts. The old Civil Court remained in
essence but was called the Governor's Court. It was empowered
to deal with actions involving less than £50. Of higher order
was an entirely new civil Court called the Supreme Court and
having jurisdiction in matters where more than £50 was in issue.
The Governor, "assisted" by the Judge-Advocate, acted as a High
Court of Appeals. The Supreme Court was the first in the
Colony's history to be under the superintendence of a Judge —
an extraordinary anomaly, as the Judge's precedence and status
were subordinate to that of the Judge-Advocate.

The whole system was still obviously unsatisfactory and
the impression made upon Commissioner J. T. Bigge, coupled
with recommendations by Judge-Advocate Wylde and Mr. Justice
Field, led to the Commissioner's lending support enough to
persuade the Secretary of State for the Colonies of the need
for wider reform. This found its result in the enactment of
4 Geo. IV c. 96 which, inter alia, authorized the King to
issue Letters Patent for the constitution of new Courts of
Judicature. The letters were issued on 13th. October, 1823
(the Third Charter of Justice) and set up a Supreme Court in
these terms: "Now know ye that we upon full consideration of
the premises and of our especial Grace certain knowledge and mere motion have in pursuance of the said Act of Parliament thought fit to grant direct ordain and appoint that there shall be within that part of our Colony of New South Wales situate in the Island of New Holland a Court which shall be called the Supreme Court of New South Wales and we do hereby create direct and constitute the said Supreme Court of New S. Wales to be a Court of Record."16

The Supreme Court was a single Court. When the need for a further Judge to assist Chief Justice Forbes was under consideration it was expressly stated that, as the Act contemplated "only one Court ... they (the Judges) would not so divide themselves, as to hold two Courts concurrently at the same time"17. On this single Court a wide jurisdiction was conferred. The Act gave it cognizance of "all Pleas Civil Criminal or Mixed in all Cases whatsoever, as fully and amply ... as His Majesty's Courts of King's Bench, Common Pleas, and Exchequer at Westminster".18 It was also contemplated by the Act that the Supreme Court would have jurisdiction to hear and determine offences committed at sea including treason, piracy, felony, robbery, murder and conspiracy,19 and to adjudicate at the trial of crimes and misdemeanours.20 The Court was to have an Equitable jurisdiction21 and an Ecclesiastical jurisdiction, the latter being much amplified by the Letters Patent. A provision giving a limited jurisdiction in Insolvency was included.22 The Letters Patent further gave authority to appoint "Guardians and Keepers" of Infants and of "Natural Fools".23 Only in Matrimonial Causes was jurisdiction deliberately withheld from the Colonial Court.

The early Judges of the Court knew of no Equity Court, Insolvency, Probate or other jurisdictional Court: there was a single tribunal in which all branches of law were entertained. By the end of the nineteenth century, however, the Supreme Court might at first sight appear to have been dismembered; this being emphasized even more strongly in recent times by the practice of having the Courts constituting separate jurisdictions
in widely scattered places. It is the aim of this thesis to trace the steps by which the various departments of the Supreme Court were established and to venture the conclusion that these were administrative extensions of one and the same Court and that there is no historical justification for regarding the Supreme Court as at any time losing its unity.

Suggestions of dissecting the Court do not seem to have been made before the arrival of Mr. Justice John Walpole Willis, a self-opinionated chancery practitioner who saw the opportunity of founding a local Equity Court as one for personal benefit. He recommended in 1838 that a new judicial department in equity be set up and that he be given the presidency of it with the grandiose title of Chief Baron. He further suggested that the Insolvency and Ecclesiastical business should be transferred to himself, leaving the other two Judges to concentrate on the Common Law list. The Chief Justice may well have been disposed to acquiesce in all of these proposals had Willis not involved himself in an acrimonious quarrel with his brother Judges. In the result, the Chief Justice decided that there was not sufficient Equity business to occupy the exclusive attention of one Judge and that in any event the need was for a further puisne on the judicial strength, not for another Court. A few years later Dr. Kinchela sought the appointment of an Equity Judge so that he might receive the office, but the idea was rejected on substantially similar grounds.

The first step in extending the Court's power by subdividing its functions was taken in the passing of 4 Vic. No. 22 - an Act for the more effectual administration of justice in New South Wales. This very belatedly acknowledged the increase in Equity litigation and proceeded to confer power on the Governor to appoint the Chief Justice or one of the Puisne Judges to sit separately to determine chancery matters. It marked the commencement of the title of Primary Judge in Equity - later styled Chief Judge in Equity.

Nowhere is the confusion between the relationship of the Supreme Court and its departments more apparent than in the
Equity Jurisdiction. Indeed it was perfectly clear before the end of the colonial era that the Equity Court had come to be regarded as an entity so severed from the Common Law Court that a suitor in the one Court might be unable to secure relief, on the ground that his redress lay in the other Court. Nothing could be more repugnant to the concept of a single Court of judicature in New South Wales.

The confusion evidently arose from a false analogy between the strict separation of the English Courts before the Judicature Acts and what seemed (but was not) a separation in New South Wales. Hence, as early as 1850, the Full Court in *Bank of Australasia v. Murray*[^30] declined to grant any relief to a plaintiff who had proceeded in Equity instead of at Common Law. There, despite some strongly dissenting judgements in *Goodlet v. Fowler*[^31] and *Underwood v. Underwood*[^32], the matter seemed to rest. It was carried on as a vehicle of practical convenience, as appears from the following examination of Sir Alfred Stephen before a Select Committee of the Legislative Council:

"As you admit that there must be an appeal to the Common Law Judges, does not that admission imply that there is no necessity for dividing Equity from Common Law? I think that practically, it is much the same now. The larger portion of the Equity business is discharged by Mr. Justice Therry. Nevertheless, appeals from his decisions lie to the three Judges; or, when Mr. Justice Milford was fourth Judge, they lay to the four:— and these appeals have been more than once heard, in Mr. Justice Therry's absence. I think it desirable, however, that the Equity Judge should himself be a member of the Appellate Tribunal. (Q) Would not such an arrangement form an additional difficulty in the way of a future amalgamation of the two branches, and of the constitution of one Court? If there is to be an amalgamation of the Common Law and Equity, an additional difficulty would no doubt be introduced by this distinct previous separation:— but the admixture is not in my opinion practicable"[^35].

The view that Common Law and Equity were distinct matters
for distinct Courts was reiterated in O'Rourke v. The Commissioner for Railways and O'Connor v. North. The introduction to the Colony of Cairns' and Holt's Acts by the Equity Act 1880 accepted the separation of Law and Equity as axiomatic and then proceeded to afford some remedy by sections 4 and 32 for the litigant who would otherwise be obliged to seek relief in two Courts. The long series of cases which followed were, it is submitted, historically unnecessary as, before the Equity Act 1880 the Equity Court remained part of the Supreme Court and was invested with all its powers. The dictum in Weily v. Williams that "in this colony there is not the same amalgamation of jurisdictions" as in England under the Judicature Acts was quite the opposite of the truth. In fact the colonial jurisdictions were, and have remained, amalgamated within one Court. As Sir James Martin, C.J., succinctly stated - "the Supreme Court has jurisdiction in criminal, common law, equity and ecclesiastical matters. These are not all separate Courts presided over by separate Judges, but one and the same Court sitting in its several jurisdictions".

The subdivision of Equity, once achieved, the Court retained its sense of unity for a number of years, though many suggestions were made for a reallocation of duties. At about 1850 when the appointment of a fourth Judge was actively canvassed, Alfred Stephen considered it desirable that one of the bench of four should be appointed Equity Judge with the Insolvency and Ecclesiastical Jurisdictions added to his duties. Dickinson, J., made a similar suggestion with the novel addition that the Courts sit in different buildings "so that there might be a distinct Bar to each". He voiced strong disapproval of the calls made upon the Judges over the whole field of law and felt that specialization was necessary - "The necessity of having to consider one day a point of Common Law, another day a point of Insolvency, and another day an Equity suit, has been to me, personally, a source of the utmost distraction. Shortly after I came here I endeavoured to get up Equity. Having never
read any Equity before, I found myself dreadfully at fault whenever any Equity cases came before the Court ... Although I got up each point as it arose, I do not know that the same point has ever occurred a second time; and, therefore, whenever a new case comes before the Court I have had to go through the same course again.¹⁰

In 1857 the question of the Court's business was referred to a Select Committee of the Legislative Council which was directed to report on the expediency of establishing "a separate Court of Equity and Insolvency" and to indicate what part of the existing Ecclesiastical, Intestate and Lunacy branches might be transferred to its Judge.¹¹ The Committee considered that the Equity branch should be reformed by itself and left clear of other departments, particularly Insolvency, "because your Committee apprehend that the removal of those cases in appeal from the three Judges to the decision of one Judge would not be satisfactory".¹² By 1858 Stephen again pressed for the permanent appointment of a fourth Judge to take Equity, Insolvency, Ecclesiastical and Vice-Admiralty matters.¹³

Mr. Justice Burton in 1857 and 1858 was responsible for introducing Bills in the Legislative Council on the business of the Supreme Court. The first, which was passed by the Council, but not the Assembly, sought the establishment of a Court "of Equitable Jurisdiction ... in and for the Colony" the Judge of which should have "a sole and independent jurisdiction, exclusive of the Supreme Court in the first instance".¹⁴ The Court was envisaged to have jurisdiction in Ecclesiastical matters and the supervision of intestate estates and, following Dickinson's earlier proposal, was to be "distinct and separate from the Supreme Court, not only in jurisdiction, but also as to the Court in which its sittings shall be held".¹⁵ The second was called "A Bill to make further provision for the Administration of Justice and to establish a Court of Equity" which proposed the erection of a Court detached completely from the Supreme Court and known as "the Court of Equity of New South Wales". This Court was to have an equitable and ecclesiastical
jurisdiction and was to take over the corresponding work of the Supreme Court even to the extent of having pending suits transferred to it. The Bill did not become law.

In 1864, a year before a fourth Judge was appointed to the Bench, the very large and important jurisdiction in Insolvency was recognized as the next subdivision of the Court. Exactly ten years later the first mention was made in the Law Almanac of the newly created Divorce and Matrimonial Causes Court and its Judge—constituting yet another department of the Supreme Court. The Lunacy Jurisdiction, which had previously, for practical purposes, been part of the Equity Court, was set up in 1880 and a new Court Office opened for the Master in Lunacy. The department of the Curator of Intestate Estates was established by 1887 in addition to a previously existing Office in the Supreme Court Department of the Custodian of Wills. These offices did not merge in a consolidated Probate Department until 1897— the Probate Jurisdiction being given very little alteration by rule or statute during the colonial period. The severance of the departments was completed in 1889 with the establishment of a Bankruptcy Department in place of the old Insolvency Jurisdiction.

As against this pattern of division of functions, there is one exception in the Admiralty Jurisdiction which, in consequence, will be considered here only briefly. By Letters Patent of 5th. May 1787 authority was given for the creation of an independent Court in Vice-Admiralty pursuant to 11 & 12 Wil. III c. 7 and extending statutes. Governor Phillip together with Ross, Miller, Alt, Hunter, Bradley, King, Maxwell, Ball and other naval officers were appointed Commissioners in the Colony "for the examining, enquiring of, trying, hearing and determining and adjudging according to the directions of the same Acts in any place at sea or upon the land at the said territory called New South Wales all piracies, felonies, and robberies and all assessories thereunto committed or which shall be committed in or upon any sea or within any haven, river, creek or place where the Admiral or Admirals have
The Court was to consist of seven persons at least three of whom were to be Commissioners. Practice and procedure in the Court were patterned on the English High Court of Admiralty. Ross, the Lieutenant Governor, was Judge of the Court but, as he was more often away from Sydney than in that town, the convening of the Court occasioned great difficulty in the early years. The Court's jurisdiction was restricted to matters of a criminal kind but no prize jurisdiction was conferred; an anomaly made more emphatic by an order of the Admiralty Commissioners in 1813 purporting to revoke the Court's authority in prize cases.

Up to the time of the founding of the Supreme Court in 1824 the successive Governors continued to act as Vice-Admirals of the separate marine Court, the Judge-Advocates being appointed as Judges by commission from the High Court of Admiralty. "This Court", said Judge-Advocate Wylde, in 1821, "has never attempted ... to act as an Instance Court (and) it may be worthy of consideration, whether it would not be expedient and of great public advantage, from the increasing property of the Colonial Interests, that Admiralty Jurisdiction should be given to the Supreme Court at this place, as to the Courts in India".

There was little change in the structure of the Vice-Admiralty Court after the other jurisprudential changes of 1824. Over many years the Governor for the time being remained as Vice-Admiral and, as a matter of routine, the Chief Justice was commissioned as Judge of the Court. The business of the Court was of little substance. Therry, J., in 1857 described it as amounting to "nothing, or next to nothing. I have not for a long time heard of a single Admiralty suit".

In 1859 it was proposed by the Executive Council that the Vice-Admiralty Court's jurisdiction should be merged in that of the Supreme Court and be invested with cognizance of civil as well as criminal matters. This was not in fact achieved until the twentieth century, the independence of the Court meanwhile being consolidated by the passing of the Imperial Acts 26 & 27 Vic. c. 24 and 31 Vic. c. 45.
Apart, then, from this exception, it is proposed now to consider in turn the processes by which the various branches of the Supreme Court in New South Wales evolved.
NOTES

1. HRA IV/I, 509, 542.
2. Id. 3.
3. Detail of the scope of this office is contained in the writer's paper "The Status and Authority of the Deputy Judge-Advocates of New South Wales", 2 SLR 501.
4. For example, HRA IV/I, 499, Watkin Tench "A Narrative of the Expedition to Botany Bay" (1789), 69.
6. The appellation "Charter of Justice" seems to have acquired its place by long usage, but is objectionable because of its tendency to confuse. There were three separate Letters Patent in the early years of the Colony which were styled "Charters of Justice". The first is here referred to, the second was for the Supreme Court of 1814 (4th. February, 1814) and the third for the Supreme Court of 1824 (13th. October, 1823).
7. HRA IV/I, 7.
8. 11 ALJ 409 at 415-416.
10. HRA IV/I, 102.
11. Id. 49.
12. Id. 127.
13. Id. 77.
14. Id. 254.
15. Id. 647.
16. Id. 509.
17. Id. 639.
18. Id. 648.
19. Section III.
20. Section IV.
21. Section IX.
22. Section XXII.
23. HRA IV/I, 518.
24. HRA I/XXI, 163-164.
26. HRA I/XXI, 160; HRA I/XXII, 323.
27. V & P 1840, 159.
28. HRA I/XVIII, 531.
29. Section 20.
30. 1 Legge, 612.
31. (1876) 14 SCR 49; cf. Broughton v. Rodd (1866) 4 SCR Eq., 54.
32. (1879) 1 NSWR Eq., 16.
34. (1886) 7 NSWR Eq. 67.
35. (1887) 9 NSWR Eq. 88.
36. (1895) 16 NSWR Eq., 190.
37. Brown v. Patterson (1883) 4 NSWR Eq. (A), 1 at 10.
38. V & P 1847 (2) 477.
41. Id. 9.
42. Id. 146
43. V & P 1858 (1), 1157.
45. Ibid.
46. HRA IV/I, 16.
47. Id. 71.
48. Id. 371.
49. The continued existence of this Court is surprising when it is considered that the Supreme Court had been invested with jurisdiction, HRA op. cit., 649.
The Supreme Court of 1824 was constituted as a single Court with a number of jurisdictions of which the Equity Jurisdiction was one. There was no suggestion at the outset that a separate Equity Court should be established. Section IX of the Administration of Justice in New South Wales Act 1823 (4 Geo. IV c. 96) made this provision:

"That the said Supreme Courts respectively shall be Courts of Equity in New South Wales and Van Diemen's Land, and the Dependencies thereof respectively, and shall have power and authority to administer Justice, and to do, exercise, and perform all such Acts, Matters, and Things, necessary for the due Execution of such Equitable Jurisdiction, as the Lord High Chancellor of Great Britain can or lawfully may within England."

Chief Justice Forbes felt that the Court should give all of its attention to criminal proceedings and matters at Common Law and he did not disguise his own belief that an Equity Jurisdiction was unnecessary: He disposed of it by saying "in an early stage of society there is comparatively but little occasion for resorting to a court of Equity" and he complained that he could not find sufficient employment for the Master of the Court, whom he regarded as a Master in Chancery. Only eight simple cases were referred to the Master within the first three years of the Court's existence and very few more up to 1832 when Master Carter, the first appointee became insolvent and was dismissed. The office was allowed to stand vacant and the Equity Jurisdiction was resorted to only rarely. Therry, J., recalled that when he arrived in the Colony "there might be two or three bills in the course of a year - half a dozen days in the course of a year would dispose of all the Equity business." Only two statutory provisions affecting Equity in the Colony were passed between 1823 and 1840. The first, 9 Geo. IV c. 83, re-enacted the terms of 4 Geo. IV c. 96 so far as the Court's jurisdiction was concerned. The second was a statute
Equity business did not commence to revive until Mr. Justice John Walpole Willis came to take his seat on the colonial bench. The Judge had practised extensively in chancery and entertained a high regard for his own abilities as an equity lawyer. He openly protested that his talents were wasted on common law matters and he suggested a reorganization of the Court so that a new office of Chief Baron might be created and occupied by himself? These recommendations which were made in 1838 visualized the entire separation of the Equity and Common Law branches of the Court. To Willis' intense annoyance, the other members of the bench did not regard his proposal as practical. However, his idea that he should concentrate on Equity hearings and the bulk of the Insolvency, and Ecclesiastical work, thus leaving the other two Judges time to make sufficient circuits, was accepted to some extent for a few years.

Willis did make a substantial contribution to the Equity Court because he drew such attention to it. Unfortunately he was so devoid of tact or concern for interests other than his own that he attracted considerable odium. At the same time he was not a fool and his ability was witnessed in his compilation in 1838 of the first Equity Rules (known as the Standing Rules) which served the Court very satisfactorily for over twenty years? He can also be pardoned for his indignation at the policy fostered by Forbes of allowing equity matters to look after themselves. "I found the practical proceedings", he said to the Governor, "a perfect chaos of irregularity; of the orders and decrees which had been made I shall say nothing more. ... Was it to be wondered then that being brought up and practising for the most part of a long professional life, in Courts of Equity and Civil Law, I should have discovered flagrant errors in the proceedings of those who had never been previously accustomed to this Branch of
Judicature and therefore could not be expected to know the principles and practice of this science ... by Inspiration? Unpardonable, however, were his public attacks on the system and on his brother Judges, exemplified in his judgements in Neale v. Solomon and Ex parte Roxburgh. Equally wanting in balance were his personal attacks conveyed by letter to his opponents as in the following extract from a note which he wrote to Chief Justice Dowling: "I believed also from the state in which I found the Proceedings, and still believe, that my Brethren (neither of whom had ever practised in a Court of Equity) were incompetent to perform the duty with credit to themselves and benefit to the Public. I confess that I am of opinion that a Chief Justice duly qualified by previous study and experience, should exercise the Jurisdiction, but I did not imagine that one, who never I believe (save since his arrival in this Colony) was engaged in any Equity Proceedings, would have accepted an office so vitally essential in its due performance to the public welfare. Dowling for some time persisted in his view that the then existing state of the Colony did not warrant the institution of a separate Court of Equity.

Meanwhile, equity business was progressively increasing and by 1836 there were signs of popular dissatisfaction with the existing machinery of the Court. The Sydney Gazette in May, 1836, described equity proceedings as adverse to all ordinary notions of reason, justice or expediency and it asserted that "in 'equity' - all is uncertainty, delay, and too often chicanery - chicanery encouraged indeed from a multiplicity of forms, and of endless technicalities - the successive innovations of cozening lawyers and the concessions of too pliant Judges". There is reliable evidence, particularly that of Therry, J., supporting the essential truth of these apparently over-coloured assertions. Dr. Kinchela, who was a candidate for a seat on the bench, pressed for the appointment of a fourth Judge to deal with Equity business. In support of his claim he pointed out that in 1836 there were
157 pending equity suits of which only twenty had been finally determined. In his view "as the equity business of the Supreme Court has already increased very much, and is likely further to increase from the nature of the conveyances, and settlements, which were heretofore made by parties in this Colony before they had obtained legal titles to their property, it may be deemed expedient to His Majesty's Government to appoint an assistant Judge for this Colony, whose duty it would be to attend to the Equity and Chamber business of the Court, particularly when the Circuit Courts shall be established ... The equity and chamber business of the Court would, even now, occupy the entire time of a Judge".17

Kinchela did not secure the position which he sought, but his representations remain to demonstrate the alteration in circumstances which compelled Dowling to change his own mind. The need for an Equity Court was at last being so much felt that some action had to be taken and it was taken in 1840 by the Act for the more effectual administration of Justice in New South Wales, 4 Vic. No. 22.18 The efficacy of the statute, so far as the Equity Court was concerned, was another question. The Act merely declared by a masterpiece of understatement that "the Equity Branch of the Supreme Court hath lately increased", enabled one Judge to exercise the jurisdiction and revived the office of Master in Equity.19 The last was most significant as the Master's office typified the essential slowness of the old style of chancery procedure. In this office for instance accounts were to be taken, references made and evidence heard - all tedious and wasteful inheritances from England.

The provisions of section 20 of 4 Vic. No. 22 were of greater face value than actual worth. They enabled the Governor to appoint the Chief Justice, or if he declined, 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 ... Court of Equity".20 The decrees and orders of such Judge were then to have the same validity as if pronounced by the Full Court, but an appeal
to the other Judges of the Court could be made within fourteen days? This did not achieve what Willis and Kinchela had hoped - the appointment of a separate Judge to concentrate on Equity business. It merely modified the original basis of the Court's jurisdiction whereby the Full Court was the proper body to entertain all Equity matters. It was not effectively applied in the time of Dowling, CJ., and the importance of the statute rather was that it marked the first division of the Court into its component jurisdictions - as jurisdictions of one and the same Supreme Court, not as new Courts independently established. The division was therefore in no sense a separation of Equity from Common Law so that two Courts existed where only one had been before. Indeed, the idea of separate Courts for separate subject matter still had very influential opponents: Alfred Stephen, for instance, wrote to the Governor in 1840 saying - "as to each of these proposed separate Jurisdictions, it is to be observed, that the necessary additional expence (sic), will be out of all proportion to the expected advantage. There must be separate Officers, with separate Offices and Salaries. Again, there will be produced by such a system, a clashing of interests, and of decisions, every way undesirable".

The 1840 division was simply intended, though it did not so work out in practice, to leave two Judges to concentrate on criminal and civil matters while the third Judge should give his whole attention to equity, insolvency and ecclesiastical work. The change was not a success because the Equity Judge was obliged to give priority to any other Court business which his brethren could not deal with in their lists. According to Therry, J., in 1857 "Equitus sequitur legem was facetiously enough translated not very long since, "Equity always comes after common law"; for no matter if it were a case of assault involving damages to the extent of £10; or a case of pocket-picking to be tried at Darlinghurst, either must have precedence of the case of Jobbin's will, which involved some £80,000".

It was in pursuance of 4 Vic. No. 22 that Dowling, CJ.,
took the title of Primary Judge in Equity towards the close of 1840. This marked the climax in Willis' bitterness, the details of which cast some light on the emergence of the jurisdiction. Governor Gipps had observed the "natural sort of arrangement" between the Judges by which Willis had, almost exclusively, confined himself to the equity hearings and the Chief Justice had acknowledged the "very large and meritorious share" taken by Willis in the Equity Court. However, the members of the Supreme Court became so weary of Willis' provocations that they resolved in 1840 to take all litigation in rotation; a proposal which infuriated Willis and tricked him into a foolish mistake which caused his downfall. The mistake was that Willis wrote to the Governor formally withdrawing from exclusive authority in equity on the grounds that he would not permit his greater knowledge and experience to attract additional responsibilities to himself "merely in case of others, who claim an equal share in this Equitable Jurisdiction". He also wrote to Dowling asserting that he had never been anxious for the office of Equity Judge and that he did not propose to hold it as a locum tenens for others. Willis expected, no doubt, that the other Judges would hastily appeal for his reconsideration, and they might well have done so, had he not abandoned diplomacy completely. In June, Stephen, J., sent a private letter to the Chief Justice which somehow fell into the hands of Willis who promptly published the following passage: "This is my week, and there is one Equity Case, if not more, for Friday. I am willing, of course to take it alone, but I should feel much relieved if you would sit with me. In return, if it can be of any assistance, I shall be most glad to sit with you during your week. The fact is, that, although I studied Equity under James Stephen, and for a short time under Mr. Garratt and drew a goodly number of Bills and Answers with them, and even commenced my career as an "Equity Draftsman" yet I have for many years had little practice except at Law and I do not therefore feel any confidence in my first renewal, in a Court of Equity here". To the universal surprise of the legal profession and of the Governor, Dowling took the opportunity himself to accept
the office of Primary Judge. He told Willis that he did not "distinctly recollect how it happened that this duty, which you appeared to have undertaken, devolved upon yourself, but so it did - certainly not from any disinclination on the part of Mr. Justice Burton, Mr. Justice Stephen, or of myself to take a full share of Equity Business, although the amount of it pending was very small compared with other branches of Jurisdiction". The Chief Justice also seized on Willis' voluntary resignation as the rationalization of his action, explaining that "your assurance ... determined me then to apprise the Governor ... that, although the duties of the office might possibly interfere with those of a Legislative Councillor, yet I could not then shrink from the position in which I was placed, and (if it was his pleasure) I should have the honour of accepting the appointment".30 Willis was beside himself with animosity: "I did suppose", he said, "that the business having been for the last three years chiefly in the hands of a Judge who is vain enough to think he discharged it satisfactorily, would have been a sufficient apology even for the Chief Justice declining to accept it".31 The incident was the breaking point of the feud. In 1841 the Governor resolved the matter in what seemed the only way by removing Willis under the guise of appointing him resident Judge at Port Phillip.32

The so-called revival of the office of Master effected in 4 Vic. No. 22 was quite misleading. The old office of Master was not really revived at all, for it was not confined to the chancery side but took in all jurisdictions under the style of Master of the Court. The office created in 1840 was limited to the Equity Jurisdiction alone. It is convenient at this stage to review the early basis of the title so that the distinction may be understood.

In November 1815, Mr. Justice J. H. Bent wrote to Lord Bathurst "another indispensible officer is a Master in Equity, and, for want of such officer, I shall be obliged in the Supreme Court to make all references to myself and to take all accounts".33 Barron Field, J., felt the same difficulty when he
assumed office. He stated that the duties of Master both in Law and in Equity naturally fell to him and that no one had questioned his performance of the dual functions until 1820; he thereupon recommended that he be formally appointed "Master and Examiner" of the Court. "They said they cd. find no Precedent for it as upon looking in the Red book they found that a Barrister acted as Master in all the other Colonies. I told them ... that here in consequence of the necessity of the case we must make a Precedent". However, the members of the Court declined to appoint the Judge or the other nominees (Mr. Wylde, senior, and the Judge-Advocate) and drew up a rule ordering that the Full Court should act as Master and Examiner. Field strongly protested (the fees being a source of revenue to him) with the result that the Court agreed to rescind its rule and in 1820 Field, by letter to the Governor, announced that he had appointed himself Master and Examiner. Commissioner Bigge considered this action to be "certainly justified by the refusal of all the practising solicitors, with the exception of Mr. Wylde, to give up their practice for the purpose of undertaking an office that promised so little emolument as that of master and examiner in equity".

By 4 Geo. IV c. 96 the sovereign was empowered to issue Letters Patent for the definition of the "Proceedings of the Sheriff, Provost Marshal, and other ministerial Officers" in the Supreme Court constituted by the Act. The Letters Patent accordingly issued on 13th. October, 1823, (the 'Third Charter of Justice') made provision that "there shall be and belong to the said Court the following Officers that is to say a Registrar a Prothonotary a Master and a Keeper of Records". The Master so appointed was not only Master in Equity, but Master of the Court, as may be easily verified by reference to the terms on which Stephen proposed the Office. "It will further be essential to appoint a Master, who will be charged with the taxation of Costs, the investigation of complicated accounts, and generally with the same occupations as those which are performed by the Masters in Chancery, and the Masters of the Court.
Further evidence is afforded by the entire omission from the Letters Patent of any reference to the Court's jurisdiction in Equity. The Master was, however, to confine himself to the civil side of the Court, with the extraordinary consequence that he was eligible to practise privately in criminal matters. In pursuance of the Patent, William Carter was by Warrant appointed "Master of the Supreme Court" in December, 1823.

A very clear statement of the dual functions of the Master as a ministerial officer of all departments of the Court was made by the Attorney-General of Van Diemen's Land. He was speaking of the operation of the office in that territory, but there was no appreciable variance from its operation in New South Wales. At Law the Master had to tax bills of costs, settle points of practice and receive references from the Judge, determine matters of account, hear some prosecutions for assaults, libels and similar charges and to act as arbiter in suits where settlement or compromise seemed feasible. In equity his duties were substantially larger and more important, as he served as the Judge's assistant to determine in Chambers the detail of matters which would be prolix for the Court. Gellibrand summarized these duties as follows: "as a Master in Chancery.

The Bill may be referred to him upon a demurrer, or the answer may be referred to him upon exceptions, as to its sufficiency; in either of which cases he may be compelled to report to the Court upon Papers drawn and settled by himself. All witnesses must be examined by him, upon interrogatories, no person being present upon such examinations but the Master, by whom the answers are taken down, and the Witness, which must take place in every case, because no parol evidence is allowed in a Suit in Equity. Upon all questions of Title, partnership and executorship accounts, and in fact every transaction where it may become necessary to go into the detail they must all be referred to the Master, who is to decide upon the legal effect of the several cases referred to him, and report to the Court the result of such references. If either party is dissatisfied
with the Master's report, an application is made to the Court for the Master to review the same, and, if the report does not appear satisfactory, it is sent back for reconsideration, otherwise (which is generally the case) it is confirmed.""

This differentiation of functions is more enlightening than the official statement of the Master's duties in New South Wales. These were set out by Stephen under six divisions:

1. To tax costs at Law, in Equity, in the Ecclesiastical Jurisdiction and in criminal matters.

2. To investigate all accounts and, in Equity, to investigate all disputed questions of fact (save those considered proved by depositions, or referred for decision to a jury).

3. To prepare all "conveyances leases and other instruments of a legal nature" which the Court might require any litigating parties to execute.

4. To attend to the management of estates of minors, lunatics and other incapable persons.

5. To take depositions of witnesses required to be examined on written interrogatories.

6. To attend in Court "to assist the Judge with information as to the practice and proceedings of the Department of the Court over which he is to preside.""

Chief Justice Forbes certainly did not show that he fully appreciated the scope of the Master's intended duties. He seems to have regarded the officer as attached to the chancery side of the Court only and, as he did not see any need for an Equity Court, he was unable to discern what use the Master could be. Forbes accordingly recommended that the office be abolished and Governor Darling agreed that this should be done. Neither had foreseen the consequences of removing Master Carter on the pretext of appointing him to the office of Sheriff which had recently fallen vacant. In England powerful patrons were contending to have the Shrievalty occupied by their nominees and Thomas Macquoid was in due course appointed at the instance of Sir George Murray. When Macquoid arrived in Sydney, Carter was left without employment and demanded and obtained his old office
as Master. Having then to do what he could with the existing machinery, Francis Forbes caused a rule of Court to be made in September, 1829, for the establishment of three separate Court administrative offices - those of the Registrar, Master and Chief Clerk respectively. The rule made it absolutely clear that thenceforth the Master was to be primarily an equity officer. In his department "all proceedings on the Equity side of the Court, or which belong to the Jurisdiction of the Chancellor by the Common Law shall be commenced and conducted and to the said officer shall be referred all Bills of Costs, Bills of Exchange, Promissory Notes, and all other matters and things which by the course and practice of the said Court, shall from time to time be referred". Even on this footing, the Master's office virtually remained in abeyance as Master Carter became insolvent in 1832 and was forthwith dismissed. The Mastership was thereupon abolished entirely.

The revival of equity business which, as has been observed, led to the enactment of 4 Vic. No. 22, was preceded by some close thought as to the ministerial officers on the equity side of the Court. By 1839 Governor Gipps was convinced that a Master would be again required and he made a recommendation accordingly to Lord Glenelg - "it should be left to the Local Legislature to establish ... one or more Masters in Chancery". This was approved in England where Lord Stanley expressed the wish that the office be assimilated as closely as possible to the English office of Master in Chancery. The old colonial office of Master on the Common Law side of the Court was never re-established. The first Master in Equity was Dr. Kinchela who was obliged to relinquish the post after only a few months because of illness. Lord Stanley directed that the vacancy be filled by Samuel Frederick Milford with a salary of £1000 per year.

To return to the general position of the Court and the Equity Jurisdiction after the passing of 4 Vic. No. 22 is to return to a system which was doomed to failure. Equity litigation was constantly increasing but, unless the Primary Judge were able to attend to it personally, no hearing was possible.
As the Chief Justice was Primary Judge this was often a source of great embarrassment for he was constantly required in the Banco sittings and could not delegate his equity jurisdiction even were he on circuit or ill. By September 1841 an amending Act had become necessary and was passed in the 5 Vic. No. 9, an Act for the Better Advancement of Justice. This enabled any of the Judges to exercise the Primary Judge's powers in the event of his absence or illness. The unsatisfactory provision for appeals to the remaining two Judges was also replaced by allowing an appeal to the Full Court. The combined effect of section 21 of 4 Vic. No. 22 and of section 13 of 5 Vic. No. 9 was thus to give an appeal to the Full Court from the decisions of the Primary Judge, but, in the absence of an appeal in the manner prescribed, the decrees and orders of the Primary Judge took effect as if made by the Full Court itself.

The result of the legislation was not to vest the entire jurisdiction in one Judge, but only to delegate the jurisdiction to him (assuming that there was no subsequent appeal). The Court considered as obiter dicta in *M'Laughlin v. Little* that appeals to the Full Court were not so much appeals in the strict sense as rehearings. Stephen later pointed out that, in any case, only a limited part of the jurisdiction was delegated - "the powers incident to the office of Lord Chancellor, ... such as the issuing of Commissions in Lunacy, and the administration of Idiots' and Lunatics' estates, are left where the Act of Parliament, and ... the Charter, placed them; with the Court". Care and guardianship of infants and general rule making power also remained with the Court.

For about fifteen years after 1842 equity business went ahead by leaps and bounds. By 1844-46 there were 147 equity suits and in 1853 there were 97 cases by bill, rule nisi, claim or petition in the single year. In 1854 the number was 114. By 1856 it had risen to 346. The Master in Equity was constantly employed; matters before him on hearing being quite appreciable. In 1843 there were 63 such matters, in 1844 there were 34 and thereafter 1845 - 49, 1846 - 23, 1847 - 21, 1848 - 22,
By 1842 it was considered that the 4 Vic. No. 22 should be further amended to allow of more expeditious procedure in the Equity Court. The Legislative Council referred a Bill to this end to a Select Committee under the Chairmanship of the Chief Justice. The Committee decided that Dowling's dual rule as Chief Justice and as Primary Judge was not objectionable, and deferred the question of procedural reform.

Ample verification of the increase in equity business was provided by the consistent rise in expenses of equity proceedings. Master Milford observed of this: "I think it is expensive, but it is difficult to say where the expense lies; I do not think it is altogether with the fees of Court. I have analysed three bills of costs, and I find that in one, where the entire costs were ninety-nine pounds two shillings and ten pence, the Attorney's fees were seventy-two pounds ten shillings, Court fees fifteen pounds thirteen shillings and four pence, and Counsel's fees ten pounds nineteen shillings and six pence; these are the taxed costs. In another case, where the costs were also taxed, the total amount was one hundred and fifty-eight pounds - the fees of Court were very high, why I cannot tell - twenty-eight pounds six shillings fees to counsel twenty-one pounds one shilling and eight pence, and the remainder, one hundred and nine pounds, including payments to witnesses, went to the Solicitor. In another case, where the bill was not taxed, the total amount was three hundred and thirty three pounds thirteen shillings and four pence, the Counsel's fees eighty six pounds fourteen shillings, Court fees twenty seven pounds sixteen shillings and the Solicitor's charges, without deducting the witnesses expenses, which were very high, two hundred and nineteen pounds three shillings and four pence."

It is noteworthy that some of the delay and expense in equity was attributed to the want of "an Equity Judge, that is, an Equity Judge properly so called, a man brought up to that branch of the profession", and to the further circumstance that
decisions of the Primary Judge were not final. In the 1840's it was quite common for speculative re-hearings to be brought before the Full Court and an opinion was expressed that the public were not generally satisfied by the decisions given by the Primary Judge, "even in the times of Sir James Dowling and Mr. a'Beckett it was the same; whether they are dissatisfied or not it is difficult to say but they abide the chance of having the decision altered by going to the three Judges".

So far as the jurisdiction's inherent delays were concerned, the cumbersome nature of pleading and procedure and the infrequent sittings of the Court in the Equity jurisdiction came under regular attack. The inadequacies of the contemporary law and practice were trenchantly summarized by the Select Committee on the Division of the Legal Profession Abolition Bill when, in 1847, they urged the Legislature "to cut down the oppressive fees which are exacted by the Government from suitors; - to get rid of the senseless jargon and prolixity of some of the forms of law; ... to abolish all useless forms; - to cut off all sources of delay; ... and above all, to thoroughly cleanse out that Augean sty - the Court of Equity, and, instead of the prolix, dilatory, and expensive system which prevails there at present, to introduce a concise, simple, and expeditious mode of proceeding suited to the wants and means of the community at large".

Local lawyers, while they differed on the merits of the then existing equity procedure, were united in the view that many of the unsatisfactory features of the Equity Court could be overcome by giving the Equity Judge a reasonable chance to concentrate on equity business. Sir Alfred Stephen considered that "if any Equity Judge were appointed, (especially one from the Equity Bar) who would also take the Insolvency and Ecclesiastical Jurisdictions, exclusively of the other Judges, it would in my opinion be an advantage, to give the remaining three Judges the Common Law duties only". Robert Johnson, a Solicitor, recommended that the Equity Court should sit more frequently and regularly and that "the Judge who sits in Equity
should not have so many other duties to perform, as in consequence of his not having time to prepare his judgments they are much delayed, and the Equity business is very much retarded. This could, in his opinion, be achieved best by having a Judge exclusively confined to Equity suits. A few years later, Dickinson, J., echoed these sentiments by suggesting that there be a fourth Judge added to the Court strength, who should confine his attention to Equity, Insolvency and Ecclesiastical business, subject to an appeal to a Bench comprising the Chief Justice, the Primary Judge and one of the Puisne Judges. The Primary Judge, would, however, take precedence only with the Puisne Judges according to date of appointment and he would receive the same salary as they did. He felt that this would be a solution as "an Equity judge will never be exempt from liability to be called on to sit at Nisi Prius, if he should also be a judge of the Supreme Court. The power to call him in will soon evoke a supposed necessity to do so".

The Master's office, unworkable enough with the burdens of equity proceedings, had been brought to a standstill with the addition of insolvency matters. The Master was obliged to enlist the aid of the Chief Justice in an attempt to confine his labours within reasonable bounds. Stephen observed that "the very able and learned" Master Milford, although performing his duties with great efficiency, had "a task imposed upon him which is, beyond all reason, laborious; and I venture to say, that no man but himself could so long have performed them so well. I believe that, for months past, he has never had one unoccupied hour; altho' we have been compelled to dispense with his attendance, where his assistance to ourselves is most valuable, in the Banco Equity Sittings". In 1858 one of the commissioners enquiring into the proposal for the appointment of a fourth Judge asked a witness whether the duties of the Master could not conveniently be vested in such Judge, were he appointed. The answer was that the formal matters before the Court were ample to occupy the Master and a further Judge as well; in other words that the Judge was required in addition
to and not in substitution for the Master. This was the more so, as most references on particulars of account and investigations of title did not lend themselves to performance by a Judge where a ministerial officer was available.

In 1857 the initiative passed to Therry, J., who made a strong appeal for reform of the jurisdiction as well as of the Supreme Court at large. He expressed astonishment that in 1857, with a population of over 300,000, the Colony had only three Judges - no more than there had been on his arrival, some ten years previously, when the population was only 50,000 (including convicts). At a time when "questions constantly arose of a most momentous character - whether as regarded the value of property involved, the magnitude of the interests at stake, or the intricacy of the questions to be decided" he felt that "justice was delayed; that parties were put to expense - to vexatious expenses - and he could not perform the duties devolving upon him in a manner satisfactory to himself or which could be satisfactory to the country. The delays were constant; counsel were prepared, but they were not heard; appointments were made, but they were frustrated. Circuits, or terms, or criminal courts intervened; and he, as Primary Judge, perhaps concluded in May the hearing of an argument which had been commenced in January; and before it was finished probably much that was urged at its commencement had passed from his mind". Therry did not think that the neglect of the Equity Court was a matter of chance, but rather that it was deliberate and calculated. In his view; "This was a commercial country, and the commercial interests of the country were fostered and its prosperity promoted. But Equity dealt not with active-minded men, attentive to their own interests, clamorous for their rights. The Equity Court had to protect infants, women, lunatics, parties who were not heard, and whose interests consequently were postponed to those whose interests were more active, - more able to make themselves heard". He considered that the Court had too long made its facilities available exclusively to suitors at law and he contended that equitable relief should be given
a degree of attention at least equivalent to that at Common Law. He pressed for a separate Equity Court, whether it was to be equal with the other Courts, "or, perhaps, as in England taken to the other extreme and raised above them".  

Alfred Stephen disposed of the Equity Jurisdiction by saying "Equity was like an unfavoured child - kicked, it might be said, from one room to another until it ran the risk of being utterly neglected". To remedy this neglect he stimulated the appointment of a Select Committee of the Legislative Council to enquire into the state of business in the Supreme Court. The Committee reported what seemed obvious enough - that an increase in the number of Judges could not be delayed and that equity reform was long overdue. At the initiative of Sir William Burton, the Chairman of the Committee, a draft Bill to make further provision for the administration of justice and to establish a Court of Equity was submitted in 1858. The proposal was warmly approved by the Committee and notice was taken of it in the Governor's address at the opening of Parliament when he referred to "the great injury daily felt by suitors in the Supreme Court, especially in the Equity branch". Yet, when it came to a vote in the Legislative Assembly, the Bill was decisively defeated.  

In 1858 Stephen wrote to the Attorney General seeking the permanent appointment of a fourth Judge to preside solely in Equity, Ecclesiastical, Insolvency and Vice-Admiralty matters. If this were not done, he considered that "the suitors of the Court (would) practically be denied the means of attaining justice". He pointed out that double sittings of the Court to hear causes were frequent throughout the course of a year, though they had been quite rare only a few years before; that Circuits had been extended from about six to about twelve or fifteen days; and that "notwithstanding these prolonged sittings, and repeated instances of a third Judge being contemporaneously engaged in hearing Equity Cases or in Chamber business, there is a serious arrear in almost every branch of the jurisdiction of the Court". He considered that such arrears could not help but increase - that the three existing Judges were taxed with duties to their full capacity and had no more
time (even private time was drawn against) to devote to the public.

In evidence to the Select Committee on the Moreton Bay Judge's Appointment Bill, Stephen again affirmed his belief that the appointment of a fourth Judge in Sydney would assist the Court in a more ready disposal of business. In response to a question whether there would be sufficient Equity business to occupy the attention of one Judge throughout the year he said: "I think that the Equity Judge should take all ordinary and pressing Chamber business in Term, and while the other Judges are on circuit. Including that business, and the matters more allied to the Equity business than to Common Law, I think that his time will be fully occupied." He also observed that there would be a further advantage in that a single Equity Judge would ensure greater consistency and avoid the inconvenience arising from the hearing of part of a suit by one Judge and part by another.

Despite these recommendations, the appointment of an additional Judge was not achieved until 1865 when an enabling Statute, 28 Vic. No. 7, was passed with the somewhat delayed recital that "the business of the Supreme Court ... has of late years so largely increased that the present number of Judges is insufficient for its disposal".

It was about the same time that the position of the Master was once more brought to prominence in the despatch of a letter of resignation on the ground of overwork by Master Deffell in December 1865. As the government ignored his approach, he wrote again in the following year stating that he could no longer satisfy his oaths of office because the quantity of time which he was obliged to devote to the office of Chief Commissioner of Insolvent Estates left him no opportunity to attend to matters in Equity. He accordingly asked to be relieved of the office of Master, quoting the approval of the Judges, who expressed their satisfaction of the "impossibility of a continuance, as at present, without a denial of justice pro tanto to suitors and to creditors and insolvants, through (the Master's)
being unable simultaneously to discharge the heavy and daily
duties of the two departments”. At the same time the Legis­
lative Council passed a Bill "to abolish the Office of Master
in Equity and to provide for the more speedy and efficient dis­
posal of business in the Equitable Jurisdiction", however the
Bill was not ratified by the Assembly and went no further.

The government was left little alternative but to accept
Deffell's resignation and it thereupon commenced an investi­
gation of the functions of the office of Master in Equity and
of the question whether that office might advantageously be
abolished. A Select Committee was appointed by Parliament
which, in 1868, published a progress report of evidence. Judge
Macfarland, who was one of the witnesses, strongly criticized
the office and advocated its abolition because of its associa­
tion with slow methods. Some Solicitors giving evidence were
also in favour of abolition. Mr. W. G. A. Fitzhardinge, com­
plaining of the "enormous and useless expense", asserted that
from one half to two thirds of the costs in Equity proceedings
were incurred in unnecessary enquiries in the Master's office.
This arose, in his opinion, from the Master's having to take
all the evidence in writing, which would not be necessary were
a Judge to attend to the matter. James Norton in reply to the
question "would proceedings in Equity be less expensive and
more expeditious, if there was no necessity for going through
the Master's office?" said, "certainly; there would be less
delay and less expense, that is, independently of the ques­
tion whether it is necessary to go to the Master's office at
all".

Mr. Justice Hargrave, on the other hand, felt that although
there was need for improvement, the abolition of the office
could not be entertained for the very practical reason that
the Judges could not possibly accept any additional adminis­
trative work. In support of this, he reviewed the duties which
the local Master discharged, but which were within the province
of quite separate officers in the English Courts. In the first
place, the Master acted as "Examiner" to take evidence before a
decree, secondly, he settled the text of decrees (which in England was the preserve of the Registrars and Clerks of Records) and, thirdly, he fulfilled the duties of Master and Commissioner in Lunacy. Apart from these, the larger tasks of the Master's department included "all accounts and administration of estates, all questions involving disputes between executors or trustees and legatees, mortgagors and mortgagees, all questions with regard to contracts in which damages will not be sufficient compensation to persons thinking themselves aggrieved. ... The working out of all the decrees made by the Primary Judge, under ... statutes, or under the regular Equity jurisdiction, is carried out by the Master in Equity". Hargrave, J., considered that the accounting work, all of which was executed by the Master, constituted half of the business in Equity. Mr. Holroyd, the then Master, was equally persuasive that his office should be retained. He pointed out that, although the taking of evidence might be better left to the Judge, this only accounted for a relatively small proportion of the Master's duties which could not be passed on conveniently to the Judge. There was really no alternative, while the course of practice remained as it was, to the retention of the Master and his office accordingly survived the second attempt within forty years on its life.

To revert to the position of the Equity Court itself during the period from approximately 1860 to 1880 is to observe in miniature the same terrible delays with which the chancery Courts in England were oppressed during the eighteenth and nineteenth centuries. The reason clearly lay in the inadequacy of the local practice, founded as it was on the old procedure, to cope with the volume of litigation. Until a fresh start was made in the Colony by the Equity Act of 1880, equity law remained in the doldrums. The impossibility of securing trial by jury with *viva voce* evidence, the inability to obtain damages in a suit seeking equitable relief, the lack of an adequate remedy by counter claim, the tedious and futile device of Interrogatories and the waste of time and expense involved
in Exceptions, were but samples of the defects which the 1880 statute overcame. Reference to the law reports is sufficient to demonstrate the calls made upon the Equity Court by litigants at about this period. Year by year the pages allotted to the Equity decisions increased and, after 1880, not infrequently rivalled in volume the judgements delivered in all other jurisdictions combined. Considering the prolixity of proceeding, the number of matters disposed of between 1860 and 1880 was a testimonial to the energies of the Judges in striving to clear their lists.

It is on record that the then Master in Equity stated in 1868 that equity suits quite commonly lasted for four or five years and he had known several cases which had lasted for as many as eight years. Henry Cary, a Sydney Barrister, had earlier drawn attention to the "great denial of justice" caused by the Equity Court's inability to sit and by the ruin which consequently befell a large number of suitors. The Judges were not permitted to give sufficient time to their responsibilities in Equity and were still expected to give priority to matters at Common Law. Equity sittings were in fact reduced to about a fortnight in every six months at a time when more hearings were required. The confusion which this caused need not be described. Solicitors no longer pressed equity cases because the chances of their being heard were almost hopeless. The legal profession generally advised clients to settle rather than be parties to contested equity claims in which they might, as Dickens put it, expect a judgement on the Day of Judgement. As early as 1858 a Barrister had asserted that there was no prospect of the cases then set down in Equity being heard without some addition being made to the bench. The decline which thus occurred did not in any way signify that litigants had no need for a chancery Court. The position rather was that "a vast deal of Equity business (was) not attempted at all from the known impossibility of proceeding."

Only occasionally did the Judges publicly pronounce the difficulties under which they laboured. Appropriately, one
such exclamation is preserved from the lips of Hargrave, J., who, in Richardson v. Allen, said: "It is by the abuses of the equity jurisdiction, rather than by the proper exercise of its rightful power, that this Court must become most oppressive and injurious to the community. I am satisfied that if I had been enabled, as in England, to take oral evidence in this case, up to the present hearing, and were empowered now to carry out my own decree for account in Chambers, with the aid of a "chief clerk" and mercantile accountants, all real matters of difference between the plaintiff and the defendants as to these trust accounts might have been settled a year ago, instead of my now being reluctantly compelled to send them to the interminable inquiries and delay of the Master's office." At about the same time the association of Solicitors known as the Law Institute were campaigning for similar ideals. They rejected a proposal for a general overhaul of the law, expressing the view that most departments, other than Equity, were operating quite smoothly and that a general reform would take years to be perfected. They accordingly sought "speedy action" to reorganize the Equity jurisdiction on a basis which would be comprehensive and without "patchwork."

A notable frequency of speculative appeals was particularly troublesome in the 1870's and the whole appellate structure of the Court was unsatisfactory. It regularly occurred that the Equity Judge sat in Banco to hear appeals from his own decisions. As result, appeals when allowed, were nearly always by majority; though in Carnell v. McLennan the extraordinary conclusion was achieved of the Primary Judge's reversing his first instance judgement. This was a decision of Hargrave, J., who said on the appeal "I am extremely glad that this case has been reargued. This is a case of a colonial settlement, and is in fact no settlement at all, inasmuch as by it a power is given to get rid of the whole settlement. I am inclined to think I have gone too far, and I am inclined to support the contention that a married woman could not bind her estate by such a contract..."
as this. At any rate I do not wish to open the door to allowing a married woman to be deprived of her property by a few strokes of the pen. It is necessary to record, however, that this situation was singular and Hargrave, J., when in the minority, customarily delivered judgements of great force and learning, often pointing to basic rules of Equity which his brethren in the majority, having relatively little experience as Equity Judges, failed to appreciate. The huge number of appeals brought on questions of fact and on awards of costs were also embarrassing to the Court. Hargrave, J., commented on these in cases which came before him. Of the former he observed in Hellyer v. Druitt, "It is to be hoped that as Primary Judge I may soon have the assistance of a jury to protect parties against appeals such as this upon mere questions of fact; for, as to the law in such cases, there cannot be any difference of opinion among any Equity Judges." Touching upon appeals as to costs he said in Dixon v. Williams "I need scarcely state that I have not the least desire to throw any impediment in the way of appellate jurisdiction over the Primary Judge; but I only suggest that if this jurisdiction is to extend to every question of costs in Equity, the decisions of the inferior tribunal should not be reversed, except clearly wrong in principle, and after full inquiry into all the minute details of each Equity suit."

Legislation during the colonial period was but little concerned with the jurisdictional basis of the Equity Court and, so far as statutes did apply to Equity, the majority of them were procedural. For present purposes it is indeed necessary to refer only to two Acts - 11 Vic. No. 27 of 1847 and the Equity Act of 1880. The former, known as "An Act to render valid the acts and appointments of parties as Guardians of the persons and estates of Infants and as Committees of the persons and estates of Lunatics under orders made by the Primary Judge in Equity and to authorize the making of orders in cases of Infancy by the said Primary Judge in future", recited that the Primary Judge's jurisdiction in matters of infancy was very
doubtful and proceeded to confer a certain jurisdiction upon him. The latter was substantially a procedural enactment by which the old practice was replaced by a system designed to minimize delay and expense. The introductory sections are relevant here. The Governor in Council was empowered to appoint one of the Supreme Court Judges as "Primary Judge in Equity" to exercise the jurisdiction of the Equity Court for the purpose of disposing of motions and "matters in relation thereto". All decrees or orders of that Judge were as valid and binding as if made by the Full Court. Any other Supreme Court Judge could exercise the jurisdiction in the absence or illness of the Primary Judge and, by extension under 50 Vic. No. 36, at the request of the Primary Judge (subject to appeal to the Full Court). By section 5 the Primary Judge could sit with the assistance of two other Judges and the section was apparently intended to provide that he could call for the assistance of one other Judge to deal jointly with him in determining matters of technicality or special difficulty.

Independent though the Equity Court had thus become, it could not properly be regarded as in any way severed from the Supreme Court of New South Wales. It was only, as it were, a functional limb of a developed and vital body.
NOTES

1. A very much more detailed account of this Department of the Court is contained in the writer's unpublished paper "Equity Law in Colonial New South Wales" in the possession of the University of Sydney. Further reference may be made to "The Development of the Office of Master in Equity in New South Wales", R. W. Bentham and J. M. Bennett, (1961), 3 SLR, 504.

2. HRA IV/I, 653.

3. HRA I/XIII, 681.

4. Ibid.


6. "An Act for adopting and applying certain Acts of Parliament passed in the reign of His late Majesty and first year of the reign of His present majesty and in the first and second years of the reign of His present Majesty respectively in the Administration of Justice in New South Wales in like manner as other laws of England are applied therein". 25th. July, 1843.

7. HRA I/XXI, 164.

8. V & P 1840, 169. "I would detach also the Bankruptcy, Insolvency, and Ecclesiastical business from the Common Law Court and connect them with the Court of Equity, to which they more properly belong".


11. Id. Dowling to Gipps, 17th. December, 1840, 257.

12. (1838) 1 Legge, 86 at 88.

13. Governors' Despatches, 1238, Willis to Dowling, 1st. December, 1840, 211.


15. 26th. May, 1836, 2 col. 1.


17. Governors' Despatches, 1216, 8th. September 1836, 29.


19. This was only a partial "revival" of the office which had in origin been that of Master of the Court.

20. Section 20.


24. Governors' Despatches, 1238, Dowling to Willis, 1st. December, 1840, 207.


26. Id. Dowling to Willis, 2nd. September, 1840, 460.

27. Id. Willis to Gipps, 29th. May, 1840, 492.

28. Id. 207.


30. Id. Dowling to Willis, 1st. December, 1840, 207.

31. Id. Willis to Dowling, 1st. December, 1840, 215.


33. HRA IV/I, 168.

34. Id. 782.

35. Id. 828.


37. Section 17.

38. HRA IV/I, 509.

39. Clause IX, Id. 511.

40. Id. 486; cf. 496.

41. Id. 527-529.

42. Id. 526; HRA I/XI, 192.

43. Gellibrand.

44. HRA III/IV, 199.

45. HRA IV/I, 494; cf. HRA I/XI, 192.

46. HRA I/XIII, 681.

47. Id. 682.

48. HRA I/XII, 782, I/XV, 205.

49. Rule of 30th. September, 1829, State Archives, Supreme Court Papers, Bundle 34.

50. V & P 1840, 156.


52. Quoted in Stephen's Practice, 281.

53. Ibid.

54. These figures were obtained from records in the State Archives.

55. V & P 1842.

56. V & P 1846, 403.
57. Id. 405.
58. Id. 404.
59. V & P 1847 (2), 421.
60. Id. 477.
61. Id. 457.
63. Journal of the Legislative Council, I, 204.
64. V & P 1855 (1), 689.
65. V & P 1858 (1), 1189.
67. Ibid.
68. Ibid.
70. V & P 1858.
71. V & P 1858 (1), 1157.
72. Ibid.
73. Ibid.
74. Id. 1175.
75. Id. 1176.
76. "An Act to authorize the appointment of an additional Judge of the Supreme Court", 12th. May, 1865.
77. V & P 1858 (1), 1189.
78. Id. 819.
81. Id. 987.
82. Id. 990.
83. Id. 980.
84. V & P 1868-1869 (1), 968.
85. V & P 1858 (1), 1194.
86. Id. 1195.
87. Id. 1187.
88. Id. 1185.
89. Ibid.
90. (1870) 9 SCR Eq., 50.
91. At 61.
92. Box 2 of the Deane Papers in the possession of the Fisher Library, University of Sydney.

93. (1880) 1 NSWR Eq., 61.

94. At 63.

95. (1870) 10 SCR Eq., 15.

96. At 43.

97. (1875) 13 SCR Eq., 70.
One of the most unsettled jurisdictions of the Supreme Court was that in Insolvency. Constant statutory variation throughout the colonial period demonstrated the public importance of this form of relief, later witnessed by the assumption to the Commonwealth of legislative powers in the Federal Bankruptcy Act of 1924. Insolvency was used in early New South Wales as descriptive of a class of persons of whom bankrupts were but a species: this in turn stemmed from the restriction of the first English Bankruptcy Act (34 & 35 Hen. VIII c.4) to traders by the 13 Eliz. I c.7. Colonial insolvency legislation attempted to embrace in one jurisdiction what had in the course of time become virtually two jurisdictions in England. The English law accordingly was never adopted in the Colony because of the practical impossibility of putting its provisions into execution.

As with most other legal remedies of a civil kind, the earliest colonial insolvency provisions were quite cryptic. The Letters Patent of 2nd April, 1787, for establishing Courts of Civil and Criminal Jurisdiction on the Eastern Coast of New South Wales gave the Civil Court power to imprison a defendant whose estate "for want of sufficient distress" could not realize funds enough to satisfy the claim of a successful plaintiff. This was not a very effective remedy and, by 1811, Judge-Advocate Bent complained in general terms of the inability of the Judicial System "to meet the wants of (the Colony's) increased and ameliorated population and Commerce". Bent pointed out that the existing machinery was not satisfactory even when dealing with solvent debtors and he recommended that real estate be rendered "liable to all
just debts and demands, and to be seized and sold by virtue of the Process of the Supreme Court, in the same manner as personal chattels⁵. Notwithstanding this, the Letters Patent of 4th. February, 1814, contented themselves with confirming the authority of the Supreme Court and Governor's Court (as thereby constituted) to imprison defaulting defendants.⁶ Such imprisonment could, in practice, be a burden to the successful plaintiff who was obliged to maintain the defendant with necessaries in prison if the defendant had insufficient estate or effects to maintain himself.⁷

The "New South Wales" or Better Administration of Justice Act, 1823, (4 Geo. IV c. 96) declared it expedient to make provision for an equal distribution amongst creditors of the effects of insolvent debtors. Section XXII provided that, on the issue of process for the recovery of a debt from a resident in the Colony, or from a person carrying on business there, failure of the debtor to make full payment was sufficient authority for the Judges to summon him by public notice to attend in Court. One or more of the creditors could be appointed as provisional trustees "to discover, collect and receive"⁸ the estate under the control of the Court. If the debtor failed to attend in Court or did attend and was found upon examination to be insolvent, the Court could make an order accordingly, directing the realization of the insolvent's estate to meet his debts and to distribute the proceeds rateably amongst the creditors. Trustees could be appointed for the benefit of creditors and provision was made for the investment or safe custody of the proceeds of realization pending distribution. By section XXIII insolvents were afforded the opportunity of disclosing and surrendering their estates in which case, with the consent of a simple majority of creditors in number and value, the Court could issue a certificate having the effect of barring further personal actions against the debtor in respect of his prior debts. This was a rudimentary form of a certificate of discharge; it would only be granted where the in-
solvent's estate could return at least fifteen shillings in
the pound and provided the person had not been declared in-
solvent more than twice previously. These sections were
directly attributable to Francis Forbes who, writing in London
in 1823, set out a number of points for inclusion in the New
South Wales Bill, which included this note: "provisions de-
fining the powers and jurisdiction of the Supreme Court, and
to incorporate a short system of insolvent law, upon the prin-
ciple of the judicature act for Newfoundland (49 Geo. 3, Chap.
27)". The latter Act, so far as is relevant here, invested
the Court with power to collect and distribute goods of in-
solvents and to issue certificates of discharge.

Personal acquaintance with the needs of the Colony brought
Forbes to the prompt conclusion that the provisions of the New
South Wales Act were inappropriate. The English Legislature
did not wish to concern itself with so small an administrative
problem, and it was left to Forbes himself to rectify defic-
iencies by drafting "An Act for the relief of Debtors and for
an equal distribution of their Estates and Effects amongst
Creditors," 11 Geo. IV No. 7, which became law on 2nd. April,
1830. By this Act, where it was shown that a debtor before
execution of process was unable to pay his debts in full, any
Judge or the Court itself could summon the debtor to appear
for examination as to his affairs. Meanwhile, such debtor
could be restrained from dealing with his property and, if
there were any risk of fraud or waste, one or more creditors
could be appointed provisional trustees of his estate. The
Court, following examination of the debtor or, in the event
of his absconding, on formal proof of his insolvency, could
declare him insolvent and order the sale of his assets and
the rateable distribution of the proceeds amongst his cre-
ditors, for which purpose three or more creditors could be
appointed trustees. Where the total debts exceeded £250 the
Court with the assistance of two assessors could enquire into
the circumstances of the insolvent's financial dealings and
any creditor could appear and give evidence accordingly. Such
enquiry could declare that the debtor was not insolvent, in
which case the initial proceedings were superseded. Relief
could promptly be granted to an insolvent who made a "full and
true disclosure discovery and surrender" of his estate and con­
formed to the orders and directions of the Court. On the one
hand an imprisoned debtor would be released, on the other hand
a debtor who was not imprisoned would have the benefit of the
stay of process so as to be exempted from imprisonment. If a
debtor failed to make the required disclosure, discovery and
surrender he was liable to detention, if in custody, otherwise
to arrest and imprisonment. With the approval of the majority
in number and value of the creditors a certificate could be
granted by the Court to a discharged insolvent. This was evi­
dence of his discharge and could be pleaded in bar to suits for
recovery of debts or damages accruing prior to the declaration
of insolvency. Provision was made in the Act for the punish­
ment of insolvents who were guilty of wilful misrepresentation,
concealment or fraudulent disposal of their assets.

The 1830 Act did not afford protection in respect of Crown
debts or offences against public revenue, statutes of the realm
or of the Colony; nor did it discharge an insolvent from lia­
bility in respect of a number of actions for malicious injury -
criminal conversation, seduction, breach of promise and damages
for malicious prosecution, libel, slander, trespass and others -
though in these cases a plaintiff could consent to the insol­
vent's discharge. Section 11 of the Act recited that "it some­
times happens that persons who are prisoners in execution in
gaol for debt or damages" would often "rather spend their sub­
stance in prison than discover and deliver up the same towards
satisfying their creditors". To remedy this it was prescribed
that prisoners failing to make satisfaction within three months
could be required by their creditors to submit to the Court a
proper statement and account on oath of their assets. There­
upon the Court could order an assignment of those assets for
the benefit of the creditors taking action and, on paying out any other creditors, the prisoner was to be discharged. Where, however, imprisoned debtors had no prospect whatever of satisfying their creditors at any time, they could apply to the Court after three months for an order to be discharged out of custody on giving a full account of their financial position and assigning for the benefit of creditors such estates as they possessed and on signing warrants of attorney authorizing the entry of judgements against them rendering their after-acquired assets liable for the balance of their debts without the need for sci. fa. to revive those judgements. This provision came closest to those operative under the English Bankruptcy law.

The Act had the effect of requiring the opening of a new administrative office of the Court. As Forbes observed "it became necessary to keep an office open, separate from the Office of the Supreme Court, for the Deposit of the Books and Papers of Insolvents, which might be consulted at all times during office hours by Creditors in the presence and under the Superintendance of a responsible Clerk". This was the first time in the Court's history that it had become necessary to manage any branch of jurisdiction separately from the other branches; though the arrangement was one of convenience only and did not have the effect of creating an entirely separate jurisdiction.

Forbes' Act was limited to expire in 1832 and it was allowed to lapse. Governor Bourke said of it: "In 1830, an Act was passed ... containing all the Bankrupt Clauses of the English Acts and much of the regulations and Machinery, by which the Estates of declared Insolvents are (or have been Until lately) administered in England. After a trial of nearly two years, this System was found Unsuitable to the State of Society in the Colony, and many frauds are alleged to have been practised under cover of the law". Indeed it could be said to have imported into the Colony some of the confusions existing in England though the dual
operation of the bankruptcy and insolvency laws. Changes were promptly made by "An Act for the relief of Debtors in Execution for Debts which they are unable to pay" - 2 Wm. IV No. 11 of 6th March, 1832, which was as stringent as Forbes' Act had been mild. In outline, this legislation, which was also of limited duration, was continued by 5 Wm. IV No. 4, 6 Wm. IV No. 18, 2 Vic. No. 14 and 4 Vic. No. 24 before being repealed by 5 Vic. No. 17.

The 2 Wm. IV No. 11 commenced by enabling debtors imprisoned for debts which they could not possibly pay to petition the Court for release after having suffered detention for three months; for this purpose special days were to be appointed by the Judges. An examination of a petitioning debtor would be carried out at which creditors could attend in opposition or otherwise to question the debtor. If the debtor fraudulently concealed or misrepresented his affairs he became liable to a penalty under the Act of three year's imprisonment and a similar penalty limited to two year's duration applied if the debtor was found to have contracted the debt fraudulently. Costs were a charge against the debtor in each case.

On discharge of an insolvent under this Act, his effects could immediately be seized and sold by the Sheriff and distributed rateably amongst the creditors. "Of all the methods of winding up an estate which could be devised by the wit of man", said The Australian, "that, by the means of the Sheriff's sale, appears the worst, the most unjust, unthrifty, and in every way the most objectionable. The agents in the scramble singularly distinguish themselves by mercilessness, recklessness, and ignorance. They act in the most entire irresponsibility. Haste and confusion are the circumstances of the Sheriff's sale, waste and depreciation are its results". If the creditors were not fully satisfied it was sufficient for them to demonstrate to the Court "at any time after the discharge of such prisoner" that he was in a position to pay the balance whereupon further execution could be levied and the Court
could authorize further proceedings to be taken until the creditors had been paid in full. If the debtor refused or failed to assign after-acquired property on which execution could not be levied the Court could imprison him until he agreed to make the assignment. Not until that stage had been reached did the Act permit satisfaction to be entered on the judgement. The only concession allowed after discharge was that the debtor, in the discretion of a Judge, could be released from further imprisonment. The contrast which these measures bear to the humanity of Forbes' legislation speaks for itself: the 1832 statute was clearly framed for the relief of creditors rather than for the relief of debtors. The injustice of the measure could even extend amongst the creditors themselves, allowing some to have preference over others. "Nothing can be worse than the existing state of the practice (for law there is none) which obtains in the colony in cases of insolvency. A man who finds himself on the verge of failure, can, by power of attorney, make over a large portion of his assets to a favoured creditor, to the prejudice of the general body of creditors. On the other hand, it is in the power of one creditor to prevent an equal distribution of the estate, by refusing to acquiesce in such decision ... Above all, the future acquired property of the insolvent is liable to his previous debts, thus compelling him during the remainder of his residence in the colony, to become either a rogue or a pauper".

The Act was continued in force *in toto* for a further two years by 5 Wm. IV No. 4 of 8th. July 1834. Towards the close of 1837 the need for some relief was so pressingly felt that Mr. Justice Burton drew a Bill which was laid before the Council but was not passed. The Bill was originally prepared by the Judge when in the Colony of the Cape of Good Hope and it became law there. It was applied at the instance of the Judge in substantial part in Van Diemen's Land; however, Attorney General Stephen appended some clauses of his own, giving the Court severe inquisitorial powers, which made the
measure very unpopular. The Australian gave this account of the reasons for the rejection of the Bill when it was submitted in New South Wales: "The learned Judge ... recognised no distinction between Insolvents and Bankrupts. He so framed his law, that persons who felt themselves in a state of insolvency might go before a Judge, make an affidavit of such insolvency, and at the same time place in the hands of the Court an exact statement of their liabilities and assets, transferring the latter, without reservation into the custody of the Court. At such a stage of the proceedings it was ordained that a Master of the Court should be required by the Judge to take particular cognizance of the insolvent's effects, and having duly and prudently realised the assets, should rateably divide the same amongst the creditors generally. The insolvent in the mean time should be protected against arrest under any circumstances whatsoever, and a maintenance pro tempore be allowed to him at the discretion of the Court. No imprisonment should be permitted except in case of fraud, and for the purpose of discovering fraud sufficiently, stringent powers should be vested in the hands of the Master. In the case of the insolvent not making, in due time, a voluntary cession, it was competent for a certain number of creditors to make application on oath, to the Court, certifying their belief in the debtor's insolvency, in which case a commission for enquiry might issue.

"Now, it did so happen, practically, that the labour of acting as Insolvent Commissioner, would have fallen upon the Registrar, who, feeling that a great addition to his duties of administrator of intestate estates would thus devolve upon him became hostile to the Bill, and took every reasonable means, which, in honour, he was able, to occasion its rejection. ... Nor did the Bill find favour in the eyes of another gentleman of very considerable weight, we allude to that respectable officer of the Court, Mr. Gurner. This gentleman unfortunately took it into his head that the Bill was complex and cumbersome in its details; he declared that he did not understand it,
and no doubt he felt nervous at having to deal with, and constantly to act upon, a measure, which he did not comprehend thoroughly. ... Now we put it to any lawyer to say, whether so far from being complex, the Bill is not, considering the nature of the subject it had to deal with, extremely perspicuous. It is remarkable for nothing more obviously than a masterly simplicity".  

In 1838 a sub-committee of the Legislative Council was appointed to consider the Insolvent Debtors' and Imprisonment for Debt Bills, the former being Burton's Bill in its original draft. The committee gave its report in 1839 from which it appeared that twenty-six of thirty-seven witnesses were favourable to the general principles of Burton's Bill. The others did not so much dispute the form of the Bill, but considered its substance too extensive for the then existing state of the Colony and the committee itself agreed that the details of the proposed law were too complex. The committee placed heavy reliance on the evidence of Stephen, J., and adopted his recommendations for amendments, based on his own variations of the Van Diemen's Land law, recommending that the Bill as drafted by Burton be withdrawn.  

Giving evidence in 1838, John Gurner, Chief Clerk of the Supreme Court, emphatically stressed his views of the complication and expense of the Bill. "I am no advocate for Bankrupt Laws myself", he asserted, "I think the country would be far better without them. I think this Bill will afford a greater facility to a dishonest Debtor, than it will be of benefit to the Creditor. I think the parties who would get credit, would evade the punishment denounced, and that it would be almost impossible to bring home a case to a party, to enable the Court to award a punishment; from what I saw of the old Insolvent Law, parties disposed to commit frauds, would do it in such a way, as to render it impossible to detect them. My own impression as to the old Insolvent Law, is, that the greater part of the cases which came before the Court, were
brought forward by the friends of the parties, and with a very few exceptions, nothing further was done than to get the party declared insolvent, and nothing further has been done to this day; and in the greater number of cases, the books and papers which were lodged at that time in Court remain there now, and neither the insolvent nor the creditors, have received any benefit from them”.

Alfred Stephen saw in the New South Wales Bill the same objections which he had discerned in the Van Diemen's Land measure - the absence of power to imprison on stay of discharge, the inadequacy of provisions as to proof of debts and the want of an official Provisional Assignee. He gave this summary of his views: “I think that these several reasons are all powerful, in favor of an extensive change in those Laws. If, however, I had formed no such opinion, I should still say that any Law was better, on this subject, than the present defective Insolvent Act of this Colony; which is opposed to every principle of right Legislation: - since it protects the incarcerating Creditor alone, to the exclusion of every other, and then leaves the Debtor to be taken in execution again, by any other Creditor, only to go through again the same ineffective process for liberation: - whilst it affords no means whatever, for securing an equal distribution of property, at any time; but, leaving the Debtor a prey to every successive attack, affords him no relief, until he has no property left to pay anybody”.

Speaking of the statutory extension of 1840, 4 Vic. No. 24, The Australian said: “We think that in simply renewing the old Act, his Excellency adopts the best course open to him. It is absolutely necessary that no legislation upon this matter should be entered upon without much forethought, and ample discussion. ... We are quite aware that his Honor the Chief Justice holds very strong opinions relative to this subject. It is the conviction, we apprehend, of the learned member, that trade in the colony can never be in a
sound or respectable state so long as there is no more stringent law relative to failures of merchants than is the case at present. ... The Chief Justice, in his speech in Council relative to this subject, also dwelt forcibly, we recollect, upon the hardships endured by insolvent prisoners, by reason of the obduracy of creditors, and from the said insolvents being unable to rid themselves of their liabilities by making an oath of insolvency. In spite, however, of the startling picture drawn by the learned member of the sufferings of debtors, it did appear upon the return ... that the number of debtors so confined was very small, and that the state of the case was decidedly over coloured.\textsuperscript{20}

In 1841 there were two relevant enactments – 5 Vic. No. 9 and 5 Vic. No. 17. The first was styled "An Act for the further Amendment of the Law and for the better advancement of Justice" which only related in part, namely sections 33 to 37, to Insolvency. Governor Gipps said of these sections that they were "in the present acknowledgedly imperfect state of our Insolvent Laws, ... I trust calculated to produce good results. ... The Merchants of Sydney appear now desirous to have the measure, which was generally objected to in 1840.\textsuperscript{21}

The derivative of Burton's Bill in 5 Vic. No. 17 laid down for the first time in the Colony a representative Insolvency Law designed to give relief to debtors. It was called "An Act for giving relief to Insolvent Persons and providing for the due Collection Administration and Distribution of Insolvent Estates within the Colony of New South Wales and for the prevention of Frauds affecting the same". It was based, as has been noted, on the law applicable in Cape Colony and took effect on 29th December, 1841. The act recited the need to provide for those who "by misfortune and without having been guilty of fraud or dishonesty are or may become insolvent" and empowered the Chief Justice to appoint a fit and proper resident of Sydney to a new office as Chief Commissioner of Insolvent Estates, and to appoint any other
ministerial officers required. The Judges generally had power to levy the fees in Insolvency matters.

The Sydney Morning Herald of 17th. August, 1842, regarded as ill-conceived an impression which had arisen in the community that the Act was designed to protect dishonest debtors from the claims of their creditors. However, it pointed out that this would continue as a practical result unless creditors took upon themselves "to see the Act properly enforced". They could assist themselves, so the journal counselled, by not being "blinded by the paucity of assets appearing in the insolvent's schedule". "The Act will never work", it asserted, "until such creditors make it a positive and determined principle never to sign a certificate under any circumstances, until a dividend shall have been declared, and the creditors have an opportunity of ascertaining that the insolvent has acted honestly, both in his previous conduct, and in the surrender of all his property". The journal also drew to the attention of debtors what it described as the risk and inconvenience which they would incur by taking the benefit of the Act. They would have to give up the whole of their estates including after-acquired property until discharged; they would be forbidden to leave the jurisdiction of the Court or even to go to remote parts of the Colony, they were obliged to submit to public examination, their wives could be examined and they could render themselves liable to transportation for fifteen years on committing certain offences under the Act.

The feeling of many creditors as to the operation of the Act was well summarized by an anonymous correspondent to the Sydney Morning Herald on 31st August, 1843: "As insolvency has become a regular traffic, I find there are few who have escaped, and in many cases others to an enormous amount; how many have gained credit has been astonishing; but what is more surprising, I find that many who have taken advantage of the Act, which must have been intended for the real insolvent, may be seen riding in their carriages, gigs, and horses, keeping
their villas, &c, &c, as if they were actually in full trade, keeping up costly establishments".

A preliminary distinction was made between debtors' and creditors' petitions, but thereafter, once the matter was operative pursuant to the Act, the procedure was identical, and the former were complete on surrender of estate, the latter after adjudication by the Court. By section 3 any Judge could accept the surrender of the estate of a petitioner declaring himself insolvent. This operated whether the debtor was in prison or at large — an extension of the English law (which applied this benefit only to debtors in execution). The Judge was to call for such proof of insolvency or make such examination as he considered necessary before referring to the Commissioner the sequestration of the estate for the benefit of the insolvent's creditors. An analogous power existed with regard to petitions by representative parties having the administration of the estates of other persons.

A report of the first meeting of creditors convened under the Act is contained in The Sydney Morning Herald of 18th February 1842. The procedure adopted at that meeting was that "in those cases where payment had been secured by warrants of attorney, the creditors were sworn as to the truth of its contents, and the debt being a bona fide debt. Where a judgment had been obtained for a debt, the creditor, not having formal proof of judgment, was called on to prove the debt in the same manner as it was proved in the court when the judgment had been obtained, and unless the record was produced and proved, the costs of obtaining that judgment were not allowed. In cases where the amount claimed was represented by a promissory note, the plaintiff was required to give proof of the handwriting of the insolvent, and in no case was the insolvent's admission of the debt being due received as evidence, although repeatedly tendered".

By section 13 any Judge could accept a petition by a creditor praying for the sequestration of the estate of a person who had committed any one of a number of defined acts of
insolvency. The petition was to be supported by affidavit evidence in proof of the debt alleged and security was to be given. Provided the debt amounted to at least fifty pounds the Judge had authority by order under hand to place the insolvent's estate in the hands of the Commissioner for sequestration. These powers extended to the sequestration of estates of companies or partnerships and of deceased estates.

Acts of insolvency were defined by section 5. Until such an act was committed the creditors were armed with no power to compel sequestration. The acts consisted, in effect, of the following:

A) where a person having property in the Colony departed from the Colony.

B) where a person having property in the Colony and, being out of New South Wales, remained absent or departed from his dwelling house; subject to the proviso in each case that it be established that such person intended to defeat or delay his creditors.

C) where a person being subject of the "sentence of any competent Court" failed to satisfy the same or to make available sufficient disposable property to allow of such satisfaction.

D) where a person made a fraudulent alienation, gift, surrender, delivery, mortgage or pledge of any of his estate, goods or effects or gave any fraudulent warrant of attorney or cognovit actionem. In this regard section 6 limited such dealings to those made by a person who at the time was actually insolvent and who entered into the transaction without valuable consideration.

All alienations, transfers, gifts, surrenders or deliveries of any property after a person had contracted a debt and within twelve months of his commission of an act of insolvency or the sequestration of his estate were liable to be set aside summarily at the suit of the creditor injured thereby. Such dealings, when having the effect of preferring any creditor after commencement of insolvency or within sixty days of sequestration order, were absolutely void, excepting where the transaction
was with a **bona fide** purchaser for value without notice and for a just price or in satisfaction of a debt. All such dealings after the making of a sequestration order were likewise void. By section 11 all "acquittances surrenders or discharges" of debts or of security for debts, payment or delivery of which had not been actually and **bona fide** received and having the effect of depriving creditors of the benefit of such debts, were void when made by a person actually insolvent or contemplating the surrender of his estate or knowing that insolvency proceedings had been commenced against him or within sixty days of a sequestration order. The following section prescribed that all payments made to a creditor by a person not compellable by legal process to make them, at a time when he knew himself to be insolvent, were deemed fraudulent, with specified exceptions in the case of good faith.

After a sequestration order was obtained, a copy was lodged with the Sheriff for notation and delivery to the Chief Commissioner, who was the proper officer by his messenger to seize and attach the insolvent's estate, inclusive of movable property. In practice, the Sheriff and his officers also acted as the Commissioner's messenger. Thereafter the petitioning creditor was to take out against the debtor a summons to show cause why the estate should not be sequestrated for the benefit of creditors generally and on the return thereof the Court would receive proof and determine whether the order for sequestration be confirmed or superseded or the petition dismissed. It was obligatory for the petition to be dismissed if shown to be unfounded, vexatious or malicious. If sequestration were superseded, other creditors having provable debts were enabled by section 28 to secure its revival. Immediately on lodgement of order for sequestration with the Sheriff, execution of any other judgement or process was stayed as were other actions against the insolvent, subject to the appointment of trustees to continue any action for damages in an uncertain sum so that the decision of the Court could ground a specific
proof in the distribution of the insolvent's estate. Again, an insolvent in legal custody on other process of the Court was to be released either absolutely or conditionally in the discretion of a Judge. Any legal action commenced by an insolvent person prior to sequestration order was stayed at once until the trustee of his estate elected whether to prosecute or discontinue it, provided that the insolvent could continue in his own name and benefit any action for personal injury or wrong done to himself or to any member of his family. By section 55 a sequestration order had the effect of divesting title from the insolvent or persons administering his estate and vesting it in the Commissioner for the purposes of the sequestration.

Sections 34 and 35 of the Act dealt with the convening by the Chief Commissioner of public meetings of creditors. Two such meetings were to be notified, the first for the receiving of proofs of debts and the second for the same purpose and for the election of a trustee. The second meeting could be dispensed with if the estate were under £100 in value and an immediate ranking of proving creditors could proceed. A third meeting was later to be convened by the Commissioner to receive a report from the trustees.

Debts were to be proved by affidavit or such other mode of proof as the Commissioner should require and he had power to reject proofs subject to a right of appeal to any Judge. The Commissioner was to state the appropriate accounts between the parties in the case of mutual debts or mutual credits and to accept proofs of debts actually contracted by the insolvent to pay creditors at future dates, subject to conditions as to interest on dividends and the voting rights of such creditors. Any creditor holding a pledge or lien as security was obliged to value it and deduct it from the total amount of his proof, voting only in respect of the balance then remaining. Where a debt depended upon a contingency, the creditor could not prove until the contingency happened unless he applied to
the insolvent's trustee to set a value upon the debt. Elementary provisions as to preferential creditors were laid down by sections 41 and 42. By the former, landlords were entitled to priority in respect of six months rent with right to rank pari passu with other creditors for the balance, while the latter enabled clerks or servants of an insolvent to be paid preferentially six months salary or wages.

At the public meetings of creditors only those having debts of £50 sterling or more could vote, either personally or by agent appointed in writing. Where a second meeting was held, not more than three trustees were to be chosen for the collection, administration and distribution of the insolvent estate. All creditors eligible to vote could participate in the election of trustees and any interested person was accorded a right of complaint to the Chief Commissioner against the trustees appointed, provided that he acted before the election was confirmed by the Supreme Court. The Court itself had power to appoint a provisional trustee under section 50 pending the meeting's decision. As soon as the appointment of trustees was confirmed by the Court, title to the insolvent's property was divested from the Commissioner and vested in them for the uses and purposes of the sequestration with power to sell and dispose of any goods or chattels of which the insolvent was the reputed owner. The trustees could litigate suits by or against the insolvent in their discretion. Trustees were liable by section 57 to be removed for misconduct or absence from the Colony and in such cases, or on a trustee's death, the vacancy was to be filled at a fresh election duly confirmed by the Court. Provision for trustees to resign was contained in section 93. Any trustee could call a general meeting of the creditors and require their directions as to the disposal of any part of the estate. Such meeting had to be called on the petition of one-fourth in value of the total number of creditors. By section 78, trustees could compound or compromise debts due to the estate and could submit disputes to arbitration. In
addition to the power of sale granted by section 55 they could by section 79, on giving notice in the Government Gazette, sell any of the insolvent's estate, real as well as personal - with the exception of wearing apparel, bedding, tools of trade and household furniture of the insolvent and his family, subject to authorization by the creditors. The trustees could also proceed with or abandon, as they deemed best, any agreement which the insolvent made for the purchase or exchange of any real property. Detailed accounts were to be kept by the trustees and a formal statement of account and plan of distribution were to be prepared by them and submitted to the Court.

The Act imposed severe penalties on any insolvent who made default in complying with its provisions. By section 66 no insolvent could leave the jurisdiction or move to remote places within the Colony until the trustees' account and plan of distribution had been passed or prior consent given by a three-fourths majority of the creditors. If these provisions were not observed, a Justice of the Peace on the information of any trustee, creditor or interested party could issue a warrant for the insolvent's arrest, on which he could in due course be committed to gaol. An insolvent could at any time be examined before the Court or Commissioner concerning matters showing secrecy or concealment in his dealings and in relation to his estate generally and he was liable in default to be apprehended and sentenced to "transportation" for seven years or imprisonment for three years or lesser periods in either case. Refusal to comply with the requirements of the second meeting of creditors was a ground for committal pending compliance. In cases where wilfully fraudulent insolvency was established, section 73 provided for punishment by "transportation" for a maximum of fifteen years and a minimum of five years or imprisonment for a maximum of five years and a minimum of three years. Imprisonment of uncertificated insolvents for failure to meet their debts was expressly provided for by section 100.

After receipt by the Commissioner of the trustees' accounts and plan of distribution, the documents remained open to objection during a reasonable time by the insolvent himself or any aggrieved
creditor or other interested party. Any person objecting had to make application to the Court and obtain a rule calling upon the trustees to show cause why the plan should not be amended, subject to the determination of which, the Court had jurisdiction on the trustees' application to confirm and allow the plan of distribution. This had the effect of a final judgement as between insolvent and creditors and as to the amount of any debts, unless admitted by the Court after that time and before final distribution. Once the plan had been allowed, the trustees on demand of the creditors were to distribute the estate.

Following the third meeting of creditors and completion of any necessary examination, the insolvent could apply to the creditors for a certificate of their consent to his discharge. If this were granted by at least three-fourths in number and value of the creditors, application could be made to the Court for the certificate to be allowed. However, the insolvent was not entitled to such certificate if he had committed the crime of fraudulent insolvency. When the Certificate was allowed by the Court, the insolvent was forthwith discharged from all debts due by him at the time of the surrender of his estate and from all other claims or demands provable against the estate. Such certificate was sufficient evidence of release from any cause of action arising on debts due at the time of surrender of the insolvent's estate and the making of the sequestration order.

The Court was invested by section 103 with power to make rules, orders and regulations for the execution of the Act, the form and manner of proceeding and the scale of fees.

The Act, in summary, demonstrated a new and liberal approach to the problem of commercial debt. Imprisonment was recognized as a useless remedy and a deprivation of civil rights, though it was not abolished. The attempt to protect the insolvent's assets and to make a proper distribution was far more satisfactory than had previously been the case. Burton in his practice book "The Insolvent Law of New South Wales" epitomized his intentions in these words: "Sufficient care
it may be hoped ... has been taken that no person shall be
divested of the administration of his estate without good
cause; to say nothing, in this place, of the ample remedy
which the law provides, if any one so pursue him maliciously.
But the way in which alone creditors can proceed, after the
commission of such acts as these, also ensures his protection
against either surprise or unfounded persecution; and in this
will be found a beneficial departure from the English bankrupt
laws: No docket can be struck, or fiat issue against him, of
which he is ignorant; he cannot be made subject to the law
without having an opportunity of defending himself, if he can,
before the Supreme Court".75

Lord Stanley, however, had views of a different kind -
"On the Insolvent Debtors Act, No. 17, Her Majesty's Decision
is suspended. At this distance from the Colony, it is impossible
to estimate aright enactments so numerous and minute, and re­
lating to matters of which the interest and the significancy
are so peculiarly local. This is one of those Laws, which can
be brought to no satisfactory test but that of experience. After
it shall have been in operation for two Years, you will have ac­
quired such an insight into the defects and advantages of the
Law as will enable you with confidence to report on the actual
results of it".76 This seriousness of attitude was dictated by
parsimony rather than a sense of justice. Governor Gipps had
foreshadowed this. In 1842 he had written to the noble Lord;
"I thought it proper to resist the demands, which were made
upon me to create New offices under this Act, to be a burthen
on the public revenue; and that it is consequently provided,
by the 1st Clause of the Act, that the Commissioners and others
to be employed in carrying it into execution are to be appoin­
ted by the Chief Justice, and to take such fees as may be
allowed them by orders issued from time to time by the Judges".77
To this came the uncompromising reply: "I think that the
Patronage given to the Chief Justice by the first clause
should be vested in the Crown, or in the Governor acting
on Her Majesty's behalf. The responsibility of a Judge for the right execution of a Trust of this kind is so nearly nominal that I apprehend he is not the proper depository of it.\textsuperscript{78}

So there was nothing to do but to change the law and, while the amendments were in the draftsman's hands, a Select Committee of the Legislative Council took the opportunity of considering the insolvency law generally.\textsuperscript{79} It was already apparent that the law could not meet the troubled financial problems of the day. The Australian, which such a short time before had gushed superlatives in praise of the measure, now said of it: "The Insolvent Law is working very badly. A large number of disreputable persons have taken ample advantage of a measure, which, excellent as it no doubt is in many parts, is found practically to work entirely in favour of the debtor, and to the severe detriment of the creditor. ... The fact is that the law is not sufficiently stringent. It is to be sincerely trusted that the Judges will cause a reform in the Court; that they will place the highly responsible office of Commissioner in more able and efficient hands; and that they will give to the administration of this portion of justice, more scrutiny than has hitherto been exercised."\textsuperscript{80} The Select Committee was convened in November, 1843, and gave its report a month later. The Committee expressed the view that "the principle of the Insolvent Act is founded in justice and reason, and that the abuses, frauds, and waste of property, which have undoubtedly to a considerable extent attended the working of the Act, may be attributed in a great measure to the unparalleled distress of the times."\textsuperscript{81}

To the Governor's alarm, the Committee, in addition to the fiscal amendments demanded by Lord Stanley, proposed several dramatic changes, which became embodied in a Bill passed as 7 Vic. No. 19. These changes were:

1. a recurrence to the system of voluntary assignments (which had been legalized under 5 Vic. No. 9 but abolished by 5 Vic. No. 17).

2. the appointment of official assignees to manage estates
Governor and Judges alike were embarrassed by this, Governor Gipps observing: "It was proposed that the appointment of Official Trustees (sic) should be given to the Governor; but I declined it on the ground that the Government has nothing to do with the Administration of Insolvent Estates, and that, ... it would be scarcely possible to make the Public believe that the Government was not responsible for their good conduct, and for any losses or deficiencies which might arise out of their misconduct". 82

(3) to give the Chief Commissioner power of committal for contempt.

(4) that the power of granting certificates of discharge be taken from creditors and vested in the Judges. (Alfred Stephen considered that this power might be delegated to the Commissioner, but the Act compromised by transferring it to the Commissioner and the Judges). 83

(5) that allowances be made to insolvents in the Commissioner's discretion.

(6) that imprisonment for debt be abolished, being "a cause of unmixed evil". 84

The last was a momentous step. "I at first thought that I could not give my assent to this enactment", wrote the Governor to Lord Stanley, "and it was only after considerable doubt and hesitation that I did so. It appeared to me that, in a matter of so much importance, a Colonial Legislature ought scarcely to take the lead of Parliament; and I even doubted whether an enactment, which went on to deprive creditors of a right, which (whether it be a barbarous one or not) the Law of England has for Centuries allowed to them, might not be repugnant to the Law of England. On the score of repugnancy however my scruples were removed by the Law Officers of the Crown and Mr. Justice Burton, who, as your Lordship is aware, has taken a leading part in everything relating to the Laws of Debtor and Creditor in the Colony". 85

Shortly before the above provisions were enacted, a set of three Bills was submitted to the Council at the instance
of W. C. Wentworth, and passed. The second of these for the prevention of the wasting of the property of insolvents, became 7 Vic. No. 4. The object of the Act was "to facilitate the granting of Letters of License to persons who, though unable to meet their immediate engagements, may be in possession of property, which, if fair prices could only be obtained for it, would be sufficient to satisfy all their creditors. A Letter of License has, under this Act, the effect of protecting the individual receiving it from the operation of the Insolvent Law, and of leaving him in the management of his own property; whereas if he became insolvent, it would be handed over under the Insolvent Law to the management of Trustees". Yet this did not inspire the Governor to expect much benefit "the tendency of it being to increase the "bolstering up", as it is called, of persons in a tottering condition". He therefore assented to it with considerable hesitation as he felt that it would increase or prolong the indebtedness of the Colony.

Lord Stanley's reply in its usual acerbity declared that: "As that Law will expire in little more than two years from its date, The Queen will not disallow it. But neither can Her Majesty be advised expressly to sanction it. Until it shall have expired by the lapse of time, it will therefore continue to operate. But you will understand yourself as being distinctly prohibited from again assenting to a Law enabling a debtor to continue in possession of his property, and to avoid the ordinary legal responsibility to any one of his creditors under shelter of a license granted for that purpose by his other creditors".

The 7 Vic. No. 19 became law on 21st. December, 1843. It was styled "An Act to amend an Act intituled An Act for giving relief to Insolvent Persons and providing for the administration of Insolvent Estates and to abolish Imprisonment for Debt". It dealt in the first instance with the scale of fees taken in the Court and extensively modified them. It also provided on the administrative side that the rules of Court authorized under 5 Vic. No. 17 could only take effect on being laid before the
Legislative Council for approval. These clauses embodied the amendments which Lord Stanley had demanded.

To protect conveyances and assignments executed in conformity with sections 33 and 34 of the Advancement of Justice Act from being the basis of acts of insolvency it was prescribed by section 8 of 7 Vic. No. 19 that such documents would be deemed not to be fraudulent or void. However, a Judge could on petition of the creditors, summon the insolvent to give an account of his affairs before and after the conveyance or assignment in question and, if his explanations were not satisfactory, he could be committed to prison. As a safeguard, section 9 required trustees appointed under such conveyances or assignments to keep accounts and to submit these to the Court when required, subject to penalties for misconduct. Purchasers bona fide and for value were not obliged to make any enquiry when dealing with such trustees, in accordance with protection afforded them by section 11 of the Act.

As has been noted, a new title of Official Assignee was constituted by this amendment, though the Judges generally disliked the innovation. The Chief Justice could appoint as many fit persons as necessary to be Official Assignees of Insolvent Estates. This power avoided that previously held by any of the Judges to appoint provisional trustees, and made it optional for creditors to elect any trustee or assignee. Forthwith on the appointment of an Official Assignee as assignee of an estate, the insolvent's title vested in him alone or jointly with an elected trustee if the creditors so exercised their discretion. The assignee had the same title to transfer as the insolvent had enjoyed immediately on the sequestration of his estate.

Speaking in anxious tones, foreseeing no doubt the wrath of his overlord at the arbitrary extension of the statute by the colonial Committee, Governor Gipps apologetically reported on the measure that it "grew in favor every day with the Public; I waited as long as I could for objection from any quarter, but none came; and I consequently, though only on the same day that I prorogued the Council, gave in Her Majesty's name my
assent to the measure".93

Such presumption was too great for the Law of England to tolerate quietly - "the Act ... raises questions of such permanent importance that Her Majesty's decision on it will be suspended, until I shall be in possession of a Report, which you will make as speedily as may be to the effect which may have actually resulted from the Law, since the Enactment of it in December 1843".94 Not content with this, Lord Stanley demanded also a report from the Judges and from some of the principal merchants and landholders. So the tiresome procedure of making enquiries began again. His Excellency considered that 7 Vic. No. 19 should be confirmed - a view which the attorneys of the Court, most of the Judges and some of the Crown Law Officers vigorously opposed on technical grounds.95 The Governor's own observations certainly carried great force as against these: "I have had abundant occasion", he said, "to observe the evils which are produced in the Colony by the facility with which credit can be obtained, and by the prevailing passion for litigation. The abolition of Imprisonment for debt is calculated, I believe, to check both these evils".96

The British Government's attitude on the Colonial Insolvency Law was unpardonably negative. It would not take time to prepare a comprehensive legislation for the Colony, yet when Acts were submitted by those who might be expected best to know the Colony's needs they were effectively vetoed. This was at a time when the Colony's economy was in a perilous position and credit was seriously depressed. Governor Gipps was alarmed by the "extent to which Insolvency has occurred amongst all classes of the Community, even among men who were a short time ago considered in wealthy circumstances".97 Against this background the Legislative Council spent considerable time in endeavouring to reach a remedy and, by 1844, it directed a further Select Committee to report on the existing state of the Insolvent Law.

The work of this Committee was somewhat overshadowed by a discovery which led to the passing of 8 Vic. No. 15. The
discovery was 'that the existing law made no provision for a trustee to make a legal transfer of title to a purchaser from him. "The mystery is", the Sydney Morning Herald censoriously asserted, "not so much that the defect should have occurred in the original enactment, as that it should not have been discovered by the Council and its Select Committees whilst framing and discussing their two or three successive Amendment Bills; that it should have escaped the notice of the learned CHIEF COMMISSIONER of the Insolvent Court, and of the several orders of practitioners therein; and especially that the legal advisers of purchasers of sequestrated freeholds should have overlooked so radical a blemish in their clients' titles. How the blunder was at last found out, and to whose sagacity the public are indebted for its timely exposure, does not appear".98

The 8 Vic. No. 15 was one of two Insolvency statutes passed in 1844. It was preceded by 8 Vic. No. 6 "An Act to further amend an Act intituled An Act for giving relief to Insolvent Persons and providing for the administration of Insolvent Estates and to abolish Imprisonment for Debt" which operated in Port Phillip only. The 8 Vic. No. 15 had a similar title and did take effect in the Colony. It recited that doubts had arisen as to the nature and duration of the estate and interest of trustees of insolvent estates and as to their powers to effect conveyances; the deficiencies were at once rectified. Trustees were to take the estate of their insolvents in such estate or interest as the insolvents respectively had, with power to convey title accordingly.

There remained difficulties in the disposal of an insolvent's estate by his assignees or trustees, particularly in that the expenses were so high and that the existing legislation left some loopholes so far as the title to the insolvent's property was concerned. To resolve these "An Act to remove difficulties in the disposal administration and distribution of Insolvent Estates" was passed in October 1846 as 10 Vic. No. 14. Upon a judicial order for the appointment of an official assignee or for the sequestration of an estate after the passing of the Act, the whole of the insolvent's real and personal estate was
to vest in the assignee or trustee for such estate or interest as the insolvent had in it. Where an assignee was appointed by the creditors, the official assignee's exclusive title would be converted into a joint title with the elected officer. Either assignee could effectively convey, assign, release or assure any part of the insolvent's real or personal estate by deed and purchasers, mortgagees or other persons dealing with the assignees were relieved from enquiring whether the directions of the creditors had been obtained and as to the authority generally of the trustees to convey. This did not, however, operate to excuse trustees or assignees from the "unobservance or nonperformance" of their duties. On the insolvent's release from sequestration the residue of his property was to re-vest in him. Two statutes may be mentioned here which had a slight influence on the Insolvency Law: 13 Vic. No. 12 of 1849, an Act to prevent the escape from the Colony of fraudulent debtors whereby writs of ca. re. and ca. sa. were enabled to be executed on Sundays: 17 Vic. No. 17 was an Act for the appropriation of unclaimed balances in Intestate and Insolvent Estates.

Abuse of the power which 5 Vic. No. 17 and 7 Vic. No. 19 had vested in creditors to give directions to assignees and trustees led to its curtailment in 1857 by 20 Vic. No. 24. This required that the directions of the creditors had first to be ratified by the Chief Commissioner before they could become binding. A formal appeal to any Judge was allowed from the Commissioner's decision.

An Act declaratory of the powers of any Chief Commissioner of Insolvent Estates with regard to the issue of certificates of discharge was found necessary in 1853 in the 17 Vic. No. 32. The Chief Commissioner was further enabled by an amending Act of 1855, 19 Vic. No. 33, to enquire into all charges of fraudulent insolvency with powers of committal and all the authority of a Justice of the Peace. Not until 1861 was the Chief Commissioner's own office regularized by the fixing of an annual salary (£1000) and the granting of a statutory assurance of tenure of office during "ability and good behaviour". This
was effected by 24 Vic. No. 20, the Insolvency Commissioner's Act, which also prescribed that the Commissioner be a barrister or attorney of at least seven years standing. Master Deffell unenthusiastically wrote to the Chief Justice that he would endeavour to discharge the joint duties of Master in Equity and Chief Commissioner "as did the late lamented Judge Milford for some years prior to 1856." Very extensive authority was accorded to the Chief Commissioner by An Act to amend the Laws relating to Insolvency, 25 Vic. No. 8 which became law on the 26th December, 1861. That officer was to have all the authority and powers of a Judge of a Court of Record and the powers and jurisdiction vested in and exercised by the Supreme Court or any of the Judges thereof but only with regard to the sequestration or release of estates, the direction and prosecution of examinations, ordering payment of dividends, confirming plans of distribution and accounts and supervising payments by an insolvent person on becoming able to satisfy his creditors. An appeal was reserved to the Supreme Court. The Commissioner's approval or refusal of certificates of discharge was no longer a matter for ratification by the Court and the Commissioner was declared to have control and direction over the Official Assignees. All sales of any insolvent's property by private contract had to be approved in writing by the Commissioner. Much of the jurisdiction of the Court was thus divested from it and placed in the hands of a ministerial officer.

The same Act created a position of Registrar in Insolvency - an administrative appointment concerned with the preservation of the records and keeping of the books and accounts of the Insolvency Department and with the taxation of costs. Meetings of creditors and proofs of debts could, by order of the Commissioner, proceed before the Registrar.

In 1862 a Select Committee of the Legislative Council was appointed to consider an attempt at consolidation called the Insolvent Law Consolidation Bill drafted by Mr. Commissioner McFarland, the then Chief Commissioner of Insolvent Estates. The Bill was expressed to abolish the office of Chief Commissioner
and to transfer to a separate Court the jurisdiction exercised by that officer and by the District Commissioners and Official Assignees in Insolvency.

Giving evidence before the Committee, McFarland said of the existing local Acts of Parliament that they were not "to say the least of it, suitable to the present circumstances of the Colony, and to the magnitude of the commercial and other interests at present affected by it; that (they are) defective in many respects, injurious to the general body of creditors in insolvent estates, and an inducement to fraud". So far as jurisdiction was concerned, the Commissioner thought that his own office was judicial in all respects but in name and went on to observe that "up to the present hour there is not in this Colony any Court of Insolvency; nine-tenths of the jurisdiction in Insolvency is vested in the Chief Commissioner under the 25th Victoria No. 8, sections 4, 5, 6, 7 &c., and the remaining tenth still remains in the Supreme Court." The Chief Commissioner virtually and substantially, has within himself, nearly all the Insolvency jurisdiction - but still he does not constitute a Court, and he is not a Court; there is no Court of Insolvency in the Colony and I know that this operates injuriously." 

The Committee was not favourably impressed by the proposal to abolish the Chief Commissioner's office and recommended its retention. It further recommended that the Court of Insolvency should be precluded from trying criminal offences against the Insolvent Law unless the insolvent himself should consent to its jurisdiction. The matter did not become of significance as the Bill was discharged from the paper after the return of the Committee's report.

It was uncertain under the then existing legislation whether the requirements of proof of insolvency had been entirely satisfied in the orders of the Chief Commissioner made in the early 1860's. To remedy this 27 Vic. No. 4 "An Act to render valid certain orders of Sequestration in Insolvency" was passed in December 1863, whereby all orders made were deemed effective notwithstanding deficiencies of proof. In 1867 an Act to
facilitate proceedings in Insolvency, 31 Vic. No. 9, became law. This was designed to simplify the proof of debts by companies by permitting a duly constituted agent of a corporation to present petitions and make any necessary oaths in the corporate name. This would apply whether the creditor were in the Colony or absent from it. Default in payment to creditors by an Official Assignee named William Perry led to a special enactment, 36 Vic. No. 16 for distribution of the funds. Of passing interest is "An Act to amend the Law of Arrest and Imprisonment on Civil Process", 37 Vic. No. 11 of 1874. By section 5 of that Act any person in custody pursuant to a judgement under a writ of ca. sa. or ca. re. was entitled to be discharged on the sequestration of his estate when the Chief Commissioner absolutely or conditionally so ordered, but subject to restrictions on the debtor's departure from the Colony.

What may be described as the first (and indeed the last) consolidating Insolvency Act was introduced in 1874 - 38 Vic. No. 1 - An Act to expedite and lessen the expense of proceedings in Insolvency. This Act prescribed that the Insolvency Jurisdiction of the Supreme Court was to continue to be exercised as "a superior Court of Record of Law and Equity". Orders of Court in Insolvency were to have the same force and effect as judgments at Law or decrees in Equity. It did not (with the exception of a portion of 5 Vic. No. 17) repeal prior Acts, but stipulated how many and what portions of the earlier statutes conferred jurisdiction in the first instance on the Chief Commissioner. To this extent the Commissioner was accorded cumulatively with authorities already vesting in him all the powers possessed and exercised by the Supreme Court or any Judge whether in Chambers or in open Court. An appeal from District Commissioners to the Chief Commissioner and from the Chief Commissioner to the Court was reserved. The Commissioner was to be one of a panel with two Judges to frame general Rules of Court in Insolvency, other than Rules on appeals. For the purposes of the then Companies Act, the Commissioner was deemed to be "the Court"
with consequent powers in respect of proceedings referred to him on the winding up of insolvent companies.
NOTES

2. Legge, 135.
3. HRA IV/I, 7-8.
4. Id. 61.
5. Id. 63.
6. Id. 85.
7. For an account of the conditions of the colonial debtors prison vide Sydney Gazette, 17th. February, 1825.
8. HRA IV/I, 659.
9. Id. 419.
10. HRA I/XVI, 5-6.
11. Id. 566.
14. The text of the Bill is conveniently set out in several issues of The Australian commencing with that of 16th. September, 1841.
15. 9th. September, 1841, 2 col. 2.
16. The Australian, 18th. December, 1841, 2 col. 4; V & P 1838, 269.
17. V & P 1839.
20. 5th. October, 1840, 2 col. 1.
21. HRA I/XXI, 556.
22. 2 cols. 1-2.
23. 3 col. 2. Cf. 30th. July, 1840, 2 col. 6: "A certain baker, in this town, after his recent declaration of insolvency, has been seen to mount his horse, and ride down the street, actually snapping his finger in the faces of all the creditors whom he fell in with, and, as it were, laughing them to scorn".
25. 2 col. 3.
26. Section 15.
27. Section 14.
28. Section 17.
29. Section 18.
30. Section 7.
31. Section 8.
32. Section 9.
33. Section 10.
34. Section 20.
35. Section 21.
36. Section 22.
37. Section 24.
38. Section 25.
40. Section 27.
41. Section 30.
42. Section 31.
43. Section 32.
44. Section 33.
45. Section 77.
46. Section 36.
47. Section 37.
48. Section 38.
49. Section 39.
50. Section 40.
51. Section 46.
52. Section 47.
53. Section 48.
54. Section 54.
55. Section 55.
56. Section 56.
57. Section 58.
58. Section 61.
59. Section 80.
60. Section 84.
61. Section 83.
62. Section 87.
63. Section 67.
64. Section 68.
65. Section 69.
66. Section 88.
67. Section 89.
68. Section 90.
69. Section 91.
70. Section 92.
71. Section 94.
72. Section 95.
73. Section 97.
74. Section 99.
76. HRA I/XXI, 573.
77. Id. 726.
78. Id. 573.
80. 7th. May, 1842, 2 col. 3.
82. HRA I/XXIII, 291.
83. Governors' Despatches (Mitchell Library) 1223, 119.
84. Id. 107.
85. HRA I/XXIII, 291.
86. Id. 281.
87. Id. 181.
88. HRA I/XXIV, 58.
89. Vide Burton's opinion (Governors' Despatches, 1233, 155) and Stephen's opinion (Id. 109). Section 12.
90. Section 13.
91. Section 14.
92. Section 15.
93. HRA I/XXIII, 291.
94. HRA I/XXIV, 59.
95. Id. 526.
96. Id. 527.
97. HRA I/XXIII, 84.
This had been preceded in the previous year by a Select Committee of the Lower House (V & P 1861 (1)) prompted in turn by petitions protesting at the "loss, dissatisfaction, and apprehension to this important mercantile community" V & P 1858-1859 (1), 567.

It was said of this gentleman that he was "unsuitable to his office by reason of his imperfect knowledge, not only of his profession, but of business transactions generally; and that his temper, demeanour, and mode of conducting the business in his department have been productive of annoyance to many persons, and dissatisfaction to the public generally" V & P 1863-1864 (2), 595.
The Bankruptcy Act of 1887 entirely changed the structure of the Insolvency Jurisdiction and gave to the reconstituted department the title of Bankruptcy Jurisdiction of the Supreme Court, which was vested in the Judge in Bankruptcy. The judicial powers thus remained with the Court, the great advantage being that a single tribunal was at last established, obviating the need which had sometimes arisen of resorting to various Courts in respect of matters arising out of one and the same estate. A more dramatic alteration was the merging of the office of Chief Commissioner of Insolvent Estates in the new Judgeship (subject to modified pension rights) pursuant to section 128. This was a necessary consequence of the very wide powers vested in the Chief Commissioners since the institution of their office under 5 Vic. No. 17. The Commissioner had only performed ministerial duties and so did not constitute a tribunal in his own right; he was therefore limited to the specific matters delegated to him by statute. Because of this, suitors were again under necessity at times of proceeding in other jurisdictions. In one recorded case six actions had to be prosecuted in respect of the same estate in separate Courts — the Supreme Court at Common Law, the Supreme Court in Equity, the Insolvency Court, a County District Court, a Sydney District Court and a Police Court.

The Judge was enabled by section 130 of the 1887 Act to decide all questions of priorities and all other questions whether of law or equity or questions of fact in any case in Bankruptcy coming before him. However, the Judge had a discretion to refer matters of fact to a jury and could grant new trials in respect of such matters. "The 130th section of the Bankruptcy Act is intended by the Legislature to give the Judge in Bankruptcy as full power of dealing with all matters that arise before him as formerly could have been obtained in the other jurisdictions of the Court, either
at law or in Equity. The provision is a most beneficial one, because instead of obliging the Bankruptcy Court to relegate to the other jurisdictions the matters which arise before the Court itself, the Judge in Bankruptcy is able to deal with them as fully and finally as if they had come before the Primary Judge in Equity or before one of the Common Law Judges”, per Owen, CJ in Eq., in Re Samuel Wilson. The Judge, being a member of the Supreme Court could sit in other jurisdictions, and the Act expressly contemplated that other Judges would take his place in vacation or during his absence or illness, unless an Acting Judge in Bankruptcy were appointed. The Judge's orders were enforceable in the same manner as other orders of Supreme Court Judges. The Judge could exercise the whole or any part of his jurisdiction in Chambers and could delegate to the Registrar in Bankruptcy such powers as he considered expedient. The Judge ordinarily would not interfere with the Registrar's discretion after delegation though an appeal from the Registrar was so much a re-hearing that the practice was for the Judge to substitute his own discretion for the Registrar's in reaching his decision. Any person having a right of audience before the Chief Commissioner had that right preserved qua the Judge pursuant to section 134 of the 1887 Act. The Judge was not amenable to the writs of Prohibition or Writ of Mandamus, but an appeal lay to the Full Court from his decisions under section 135. The Judge himself could not be a member of the bench on the appeal. By 60 Vic. No. 29, section 135 was amended to provide that appeals should be by way of re-hearing and this was confirmed by section 138 of the 1893 Act. The consolidation, however, failed to repeal section 135 of the 1887 Act thus causing a palpable inconsistency, especially as Re Farrar had laid down that appeals under the 1887 Act were not re-hearings so that only the original evidence could be considered on the appeal. The then Chief Justice expressed
regret and surprise in reaching this decision but could see no authority in the Act from which the Court could exercise more than a power of appeal proper. His Honour said: "From the outset I confess I have been unable to see why the Bankruptcy Act should not have given to this Court the same powers as the Equity Act gave it. I am unable to see any good reason why we should not have the power of re-hearing cases which have been determined in the Court of Bankruptcy, just as we have in cases determined by The Chief Judge in Equity. ... I am of opinion that in order that the right of re-hearing should be given to the Appellate Court, it must be given by express words, or must be given in such a way that the Appellate Court would have the same right of re-hearing as was the case before the Equity Act of 1880 was passed". Innes, J., agreed that "the safest course, and in fact the only course, is to say that the Legislature has by the Bankruptcy Act precluded the Judges from conferring upon themselves a jurisdiction which the Act has not conferred".

The Bankruptcy Jurisdiction was autonomous and, unless a Court of Equity contained some jurisdiction which the Bankruptcy Court did not, there could be no suggestion of restraining Bankruptcy proceedings by injunction. Owen, CJ in Eq., held in Nicholls v. Saywell "The Equity Court is asked to interfere with the verdict on the ground that the verdict has been improperly obtained. It is contended that there was fraud in regard to the award and the conduct of the arbitrator, and the Court ought not to have acted on the verdict - that the Court of Bankruptcy is as capable of determining as this Court. Therefore, there is no ground for going out of the jurisdiction of the Bankruptcy Court into the jurisdiction of the Equity Court for that purpose". A similar decision was reached by the Full Court in Re Wordsworth, which was applied by Manning, J., in Re Thornley where he said "it is
my clear duty to remove to this (the Bankruptcy) Court all questions dealing with bankruptcy

The Act of 1887 made provision for the appointment of District Registrars in Bankruptcy and other necessary ministerial officers who were all to be officers of the Supreme Court. The existing staff of the Insolvency Court was to be taken over on this basis and to operate under the Bankruptcy Act. All such officers were to be remunerated out of consolidated revenue, with the curious anachronism that District Registrars were permitted in addition to take the fees received to their own use. The last-mentioned provision was deemed to have been repealed by 60 Vic. No. 17 and was accordingly omitted from the 1898 statute. The 60 Vic. No. 29 made provision for the appointment of acting Registrars in the event of illness or indisposition of a District Registrar. Official assignees or trustees were also officers of the Court - their principal obligation to the Court being the payment of a percentage of the funds realized in the estate to the Treasury. The jurisdiction of the Registrar in Bankruptcy was prescribed with great particularity by section 141 of the 1887 Act and in much expanded terms by section 143 of the 1898 Act. A District Registrar had identical powers and jurisdiction in respect of examinations, issuing of summonses, enquiries or accounts.

The Bankruptcy Act of 1887 (51 Vic. No. 19) drew quite substantially upon legislative reforms in the English Act of 1883. It was much concerned with principles of public morality by promoting honest trading and raising the standards of commercial credit. At the same time it preserved in the creditors of a bankrupt fairly wide liberty to get in the bankrupt's assets and to satisfy their own claims. Because the official control was of a limited kind, the Act did not entirely achieve its intentions.

The Act was divided into eight parts, which will here be
considered in turn.

PART I Proceedings from Act of Bankruptcy to Discharge

Eleven acts of bankruptcy were specified, commission of any one of which rendered a person liable to be declared a bankrupt. Assignment to trustees for the benefit of creditors was the first ground. It could not be availed of unless the petitioning creditor represented at least one fifth in value of all creditors. The Supreme Court held in In re McCulloch that a creditor not referred to, or inaccurately referred to in a deed of assignment would not be bound by it. The second act of bankruptcy was the conveyance of the bankrupt's property with intention to defeat creditors.

This differed from the English Act, which required that the conveyance be fraudulent; so that it was sufficient in the Colony simply to show an intent (whether fraudulent or not) on the part of the bankrupt to defeat his creditors. Accordingly, an assignment made on the eve of trial of a suit in anticipation of an adverse verdict manifested a sufficient intention to found an act of bankruptcy. It was necessary, however, that the intention exist on both sides. By section 4 (1) (c) transfer or charge of property which would be void as a fraudulent preference if a sequestration order were made in fact, was made a further act of bankruptcy. Departing from or remaining out of the Colony, leaving or keeping house and wilful absence with intent to defeat or delay creditors were also grounds. Again, if execution were levied and goods sold, but payment to a creditor refused, or if a person filed in Court a declaration of inability to pay debts or filed a bankruptcy petition against himself, acts of bankruptcy were committed. If a creditor obtained a final judgement against a debtor, or a bankruptcy notice were served, failure of the debtor to comply within the time limited was an act of bankruptcy, subject to any counter-claim or set-off. It is interesting to observe the decision in Roberts v. Hill whereby a married woman
possessed of separate estate could not be rendered liable under this section merely by service of a bankruptcy notice unless she had a protection order under 22 Vic. No. 6 s. 4. A ground existed under sub-section (h) if a debtor gave notice to his creditors that he had suspended or was about to suspend payment of his debts; under sub-section (i) if a person had been declared bankrupt in a British Court and not discharged; and under sub-section (j) if the majority of creditors at a meeting at which the debtor admitted his insolvency called on him to present a petition against himself and he did so. By section 8 (ll) it was also made an act of bankruptcy for a person to pay money or give security to a petitioning creditor after sequestration order made.

No jurisdiction was conferred on the Court to annul acts of bankruptcy and rules of Court made to this end were declared void by the Privy Council in King v. Henderson. Lord Watson made this analysis: "These Acts define, with great minuteness, the various ways in which an act of bankruptcy may be constituted, one of them being by a bankruptcy notice under s. 4(2) of the principal Act. When an application is made for a sequestration order, which complies with the requirements of ss. 6, 7 and 8 of the same Act, ample discretion is vested in the Judge either to grant or refuse the petition; and, if a sequestration order be made, it may subsequently (s. 5(ll)) be discharged or annulled. But whilst the Judge may, in his discretion, competently refuse to follow up an act of bankruptcy by issuing a sequestration order, the statutes give him no jurisdiction to annul an act of bankruptcy, or to declare that it never was committed. There is no authority to be found for the procedure of the learned Judge, save in the 51st of the General Rules framed by the Court, which provides that "When the Judge makes an order setting aside the bankruptcy notice, he may at the same time declare that no act of bankruptcy has been
committed by the debtor under such notice". Now the only power which the Court has to frame rules is conferred by s. 119 of the principal Act, and it is strictly limited to rules "for the purpose of regulating any matter under this Act." In the opinion of their Lordships, a rule empowering the Judge to make a declaration that no act of bankruptcy had been committed under the notice, is in no sense a regulation either framed or calculated to carry out the objects of the Act. It is, in their opinion, the new creation of a jurisdiction which the Legislature withheld, it is inconsistent with and so far repeals the plain enactments of the statute, and it takes away from creditors the absolute right which the statute gave them of founding a petition for a sequestration order upon the bankruptcy notice.

The Judge was enabled by section 5 to make a sequestration order on proof of the commission of an act of bankruptcy. This was a new concept in the law of the Colony as it originated the idea of bankruptcy as a legal status actually affecting the personality and rights of the debtor. Even under the English legislation of 1883 a person was still left in the hands of his creditors to be adjudicated bankrupt, the Court's "receiving order" merely permitting the creditors to proceed. The Judge's authority in the Colony was delegated to the Registrar in the case of debtors' petitions.

The conditions precedent to the making of an order were that a liquidated debt of at least fifty pounds be due by a debtor domiciled or usually resident in New South Wales who had committed an act of bankruptcy not more than six months before presentation of the petition. Creditors' petitions had to be verified by affidavit. This could be sufficient proof if the debtor failed to appear, but the Judge had discretion to refuse to make an order if dissatisfied with proof, or to allow the petition to stand over or be withdrawn. He could also stay or dismiss a petition where
an appeal or motion for new trial was pending, and could stay
proceedings to try questions relating to the debt, if the debtor
disputed it, but subject to security. Otherwise, a petition
could not be withdrawn without leave of the Judge which had to be
obtained in solemn fashion after proving the determination of a
settlement by affidavit. Debtors' petitions had merely to allege
inability to pay debts, whereupon the Court was obliged to make an
order, provided the proper form had been used.

It was apparent then that the administration of colonial
estates in bankruptcy was primarily a matter for the Court. Of
this Manning, J., said in Re Badgery: "When the Bankruptcy Act
was passed the old Act (5 Vic. No. 19) relating to deeds of
assignment was repealed and one must conclude, therefore, that in
the opinion of the Legislature it was inexpedient to provide in
any way for the compulsory administration of the estate outside
of the Court of Bankruptcy, or, in other words, that prima facie
all estates should be administered by the Court. The reason is
fairly obvious: (1) That as a general rule the supervision of
the Court over the trustee is desirable; (2) that the inquisitorial
powers of the Act can be applied to investigate the position of the
debtor and favoured creditors; (3) that transactions can be
impeached as preferences.

"It was, however, seen that possibly some estates might be
wound up to the greater advantage of all the creditors by trustees
outside the Court, and it was, therefore, provided that when a
petition was presented against a debtor who had assigned his estate
at Common Law for the benefit of his creditors, such trustees should
have notice of the hearing of the petition, and the Judge was
invested with power to dismiss the petition if he was satisfied
that it would be for the advantage of creditors that the winding up
should proceed under an assignment deed.

"This discretion, I think, should be exercised in cases where
it is beyond doubt clear that the estate can be easily
administered, and that no question of law is likely to arise,
and where the estate may have to be nursed in order to be realised
to the best advantage; but if it is made to appear that questions
of law will arise, the Court ought not to deprive any creditor —
that is, any creditor to a substantial amount — from having the
estate wound up in bankruptcy, and especially where there is any
question of preferences, for preferences are generally nice questions
of law, and there is no way of impeaching them except in the
Bankruptcy Court”.

Section 5 of the Act prescribed that, on the making of a
sequestration order, a debtor became bankrupt and continued so
until he was discharged or the order was annulled. Section 10
extended this by defining the effects of the order. All the real
and personal property of a bankrupt, or the whole of his estate in
it, vested in an official assignee named in the order (or in any
special manager appointed after sequestration order under section
13). This applied to property of the bankrupt existing at the
date of the commission of the first available act of bankruptcy,
or acquired subsequently, whether between that act and the order
or after the order. Any other property, for instance that within
the reputed ownership of the bankrupt, was excluded. The relation
back of the assignee’s title to the commission of an act of bank-
ruptcy marked the restoration of an old law, the doctrine of
relation back having lapsed in the Colony after 5 Vic. No. 17.
Immediately on the making of a sequestration order no person,
without special leave, had any remedy against the bankrupt: and
signing judgement on a debt constituted a "remedy" for this
purpose. However, secured creditors were protected to the extent
that their title accrued prior to the material act of bankruptcy.
The Judge had power by sub-section (4) to stay actions or process
against the property or person of a debtor and could discharge him
out of custody, such discretion to be effective after presentation of petition and before sequestration order. As soon as a sequestration order was made, sub-section (2) became applicable. In addition, by sub-section (6) all actions or proceedings at law or in equity commenced by the bankrupt were stayed pending the official assignee's election whether to prosecute or discontinue them.

Speaking of this sub-section in Re Summerhayes, Manning, J., said: "By our Act, s. 10, sub s. 6, which is similar to 5 Vic. No. 17 s. 33, the official assignee, where a person who has brought an action has subsequently become bankrupt, has to elect within four weeks after notice whether he will prosecute or discontinue it. If he can discontinue the action, it is admitted that he can bring another action in his own name, just as any other person who discontinued an action could do; but if he allowed the time to pass even by one day, it is said that he is then to be in the position of having absolutely abandoned all right of action; that is to say, he is in a worse position if he lies idle than if he absolutely refuses to have anything whatever to do with the action. I do not think that can be the meaning of this section. I think these words were put in to provide for the three courses open to the official assignee - (1) to go on, (2) stop, or (3) do nothing". To the argument that a common law suit could not be considered before the Bankruptcy Court where the official assignee had failed to give notice of his election to proceed within the prescribed time, his Honour replied: "If (the official assignee) is allowed to discontinue the proceedings and give notice of it, I do not see how on any reasonable ground whatever he can be in a worse position because he did not formally elect to do one thing or another. I think the official assignee has perfect liberty to proceed now, notwithstanding the judgment in the Court of common law, and that he has chosen to take proceedings in this Court he has done rightly. In my opinion, all matters brought either by or against the official
assignees ought to be dealt with in this Court. Following the making of a sequestration order, the debtor was to prepare a statement of his affairs showing his assets, debts and other liabilities, particulars of his debtors and creditors and of security given. Failure to comply was contempt of Court. Thereafter the first meeting of the bankrupt's creditors was to be held at which he was to submit to such further examination as to his affairs as the meeting should require. This examination was discretionary, whereas the public examination before the Judge prescribed under section 16 was mandatory and any creditor had the opportunity of attending at the latter to question the bankrupt as to his affairs and the causes of his failure. The creditors could consider proposals for a composition or scheme of arrangement, determine whether the bankrupt be permitted to retain his personal effects, authorize the official assignee to allow the bankrupt's retention of tools of trade and wearing apparel above the value of £20 and appoint a trustee or committee of inspection. Any such directions had to be submitted to the Judge for ratification, thus restoring the requirement of section 1 of 20 Vic. No. 24. That statute and 5 Vic. No. 20 s. 17, which did not impose any obligation to approach the Judge, were alike repealed by the 1887 Act. Defell, J., held that section 16 re-established the old practice in insolvency law and that it did not operate to enable creditors who had failed to attend the meeting, to appear in Court and oppose a majority decision. In the case of estates under £200 in value only one meeting of creditors was necessary, otherwise the official assignee or trustee could summon further such meetings at any time.

In addition to the power under section 16, the creditors were enabled at any meeting by special resolution to entertain a proposal for a composition or scheme of arrangement, subject to
ratification by a further meeting and by the Judge. It may be noted that this machinery was defective in omitting any provision for annulment of bankruptcy on acceptance of scheme or composition. The Judge had an undefined discretion to refuse approval to a scheme or composition if he considered its terms unconducive to the benefit of the general body of creditors. If he approved, the debtor was at once released from all claims of creditors which could have been proved in the bankruptcy. If default were made in payment of an instalment under a composition, a creditor under the old law could sue for his whole debt, but the combined effect of section 10(2) and Rule 80 under the 1887 statute was to preclude the bringing of any action without leave of the Judge. Sub-section 11 of section 19 provided an alternative remedy whereby such a creditor could apply for annulment of the scheme. A further constructive change was made by the Act concerning the enforcement of schemes. Under the old law, deeds of assignment were prone to be set aside if attacked, but section 19(10) enabled the Court or any Judge summarily to enforce the provisions of the scheme.

The creditors, whether there was to be a scheme or not, could at any meeting elect one or two trustees in addition to the official assignee. Alternatively the selection of additional trustees could be left to the Committee of Inspection. It was evidently intended that these provisions would operate in cases of undue technicality or difficulty, the expense involved being prohibitive in the ordinary course. The Judge had to approve the election of a trustee, whereupon the estate of the official assignee or trustee previously in office divested in favour of the new appointee. Not until section 26 was provision made for the constitution of a Committee of Inspection as referred to above. This could be appointed by ordinary resolution from among the number of the creditors at the meeting and qualified to vote or
their proxies - the total number to be not more than five nor less than three. The Committee was to superintend the administration of the bankrupt's property for which purpose it was to meet at least once each month and could act by majority resolution at such meetings. The function of the Committee remained merely an additional safeguard for the creditors.

Bankrupts had stringent duties imposed upon them by section 27 of the Act. These included lodging statements of affairs, delivering to the official assignee all books of account and financial records, submitting to public examination, attending at creditors' meetings and supplying the official assignee or trustee with information or assistance. Heavy penalties, including arrest, were stipulated for non-compliance or improper or fraudulent conduct.

Where, previously, the release of the bankrupt's estate and his person from liability had been interdependent, the 1887 Act rendered them distinct. Two cases were prescribed by sections 34 and 35 respectively in which an estate could be released: in the first place where a scheme or composition had been accepted and approved; and, secondly, where the bankrupt paid his creditors in full or obtained a legal acquittance of the debts due to them.

Manning, J., described the obtaining of approval to a scheme under section 34 as a "cumbersome method", but the procedure of release under section 35 he thought "useful" and to have justified itself, although it had no English legislative equivalent. "Whether the release be granted under s. 34 or s. 35, there would be no enquiry as to 'commercial morality', because the bankrupt is not absolutely free of the Court till he has obtained his certificate of discharge, or an equivalent order, that the release shall so operate, and all such questions would arise on such application for the certificate".

The result of the release was to vest the bankrupt's property (otherwise undisposed of) in his name as if his estate, to that
extent, had not been sequestrated; though the section failed to specify how a trustee under a scheme or composition was to retain title, if the scheme or composition were the basis for the release. After three months from date of sequestration the bankrupt could publish notice of his intention to apply for a certificate of discharge, but immediate application could be made if his estate had already been released under section 36. The official assignee and all proving creditors had to be notified and could appear and be heard personally or by counsel. At such hearing the Judge could grant or refuse an absolute order of discharge or make a conditional order of discharge or suspend the operation of the sequestration order. Section 37(3) provided that the Judge was to take into consideration a report by the official assignee or trustee as to the bankrupt's affairs or conduct, which report was, by section 40, prima facie evidence of the statements contained in it. This was a further variation of the old law in that the Court was relieved from the virtual necessity, previously existing, of relying upon the majority decision of the creditors. It was thus the official assignee's duty to bring to the Court's notice all matters which it ought to consider and all facts which could assist in deciding whether a certificate should be issued. Having furnished his report the official assignee became functus officio. Three new grounds for refusing or suspending a certificate of discharge were laid down in section 38 by sub-sections (b), (c) and (n) respectively. The first was where the bankrupt had wilfully delayed surrendering his estate or had avoided sequestration to benefit one or more creditors to the prejudice of others; the second where the bankrupt had continued to trade or obtain credit up to £50 after knowing himself to be insolvent; the third that the bankrupt had carried on business by means of fictitious capital - for example where a bankrupt carried on business under his own name with capital belonging to his wife, or commenced to carry on
business without any capital at all. A certificate of discharge did not release the bankrupt from debts on recognizances or at the suit of the Crown or any person for offences against any public revenue statute, or at the suit of the sheriff or other public officer on a bail bond. The Colonial Treasurer was to certify his consent to the discharge which then operated to release the bankrupt from all other debts provable in the bankruptcy.

PART II Administration of Property

This part of the Act dealt with the nature of debts provable in bankruptcy and the mode of their proof. Section 45 prescribed, in effect, three categories of provable debts: those present or future debts and liabilities to which the debtor was subject at date of sequestration order; those to which he might become subject before discharge by reason of obligations incurred before sequestration order; and demands in the nature of unliquidated damages arising from contract, promise or breach of trust. It was in the last of these categories that the Act made a change in the Colonial law as unliquidated claims could not previously be proved. The extension did not operate to allow a bare possibility of an unliquidated claim arising out of a contract not ended by bankruptcy to be proved.

The Act dealt in greater detail than previous Colonial legislation with preferential debts. Section 48 gave absolute priority of payment to wages and salary of servants of the bankrupt within six months of the sequestration order, or to wages of labourers or workmen for time or piece-work during the same period — neither payment to exceed £50. The following section gave a further priority in respect of debts due to apprentices as reimbursements of their indenture fees, and section 50 gave preference to three months' arrears of rent at the suit of the bankrupt's landlord. Section 52 defined the classes of property which could be divided
amongst the bankrupt's creditors. The inconsistent position was reached that the official assignee's title to such property related back under section 51 only to the commission of the first act of bankruptcy within three months of the presentation of the petition. This was described by one commentator as "a slip caused by a careless use of paste and scissors in adapting the English Act of 1883", which had reduced the period of relation back from six to three months, but this was not otherwise operative under 51 Vic. No. 19. As a practical result creditors presenting petitions had to avoid alleging more than one act of bankruptcy, if the earliest occurred more than three months prior to presentation of their petitions. "This", said Manning, J., in Re Fischer, "is only one of numerous errors of a like kind in our Act, and the result is that it may be necessary in some cases of voluntary sequestration to have a distinct adjudication to catch a transaction which could not be reached by the relation back of three months".

Sections 53 to 58 dealt with the effect of bankruptcy on antecedent transactions, particularly the restriction on the rights of creditors under execution or attachment, the avoidance of voluntary settlements and of fraudulent preferences. With regard to fraudulent preferences, the Act operated without regard to the intentions of debtor or creditor; any alienation would be void under it if it had the effect of preferring any then existing creditor to another. The law was thus relegated to its condition before 25 Vic. No. 8 so that the official assignee could go behind all alienations of a debtor who was unable to pay his debts as they fell due, or knew that proceedings had commenced for sequestration of his estate or who alienated property within 60 days of the sequestration order - even though the person dealing with the bankrupt exercised good faith and gave value.
Section 57 prevented the official assignee from taking title to any property disposed of by the bankrupt to a bona fide purchaser for value without notice. In Re Bond the Chief Justice gave this account of the legislation: "The effect of ss. 55, 57 and 58 of the Bankruptcy Act, 1887, first came under consideration in Davey's Case (10 N.S.W.L.R. Eq. 179), when Mr. Justice Owen went very fully into the matter, and as a result decided "that the three sections read together provide that a payment made by a bankrupt to his creditors is valid, though having the effect of preferring an existing creditor, provided the preference is not fraudulent and in itself an act of bankruptcy, and provided it is made before a sequestration order and without notice of any available act of bankruptcy."

"This ruling was followed and approved of by Mr. Justice Manning in the case of In re Jackson (11 N.S.W.L.R. Com. Law 303).

"The matter has now for the first time come under the consideration of the Full Court, and we are asked to review these decisions. The matter has been very fully argued, and after careful consideration during the argument and since we have come to the conclusion that the ruling of Mr. Justice Owen in Davey's Case is correct and contains a full and precise exposition of the law upon this subject. It is argued, however, that Davey's Case was one of payment to a creditor, and therefore protected by sub-clause (a) of s. 57; but here this being an assignment of property comes under sub-clause (c) of that section, that the consideration for the assignment being a past debt it is not an assignment by the bankrupt for valuable consideration, that the former law under 5 Vic. No. 17 did not protect a transaction of this kind, and that to hold such a transaction protected would entirely frustrate that salutary object sought to be gained by the provisions contained in s. 56.

"We have no doubt that the Bankruptcy Act has in this respect
altered the law, has brought it more in conformity with the English law upon this branch of the subject, and was intended to ameliorate a law which many considered to work unjustly as between a bankrupt and his creditors.\(^{70}\)

The official assignee was to take possession of all of the bankrupt's movable property as quickly as he could, to which he was placed in an analogous position to a receiver. The official assignee could disclaim any onerous property pursuant to section 62, as result of which the bankrupt's rights and interests therein were determined as from date of the disclaimer. The official assignee was invested with fairly extensive powers by section 63 and he could exercise these independently of a Committee of Inspection. They included powers to sell property, to give receipts, to prove for debts and to execute instruments. Powers exercisable with consent of the Committee of Inspection included the carrying on of the bankrupt's business, the institution or defence of any legal proceedings, mortgaging of the bankrupt's property, making of compromises and arrangements and selling the bankrupt's property privately.\(^{71}\)

Within four months of sequestration the official assignee or trustee was to file an account and plan of distribution.\(^{72}\) The latter was to be approved by the Judge and was held in the Registrar's office for a limited period so that creditors could inspect it and raise objections, as could the bankrupt or any interested party. On disposal of any objections the Judge had power by section 71 to confirm the plan, though if no objections were raised the practice was for this to be delegated to the Registrar. When the official assignee had realized all of the bankrupt's property he was to declare a final dividend and give notice of the last date for lodgement of claims before proceeding to payment.\(^{76}\) Any surplus was payable to the bankrupt.\(^{77}\)
PARTS III - VIII

Part III of the Act dealt with "Creditors' Trustees and Official Assignees" covering in sections 80 - 84 their remuneration. Official assignees were to be appointed by the Governor in Council and were to give security. Following sections made provision for removal or resignation of official assignees and for the filling of vacancies in that office during the realization of a bankrupt estate. Much wider control by creditors over official assignees and trustees was accorded by the Act than had previously been possible. Hence, regard was to be had to the directions of creditors by resolution at general meetings, and an assignee was obliged to summon meetings of creditors to ascertain their wishes if he were requested by them or thought it necessary. The bankrupt or any creditor could appeal to the Judge against any act or decision of assignee or trustee and the Judge could investigate and deal with, of his own initiative if necessary, any irregularity in the performance of the officers' duties. At least twice yearly the assignee or trustee was to submit his official accounts for audit, the books being properly kept in accordance with section 96. At least once in every year the assignee or trustee was to submit a statement of the proceedings in the bankruptcy which was to be examined. The Registrar was to keep a Bankruptcy Estate Account into which the funds received by the assignee or trustee were to be paid but withdrawals for working purposes could be made with the Registrar's approval.

Procedure under the Act was regulated by Part IV; the following Part dealt with the application of the Act to partnerships, deceased debtors, married women and to special circumstances. Owen, J., pointed out in In re Hidden Star Gold Mining Co., Pickering's Case that section 109 which prevented the application of the Bankruptcy Act to associations registered under the Companies Act left an anomalous situation. The Act 38 Vic. No. 1 provided that
in certain cases of the winding up of companies proceedings could be taken before the Chief Commissioner of Insolvent Estates, subject to appeal to "the Court" which, for the purposes of the Companies Act, meant the Supreme Court in its equitable jurisdiction as exercised by the Primary Judge. Accordingly, when the powers of the Chief Commissioner were by section 127 of the Bankruptcy Act transferred to a Judge of the Supreme Court without appropriate modification being made elsewhere, the Primary Judge came to exercise an appellate jurisdiction over another Judge of equal standing and co-ordinate jurisdiction. Part VI specified indictable offences under the Bankruptcy Act and Part VII dealt with the jurisdiction of the Court - which has been considered in much greater detail above. Finally, Part VIII dealt with miscellaneous provisions of which a significant section was number 150, permitting service of notices by prepaid post in the absence of other directions - an appreciable simplification of the earlier law.

Some difficulty occurred in construing the Court's power to administer deceased estates in Bankruptcy. This was resolved by Manning, J., in Re the Estate of Weingarth where he said:

"Under our old Insolvency Act there was provision made for the administration in the Insolvent Court of the estates of deceased persons; but in England, prior to the passing of the Judicature Act of 1875, there was no similar provision, and then the estates of deceased persons were necessarily administered in the Chancery Court, and in that Court preferences were allowed, and could not in any way be impeached.

"By s. 10 of the Judicature Act it was provided that, in administering the estates of deceased persons, the rules of (the) Bankruptcy Act should apply, and consequently preferences by executors or administrators were no longer allowed.

"Sect. 125 of the English Bankruptcy Act of 1883, so it seems
to me, carried the law no further, and that appears also to have been the opinion of the Court of Appeal in Re Gould (4 Mor. 202).

"What passed to the official receiver under the 1883 Act was the estate of which the deceased was possessed at the time of his death, and that estate was to be dealt with as provided for by s.125.

"Here, as I have previously stated, the Insolvency Court has for years past been administering the estates of deceased persons who turned out to be insolvent, and it seems to me that our Legislature in passing our Bankruptcy Act declined to follow the English Act of 1883, but desired to keep up the jurisdiction the Courts here previously possessed".

The Bankruptcy Act was almost immediately supplemented by the Bankruptcy Act Amendment Act of 1888, 52 Vic. No. 11 which inter alia gave the Court wider jurisdiction to make vesting orders and defined the official assignee's powers to convey title. This was followed by a more extensive amendment in 1896 in the Bankruptcy Acts Amendment Act, 60 Vic. No. 29. The last was destined to have a very short life, as the reforming spirit of statute consolidation at the end of the nineteenth century resulted in the emergence of an entirely new Bankruptcy Act - No. 25 of 1898. This followed very closely the division of Parts established in the 1887 enactment.

Little change was made by the 1898 Act to the acts of bankruptcy defined in 1887. The fraudulent preference section (s. 4(1)(c)) was, however, subject of some interesting litigation. Davey's Case assumed that fraudulent preferences were of themselves acts of bankruptcy and this decision was subsequently applied, putting an end to the doubts which had long prevailed on the point; as, for instance in Humphrey v. McMullen where it was held that, under the Insolvency Acts, the law in New South Wales followed that existing in England before the passing of the colonial statute
of 1869. Section 10 dealing with the effect of sequestration orders was also modified to clarify what "property of the bankrupt" would vest in the Official Assignee.

A source of confusion existed after the passing of 60 Vic. No. 29, concerning section 21(1) of the principal Act. This was rectified in section 21(1) of the 1898 consolidation which dealt with the appointment of creditors' trustees. Under the old law it had been possible for the creditors to nominate trustees in addition to or in place of the official assignee. The 60 Vic. No. 29 deleted the words "in place of" in section 21(1) but did not make corresponding changes in other sections of the Act. The amendment had the practical effect of abolishing trustees in bankruptcy, as the official assignee was obliged to wind up the estate and the appointment of an additional trustee constituted a needless expense. One section redrawn partially in consequence of the change to section 21(1) was section 24 dealing with the vesting of a bankrupt's estate in the official assignee.

A significant amendment to section 42(5) gave an indication of the wider scope of the Court's jurisdiction. The sub-section provided that in effect a certificate of discharge should be issued by the Registrar after an order accordingly had been made by the Court. The 1887 Act referred to the order being made by the Judge and 60 Vic. No. 29 added the words "or Registrar". It was apparent that the Court did not include the Registrar and that the Court was the proper tribunal to make such an order, for which reasons the consolidation appropriately altered the wording.

A considerable amount of litigation cast doubts on the operative scope of sections 56, 57 and 58 which dealt with preferences and protected transactions. The leading section was 56 whereby every alienation, transfer, gift, surrender, delivery, mortgage, or pledge of any property and every warrant of attorney or judicial proceeding made, taken or suffered by any insolvent person having the effect of preferring any existing creditor, whether
fraudulently or not, was void. The two following sections provided, in effect as regards section 57 that approved trans-
actions by the bankrupt would remain valid if they had taken place before sequestration order and the other party involved acted *bona fide* for value and without notice; and, as regards section 58 that a duly registered conveyance or assignment in trust for creditors had been made, provided the trustee acted *bona fide* and without notice of proceedings to sequestrate the bankrupt's estate. The construction had consistently been laid down by the Supreme Court that sections 57 and 58 were provisos to section 56. Salusbury's *Law and Practice in Bankruptcy* made the following appraisal of the result: "The construction put upon the three sections seems to maintain to a great extent the hardships which the Act of 1896 was apparently intended to remedy. An available act of bankruptcy is any act of bankruptcy available for a bankruptcy petition at the date of the presentation of the petition on which a sequestration order is made; and a petition may be grounded on an act of bankruptcy which has occurred within six months before the presentation of the petition; so that no transaction, even to the extent of a *bona fide* advance, is safe; if the borrower becomes bankrupt within six months of the transaction and the Court is satisfied that the borrower's intention was fraudulent, however innocent the lender might have been".

Section 123 permitted a bankruptcy to be presented by and against a married woman in respect of her separate estate, thus making a considerable advance on the earlier legislation. A married woman having a separate estate, whether or not carrying on a trade independently of her husband could in consequence be made bankrupt for non-compliance with a bankruptcy notice in any case where she could be sued as a *feme sole*.

Ultimate reassurance that the Bankruptcy Department remained within the province of the Supreme Court was afforded by the
memorandum appended to the Act by the Commissioner for Consolidating the Statute Law. "In section 127 of 51 Vic. No. 19 the whole of the then existing jurisdiction in insolvency was declared to be the bankruptcy jurisdiction of the Supreme Court, and was vested in the Judge in Bankruptcy. The same Act gave additional powers, which were to be exercised, not by the "Court" but by the "Judge", and it uses throughout the expressions "the Judge" - "the Court or Judge". This is somewhat confused, and raises some doubts and obscurities. It might be argued, for example, that in an appeal on any of the newly-created matters of jurisdiction the Supreme Court had no jurisdiction at all. Then by 60 Vic. No. 29, section 29(1), all appeals from the Judge in Bankruptcy are by way or re-hearing, as in Equity appeals. It has seemed, therefore, better throughout this consolidation to speak of the jurisdiction as being that of the Court, exercised by the Judge or Registrar, as the case might be. The Judge in Bankruptcy, Mr. Justice A. H. Simpson, on being consulted, entirely concurs in this view".
NOTES

1. Section 127 (1).


3. (1891) 1 BC, 61 at 65.

4. There was some divergence in decided cases whether the jurisdiction of the Court was exclusive even where strangers were concerned, but by the time of the 1898 Act it had been clearly laid down that the jurisdiction was not exclusive but concurrent - Palmer v. Payne 17 NSW B & P 10, 6 BC 50.

5. Sections 132-133.

6. Re Gibbs 3 BC 24; Re Goldstein 4 BC 18.

7. (1895) 5 BC 88.

8. Ibid.

9. Id. 89.

10. (1891) 1 BC 59.

11. 5 WN 96.

12. (1896) 6 BC 51.

13. At 52.

14. Section 136 (1).

15. Section 136 (2).

16. Section 136 (3).


19. NSW 119.

20. Section 4 (1) (b).

21. Per Manning, J., in Re Rogers 1 BC 46.


23. Re Fischer, Sydney Morning Herald, 5th June, 1891.

24. Section 4 (1) (d).

25. Section 4 (1) (e).

26. Section 4 (1) (f).

27. Section 4 (1) (g).

28. (1898) 9 BC 5.

29. Id. 8.
30. Section 9 (1).
31. Section 6.
32. Section 8 (1).
33. Section 8 (4), Re Griffin 1 BC 29.
34. Section 8 (6).
35. Section 8 (7).
36. Section 8 (9).
38. Section 9.
39. (1892) 2 BC 81.
40. Id. 82.
41. Section 10 (1).
42. Section 10 (2).
43. In re Wearne 6 WN 174.
44. Section 10 (3).
45. (1890) 1 BC 24.
46. Id. 25.
47. Section 14.
48. Section 15.
49. Creditors who failed to attend the meetings could not subsequently be heard to oppose the resolutions passed - unless special grounds had since come to their knowledge - Re J. T. & F. Hawksford (1890) 1 BC 12.
50. Section 16.
52. Section 19.
53. Section 21.
54. Section 24.
55. Section 28.
56. Re Taylor (1898) 8 BC 50 at 51.
57. Section 36.
58. Section 37.
59. Re Joseph (1891) 1 BC 59.
61. Re Barrett (1891) 1 BC 13.
62. Section 42.
63. Salusbury, 1st. edition, 111.
64. Cf. sections 10 (1) and 6 (c).
65. (1891) 1 BC 84.
66. Id. 93.
69. (1895) 5 BC 51.
70. Id. 55.
71. Section 59.
72. Section 64.
73. Section 67.
74. Section 68.
75. Section 69.
76. Section 78.
77. Section 79.
78. Section 86.
79. Section 91.
80. Section 92.
81. Section 93.
82. Section 94.
83. Section 97.
84. Section 98.
85. 10 NSW Eq. 40.
86. (1897) 7 BC 70.
87. Id. 71.
88. Reflecting on the combined statutes in 1889 the Registrar in Bankruptcy said: "There is no doubt that it possesses many unquestionable advantages over the old law, among which may be mentioned - (1) the extended jurisdiction given to the Court by section 130; (2) the control of the Judge over official assignees and trustees given by section 93; (3) the power of creditors to appoint a committee of inspection under section 21 (3); (4) the manner of holding first meetings of creditors; (5) the power of creditors to accept a composition under section 19; (6) the power of the Judge to grant an injunction under section 4 (5) to prevent a debtor disposing of his property; (7) the improved and easy method of proving debts; (8) the creation of the "Bankruptcy Estate Account" under section 98; (9) the title of the Official Assignee relating bank to the act of bankruptcy under section 10; (10) power of the Judge to commit bankrupts for trial under section 124; (11) the advertising meetings of creditors and applications for certificates in local newspapers; (12) the Official Assignees or trustees having to give seven days' notice in writing to each proved creditor of the intention of the bankrupt to apply for his certificate of discharge" V & P 1889 (2), 1074.
89. 10 NSWR Eq., 179.

90. 7 SCR, 84.

91. In re Atlas Engineering Co. 10 NSWR Eq. 179; In re Jackson 10 NSWR 307; Re Rogers 1 BC 46; Re Bond 16 NSWR B & P 74.

On 2nd April 1787 Governor Phillip was issued with his commission by which he was given a great number of powers necessary for the foundation of the Colony and, among these, was one specifically directed to the position of lunatics and the insane in these terms:

"And whereas it belongeth to us in right of our Royal Prerogative to have the custody of ideots and their estates and to take the profits thereof to our own use finding them necessaries and also to provide for the custody of lunaticks and their estates without taking the profits thereof to our own use.

And whereas while such ideots and lunaticks and their estates remain under our immediate care great trouble and charges may arise to such as shall have occasion to resort unto us for directions respecting such ideots and lunaticks and their estates Wee have thought fit to entrust you with the care and commitment of the custody of the said ideots and lunaticks and their estates and Wee do by these presents give and grant unto you full power and authority without expecting any further special warrant from us from time to time to give order and warrant for the preparing of grants of the custodies of such ideots and lunaticks and their estates as are or shall be found by inquisitions thereof to be taken by the Judges of our Court of Civil Jurisdiction and thereupon to make and pass grants and commitments under our Great Seal of our said territory of the custodies of all and every such ideots and lunaticks and their estates to such person or persons suitors in that behalf as according to the rules of law and the use and practice in those and the like cases you shall judge meet for that
trust the said grants and commitments to be made in such manner and form or as nearly as may be as hath been heretofore used and accustomed in making the same under the Great Seal of Great Britain and to contain such act and convenient covenants provisions and agreements on the parts of the committees and grantees to be performed and such security to be by them given as shall be requisite and needful.²

There, for some time, the power remained. Judge-Advocate Bent did not include a suggestion for a Lunacy department in his many proposals for the constitution of a Court of civil jurisdiction. The Letters Patent of 1814³ establishing such Court made no provisions affecting lunatics and the matter seems only to have been raised in 1820 when Field, J., in writing to Commissioner Bigge, said: "Although the equitable jurisdiction of the Supreme Court is given by the present charter in very general words, yet I think ... that the custody of Idiots and Lunatics which the Governor has at present under his commission should be transferred to this chancery as the whole is included in the courts of equity at Calcutta and Columbo".

In this proposal the Commissioner concurred⁴ and his views were given recognition by the inclusion in the Letters Patent of 13th October, 1823⁵ (the so-called third Charter of Justice), of section 18, which provided: "And we do hereby authorize the said Supreme Court of New South Wales to appoint Guardians and Keepers of Infants and their Estates according to the order and Course observed in that part of our United Kingdom called England and also Guardians and Keepers of the persons and Estates of Natural Fools and of such as are or shall be deprived of their understanding or reason by the act of God so as to be unable to govern themselves and their Estates which we hereby authorize and empower the said Court to enquire hear and determine by inspection of the Person or by such other ways and means by which the truth may be best discovered and known".⁷
Inconsistently, 4 Geo. IV c. 96, while investing the newly constituted Supreme Court with "Jurisdiction in all cases whatsoever" remained silent on the specific authority of the Court in matters of lunacy.

The earliest surviving instance of the operation of the Governor's power in this regard appears to be a record in the State Archives of an indemnity dated 1801 relating to a lunatic's estate. It is of passing interest to observe that the document was made between the notorious Simeon Lord and John McArthur. It is in these terms: "Whereas H E the Govr of this Terry hath by a Commission under the seal of sd Colony and bearing date the day of Novr in the year of our Lord 1801 given and granted the custody of C B a declared Lunatick together with all his goods chattels credits and effects of whatsoever kind or nature the same may be and which are now in this Territory with J McArthur Esqe in conjunction with the Revd S. M. Clark And Whereas it appears that the Estate & personal property of the said Lunatick is likely to become subject to many claims and demands of debt which must necessarily involve the sd J McA Esqe in many suits at Law before the Court of this Colony as well as ultimately before H M in Council Now Know Ye that I S L of Sydney Merchant do by these presents and at all times hereafter save and keep harmless and indemnify him the aforesd J McA his and every of his heirs E A & A and his and every of his Lands Tenements Hereditaments Stock and all other his property of whatsoever kind or nature the same may be from all costs charges and expences in Law or Equity and from all damages whatsoever he shall or may pay sustain or be put out for by reason or upon account as Commissioner as aforesaid Hereby binding myself my Heirs E A and Assigns in the due performance of all matters things and circumstances touching the same".

Not long afterwards a more formal machinery was set in motion for the care of the mentally unfit, and as early as 1805 juries were called to make enquiry whether a person was a lunatic. The occasion was on 18th October 1805, when one Charles Bishop was found by the jury to be incapable of governing himself,
his chattels and tenements.\textsuperscript{10}

In 1810 a board of three surgeons replaced a jury in finding Alexander Bodie labouring under such serious mental derangement as to justify the Governor in appointing Committees of his estate.\textsuperscript{3} This board evidently continued in operation but it did not replace the inquest by jury, as one writer has suggested,\textsuperscript{12} for the jury procedure was clearly in evidence in the civil jurisdiction of the Judge-Advocate's Court. Jonathan Burke McHugo, Super Cargo of the Brig "Active" was examined in February 1812 by two surgeons who certified that he suffered from a "severe mental derangement".\textsuperscript{13} Judge-Advocate Bent thought it advisable to proceed by Information, rather than Petition, as the lunatic had no relatives in the Colony and the appointment was a matter of "mere discretion" on the Governor's part.\textsuperscript{15} This procedure was adopted after issue of a Commission "in the nature of a writ de Lunatico Inquirendo"\textsuperscript{16} under the territorial seal and thereupon a "respectable jury" of twelve men was assembled. They found that "the said Jonathan Burke McHugo is at the time of taking this Inquisition of an unsound mind and doth enjoy lucid intervals so that he is not capable of the government of himself his tenements goods, and Chattels, and that he hath been in the same state of lunacy for the space of Three Weeks last past and upwards; but how or by what means the said Jonathan Burke McHugo so became Lunatic the Jurors aforesaid know not, unless by the visitation of God".\textsuperscript{17} The Governor accordingly appointed Committees of McHugo's estate. Such strict procedure does not appear always to have been applied. Bigge's Report on the Judicial Establishments refers to the case of Michael Hoare, a convict who, although stated by a surgeon to be only feigning insanity, was committed to the Castle Hill asylum at the direction of the Rev. Samuel Marsden as visiting magistrate.\textsuperscript{20} "It seems somewhat extraordinary", said Commissioner Bigge, "that Mr. Marsden should have taken upon himself to decide upon his insanity without a previous reference to (the surgeon), but it appears that this power has been exercised both by himself and Mr. McArthur upon their own view of the prisoners whom they
considered to be lunatics, and whenever their custody in the gaol became ... a cause of annoyance and disturbance to the other prisoners, or to the neighbourhood".21

The change consequent upon the investing of jurisdiction in the Court by the Letters Patent of 1823 seems to have been of no practical significance for several years. In 1828 the Sydney Gazette reported that: "A commission of lunacy, the first, we believe that has been held in the Colony, was summoned at the Court-house, on Wednesday last, to enquire into the fact of mental imbecility alleged against Mr. James Birnie of Sydney, and to decide on the propriety of committing the management of his affairs for the benefit of his family, to other hands. Dr. Bland stated, that, to his knowledge, Mr. Birnie has been labouring under mental imbecility with occasional fits of madness, for the last twelve months, and in his opinion was utterly unfit to be entrusted with the management of his own affairs. Dr. Macleod deposed to the same effect, whilst the testimony of the medical gentlemen was corroborated by several other witnesses who detailed specific instances in support of their opinions. The verdict of the Jury was, that Mr. James Birnie was of unsound mind, and incapable of managing his own affairs".22 A similar commission in 1829 led to the finding that Colonel Johnstone's widow was insane, but enjoyed lucid intervals, whereupon an application was made to the Supreme Court to appoint trustees of her estate.23

It is convenient to note here that the first mental hospital in the Colony was founded in 1811 at Castle Hill by Governor Macquarie.24 The far-sighted humanity of this Vice-Roy is seen in the instructions which he gave to the Superintendent of the Asylum.25 In summary they were that he should "pay the most particular attention to the cleanliness and comfort" of the inmates and not allow the Keepers "to exercise any unnecessary severity" towards them. The food for the lunatics was to be "properly dressed and regularly served out to them at the proper hours"; a "good garden" was to be cultivated to ensure a constant supply of vegetables "particularly potatoes and
cabbages"; and strict compliance was to be made with the directions of the surgeon in charge of the Asylum. A report was to be furnished to the Governor every month. This standard unfortunately was not maintained after Macquarie's administration: the Castle Hill establishment was closed and transferred to "a wretched hired Building without outlet of any kind" at Liverpool, the rent of which was paid "out of the Military Chest", prompting Governor Bourke in 1835 to propose the urgent construction of a permanent building at the expense of the Colony. Until 1843 the successive asylums were regulated first by the law of England for the time being and then, in the years following 1828, by the English law operative immediately prior to the passing of 9 Geo. IV c. 83, subject to the directions of the colonial government.  

The first New South Wales statute dealing specifically with the persons of the mentally ill was the Dangerous Lunatics Act, 7 Vic. No. 14, which was not passed until 1843, though there had been an earlier Act dealing only with property rights, the Imperial Acts Adoption Act, 5 Wm. IV No. 8, which adopted the English Persons Under Disability Act, amending the law relating to the property belonging to idiots, lunatics and persons of unsound mind. The want of statutory authority was emphatically brought to official notice by the recovery of damages against a magistrate who had made an order with government approbation regarding the estate of an alleged lunatic. Governor Gipps in his message to the Legislative Council on the passing of the Act observed that the measure was necessary "that no uncertainty may remain as to the course of proceeding which is to be adopted, in respect of the custody of insane persons". The same Act in addition to dealing with those who had been found not guilty on the ground of insanity, went on to make provision for the safe custody of and prevention of crimes being committed by persons insane. If any person were apprehended under circumstances denoting a derangement of mind coupled with intent to commit suicide or some crime for which,
of the Peace on having the person brought before them could call to their assistance two legally qualified medical practitioners. If, upon view and examination those practitioners expressed their opinion that he was a dangerous lunatic or idiot, or if upon any other proof the Justices were able to their satisfaction to form the same opinion then they could commit him to a gaol, house of correction or public hospital to be kept in strict custody. Thereafter the person could only be discharged by order of two Justices of the Peace (one of whom was to be one of the Justices who signed the warrant for custody), or by one of the Judges of the Supreme Court, or by order of the Governor that he be removed to a public lunatic asylum. Nothing in the Act was to prevent friends and legal officers seeing the person at any reasonable time. The Act further provided that, if any relative or friend entered into a recognizance for the peacable behaviour and safe custody of the idiot or lunatic they could have him released into their care and protection.

The requirement of evidence of two medical practitioners carries over into many sections of the Act, including the power of the Governor (still a prerogative and not a judicial power) to direct persons under sentence of imprisonment or transportation to be removed to a lunatic asylum and, in section 3, to direct insane persons committed for trial to be removed to a lunatic asylum. Section 5 of the Act provided for the release of a person where two legally qualified medical practitioners certified that he or she was not insane or a dangerous idiot and was able to go at large with safety. Such certificate, if sent to the visiting Justice, or in his absence to the keeper of the gaol or house of correction, was to be transmitted forthwith to the Governor, who was then required to order liberation. Section 7 of the Act brought to the Colony an English provision relating to Court visitors, in requiring that five visitors be appointed to each lunatic asylum within the Colony, one of whom was obliged to visit each asylum at least once in every week and to make reports to the Colonial Secretary. Two of the visitors
were to be appointed by the Legislative Council according to
the Act as first passed, but Lord Stanley censured this severely
as a "usurpation ... by the Legislature of administrative func-
tions" and ordered its suspension until the Governor should
have recommended its repeal to the Council.

Though the title of the Act extended merely to dangerous
lunatics, section 11, obviously borrowed from an 1828 English
Act, made provision for any insane person to be received into
a lunatic asylum. On the application of one or more relatives
or guardians of an insane person, together with the written
sanction of one of the Judges of the Supreme Court and the cer-
tificate of two legally qualified medical practitioners that
they had examined and found such person to be of unsound mind,
the Governor was given power to direct that person's detention
in such lunatic asylum as he might appoint. This was the first
introduction into local law of the curial assistance to the
Governor being exercised by a Judge alone, rather than by the
old procedure of Judge and Jury of twelve. A form of medical
practitioner's certificate was first prescribed by Rules of
Court of 3rd July, 1867. There being no Poor Law in New South
Wales the cost of removal and maintenance of insane persons was
to be defrayed by the Colony, provided that no insane person
being a convict confined in any asylum should be supported out
of any funds of the Colony either locally or generally. Rela-
tives were given power to agree with the Superintendent for
maintenance in an asylum of lunatics and idiots. It may be
noted that the Poor Laws did have an indirect effect on the
development of the lunacy legislation of the Colony through
the practice which English Justices of the Peace, Overseers
of the Poor and Churchwardens had adopted of farming out poor
lunatics to private asylums. But the indirectness of their
operation in the Colony was emphasized by Dowling, C.J., with
whom Burton and Willis, J.J., agreed in Regina v. Schofield
when he said: "We must take judicial notice that there are no
Poor Laws in this Colony, and no poor in the legal sense of
the word".
This Act was amended by the Dangerous Lunatics Act, 9 Vic. No. 4, and again by 9 Vic. No. 34 and later, in 1868, by 31 Vic. No. 19, which, for the first time, set up lunatic reception houses and gave power to justices to commit lunatics to a reception house instead of to a gaol, house of correction or public hospital. This was an important extension of judicial power. The same Act gave authority for the establishment of privately conducted licensed lunatic asylums and gave the Governor authority to commit a lunatic to such a licensed house, provided that he was not to do so in the case of prisoners under sentence, or persons under committal, for any criminal offence. In this, the effect of an English Act of 1774 is apparent, especially in the long chain of sections dealing with licensing, the keeping of records and medical case books, the reporting to the Colonial Secretary of escapes, deaths, discharge or removal, and the monthly inspections by visitors appointed for that purpose. It may be mentioned that 31 Vic. No. 19 followed at least four earlier attempts to amend the Lunacy Laws. In 1859 the Legislative Council read and referred to the Assembly a Bill to simplify proceedings under Commissions of Lunacy. The Bill was not considered that year and was postponed when resubmitted in 1860. In 1862 the Legislative Council purported to pass "An Act to Regulate Private Lunatic Asylums" but the Assembly rejected this on the grounds that it should have originated in the lower Chamber. A further Bill introduced into the Legislative Assembly in 1863 was discharged without having been read. In 1865 a "Lunatics Further Protection Bill" was put forward, but, when it came before the House, Forster moved:

"That the Question be amended by omitting all the words after the word "That", with a view to inserting in their place the following words: - "the Law regulating admission to Lunatic Asylums requires to be amended, and that a Bill for the purpose ought to be introduced with a little delay as possible (2) That an Address be presented to the Governor, respectfully acquainting His Excellency with the purport of the foregoing Resolution".
The Speaker having overruled the amendment for impropriety in proposing to present an address to the Crown regarding a Bill yet before the House, the original question was put and negatived.

A Committee appointed by the Legislative Assembly to report on the existing lunacy law advised the House that "further legislation in reference to Lunacy is imperatively called for". It was as result of this that 31 Vic. No. 19 was enacted. The justification for the Committee's sense of urgency may be gauged from some of the evidence laid before it. One Magistrate averred that some persons of undoubted sanity had been committed to asylums at the instigation of others with improper motives. He gave this example "Myself and a brother Magistrate prevented two very respectable persons from being sent to Tarban Creek. In one case his relatives brought an old gentleman up believing him to be insane, and they swore he was insane; but myself and Captain Scott thought it was done for the sake of getting his property, and we solicited a friend of ours, a solicitor, to take up the case, and it was proved to our satisfaction that the man was perfectly sane". The Clerk of Petty Sessions in Sydney considered the whole system susceptible of improvement, especially to rectify the hurried nature of the examinations and the insufficiency of grounds on which persons were found insane. Of the medical evidence he remarked that the practice appeared to offer a premium to make a man out to be mad. It arose in this fashion - "the Police Surgeon first examines the party charged, and if he believes the case is one that ought to be sent on to the lunatic reception house, a second medical man is called in. They give their evidence before the Magistrates; and if the two medical men give evidence each of them is entitled to a guinea, whereas if only one medical man is examined the practice is that he does not get any fee at all; so that although I believe at present there is no want of care exercised in coming to a conclusion, still the system strikes me to be wrong".

The combined effect of section 5 of 31 Vic. No. 19 and
order the removal of a person to an asylum gave rise to a very significant clash between the judiciary and the administration in 1874. Sir Hercules Robinson, the then Governor, made a short visit to Fiji and announced that he would not appoint an Administrator in his absence. This decision appears to have irritated Sir James Martin, the Chief Justice, who evidently expected that he would be sworn in as Lieutenant-Governor. Perhaps he intended to force a resolution of his grievance by refusing to give his certificate for the admission of one McNamara to an asylum, on the grounds that such certificate would be useless in the Governor's absence. Writing to the Minister for Justice, who had demanded an explanation, the Chief Justice said:

It ... very plainly appears (1) that the Governor is the person to order the removal of the lunatic to an asylum (2) that he is to take this course only if he shall think proper which implies the exercise by him of his own personal judgment and (3) that he alone is the person to determine to what asylum or licensed house the lunatic is to be sent. As I am officially informed that the Governor is absent from the Colony and as I know that until he returns or an Administrator is sworn in the supposed lunatic referred to by you in your letter cannot be legally sent either to an asylum or to a licensed house I have deemed it right not to deal at present with the papers submitted to me ... If it be contemplated by the Government as I infer by your allusion to this responsibility to send anyone to a lunatic asylum without the express personal sanction of the Governor given by him after a personal examination of the facts there is the greater reason why I should not be giving my sanction while the Governor is away and the Government is committing so great a violation of the Law.43

A very vigorous exchange of feelings between the Minister and the Judge ensued, the tone of which may be gathered from the closing lines of the Minister:

I have not desired, and in no portion of my letter have I
attempted, "to instruct the Judges how their duties are to be performed". On behalf of the Government I called your attention to the duties imposed by law upon the Judges in the matter under review, and pointed out the line of separation between such judicial duties and executive authority, and it cannot be asserted that the Government have "no concern" in this matter. I may, however, point out that you have taken upon yourself to instruct the Government in the performance of duties with which a Judge of the Supreme Court has "no concern".

The Minister then referred to Hargrave, J., who not only volunteered to sign any certificate of admission required in Lunacy, but trenchantly criticized the refusal of the Chief Justice to perform the duty which the Act imposed:

As to the legality of my declining to delay my reports, &c., after official notice of the Chief Justice's claim, I consider that as a Judge of the Supreme Court my oath requires me not only to perform every judicial duty "without fear, favour or affection", but also without any "denial or delay" &c. The 44th section of Magna Charta, and the 29th section of Henry the 3rd Charter, have always been the great rule in all questions of judicial duty, and forbid all postponements of "justice or right" ... As to the construction of the words used in the 11th section of the 7th Vic. No. 14, and 5th section of 31st Vic. No. 19 - I cannot concur in the Chief Justice's construction of the words "if he shall think proper" as implying any other duty in the Governor than as in the numerous other matters in various statutes and in the general administration of Government, which require the approbation of the Governor to the final action of the Executive authority.

There can be no doubt that Hargrave, J., was right in his view and that the Judges must of necessity have supplied their certificates whether the Governor was in the Colony or elsewhere.
Before considering the next major enactment in the Lunacy Act of 1878, three smaller statutes may be mentioned. The first was 11 Vic. No. 27 of 1847, an Act "to render valid the acts and appointments of parties as ... Committees of the persons and estates of Lunatics under orders made by the Primary Judge in Equity". It was on the basis of this Act that Rules of Court of 13th February 1850 prescribed that the practice in Lunacy matters would follow as closely as possible the practice in Equity and that the same fees would be payable. The next, 13 Vic. No. 3 of 1849 amended the law "in respect to the safe custody of persons dangerously insane and the care and maintenance of persons of unsound mind", and the last, 24 Vic. No. 19 (1860) was "to make better provision for the custody and care of Criminal Lunatics". The legislative position before 1878 was very far from satisfactory and was described as a "barbarous and cruel system ... the darkest blot in our character as a community".

The decision of the Full Court in *In the matter of Mackenzie Bowman* may also be noted here. It arose from section 6 of 22 Vic. No. 14 "An Act to expedite Suits and Proceedings in Equity and to facilitate the despatch of Business in the Supreme Court in Banco" (1858). The material part of the section provided that "the Supreme Court may be holden before and by the Primary Judge in Equity ... for the exercise of the jurisdiction of the Court in cases of lunacy, and over the persons and property of such as are of unsound mind". This was intended to regularize the practice of hearing lunacy matters in the Equity Court. Counsel sought to show that this meant that the Primary Judge's decisions in Lunacy were final and could not be subject of appeal. The Court did not accept the submission, holding that the jurisdiction of the Full Court had not been taken away nor transferred to the Primary Judge, "but simply the Primary Judge is enabled equally with the Court to hear lunacy cases". So there was an effective appeal to the Full Court, the procedure of which followed that exercised in England by the Lord Chancellor at the time of the "Charter
of Justice. Accordingly, appeals in Lunacy were in the nature of rehearings.

The Lunacy Act of 1878, 42 Vic. No. 7, was a comprehensive and detailed statute which made elaborate provision for the care of the mentally ill and of their estates and, in the form of its consolidation by the Lunacy Act of 1898, laid down the pattern of lunacy law in New South Wales for the next eighty years. The statute at once expressly repealed all prior colonial Lunacy legislation with the exception of section 6 of 22 Vic. No. 14, which was however repealed by necessary intendment in section 92 of the 1878 Act. In In re W. M. the Full Court was called upon to determine whether the combined effect of the 1878 and 1898 Acts was to cut down the Court's jurisdiction in Lunacy to that expressly or by necessary implication conferred upon it. It was argued that, as 17 Ed. II chapters 9 and 10 were, to the extent of their operation in the Colony, repealed by the 1878 Act, the powers conferred by clause XVIII of the "Charter of Justice" were impliedly taken away. The Court held that the statute of Edward II was declaratory only of the common law and that its colonial repeal had no effect on the "Charter of Justice", or its extended provisions pursuant to 9 Geo. IV c. 83. In the judgment of Owen, J.: I cannot see that the Lunacy Act of 1878 repeals or takes away the general powers of the Court. So far as the Court is concerned, it only substitutes a new mode of enquiry by petition to the Court itself, for the old mode of enquiry by commission de lunatico inquirendo. I, therefore, am of opinion that the powers conferred on the Court by the Charter of Justice still remain vested in the Court as fully under the new process as under the old process by commission.

Thus, the statutes did not affect the jurisdiction of the Sovereign as the fountain of justice; and, as to the commitment to custody of the persons of lunatics, it only cut down his prerogative right to take the property of lunatics regarded
as derelicts and to put the proceeds in his privy purse.

counsel's contention for a total repeal was, in the view of
Walker, J., a confounding of jurisdiction with procedure:
the alteration in the mode of exercising the jurisdiction
was an entirely different thing from repealing the jurisdic-
tion itself. 60

Section 4 of the 1878 Act was repeated verbatim in the
1898 Act. 61 It retained the criminal procedure by providing
that, upon information on oath before a Justice, if it appea-
red that any person was insane and without sufficient means
of support or was wandering at large or was discovered under
circumstances indicating that he was likely to commit some
offence against the law, the Justice was given power by order
under his hand to require a Constable to apprehend him. Con-
stables finding persons so wandering or under such circumstan-
ces were given a general power, without any order, to appre-
 hend and take them before two Justices. 62 Section 5 of the
1878 Act was also repeated verbatim in the 1898 Act and used
the same procedure of information on oath to a Justice in the
case of persons deemed to be insane and not being taken proper
care of, or being cruelly treated. Any constable could give
that information upon oath to a Justice who could himself
visit and examine the person and make inquiry into the case,
or order a medical practitioner to examine him and give a
written report of his opinion. If it then appeared that the
person was insane and not under proper control and care or was
cruelly treated or neglected by any relative or other person
having charge of him, the Justice was to require a constable
to bring him before two or more Justices. Both Acts contained
a provision requiring the Justices before whom such person was
brought to call to their assistance any two medical practition-
ers who had previously examined the person apart from each
other and had given the requisite special certificate. 63 The
Justices were to proceed in all respects as if such person
were brought before them in a Court of Petty Sessions and
were given power to direct him to be removed into some hospital
for the insane or licensed house and to be received into and
detained there accordingly. The power of the Supreme Court to find persons insane was preserved.\footnote{65}

The Governor was given power to appoint hospitals,\footnote{66} and to grant licences for houses and premises, for the reception and temporary treatment of the insane and to declare wards of any hospital to be wards for the temporary reception of the insane. The detention of insane patients in reception houses, gaols or public hospitals beyond fourteen days was prohibited\footnote{69} unless a medical officer certified that such persons were not in a fit state to be removed or would be benefited by remaining there, in which event the removal was postponed.

Justices could order the discharge of a person from any reception house, gaol or public hospital on receiving a certificate from the medical officer that he was of sound mind or might, with safety, be discharged to the care of a relative or friend.\footnote{71} Both the 1878 and 1898 Acts\footnote{72} made provision for hospitals for the criminally insane, and in substance, repeated the terms of an English Act of 1800\footnote{73} and the New South Wales Act of 1843\footnote{74} as to persons charged with offences who were acquitted on the grounds of insanity. Provision was also made for an Inspector General to be appointed by the Governor in Council to visit and report on hospitals and licensed houses,\footnote{75} with power to order the removal or transfer of patients,\footnote{76} or their entire discharge.\footnote{77} The person signing an order or request for a patient's admission could similarly obtain his discharge,\footnote{78} unless the patient were dangerous or physically unfit.\footnote{79} Statutory procedure for declaring persons insane and for the appointment of Committees of their estate was included in Part VII of the two Acts.

By the 1878 Act, the constitution of a separate Lunacy Department was effected. This was particularly apparent in the appointment of an entirely new ministerial officer, called the Master in Lunacy, to administer the Department.\footnote{80}

The Act abolished the old procedure by commission de lunatico inquirendo and empowered the Supreme Court by any of its Judges to declare a person to be of unsound mind and
incapable of managing his affairs and, if necessary, to appoint a committee. Thereafter the reference was to the Master as to the administration of the lunatic's estate. The Court was also made the proper tribunal to declare that an insane person had recovered and to order his release from its control and to discharge any committee. Procedure was by petition with supporting affidavits and the hearing would proceed before a Judge unless he, or the Court, ordered that the matter be referred to a special or common jury. Trials of certain questions before the Master and jury could be ordered. Where a person had been found insane by legal proceedings in the British Empire, the presentation of a proper copy of that determination was sufficient to ground the Supreme Court's power to appoint a committee with regard to the lunatic's estate in the Colony. Appeals lay from the decision of a single Judge to the Full Court under section 104.

Part VIII of the Act was devoted to the constitution of the Master's Office, that officer's powers and duties, and the management of the estates of insane persons. The Master was to undertake the general care, protection and management or supervision of the management of the estates of all insane persons and patients in New South Wales. He was also to supervise and enforce the performance of the obligations and duties of all committees. To this end the Court could order that a lunatic's property be sold or otherwise dealt with under the Master's control, the expenses incurred being charged against the estate. The Master could prosecute all enquiries which might be necessary and he could summon persons to appear before him, administer oaths, take evidence and recognizances and require the production of books and other records. He enjoyed these authorities generally and in respect of any reference made to him by the Court. Unless the Court otherwise directed, the Master was in every case to conduct a next-of-kin enquiry and certify to the Court the identity of such persons. A large number of other particular powers relating particularly to accounts and reports were also specified.
Section 141 conferred on the Master a general authority to deal with the estates of insane "patients" (these were defined by the Act as being those lunatics detained in hospitals, reception or licensed houses, and were distinct from insane "persons"). He could take summary proceedings to recover any real or personal property wrongfully detained from a patient and was to get in and pay into Consolidated Revenue in trust for a patient any moneys which were payable to him. However, as was pointed out in Re George King: "The right of an insane patient to deal with his property is not taken away by the Act, but by the general law, that a person of unsound mind cannot alienate. The powers of care, protection, and management conferred on the Master do not divest the patient of his estate, or take from him, if shewn to be at the time of sound and disposing mind, the power to dispose of his property. In every case the capacity or incapacity of the patient must be proved; and if such capacity be proved, the patient can alienate by deed as he undoubtedly can by will."

The Master could disburse funds from the patient's estate for maintenance and he could manage and care for the patient's property including the sale, letting or other disposal of it. An important and unusual power was laid by section 146 which enabled the Court to direct a personal examination of an insane patient by the Master; and for the Court, on having the Master's report, to make orders for the appointment of a guardian of the person or estate of the patient or, alternatively, of a receiver of the patient's estate; and could make further orders as to the application of the patient's income. The general management of the estates of insane persons by committees under authority of the Court was provided for in detail by sections 148 to 175 of the Act.

It is unnecessary here to consider the Lunacy Act No. 45 of 1898 as it was very little concerned with the Court's jurisdiction. It may, however, be noted that the Act in defining "Court" accepted as fundamental that the Lunacy Department was a distinct jurisdiction of the Supreme Court, though the term
"Judge" was taken to mean any Judge of the Supreme Court. Consis­tently the word "Court" should surely have been defined as "the Supreme Court" not as "the Supreme Court in its Lunacy jurisdiction".
NOTES

1. For the relationship between Colonial and British Law on this subject reference may be made to "Historical Notes on the Law of Mental Illness in New South Wales", Mr. Justice J. H. McClemens and J. M. Bennett, (1962), 4 SLR, 49.

2. HRNSW, I Pt. 2, 64. Identical provisions were contained in subsequent Commissions; for example, Governor Hunter, HRNSW II, 113, Governor Bligh, HRNSW V, 631.

3. HRA IV/I, 77, otherwise called the Second Charter of Justice.

4. Id. 861.


6. HRA IV/I, 509.

7. Id. 518.

8. Id. 648.


10. Sydney Gazette, 24th. November, 1805. This was an early example of the summoning of a jury in New South Wales. The twelve "good and lawful men" having said "on their oaths" that Bishop was a lunatic, the Governor committed his estate to John McArthur and Samuel Marsden, "they having voluntarily accepted the same from motives of humanity".


12. Id. 18. This seems to have been an assumption drawn by Professor Bostock from the appointment of three surgeons by Governor Macquarie in Bodie's Case.

13. What is probably the first colonial certificate of insanity by two medical practitioners is preserved in the State Archives, Walsh and Redfern to Campbell, 1st. February, 1812, Colonial Secretary, In-Letters, Bundle 6, CS8, 18.

14. Ibid.

15. Id. Bent to Macquarie, undated, 21.


17. Id. Bent to Macquarie, undated, 25.


19. Ibid.

21. Id. 20.
22. 30th. May, 2 col. 4.
24. A complete account of this and later mental hospitals is contained in Bostock, op. cit. 18 et seq.
26. HRA I/XVII, 631.
27. Governor's Despatches (Mitchell Library A1233), 43.
28. "An Act to make provision for the Safe Custody of and prevention of Offences by Persons dangerously Insane and for the Care and Maintenance of Persons of Unsound Mind".
29. 11 Geo. IV and 1 Wm. IV, c. 65.
30. HRA I/XXIII, 287.
31. Ibid.
32. This was the first time that Magistrates and Justices in the Colony were invested with such power. Governor Gipps thought that this justified the charging of maintenance of the dangerously insane against public funds of their respective districts of residence; the Council, however, declined to sanction the proposal. HRA I/XXIII, 288.
33. HRA I/XXIV, 58.
34. 9 Geo. IV, c. 40.
35. Quoted in F. H. Linklater, "The Statutes Relating to Equity and Lunacy and in Force in New South Wales" (1879), 200.
36. Ex parte Clarke (1896) 17 NSWR, 249; R. v. Schofield (1838) 1 Legge, 97.
37. Id. 102.
38. "An Act to alter and amend an Act intituled 'An Act to make provision for the safe custody of and prevention of offences by persons dangerously insane and for the care and maintenance of persons of unsound mind", 1845.
39. A summary of the objects of the statute is contained in HRA I/XXV, 119.
40. "An Act to amend the Law for the care and treatment of the Insane".
41. 14 Geo. III, c. 49.
43. V & P 1862 (1), 581.
44. Id. 1863-1864 (1), 1024, 1400.
45. Id. 1865-1866 (1), 98.
46. Id. 1868-1869 (3), 507.
47. Id. 512.
48. Id. 523.

49. Papers transferred from the Attorney-General's Department to the Mitchell Library (Al537-3), 148 and 149, 5th. October, 1847.

50. Id. 141, 9th. October, 1847.

51. Id. 142, 26th. October, 1847.

52. Stephen's Practice, Supplement, 64.


54. Edward Pratt to the Colonial Secretary, 28th. March, 1866, Parkes' Correspondence, N-O-P, 547, Mitchell Library, (A926).

55. (1867) 6 SCR, 399.

56. Of 1823, i.e. the third.

57. Ex parte Posbery, (1904) 4 SR, 74.

58. (1903) 3 SR, 552.

59. At 567.

60. At 569.

61. Section 4 (1).

62. Parkes' Correspondence, op. cit., 549.

63. Section 5.

64. Section 6 in each Act.

65. Section 14 (1878), section 16 (1898).

66. Section 17-18 (1878), Part II (1898).

67. Section 24 (1878), section 31 (1898).

68. Section 45 (1878), section 52 (1898).

69. Section 48 (1878), section 55 (1898).

70. Section 49 (1878), section 56 (1898).

71. Section 51 (1878), section 58 (1898).

72. Part V in each Act.

73. 39 & 40 Geo. III, c. 94.

74. 7 Vic. No. 14.

75. Part VI in each Act.

76. Part VI (2) in each Act.

77. Section 87 (1878), section 96 (1898).

78. Section 84 (1878), section 93 (1898).

79. Section 86 (1878), section 95 (1898).

80. Master Holroyd as Master in Equity automatically assumed the office on 16th. May, 1879, but his staff of clerks was not appointed until August of that year and the office was not in full working order until early in 1880 - V & P 1880.
81. Section 92.
82. Section 93.
83. Section 94.
84. Section 97.
85. Section 98.
86. Section 102.
87. Section 105.
88. Section 106.
89. Section 108.
90. Section 109.
91. Section 120.
92. Section 142.
93. Section 143.
94. 9 NSWR Eq., 1.
95. At 6.
96. Section 144.
By the Letters Patent of 2nd April, 1787 (commonly called the First Charter of Justice, or the warrant for that Charter) the constitution of a Court of Civil Jurisdiction was declared. Authority in matters of Probate was bestowed for the first time in compendious terms: "And Wee do further Will, Ordain and Grant to the said Court full power and Authority to Grant probates of Wills and administration of the personal Estates of Intestates dying within the ... Settlement".

A grant of Probate was made by the Civil Court at least as early as 1796, but the majority of cases were intestacies - Judge-Advocate Dore himself died not only intestate but insolvent. An early form of a grant of Letters of Administration is preserved in the State Archives in the Estate of John Shapcote. The document is in the following form:

"Cumberland to wit

At a Court of Civil Judicature, held by Order of the Governor, at Sydney, in the County of Cumberland, in the Territory of New South Wales, this 20th day of July in the Year of Our Lord 1790

Present (The Judge-Advocate
(Revd. Richard Johnson

"Mr. John Peter Shapcote, came before them, and claimed Administration of the Estate of his late Father, Mr. John Shapcote, a Lieutenant in His Majesty's Navy, who died on board the Neptune Transport, at Sea, intestate.

And having taken the Oath annexed, and entered into the Bond (with two Sureties) required by the Act of the 22 &23d of Car. 2 Cap 10, Letters of Administration were accordingly granted him, and Saturday the 24th Day of this instant Month of July appointed for him to appear, and bring in and exhibit an Account of his said Administration".

This grant was made on the applicant's entering into a bond in the sum of £80 sterling with Judge-Advocate Collins and submitting his accounts - which he accordingly did in the most minute detail! Within a decade the form of grant of
Letters had commenced to take on greater maturity, as in the 
Estate of William Stevenson:

"By virtue of the Power and Authority given to the said Court of Civil Jurisdiction by certain Letters patent under the great Seal of Great Britain bearing date the second day of April one thousand Seven hundred and Eighty Seven for granting Probates of Wills and Letters of Administration to the Effects of persons dying within the Settlement and Territory aforesaid We do hereby issue these Our Letters of Administration unto them the said Shadrach Shaw and Simeon Lord requiring and empowering them to collect all the Goods Chattels Credits and Effects of the said William Stevenson deceased which may be in this Territory and Such Goods Chattels Credits and Effects Well and truly to administer and dispose of according to Law and to the Oath which they the said Shadrach Shaw and Simeon Lord have taken and entered into and they the said Shadrach Shaw and Simeon Lord are hereby required to exhibit before the Judge Advocate for the time being or before the Court of Civil Jurisdiction a full just true and perfect account of their Administration whenever they shall be called upon or required so to do".

The Letters Patent of 4th February, 1814, commonly called the Second Charter of Justice, in establishing a "Supreme" Court with Civil Jurisdiction, devoted considerable attention to establishing its authority to grant Probates of Wills or Letters of Administration. "It may frequently happen that the Estate and Effects of Persons, dying in our said Colony of New So. Wales and it's Dependencies, are wasted and embezzled and their Debts contracted there remain unpaid, for Want of a proper Authority vested in some proper Person or Persons residing therein to take Care of the same"; to remedy "which Mischief" the Court was enabled on proof of a Will to grant probate under Seal to the executors named. This still applied only to personal estate. In intestate estates the Court could "grant Probates of Wills or Letters of administration with an Authentic Copy of the Will annexed" to the next of kin within the jurisdiction, to the principal creditor or to some other approved person on giving security. This did not have the effect of creating a separate Ecclesiastical or Probate Department within the Court, even though this branch was described as "the Supreme Court of Ecclesiastical Judicature". It merely invested one and the same Court with these in addition to its other powers.

Mr. Justice Field who had a discerning eye for Court fees, which he not infrequently appropriated to his own use, early
made objection to the "flat rate" charge of £4 for each grant of Probate or Letters. He therefore prepared a scale of charges in 1817 which commenced at £2 and rose to £20, calculated on personalty only and on the basis that the "few persons who die in the Colony with above £5,000 besides their real property, can well afford to pay £20". Macquarie was pleased to confirm this in what Field styled a "very handsome manner".

Field expressed concern to Commissioner Bigge at the inability of the Registrar of the Court to apply for Letters of Administration ad colligenda in default of their being executors or administrators in the Colony. He considered that the estates of persons dying without "will or kin" often "became the subject of a scramble" because of the deficiency. Bigge agreed with this and reported: "It has occurred, that upon the deaths of convicts upon the passage to New South Wales, or where the inhabitants of the remoter districts have died suddenly, possession has been taken of the effects without security or inventory, and that very inefficient means have been adopted to give information or to transmit the proceeds to the absent relatives. To prevent these abuses I think it will be expedient to give the Supreme Court in New South Wales, as well as the court in Van Diemen's Land, in cases where the next of kin or an executor when cited shall refuse to take out administration or probate, the power of granting letters ad colligenda (sic) or of administration to the registrars of the respective courts for the purpose of enabling them to collect the assets of deceased persons, and to sell and convert them into money under the direction of the court, the registrar being first required to give security for the payment and due account of all such monies as shall come to his hands by virtue of such administration". The Commissioner also considered that the Registrar should be obliged to transmit to an officer called the "colonial agent" a list of persons dying intestate in the Colony and a statement of their estates.

In 1818 Governor Macquarie issued a Proclamation which recited that many Executors were failing to prove wills and that
unauthorized persons were in the habit of obtaining wrongful possession of deceased estates. After drawing attention to the penalties prescribed by 37 Geo. III c. 90 for failure to prove wills and the fact that such statute did not extend to the Colony, it went on to levy a fine of £50 against any executor de son tort or unauthorized administrator who failed to take out probate or letters of administration within six calendar months of the deceased's death.

Judge-Advocate Bent in 1811 had proposed the establishment of a single Supreme Court with, inter alia, an Ecclesiastical jurisdiction and this was echoed in 1821 by Judge-Advocate Wylde. The proposal was at length realized in the so-called Third Charter of Justice, the Letters Patent of 13th. October, 1823 on which the jurisdictions of the Supreme Court (as distinct from the 1814 Court) were founded. The Court was declared to be "a Court of Ecclesiastical Jurisdiction with full power to grant Probates under the seal of the said Court of the last wills and testaments of all or any of the Inhabitants of that part of the said Colony and its Dependencies situate in the Island of New Holland and of all other persons who shall die and leave personal Effects within that part of the Colony and to commit Letters of Administration under the seal of the said Court of the Goods Chattels credits and all other effects whatsoever of the persons aforesaid who shall die intestate or who shall not have named an executor resident within that part of the said Colony and its Dependencies or where the Executor being duly cited shall not appear and sue forth such probate annexing the will to the said Letters of Administration when such persons shall have left a will without naming any executor or any person for Executor who shall then be alive and resident within that part of the said Colony and its Dependencies and who being duly cited thereunto will approve and sue forth a Probate thereof and to sequester the goods and Chattels credits and other effects whatsoever of such persons so dying in cases allowed by Law as the same is and may be now used in the Diocese of London and to demand require take hear examine
and allow and if occasion require to disallow and reject the accounts of them in such manner and form as is now used or may be used in the said Diocese of London and to do all other things whatsoever needful and necessary in that behalf Provided always and we do hereby authorize and require the said Court in such cases as aforesaid where Letters of Administration shall be committed with the will annexed for want of an executor appearing in due time to sue forth the Probate to reserve in such Letters of Administration full Power and authority to revoke the same and to grant Probate of the said Will to such Executor whenever he shall duly appear and sue forth the same. And we do hereby further Authorize and require the said Supreme Court of New South Wales to grant and commit such Letters of Administration to any one or more of the Lawful next of kin of such person so dying as aforesaid and being then resident within the Jurisdiction of the said Court and being of the age of twenty one years and in case no such person shall then be residing within the Jurisdiction of the said Court or being duly cited shall not appear and pray the same to the Registrar of the said Court or to such person or persons whether creditor or creditors or not of the deceased person as the Court shall see fit. Provided always that Probates of Wills and Letters of Administration to be granted by the said Court shall be limited to such money goods chattels and effects as the deceased person shall be entitled to within that part of the said Colony situate within the Island of New Holland."

This was strictly a Probate Jurisdiction rather than an Ecclesiastical Jurisdiction, as other matters such as jurisdiction in divorce which had been the province of the English Ecclesiastical Courts, were excluded. Section 15 of the Charter required administrators of intestate estates to give security by Bond to the Crown, enforceable at the suit of the Attorney-General under section 16. All executors and administrators were to pass accounts until their duties had ceased with personal liability in interest should they default. They were to abide by such order as the Court might in its discretion
make for the distribution of assets. It was for the Court to allow such commission to Executors and Administrators as it deemed just and on condition that the requirements of the Act had been observed.

The Court's authority under the Patent was "placed beyond doubt" by 4 Geo. IV c. 96 which, by section 10 conferred an Ecclesiastical Jurisdiction upon the Supreme Court in these terms: "And be it further enacted, That the said Supreme Courts respectively shall be Courts of Ecclesiastical Jurisdiction, and shall have full Power and Authority to administer and execute within New South Wales and Van Diemen's Land, and the Dependencies thereof respectively, such Ecclesiastical Jurisdiction and Authority as shall be committed to the said Supreme Courts respectively by His Majesty's said Charters or Letters Patent: provided that, in all Cases where the Executor or Executors of any Will, upon being duly cited, shall refuse or neglect to take out Probate, or where the next of kin shall be absent, and the effects of the Deceased shall appear to the said Judges respectively to be exposed and liable to Waste, it shall be lawful for the said Judges respectively to authorize and empower the Registrar, or other Ministerial Officer of the said Supreme Courts respectively, to collect such Effects, and hold or deposit or invest the same in such Manner and Place, and upon such Security, and subject to such Orders and Directions as shall be made, either as applicable to all such cases, or specially in any Case, by the said Judges, in respect of the Custody, Control, or Disposal thereof."

It will be noted particularly that the jurisdiction so conferred was a jurisdiction extending over personality only. Nor was it yet a thoroughgoing Ecclesiastical Jurisdiction, many of the powers of the Courts Spiritual still being withheld. Nor again did it establish a separate Court, but the existing Court was given wider authority within its existing constitution.

The statute 9 Geo. IV c. 83 as well as confirming the Third Charter of Justice rendered all English laws and statutes
then in force (and not inconsistent with colonial laws) oper­
tive within the Colony, as result of which the Court was per­manently assured of a Probate jurisdiction in which would be applied "the law, manner and custom of England and in particu­lar of the Diocese of London, as far as it should be applicable in the then state of the Colony".7

Once the jurisdiction was laid down, the Court and legis­lature seemed to withdraw from systematic supervision of de­ceased estates for almost twenty years. Generally speaking, executors failing to prove were not pursued and their failure to file accounts was not penalized. The last serious attempt to deal with such defaults for a considerable time was a pro­clamation by the Governor in 1826 which recited the tenth sec­tion of the New South Wales Act and ordered that persons ac­quainted with the wrongful disposal of assets in deceased es­tates should give information accordingly to the Attorney-General.24 The proclamation seems to have been enforced in a desultory way.

In 1838 another superficial attempt was made to remedy this slackness. Mr. Justice Willis' energies in preparing new Rules of Court in Equity were simultaneously directed to pre­paration of Probate Rules, in which form they remained largely in force until 1890. These also took the title of the Stan­ding Rules.25 They provided for all applications for Probate and Letters of Administration to be made by petition supported in the former case by an affidavit of circumstances and par­ticulars of proof31 and in the latter case by an affidavit of death, particulars of estate and next of kin.32 A creditor could apply for Letters of Administration on citing the de­ceased's widow and next of kin to appear and show cause why administration should not be granted to him.33 Provision was made for caveats to be entered against applications for Pro­bate or Letters34 and the matter would then be set down to be heard before one of the Judges of the Supreme Court,35 the parties proceeding in substantially the same manner as at a trial at Law.36

An effort to pursue the proclamation of 1826 was certainly
made, but, after initial enthusiasm, abandoned to almost identical casualness. Rule 18 provided that "in all cases where the Executors of any Will shall neglect or refuse to bring into Court such Will, and take out Probate of the same, or renounce the execution thereof, - a Citation may issue as of course, after the expiration of six weeks from the death of the Testator, at the instance of any Party interested in such Will directed to such Executors, calling upon them to bring in such Will, and take out Probate of the same, or renounce the due execution thereof".

The troublesome question of the Court's jurisdiction to require accounts of executors and administrators was also raised by the Standing Rules of 1838. Reviewing the history of this measure John Gurner, who had formerly been the Chief Clerk of the Court stated to a Select Committee of the Legislative Assembly in 1845 that "Sir Francis Forbes when he first arrived in the Colony, gave instructions for it to be done, and a large number of citations were written out for the purpose, and some few issued, but I believe it was found almost impossible to carry it out, and it was, therefore, eventually abandoned". Gurner himself doubted the authority of the Judges to make such a Rule.

The Standing Rules required all Administrators who had obtained their Letters within the preceding six years to file Inventories and pass accounts, such duties to be insisted upon in all future cases. It was, however, common ground that the provision was not seriously enforced. In the early 1840's it was proposed to remedy this deficiency and to extend the operation of the Rule to executors. Alfred Stephen was decidedly of opinion that the failure of executors and administrators to file accounts was in direct breach of their oaths and that the Judges proposed to insist upon the filing of these documents. Rules of Court were accordingly passed in June 1845 which made the Court's attitude quite clear: "Every person, to whom Probate or Letters of Administration shall hereafter be granted, shall within six calendar months next following, exhibit and
cause to be filed in the Office of the Registrar and Prothono-
tary, a full, true, and perfect Inventory of the goods, chat-
tels, and credits of the Deceased; - and shall, within fifteen
calendar months after having obtained such Probate or Adminis-
tration, cause to be made and filed in the same Office, a full,
true, and just Account of his Administration; - which Account
shall be passed before the Court, or in Vacation before one of
the Judges, at such time or times as shall be thereafter appoin-
ted for that purpose. The Registrar was required on the first
day of every Term to report to the Court the names of parties failing to comply.

Commenting generally on the jurisdiction to the Select
Committee of the Legislative Assembly on the Morten Bay Judge's
Appointment Bill, Sir Alfred Stephen said that it included "the
grant of Probates and Letters of Administration, and deciding
all matters incidental thereto, such as the occasional dispen-
sing with sureties, or directing the amount of security to be
less or more. Sometimes in determining whether the evidence of
death is sufficient; or the party seeking to be administrator
is the proper one; and so on. Occasionally an Ecclesiastical
case will occupy in this manner half an hour; but I do not
think more, and rarely quite so much."

It is apparent that the Court's jurisdiction in matters
of Probate and Administration was not effectively exercised
during the 1830's and 1840's. Applications for grants of
Probates and Letters were regarded as ministerial matters for
the attention of the Chief Clerk of the Court with the result
that they were doomed to perpetual delay and inefficiency be-
cause of inadequate Court staffing. Intestate estates came
under the control of the Registrar of the Court and the dis-
honesty and irregularity practised in this department illus-
trate positively the nonchalance with which the Court for a
long time regarded this segment of its jurisdiction. The
duties in intestacies were added to the Registrar's Depart-
ment by Francis Forbes, with the principal object of giving
Mr. Registrar Manning sufficient employment. Manning's office
to this extent was not governed by Rules of Court or even subject to Court supervision for about ten years. As his position meant that considerable sums of money would pass through his hands, the British Government demanded security from him which was only paid after most emphatic protests."

The general scope of the Court's jurisdiction and of the nature of the Registrar's duties was reviewed in a report prepared for the Governor by the Judges in 1832 to the following effect: "Whenever a party dies possessed of property in this Colony, either intestate or otherwise, having no Executor or personal representative within the jurisdiction of the Supreme Court, the Registrar is empowered, upon proper application to the Court, to collect the Estate and Effects of the deceased, and hold the same pursuant to the directions of the Statute 9th George 4th, c. 83d, s. 12, until some person, duly Authorized, appears before the Court and claims Probate of the Will or Letters of Administration, as the case may require. When a person duly authorized appears, it is the practice of the Court to grant Administration upon sufficient security being given by bond, pursuant to the New South Wales Charter of Justice, 13th. October, 4 Geo. 4th. In cases where the party entitled to administration resides out of the Jurisdiction of the Court, a difficulty frequently arises in proving the legal claim and personal identity of such party. This difficulty, we apprehend, can only be remedied by an Act of Parliament, containing provisions analogous to those in the first Section of the Statute 54th Geo. 3rd. c. 15 enabling the party to go before some constituted public Authority within the United Kingdom and make Oath or affirmation of his identity, and prove his claim, after the manner therein prescribed; and, upon the same being duly certified and transmitted to some person authorized, by power of attorney, to appear in the Supreme Court to claim Administration, enabling the Court to grant Administration to such Attorney upon his giving the Bond required by the Charter of Justice for the due Administration of the Estate and Effects thus coming to his hands by represen-
The Attorney would be then enabled to transmit the effects of the deceased to the rightful claimant in England. Inasmuch however as Attorney's so appointed may oftentimes find difficulty in giving the requisite security in New South Wales for the due Administration of the Effects coming into their hands, particularly when such Effects are of small amount, we would suggest that in cases where such difficulty may arise, a power should be given by the same Act of Parliament to the Supreme Court to direct the Registrar, or other Ministerial Officer of the Court for the time being to Administer the Effects, subject to the Orders of the Court, without requiring any further or better Security than that already required of such Officer in his Official capacity; with a declaratory enactment that the receipt of the party or his attorney shall be a sufficient discharge of the Registrar, or other Ministerial Officer, for all Monies and Effects which he shall pay or deliver over to such party or his Attorney, under the Order of the Court".

In 1838, the year it will be recalled of the Standing Rules, Mr. Justice Burton suggested by happy chance that some further Rules be made circumscribing the Registrar's office and obliging the Registrar to bring in accounts concerning deceased estates and to lodge funds in his hands in Savings Bank account. The Judges agreed that this be done, with the most revealing result. Manning protested that the moneys paid into his hands were in some fashion his own to invest and that the interest on them was a return for his occupation of the office. He outspokenly objected to the proposed Rules - the Judges receiving "an indignant, and, indeed, a very vapouring letter from Mr. Manning in which he moists upon the indignity of being called upon to give sécurités! and maintained his right to use the Suitors moneys for his own benefit".

The impression thus made on the Judges left no doubt that the Rules should be passed and passed they were. At the same time the Chief Justice suggested to the Governor that the Registrar be compelled by statute to account for and deposit with
the Government all the moneys in his possession. A Bill was prepared and passed as 1 Vic. No. 4, "An Act for the invest­­ment of moneys belonging to Intestate Estates by the Supreme Court in the New South Wales Savings' Bank at Sydney". Manning was ordered to make his account which, when produced, indicated that he had kept no proper records at all and that he admitted to a debit balance (owing to the fund by himself) of just under two thousand pounds. The fund, when audited, was shown to be owed at least three thousand pounds by its custodian. What greater amounts may have been thus misappropriated could only be guessed at, for most of the estates were those where adminis­­trators were out of the jurisdiction and the Registrar had fre­­quently been given powers of attorney on behalf of those ent­­itled. It even appeared that estates had been vested in him in a personal capacity without ever coming under the nominal control of the Court.

Despite these warnings, the Judges and officers of the Government alike did nothing to rectify the obvious defalcation. "From that day all vigilance seems to have ceased. From 31st October 1838 to 27th October 1841, the Judges permitted Mr. Manning to go on receiving and misapplying Funds without once calling on him to account or exacting from him any security."

Only when it was discovered in 1841 that Manning was actually insolvent, having by that time misappropriated almost £10,000 more, was the seriousness of the position properly assessed. Lord Stanley cast merciless blame upon the Judges for having failed to enforce their Rules and having remained idle when on notice of the Registrar's defaults. He demanded instant action to protect intestates' estates, recommending the adop­­tion of English Rules of Court. Manning was suspended and his estate sequestrated in insolvency at the suit of creditors to a total of over £30,000. The estate realized 7d. in the pound which the administrators of intestate estates took pari passu with Manning's numerous personal creditors.

The Governor had no wish to accept any liability for an officer whom he regarded as under the exclusive control of the
Judges. However, the representatives of intestates made such compelling demands for redress that the Government was obliged to intervene. This it did by passing in 1849 "An Act to provide for the payment of claims on the late Registrar of the Supreme Court in respect of Intestate Estates" - 13 Vic. No. 44. The Statute recited that funds had been deposited at Savings Bank on account of deceased intestate persons and that a fund would be established from such moneys when unclaimed after a period of six years. With this fund claimants on the Registrar were ultimately paid.

In 1847 an Act was passed to reconstitute the supervision by the Court of intestate estates. This Act was 11 Vic. No. 24 - "An Act for the better preservation and management of the Estates of deceased persons in certain cases". It established a new office of Curator of Intestate Estates with the safeguard that any appointee should first give security in two thousand pounds. It was for the Curator, on receiving information on oath of the death of an intestate leaving personal estate in the Colony but no administrator, to apply to the Court for an order authorizing him to collect, manage and administer the estate. He had the like powers if the Executors of a deceased person's will failed to take out Probate within six months of the deceased's death. Stringent provisions were inserted as to the submission and passing of the Curator's own accounts. Additional authority was invested in the Curator by an amending Act, 15 Vic. No. 8 of 1851. This was styled "An Act to amend in certain particulars the Act passed for the better preservation of the Estates of deceased persons". It enabled the Curator to intervene where he was satisfied on affidavit evidence that a deceased's effects would otherwise be purloined, lost or destroyed or that great expense would be incurred by any delay. This Act also contained an indemnity clause by which the Curator was not to be subject to any personal liability for anything done by himself or his agents in the performance of their official duties.

It will be observed that, up to this time, there had been
by the Third Charter of Justice, 9 Geo. IV c. 83 and the inherited Ecclesiastical Law. Surprisingly enough, this remained so for a further forty years, no legislative attention at all being directed to the constitution of the Court in these matters until the passing of the Probate Act of 1890.

There were, in the intervening period, two Acts of Parliament governing the Court's practice. The 15 Vic. No. 17 of 1851 established a new scale of Court fees. In 1858 the 22 Vic. No. 14 - "An Act to expedite Suits and Proceedings in Equity and to facilitate the despatch of Business in the Supreme Court in Banco" - declared that the Supreme Court was to be deemed held before and by the Primary Judge in Equity for the purpose of granting probates and letters of administration. This continued to be the practice until the Probate Act of 1890 set up a separate Department.

It is convenient at this stage to mention some of the more important substantive statutes enacted in the Colonial period. This thesis is not concerned with their contents but rather to demonstrate by their paucity the lack of interest evinced by Parliament in advancing this branch of the law.

The earliest measure, 5 Wil. IV No. 8 simply adopted the Imperial Act "for making better provision for the disposal of the undisposed of residues of the effects of testators". This overcame the objection that the appointment of executors without express dispositions of residuary personalty enabled such executors to retain the residue to their own use, by converting the position of executors into that of trustees for the parties entitled under the Statute of Distributions. Another adoption of English law was made in 3 Vic. No. 5 which introduced into the Colony the Wills Amendment Act of 1837 - 7 Wil. IV & 1 Vic. c. 26. This statute abolished many ancient laws and prescribed that every person could dispose by will of his real or personal property provided that such will complied with some elementary requirements. These were that every will should be in writing, signed by the testator, or for him by some person in his presence "at the foot or end thereof", the signature to be made or acknowledged in the presence of two or more witnesses present
at the same time. The witnesses were to subscribe the will in the testator's presence, but were not bound to use any particular form of attestation. The only regular exception to these formalities was in the case of soldiers on active service or mariners or seamen being at sea. The expression "at the foot or end thereof" was enlarged under 17 Vic. No. 5 - "An Act to amend the Law with respect to the execution of wills".

The Act "to alter the succession to Real Estate in cases of Intestacy", 26 Vic. No. 20, may also be mentioned here. It was commonly called "Lang's Act" and was passed specifically to abolish primogeniture. "This important statute provided that, upon the death of the owner intestate as to any realty, such realty should pass to his personal representative, to be distributed as personalty amongst his next of kin, instead of to his heir. The interest to be taken by husband and wife, should, however, not exceed that formerly to be taken by him by the curtesy, or her dower, respectively". The changes made by it are clearly emphasized when tested against the prior law. Sir Alfred Stephen gave the following answers to a Select Committee of Parliament on Landed Property in Cases of Intestacy Bill: "Landed property descends to the eldest son; or, if there be daughters, to them jointly; or, if there be no children, in a regulated course of descent on the same principle; and, in the case of personal property, it goes to the administrator, or if none be appointed, then to the Curator of Intestate Estates. ... In this Colony landed property has always been unqualifiably subject to the payment of debts, in the first instance, of every kind; whereas in England, ordinarily, the land was subject only to debts of a higher order, binding the heir - such as debts by recognizance, or bond, or other instrument under seal".

It is convenient to refer here to the most important decision relating to the powers of the Ecclesiastical Court which was laid down by the colonial Supreme Court. This was In the Goods of James Blackwood, a judgement of the Full Court delivered in 1881. A testator died in London having appointed
executors domiciled in Victoria. The assets in the estate were substantially in New South Wales, but no creditors were there. The Primary Judge, Hargrave, J., ruled that under the Charter of Justice he had no jurisdiction to grant Probate to the executors as they were not within the Colony. The Full Court overruled the Primary Judge and held that the Court's jurisdiction was identical to that of the English Ecclesiastical Courts at the date of the third Charter of Justice and that the Court had power accordingly to grant Probate to an executor resident outside its jurisdiction. The judgement of the Chief Justice, Sir James Martin, is of the greatest significance and is quoted here at length:

"It is not easy to construe the fourteenth section of the Charter of Justice. In England, it is sufficiently clear that, before the "Probate Act", probate would be granted to an executor resident out of the jurisdiction, because, in the cases to which we have been referred, it has been argued that section 73 of that Act provides that, in certain cases, where application is made by a foreign executor, the Court may refuse probate. This implies that, for that section, there would not exist power to refuse probate to such an executor. The same power that the English Ecclesiastical Courts had is given to the Supreme Court of this colony by section 14 of the Charter of Justice, except so far as they may be abridged by the terms of that section. By that section full power is given "to grant probates, under the seal of the said Court, of the last wills and testaments of all or any of the inhabitants of that part of the said colony and its dependencies situate in the said island of New Holland, and of all other persons who shall die and leave personal effects within that part of the said Colony". That is a general power to grant probates - as large as the power vested in the English Courts at that time; and, therefore, includes the power to grant probate to executors out of the jurisdiction. Then come the words - "and to commit letters of administration ... of the persons aforesaid, who shall die intestate, or who shall not have named an executor resident within the colony, or when the executor, being duly cited, shall not appear and sue forth probate, annexing the will to the said letters of administration, when such person shall have left a will without naming any executor, or any person for executor, who shall then be alive and resident within the said colony, or who, being duly cited thereunto, will not appear and sue forth a probate thereof". The question arises whether these words limit the power of the Court in cases where the executor is not resident in the colony. I am of opinion that the words do not so limit the power. They are intended to apply to the case of an executor residing in or out of the colony, on whose behalf no application has been made for probate, and thus to provide for administering the property of the deceased, that it should not be left unguarded. But where an application is made by the executor, then probate ought to be granted to him. This view is borne out by the like words in a later paragraph, to this effect - "Provided always and we do hereby authorise and require the said Court, in such cases as aforesaid, where letters of administration shall be committed with the will annexed, for want of an executor applying in due time to sue forth the probate, to reserve in such letters of administration full power and authority to revoke the same, and to grant probate of the said will to such executor whenever he shall duly
appear and sue forth the same". So that it would seem that, if an executor did not make his application in due time, then the Court had power to issue letters of administration with the will annexed, reserving power for the executor to come in and prove. This tends to show that the general power to grant probates to executors, wherever resident, is not limited, but that the clause provides that the estate may be protected if the executor does not apply. It seems to me that this probate ought to be granted".

Sir William Manning as Primary Judge in Equity in the 1880's and also as a Legislative Councillor directed considerable attention to the need for a reformed jurisdiction for the granting of Probates of Wills and Letters of Administration. He made many modifications to the Court's practice, one of the most important of these, so far as concerns jurisdiction, being contained in his decision in Vivers v. Vivers53. This was a matter of administration which was governed by the fourteenth section of the Third Charter of Justice, to the intent that the Court could grant Letters to "any one or more of the lawful next of kin" of the deceased. Notwithstanding this, the course of practice for sixty years had been to grant administration automatically to an intestate's surviving spouse without reference to the next of kin. This followed the then current practice in England. In Viver's Case a deceased's daughter sought a grant of administration in preference to the widow on the grounds that husband and wife were not next of kin at law so the Court had no power under the Charter to make the grant to a surviving spouse. This submission was accepted by Sir William Manning thus establishing for a time a practice whereby administration would only be granted to a spouse if the next of kin were minors or failed to appear on citation.

In 1885 Sir William Manning urged the government to bring down legislation to reconstitute the ecclesiastical jurisdiction by establishing a Department of the Court with authority in matters of Probate and Administration. In accordance with his suggestions the Government gave directions for a Bill to be drawn and Mr. Justice C. J. Manning did so. The Bill was introduced into the Legislative Council and referred to a Select Committee which apparently never met with the result that the Bill went no further. However, its text was revised
by Sir William Manning and Windeyer and Owen, JJ., and it was reintroduced in the Legislative Assembly in 1890. It took priority over an unofficial Probates of Wills Facilitation Bill presented in the same year.

The lastmentioned Bill had been particularly introduced to express disapproval of another innovation in practice made by Sir William Manning. From 1838 all applications for Probate or Letters were to be made on petition or motion to the Court but in 1881 the Judge virtually repealed the relevant Standing Rule. He made it mandatory that in all cases of estates of £500 or more in value such appearances were to be made in Court, in other words, the attendance of counsel was necessary. Such an attendance was even required for estates valued over £100 but under £500, though the attendance of a solicitor would be accepted in those cases. Only in estates under £100 did the Judge allow the old procedure on simple petition to apply. The notorious politician, Mr. Crick, was very eloquent on the subject before the House. He had tried to obtain a grant himself on behalf of a poor widow. "The widow being in very straitened circumstances I went over myself to the late Mr. Justice Manning. I met him in chambers, and I said, "I am glad I met your Honor, as I desire probate of this will. The widow is in very straitened circumstances indeed, and it will probably be a fortnight before your Honor is in town again. The papers have been certified by the proper officer as correct. They are correct, your Honor, and I now ask for probate". He said, "I cannot hear you". Thinking the unfortunate functionary was slightly deaf, I spoke considerably louder. He said, "I cannot hear you". Well, I fairly roared at the judge. He said, "I hear you well enough, sir, but I wish to tell you that in a matter over £500 I cannot hear you". Desiring to get probate, and to get the matter through, I had to rush out, and I met some young man standing outside with a thin nose and horsehair on his head - I never saw him before - and I called him up. He assured the judge just exactly what I had told him - that the papers were correct - and probate was granted. Now, was not that a farce? Sir William Manning was, however,
quick to rejoin that he did not consider it within the scope of a Judge's duties "that he should have a parcel of papers pitched into his chambers, have to go through them all, and form his own judgment, picking holes here and holes there, and calling for an amendment here and an amendment there, because he was not satisfied with the proceedings as they were". He considered that the retaining of the legal profession was accordingly justified.

Speaking of the Probate Bill (which was passed into law as the Probate Act of 1890) the Minister of Justice pointed out the extremely unsatisfactory nature of the colonial Court's jurisdiction. No adjustment had been made to match the sweeping away of the old ecclesiastical procedure in England in 1857 and no attempt had been made to follow the English precedent of creating a Court with Probate jurisdiction. In summary he observed of the Bill that its principal object was "to conform the practice of granting letters of administration and probate with the newer practice - to bring our practice into something like a modernised form. ... Provision is made for letters of administration and probate being granted in cases where the amount does not exceed £500. Provision is also made that all real estate shall pass through the executors whether specifically devised or not. This is the practice in the adjoining colony of Victoria, and has been found to work very well. Then it is proposed that probate shall be proof of the will in all matters concerning real estate as in personal estate. That will materially lessen the cost to persons having occasion to go into court to produce a will in giving evidence as to their title to real estate. Another important matter is the recognition of foreign probate and letters of administration. Provision will be made for their recognition. That is also a step greatly in advance of our present practice, and will assimilate our law not only to the law of the various neighbouring colonies, but also to the English law." This had the ancillary benefit of allowing the Court to deal with real estate as well as with personalty.

Despite the seeming simplicity and want of contention in
the Bill, the politicians contrived to protract its passage for almost a year. Particularly in the Legislative Council was it beset with trifling amendments argued at length and, usually, withdrawn without achieving anything. Sir William Manning pleaded for expedition. The Judge sitting in Probate matters declared that "not a week passes without my having to express publicly in court my hope that the Probate Bill now in your hands may speedily become law".

At last the measure was passed and became Act No. 25 of 54 Victoria. In reviewing the provisions which it made for the constitution of a Probate Jurisdiction in the Supreme Court it is convenient to read with it the supplementary Amending Act 56 Vic. No. 30.

Section 4 of the principal Act left the Court's powers exactly where they were, in extent, but the exercise of those powers was virtually transferred from the Supreme Court to the Supreme Court in Probate Jurisdiction. The wording of the section was as follows: "The jurisdiction and authority heretofore vested in or exercised by the Supreme Court or the Primary Judge in Equity in respect of the estates of deceased persons shall be vested in and exercised by the Supreme Court in Probate Jurisdiction, and by such Judge as may from time to time be permanently or temporarily appointed in that behalf by the Governor under the title of the Probate Judge, or by any Judge of the Supreme Court acting for the said Probate Judge during his illness or absence or at his request". It will be observed that this did not create a Court separately from the Supreme Court, but a jurisdiction within the Court. This is further apparent from the Act's interpretation of the term "the Court" to mean, inter alia, the Supreme Court in its Probate Jurisdiction. The jurisdiction was expressed by section 11 in wide terms, so wide indeed as to merit description as "unfettered" - "the Court shall have jurisdiction to grant probate of the will or administration of the estate of any deceased person leaving property, whether real or personal within the Colony of New
South Wales". Further evidence of the essentially administrative nature of the new jurisdiction is afforded in the provision by section 5 that the Probate Judge could sit with the assistance of any Judge or Judges of the Supreme Court if he requested their attendance.

The consolidating statute, Act No. 13 of 1898, - the Wills Probate and Administration Act - confirmed by section 40 the jurisdiction which had been established under section 11 of 54 Vic. No. 25. It also, by section 33, vested in the Court "the jurisdiction and authority, prior to the coming into operation of the Probate Act of 1890, vested in or exercised by the Supreme Court or by the Primary Judge in Equity". From first to last, no statute in the colonial period was directed to a clear exposition of the "jurisdiction and authority" so referred to and this branch of the Court was left largely to rely on the practice established locally over the passage of years as adopted by Rule of Court.
NOTES

1. HRA IV/I, 6.
2. Id. 7.
3. Supreme Court Papers (State Archives 1166), Bundle 31, 3, Will of John Irving.
4. Id. 11.
5. Id. 1. A facsimile of these papers is contained in the official publication "The Beginnings of Government in Australia" (1913).
6. For example: "1 Uniform Coat £4-4-0, 15 Shirts £6-15-0, 1 Bed & 2 Pillows £2-10-0, 3 Pair of Shoes £1-4-0, 1 Velvet Waistcoat £1-10-0, 3 Pair of Nankeen Breeches £1-10-0". The total of the account, which comprised clothing almost exclusively, was £64-11-0.
7. Supreme Court Papers, op. cit., 5.
8. HRA IV/I, 77.
9. Id. 90.
10. Id. 91.
11. Id. 319.
12. Bonwick Transcripts (Bigge Appendix) (Mitchell Library) Box 28, 6762.
13. HRA IV/I, 248.
14. Id. 249.
15. Id. 860.
17. Id. 60.
18. HRA IV/I, 319.
19. Id. 63.
20. Id. 374.
21. Id. 515-516.
23. HRA IV/I, 653.
26. HRA IV/I, 509.


29. These are substantially reprinted in Stephen's Practice.


32. Standing Rule 3.


34. Standing Rule 6.

35. Standing Rule 11.


38. Practice, 316.

39. V & P 1855, 1175.


41. HRA I/XIX; V & P 1843, 313.

42. HRA I/XVI, 698.

43. V & P 1845, 1005.

44. Governors' Despatches (Mitchell Library) A1267-20, 2865.

45. Id. 2863.

46. Ibid.

47. V & P 1843, 324.


51. (1881) 2 NSW Eq., 83.

52. At 84.

53. (1886) 2 WN, 109.


56. Id. (Vol. XLIX), 4923.

57. Id. (Vol. XLV), 1666.

58. Id. (Vol. XLVIII), 4565.


60. Id. 6.
There was no provision in New South Wales for the dissolution of marriage by divorce or judicial separation at the time of the founding of the Colony. According to English accounts, the Imperial Legislature deliberately withheld such authority from the Letters Patent known as the First and Second Charters of Justice and it refused to allow the adoption of British Divorce statutes in the Colony. "The Supreme Court has no jurisdiction excepting that which it derives by Act of Parliament and by the Charter of Justice founded upon that Act, in both of which the extent of its powers and especially of its powers in Ecclesiastical causes is distinctly defined. Upon reference to those Instruments, there will be found no allusion in either of them to matrimonial causes, or to the offences which Spiritual Courts in England visit with Ecclesiastical Censures. This subject was duly considered when the Act and Charter were originally passed, the omission was not accidental but intentional, and, if it be fit to supply it, it can be done by no other authority than by Act of Parliament".

Ellis Bent's recommendations for the remodelling of the Civil Court included the establishment of a Supreme Court invested with "full power to exercise all Civil, Criminal and Ecclesiastical Jurisdiction", which would certainly have contemplated a divorce jurisdiction. Judge-Advocate Wylde adopted the same proposal in his own submissions.

The deficiency was a source of genuine grievance from quite early stages of colonial society: even so puritanical a gentleman as Field, J., had submitted to Commissioner Bigge in 1820 that the Supreme Court required an Ecclesiastical Jurisdiction which, after the fashion of Ceylon, should include matters in matrimonial causes as well as matters in probate and administration, "not for the purpose of pronouncing divorces in a society like that of New
South Wales, but for the sake of decreeing alimony to maltreated or discarded wives. The Commissioner adopted this opinion, but it was not approved in England, with the result that the Ecclesiastical Jurisdiction conferred on the Court by 4 Geo. IV c. 96 was one for the disposal of testate and intestate estates only.

In 1825 legal minds in England and in New South Wales were alike reflecting on the want of matrimonial legislation. James Stephen Junior in advising Under-Secretary Horton presumed that the danger that powers to award divorces might be abused was the chief reason for their being withheld from most of the Colonies: "otherwise it might seem difficult to assign any good reason why the parties should be indissolubly united, notwithstanding the most aggravated case of adultery which can be supposed, merely because they reside in a distant Colony". In Sydney, Attorney-General Saxo Bannister in submitting a number of questions to Earl Bathurst on the operation of the Colonial laws enquired whether the Court acquired jurisdiction "under the ancient principle of Law that Justice shall not fail by the failure of one of many Courts", or whether enabling legislation was to be awaited. "The necessity of a Court for the relief of Wives is very great", he said, "Perhaps Legislation will do but little to remedy an evil, which is caused by a physical fact, the disproportion of the Sexes. Individual misery would however sometimes be assuaged by a Court of Almonry, and individual depravity be exposed by a Court of Coercion upon gross incontinencies. The subject is not an easy one. I have been applied to very frequently to prefer informations in cases of extreme Villainy, and could only find a doubtful jurisdiction for a Common Law Misdemeanour". Earl Bathurst's reply, quoted above, was prepared in substance by Stephen, who had obviously been instructed in unequivocal terms since expressing his own
view of colonial divorce. His advice was as follows: "It is ... asked whether, as long as no ecclesiastical Court exists for the punishment of incontinency, or for allowing a separate maintenance and alimony to married women, the Supreme Court does not acquire a jurisdiction for those purposes. It is difficult to understand how such a view of the Subject should be seriously maintained. The Supreme Court has no jurisdiction at all, except by the Act of Parliament, and the Charter of Justice; in both of which the extent of its powers in ecclesiastical causes is distinctly defined. There is no reference, in either of these Instruments, to matrimonial causes, or to the Offences which Spiritual Courts in England visit with ecclesiastical censures. This subject was discussed when the Act and Charter were framed, and the omission was not accidental but intentional. It can be supplied (if it be fit to supply it) by no other authority than that of Parliament".

On the same basis, the Letters Patent constituting the Colony an Archdeaconry within the Diocese of Calcutta expressly prevented Archdeacon Scott or his successors from exercising "any Authority or Jurisdiction whatsoever in causes ... Matrimonial". So that the matter might be beyond question, the very detailed instructions given to Governor Darling directed "that you do not, upon any pretence whatsoever, propose the Enactment of any Law or Ordinance ... for the divorce of persons joined together in Holy Matrimony". There the matter rested for many years.

In 1853 an attempt was made to procure a divorce by the only possible method in the Colony - a private Act of Parliament. W. C. Wentworth introduced a Bill to annul the marriage of Patrick Mehan and Emmeline Blake. The Council immediately asked the Judges whether such an enactment was within its competence, the Judges asserted that it was, so the Council passed the Bill. There the matter ended for, although the Bill was submitted for Royal assent, the British Government saw to it
that Her Majesty was not troubled by having to consider the measure.

It is a little ironical to discover that Lord Stanley in 1858 sent a despatch in circular form to all colonial Governors transmitting a copy of the Imperial Act "to amend the law relating to Divorce and Matrimonial Causes in England" - 20 & 21 Vic. c. 85. On the grounds that uniform legislation in all Colonies was desirable, the letter declared: "It is ... the wish of Her Majesty's Government that you should consult your Council as to the expediency of at once introducing a measure which shall incorporate, as nearly as the circumstances of the Colony will admit, the provisions of the Act recently passed in England". Governor Denison, on receiving his copy, referred the matter to the Executive Council of New South Wales which, after debate "shelved" the measure because of a then impending dissolution of Parliament. Evidently the proposal encountered vigorous opposition from Martin (then the Attorney-General) on the surprising ground that the Imperial statute was not working satisfactorily in England. A question asked on the subject in the Legislative Council in 1859 received the prophetic reply "that this was one of the subjects that would come directly under the principle of Federation; and that some action had already been taken upon it in the Colony of Victoria, where a Committee of the Legislature had prepared the draft of a Bill, which had been sent up here; this Government, however, did not intend to take any immediate steps in the matter".

The want of any adequate law having thus been brought to public attention, moves were soon made to bring down legislation.

Only a few years later the Parliament of New South Wales was considering the first Bill to be submitted to regulate Matrimonial Causes in the Colony. On Friday, 6th June, 1862, Mr. Holroyd presented "A Bill to amend the Law relating to Divorce
and Matrimonial Causes in New South Wales". It was read twice
but became lost in Committee. It was a surprisingly comprehensive
measure, reciting that it was expedient "to confer upon the
Supreme Court of New South Wales jurisdiction in matters matrimo­
nal and also authority in certain cases to decree the dissolution
of a Marriage". This was in no true sense a proposed amendment of
any existing statute, but a constitution of a jurisdiction where
none had existed before. The terms in which the Court was invested
with new powers were these:

2. As soon as this Act shall come
into operation the Court shall possess and exercise jurisdiction
in all causes suits and matters matrimonial except in respect of
Marriage Licenses together with the jurisdiction conferred by this
Act and the said jurisdiction and all powers and authorities by
this Act conferred shall and may be exercised in like manner as
the other powers jurisdictions and authorities given to or vested
in the said Court.

3. No decree shall be made by the said Court for a Divorce
a mensa et thoro but in all cases in which a decree for Divorce
a mensa et thoro might have been pronounced in England according
to the law in force before the passing of the Imperial Act twentieth
and twenty-first Victoria chapter eighty-five the Court may pronounce
a decree for judicial separation.

4. Any Judge of the Court shall have full authority either alone
or with one or more of the other Judges of the Court to hear and
determine all matters arising therein under this Act except petitions
for dissolving or annulling Marriage and applications for new
trials of questions or issues before a Jury bills of exceptions
special verdicts and special cases and except as aforesaid may
exercise all the powers and authority of the Court under this Act".

The Bill went on to provide that all petitions for
dissolution or nullity of marriage were to be heard by the Full
Court, and that applications could be made by husband or wife on
petition for restitution of conjugal rights. Judicial separation would be ordered on the application of either party on the grounds of adultery, cruelty or desertion without cause for two years and upwards. The Bill also contemplated provisions for the payment of alimony and for the making of orders for the custody and maintenance of children. The law to be applied was governed by section 8:

"In all suits and proceedings other than proceedings to dissolve any Marriage the Court shall proceed and act and give relief on principles and rules which in the opinion of the Court shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts of England before the passing of the said recited Imperial Act acted and gave relief but subject to the provisions herein contained and to the rules and orders under this Act".

An immediate public response was felt to the Bill, evident at first in the presentation to the Legislative Assembly of a large number of petitions from ministers of religion and their congregations, objecting to the measure on religious grounds, and complaining of the likely "deplorable injury to public morality, and to the permanency of those family relations which lie at the base of all Christian civilization". As against this, some citizens of Sydney petitioned the House to proceed with the measure as a potential benefit to the community at large. "Your Petitioners beg most respectfully to state, that there are many persons, at present residents of this Colony, to whom the adoption of the Bill would have been a most beneficial measure, as by that means they would have been enabled to free themselves from the abject misery and degradation they at present have to encounter".

Summarizing the position, the Sydney Morning Herald stated in an editorial: "The Divorce Bill before the Legislature at the present moment has called forth strong expressions of sympathy and dissent, such as we must always expect when questions are
involved that trench upon divided religious opinions. We do not think, reviewing the whole question, that we could successfully resist a bill for relief in certain cases, but we have many misgivings as to its ultimate effect, and as to the proportion of good and evil which would result from such a law - and should be glad to see its operation as limited as possible.

The Bill did not come into operation at all, so the need to limit it did not arise. The failure seems to have inspired David Buchanan to take up the cause of the Bill which he did, in spite of the Prime Minister's withdrawal of support, with ultimately successful results. His first attempt in 1862 was a Bill to amend the law relating to Divorce and Matrimonial Causes which was read once, qualifying instantly for a number of public petitions of protest, but withdrawn and discharged on the second reading. In July of the following year he moved for leave to introduce a Bill of identical terms which was also read once but discharged before the second reading. In 1870 he introduced the same Bill again when it was passed by the Assembly and sent to the Council where it was not passed, the Council postponing its second reading for six months at the expiration of which time it was "inadvertently not set down amongst the Orders of the Day.

The usual petitions followed - dozens in identical terms - protesting "that judicial separations a mensa et thoro would provide all relief that can reasonably be asked for by persons who are themselves innocent; that no consideration for the interests of guilty persons should have weight against the interests of society at large; and that to give such liberty as this Bill contemplates to divorced persons to intermarry with the partners of their crime, would be directly to stimulate the very evil which the Legislature is attempting to alleviate and to sanction the crime which no doubt it desires to condemn". The petitions received short treatment from Buchanan himself, as may
be gathered from his speech on the second reading of this Bill when he said of a group of petitions received from the Roman Catholic community: "I say boldly that those popish petitions are worth nothing. They emanate from poor, deluded, priest-ridden slaves who have basely surrendered their thoughts, their minds, their independence into the hands of men who live by deluding them and whose system is built upon the ruins of human liberty, the wilful and systematic falsification of God's Word, and the degradation and debasement of human nature itself ... I know there will be a great deal of sentimental trash talked about the danger of passing such a Bill as this. I can almost hear the rush of that fearful tide of misrepresentation which is sure to set in when such a measure as the one we are now discussing comes on the carpet". This address is reported to have occasioned loud cheers from both sides of the House.

In March 1871 Buchanan moved:

"(1) That, in the opinion of this House, the law of this country in reference to Divorce should be assimilated to the law of England and the adjacent Colonies, with the exception of that part of the English Divorce Law which denies to the woman equal rights to those of the man.

(2) That the present state of the law of this country, in denying adequate relief, remedy or redress in cases of infidelity to the marriage vow, is inconsistent with justice, and has necessitated application to this House for the remedy by private Bill which should be obtainable on application to the Courts of Law.

(3) That under such circumstances this House is of opinion that the Government should introduce a Bill, either this Session or early next, or at their convenience, to assimilate the law of this country in the matter of Divorce to that of England, with the important exception above stated". This was rejected by the Legislative Assembly, but his earlier Bill to amend the law
relating to Divorce and Matrimonial Causes when again put to the Assembly in that year was passed and referred to the Council. It was not returned and neither was an identical Bill passed by the Assembly in 1872. An attempt by Mr. Stewart to bring in a Bill to authorize Matrimonial Divorce in certain cases reached a second reading, but expired on the counting out of the House. At Buchanan's seventh attempt, a Bill introduced in November, 1872, "to confer jurisdiction on the Supreme Court in Divorce and Matrimonial Causes" was returned by the Council with some amendments and Royal Assent was reported in March, 1873.

As the Matrimonial Causes Act this measure became the foundation of the Supreme Court's jurisdiction in Divorce. The Act, also known as 36 Vic. No. 9, conferred jurisdiction in respect of "matters matrimonial" and enabled the Court to decree dissolution of marriages in "certain cases". The Court's power extended to divorces a mensa et thoro, suits of nullity or for dissolution of marriage, suits for restitution of conjugal rights or for jactitation and "in all causes suits and matters matrimonial (except in respect of marriage licenses)". In cases where a divorce a mensa et thoro would previously have been pronounced in England the colonial Court was enabled to pronounce a decree for judicial separation which had the same effect as a decree for a divorce a mensa et thoro prior to 21 Vic. c. 85. The Chief Justice or one of the Puisne Judges was to exercise the jurisdiction, with provision for an alternate Judge to represent him during his absence or illness. A right of appeal to three or more of the Judges was reserved by section 5 of the Act. Provision was also made for jury trial of questions of fact and general or special verdicts could be returned with liberty to the parties to apply for a new trial. In all suits and proceedings other than for dissolution the Court was to apply as nearly as possible the principles and rules of the Ecclesiastical Courts in England effective before the passing of 21 Vic. c. 85.
Procedure in the Court was subject to rules and regulations which the Court itself was authorized by sections 43 and 48 to make and lay before Parliament. However, it was prescribed in the Act that oral evidence in open Court was to be used as far as possible and that where affidavit evidence was put in, cross-examination and re-examination on it was to be allowed. In cases of a wife's petition for judicial separation on grounds of adultery, cruelty or desertion, husband and wife alike were competent and compellable to give evidence. Commissions could, by section 12, be granted for the taking of evidence of witnesses out of the jurisdiction or prevented from attending Court by illness or other special circumstances.

The constitution of the Court allowed of questions of fact being tried by special or common jury. It was not mandatory for the Court to direct jury trial but, if it did so, the question had to be reduced to writing. "The reason", said Darley, CJ., in Jones v. Jones, "is that in Divorce there are no pleadings, in the proper sense of the word, and the different questions of fact to be determined have to be gathered from the statements in the petition and answer; accordingly, it is deemed necessary that the exact questions in issue should be distinctly stated in writing, in order that the Court or the jury may know what they are trying".

Applications to the Court were by petition with supporting affidavit of verification and stating that there was no connivance or collusion between the parties. The Court was to direct the manner in which service was to be effected and could entirely dispense with service in its discretion. The petitioner could be examined or cross-examined on oath. The Court had final authority in the awarding of costs, section 41 expressly declaring that there could not be any appeal on the subject of costs only. The enforcement of the decrees and orders of the Court was to correspond to the practice in the Equity Court.
Section 14, which rendered the parties competent to give evidence in any legal proceedings under the Act led to an interesting technical construction in Jones v. Jones. It was intended that the Matrimonial Causes Act should repeal that part of the Evidence Act of 1858 (22 Vic. No. 7) which provided that no spouse should be competent or compellable to disclose any communication made by the other spouse during marriage. Inadvertently, the Matrimonial Causes Act repealed part of 22 Vic. No. 10, instead of 22 Vic. No. 7, and it was submitted that the Evidence Act remained in force so that the Matrimonial Causes Act, being pro tanto inconsistent with it, must yield. Holding that the legislature had, by necessary intendment, repealed No. 7 of 22 Victoria, rather than No. 10, Windeyer, J., observed that: "during all my experience, as a practitioner and as a Judge in the Divorce Court, I can hardly remember a case in which evidence of this kind has not been given, and I cannot find that such an objection was taken or mentioned during the time that the Court was presided over by his Honour Sir W. Manning. For seven years, during which I have presided, such an objection has never been taken, and the uniform practice of the Court, as far as I can ascertain, is to admit evidence of that kind. There is hardly a case in which such evidence is not given ... If there is anything in the objection taken, the Act will become unworkable".

Judicial separation was dealt with in a scattered fashion in the Act. Section 15 prescribed as the grounds, adultery, cruelty or desertion for two years and upwards without cause. Either husband or wife could petition, but the making of a decree in the absence of either party could enable that party to seek a reversal of the decree on showing, in the case of desertion, that the alleged offence had a reasonable explanation. From the order of separation the wife was in the same position as a feme sole with regard to the acquisition and disposal of property and the
devolution of it on her death. This also applied to the wife's capacities to contract and to sue and be sued.

Either husband or wife was enabled by section 16 to petition for restitution of conjugal rights which the Court could grant "on being satisfied of the truth of the allegations" with power to award alimony where it considered it appropriate.

Section 22 enabled a husband to present a petition for dissolution because of his wife's adultery. A wife was accorded that right on the grounds that her husband had been guilty of incestuous adultery, bigamy with adultery, rape, sodomy, bestiality, adultery with or without desertion or such cruelty as would have founded an order for divorce a mensa et thoro. Where adultery was alleged, the adulterer was to be joined as co-respondent and the Court was to take special care in satisfying itself that there had been no connivance or collusion. If otherwise satisfied with the petitioner's proof, the Court could, pursuant to section 27, order the dissolution of the marriage by decree nisi in the first instance not to be made absolute for a period of at least six months unless the Court should otherwise order. Damages could be claimed from an adulterer by section 30 at the suit of a husband.

Relief in the form of alimony and orders for the custody of children was included in the Act. Permanent alimony or alimony pendente lite was contemplated by section 29, the procedure being by deed or other approved instrument. Alimony could be paid to a wife directly or to a trustee on her behalf. Before final decree, the Court was empowered by section 33 to make provision for the custody, maintenance and education of children of a disputed marriage. After such final decree, a permanent order on special application for the purpose could be made. If the ground of divorce were the adultery of a wife, she was enabled by the Act to settle her separate property for the benefit of the innocent
party and the children of the marriage.

On dissolution of a marriage, section 46 prescribed that, provided the time for appeal had elapsed, the respective parties were to be at liberty to marry again as if the original marriage had been dissolved by death.

The administration of the Act was left to the Divorce Judge. "I was appointed the first Judge in the Divorce Court", said Hargrave, J., in *Ex parte Shepherd*, "and on me devolved the burden of framing rules and regulations for the conduct of the business under that Act. The rules were framed with much care, and after some little trouble, by me, together with the able assistance of the late Mr. Robert H. Owen. As the rules now stand they are condensed from those framed by Lord Penzance under the English Act, and from those in force in the neighbouring Colony of Victoria".

In an attempt to widen the provisions of the statute, Buchanan proposed in 1873, 1874 and 1875 a *Matrimonial Causes Act Amendment Bill*. This was eventually returned by the Council but the Royal Assent was refused in England.

Certain proof of the rigid control which the Imperial Legislature continued to wield over this branch of the law is afforded in the disallowance of an amending Act, 40 Vic. No. 21 in 1878. This measure was called the *Matrimonial Causes Act Amendment Bill* and was based on the proposals of Buchanan a few years before. It had been reserved in 1877. It was simply intended to equate the rights of men and women in respect of divorce and particularly to allow a wife to petition for dissolution of marriage on the grounds of her husband's adultery.

In 1878 a short amending statute was passed as 42 Vic. No. 3. This repealed the provisions of the principal Act whereby no appeal on the subject of costs only could be heard. It further prescribed that when appeals were brought solely on
the question of costs, no security would be required from the appellant.

In 1881 another short Act, styled the "Matrimonial Causes Act Amendment Act" was reserved for approval. Its intention also was to allow equal rights to women as to men in connexion with divorce. Thus, a wife was enabled to present a petition for dissolution on the grounds of her husband's adultery, achieving what the British Government had refused in recommending the disallowance of 40 Vic. No. 21. Speaking of the 1881 statute, the compilers of Mackenzie's Practice in Divorce said: "The Act ... gave the wife a right to divorce on the ground of her husband's adultery only, a concession which was not granted by English law until 1923, and which formed the first striking difference between the law of England and that of this State. This Act made express and deliberate provision for proof of the husband's domicile in New South Wales at the time of the institution of the suit (which) ... seemed to lend some colour to the argument that it was intended to give the Court jurisdiction under the original Act in cases where the parties had their bona fide matrimonial residence in this State. That such is not the law, however, is shown by the decision in the case Webb v. Webb; and the provision would, therefore, seem to have been unnecessary, as domicile had to be proved in all such cases under the original Act, in which there was no such provision".

The Matrimonial Causes Act Amendment Act of 1884 was formally styled the 48 Vic. No. 3. It enabled the Court upon decreeing dissolution against a husband to order him to pay maintenance to his wife by weekly or monthly instalments if it appeared that he was unable to provide security for payment in a lump sum; it extended the provisions of section 28 of the principal Act relating to the avoiding of suits for nullity on the ground of collusion; and it gave the Court a discretion in awarding
costs to the Crown Solicitor when intervening or showing cause against a decree nisi.

In all other respects the Act related to the trial of jury issues as it had been demonstrated in Horwitz v. Horwitz that the previous law had insufficient machinery for striking a jury where damages were claimed. In that case a husband petitioned for divorce on the ground of his wife's adultery. The names of twenty four jurors were called in open Court and written down, from which list the petitioner and respondent each struck out six. The co-respondent claimed to be entitled to strike out six names but, because this would render it physically impossible to empanel a jury of twelve, his claim was rejected. He was subsequently rendered liable in heavy damages by the jury, wherupon he applied for a Rule Nisi for a new trial on the grounds that the damages were excessive, and that he was entitled to take part in striking the jury. Considering section 30 of the Divorce Act, 36 Vic. No. 8, the Court made the Rule absolute for a new trial. The Chief Justice found the construction of the section difficult, but he adduced that as trial was to be in the same manner as for actions for criminal conversation, a jury should be empanelled under the Jury Act, 11 Vic. No. 20. His Honour concluded: "If a separate action had to be brought against this co-respondent, he would, as defendant, have had an opportunity of striking off six names. He would not only have had his right of challenge for cause, as everybody else has, but also his peremptory right of challenge by striking out these six names. In this case he was deprived of that right. That being so, it appears to me that there has been a mis-trial". As a result it would be impossible to proceed under the existing law because a jury could not be struck unless the co-respondent in an action for damages waived his right of challenge.

The changes consequently effected by 48 Vic. No. 3 were
Forty eight special jurors were to be summoned in the case of an action for damages against a co-respondent. Where there were several co-respondents the number of jurors to be summoned was to be increased to allow of all parties striking off six names. The Court officer would then draw names until such number had been attained as would allow of the empanelling of a jury of twelve. The list of jurors was to be delivered to petitioner, respondent and co-respondent or co-respondents in turn who were each to strike off six names and the remaining twelve names or, if more than twelve, those twelve first appearing, constituted the jury. Otherwise the governing law and practice was to follow that operating at the nisi prius sittings of the Supreme Court. As a saving clause it was enacted that verdicts of juries empanelled prior to the passing of the Act were deemed not to be invalidated, reversed or otherwise prejudicially affected by the passing of the Act. The opportunity was also taken to declare that if in cases under the Divorce Act a jury could not reach unanimous agreement within six hours, a three-fourths majority verdict could be taken by consent, otherwise the jury would be discharged on failing to reach agreement within twelve hours.

Mr. Justice Hargrave, who prepared the Bill for the amending Act, had also included a provision extending the time within which desertion was deemed to have occurred to three years. Realizing, however, that this would cause the whole Bill to be reserved for Royal assent, the Judge arranged for the draft clause relating to desertion to be withdrawn by the Legislative Council in committee.

There followed a short Act in 1886 - 50 Vic. No. 12 - which recited that doubts had arisen as to the rights of parties to have contested matters of fact tried by a jury in Matrimonial Causes. The Act went on to declare that such rights were to apply in cases where a decree was sought for the dissolution of
marriage.

Just as Royal Assent was given in 1886 to 50 Vic. No. 12, a simultaneous move was made for even wider relief by the introduction in the Legislative Assembly of a Divorce Extension Bill. It was the same Bill which six years later was to be confirmed as 55 Vic. No. 37. Perhaps the most remarkable circumstance of the tussle which ensued between Church and State during those six years was the championship of the Bill by the elderly Sir Alfred Stephen, former Chief Justice and a sitting member of the Legislative Council. The same Sir Alfred almost twenty years before had outspokenly criticized David Buchanan's Divorce Bill (enacted as 42 Vic. No. 3) and, as Buchanan himself remarked, it was curious that the Chief Justice who had so vigorously condemned a Divorce law with only one ground for divorce, should take up the cause of a later enactment having several grounds. Sir Alfred Stephen spared no energy in pressing his cause: he published pamphlets, addressed public meetings, rallied the support of influential politicians and maintained a stream of press publicity which at length won success. The achievement was the more remarkable as the great majority of the Colony's religious denominations and their spokesmen denounced the proposed law. The conflict between civil and spiritual leaders deserves a brief review.

The Churches' arguments against the Bill were frequently as technical as they were various. A Melbourne newspaper of May, 1887, made this cursory summary of the objections raised: "Cardinal Moran, in conformity with the Catholic doctrine, holds that the marriage tie is absolutely indissoluble. Bishop Barry is equally emphatic in maintaining that divorce is permissible for one reason only. The Presbyterians go a step further, claiming the authority of the Apostle to the Gentiles; while among a dozen
laymen there are as many different minds". On the one hand Dean William Macquarie Cowper declaimed from the pulpit of St. Andrew's Cathedral: "The only ground then which can be adduced for departing from the law of Christ is that of expediency; or what men think will be conducive to the good of society. And those who are now striving in this Colony to extend the law of Divorce claim that they are actuated by the most benevolent and compassionate motives. We have no reason to doubt that some who are most prominent in the matter are. They have had experience of so much suffering, oppression and cruelty, that they are anxious by this means to afford relief. But is it not a dangerous thing to attempt to afford relief by legislation which is contrary to the teaching of our Divine Master? Are we wiser than He? Can we judge better than He could what is best for mankind?" On the other hand Canon Selwyn repeated his unavailing efforts of 1870 in organizing a large number of petitions of objection from Protestants in the following terms: "Your Petitioners observe with great sorrow and alarm that by the Bill now before Your Honourable House, provision is being made by which not only Divorce may become possible for causes other than those now allowed, but that the remarriage of the Divorced persons, the guilty as well as the innocent, is provided for and encouraged. It is this part of the Bill which your Petitioners look upon with the greatest repugnance, because it seems evident that if a husband or wife has been guilty of grave breaches of the marriage relation such person ought not to be set at liberty by law, to repeat their offence, and be encouraged to obtain fresh victims, upon whom their licentiousness may be exercised. Your Petitioners also desire with the greatest urgency, to draw the attention of Your Honourable House to the declaration of the Lord Jesus Christ, that "whosoever marrieth her that is put away committeth adultery". Any legislation therefore, that provides for the remarriage of one put away is a direct incentive
to a breach of the Commandment, "Thou shalt not commit adultery".

Public opinion was clearly in favour of extensions to the Divorce Law and the clerics failed in their strenuous appeals and decrees because they were themselves so divided on selecting the appropriate remedy. The Argus of Melbourne made this comment on one such brush between the Churches of England and Scotland: "The ecclesiastical world of Sydney, usually somewhat torpid, has been suddenly fluttered by the introduction of Sir Alfred Stephen's bill for amending the law of divorce. Bishop Barry denounced the proposal from the pulpit, and hastily summoned a conference of clergy and laymen to concert measures against the dangerous innovator who is willing to annul the marriage tie in confirmed cases of desertion, drunkenness and crime. According to the bishop's interpretation of Scripture there is only one cause for which divorce ought to be granted, and to go beyond that limit is to precipitate society into perdition. But the fervid denunciation of the Anglican prelate has not been allowed to pass unchallenged. Doctor Steel, a Presbyterian of renown and unquestioned orthodoxy, comes to the rescue of the bill which has incurred the episcopal censure, and boldly contradicts the bishop's theology". The Sydney Morning Herald somewhat severely reduced the differences of opinion to this formula: "We must either take a theological settlement of this question or not; if we are to do it, then we must abide by somebody's interpretation. But whose interpretation is it to be? Cardinal Moran says "Take mine", the Bishop of Sydney says "Take mine", Dr. Steel says "Take mine", and the President of the Baptist Union says "Take mine". Sir Alfred Stephen shakes his head at them all, and says that amid this diversity of interpretation he cannot accept any one of them as sufficient authority, and therefore, as a statesman, he rests his case on the ground of
Sir Alfred Stephen in his pamphlet on Australian Divorce Bills pointed out that the remedy of separation acknowledged by the canonical law was in truth divorce, though called by a different name. "Where", he asked, "since these are questions not of expediency or compromise, but of lawfulness in the sight of God, where in Holy Writ is found the warrant for this evasion? We answer for you it cannot be found there". He further relied on the theology, inter alia, of Dr. Zachary Barry, that by the authority of 1 Corinthians, VI, 16, not even separation should be countenanced by the clerics. To this he coupled a reproach to "bishop and dean, and all the conservators of the present cruelty, (who) acquiesce cheerfully in "permanent putting asunder", and allow of married persons not cohabiting; an abomination never even thought of, or hinted as even possible in Scripture".

"It is wonderful to reflect", said the Editor of the Melbourne Age after summarizing the public controversy aroused by the Bill, "that this eager and widespread conflict has been engendered by a very simple reform in the law, proposed by the oldest, most experienced, most respected, and usually most cautious, politician the neighbouring colony possesses".

Of greater interest to the legal and political historian is the chapter of misadventures which the Bill encountered in the Parliaments of the Colony and in England. One cannot but admire the resolute persistence of Stephen who, time after time, reformed his campaign as he had in turn to overcome the strongest imaginable pressures from the Church, from the unrelenting countermands of the English Government and from colonial politicians who either opposed or did not care about the measure.

When the Bill was first introduced in 1886 in the Legislative
Council it was carried, but on being referred back to the Assembly was lost in Committee for want of a quorum. Undaunted, Stephen had the same measure brought forward in the following year and it passed with a little difficulty through both Houses. "The debate was not free from a desire on the part of some members to shelve the bill by means of a count-out", said the Sydney Morning Herald, "but it was satisfactory to see that a majority were opposed to this, and that the bill was carried to a division. The numbers in the division should be some indication to those who are opposed to the bill that the measure is not considered to be the dangerous one to the community some persons have represented it to be". Paradoxically the Bill was supported in the Assembly but found its opposition this time in the Council where Knox, on the third reading, proposed the deletion from the measure of all the words after the word "that" with a view to substituting "this day six months" for "now" in the text. The supporters of the Bill allowed it to be counted out, but it was subsequently resubmitted and passed.

The Bill was obliged to be reserved for Royal assent, but the Queen was advised not to give her consent for three basic reasons. First, that the Bill was in general principle at variance with the established Divorce law of the Empire; secondly that it was considered that the Bill could be read in a manner allowing of any British subject's obtaining a divorce in New South Wales regardless of domicile; and, thirdly, that a mandate should be sought from the colonists in general election before approval could be considered. "I have only to repeat", the Secretary of State wrote to the Governor, "that her Majesty's Government would strongly urge upon your advisers the inexpediency of enlarging the grounds upon which a divorce can be obtained, until it has been fully established that the general feeling of the colony is decidedly in favour of the change, and until after communication
with the other Australian colonies it is made clear that they are prepared to adopt a similar alteration to their laws".

The exercise of the prerogative in this fashion served temporarily to unite the Houses of the Parliament of New South Wales and when an identical Bill to that of 1887 was introduced by Neild in the lower House in 1888, the Council gave every indication of support. However, they became preoccupied with a virtual vote of censure against the Colonial Office which was carried by a large majority, but the principal Bill was delayed long enough to be lost by dissolution. When again introduced it was "run over by the prorogation and killed". Exactly the same befell it in 1889.

Introduced again in the Council on the first day of the 1890 session, the Bill was referred to the Assembly for a second reading and there failed to secure a quorum despite the appeal of Parkes to the members that "they were bound by every sense they had of the value of the right of self-government to send this bill back as a protest against the interference of the Imperial Government even once, let alone time after time". Summarizing the history of the measure at that period, a contemporary newspaper observed: "The Bill has passed through the Legislative Council three times, and has also passed through the Assembly three times. It has been before Parliament in each of five successive years. It has passed through the Assembly in a session following a general election, and it has never yet been defeated in either house by an adverse vote".

After all of these vicissitudes, the Bill at last became law in 1892. The Assembly carried its second reading on 8th February by 36 to 20 votes and in the following week the third reading passed by 38 to 18 votes. By 25th February the Council read the Bill a second time on a narrower margin of 16 to 12 votes and a third time on 15th March by 18 to 7 votes. Royal assent was this time obtained on 9th May, but even then the matter was delayed
through omission to proclaim the allowance of the Act in the Government Gazette. A notification to rectify this was much delayed and the Act did not take effect until 30th August, 1892.

For a measure which had been so hardly won, the Act was short enough. It contained only seven sections of which the first was the most substantial. Any married person having been domiciled in the Colony for three years could present a petition for the dissolution of his or her marriage or for judicial separation on any one or more of four grounds. The grounds were continuous desertion for three years and upwards; habitual drunkenness for three years and upwards and coupled in the case of a husband with leaving his wife unsupported or being guilty of cruelty to her or in the case of a wife with neglecting or being unable to discharge her domestic duties; the imprisonment of the respondent for prescribed lengths of time on being sentenced for the commission of some crime; the conviction of the respondent within one year of the presentation of the petition for the attempted murder of the petitioner, or assault and cruel beatings.

The remainder of the Act was of trifling importance. So far as they could consistently stand, the provisions of the Matrimonial Causes Act of 1873 and its amendments were to remain in operation and, in particular, the previous rights of appeal and jury trial were preserved. The Court's power under the earlier legislation to make alimony orders in respect of a wife's property under a decree for divorce, was extended also to decrees on suits for judicial separation.

The Court had jurisdiction to dismiss a petition where it considered that the petitioner's own habits had contributed to the wrong complained of. Otherwise, it was to pronounce a decree on being satisfied of the proof of the petitioner's case. If it was not satisfied that the marriage should be dissolved, but
accepted a case for judicial separation it could order accordingly. The Court was given express authority by section 4 to allow proceedings in forma pauperis and to prohibit the publication of evidence. By section 5 the Court could try issues before a Judge on circuit.

The Matrimonial Causes Procedure Amendment Act of 1893 was more completely styled "An Act to amend the Law and Practice in the Matrimonial and Divorce Jurisdiction of the Supreme Court, and to validate certain proceedings therein". It was also called 56 Vic. No. 36.

By section 2 a husband petitioning for dissolution of marriage or judicial separation on the ground of his wife's adultery could claim no damages in respect of such offence committed more than three years before the filing of the petition. Section 3 enabled a respondent to apply to have a decree nisi pronounced absolute if the petitioner failed to do so at the expiration of the prescribed period. Provision was made by section 4 for deeds or documents fraudulently prepared by respondents to defeat petitioners to be set aside on such terms as the Court might consider proper. Likewise sales of real estate considered to be made with the intention of defeating a petitioner's claim to costs or alimony could be set aside. The Court was empowered to award costs to parties intervening or showing cause against a decree nisi and, in any undefended case could give the wife custody of the children on proof that the respondent had notice of the petitioner's intention to apply for a rule absolute. At any time before final decree on an application for restitution of conjugal rights (or after such decree, if the respondent failed to comply) the Court had further power to make orders for the custody, maintenance and education of children of the marriage. By section 13, a husband applying for restitution of conjugal rights could, on establishing to the Court's satisfaction that the wife had separate property, obtain an order for the settlement
of the property for the benefit of the husband and the children of the marriage.

The Act had new provisions concerning the periodical payment of alimony or maintenance. By section 12 decrees for restitution were no longer to be enforced by attachment. However, the Court could order a respondent husband to make periodical payments enforceable in the same manner as for orders for alimony in suits for judicial separation. Orders for periodical payments could be varied or modified by the Court in its discretion pursuant to section 14.

Sections 12 to 16 of the Act were based on the Imperial statute 47 & 48 Vic. c. 68. One of its most significant measures was that embodied in section 15 of the local law, whereby non-compliance with a decree for restitution of conjugal rights was deemed to be desertion. This applied even though three years had not elapsed since the failure to comply.

A few procedural alterations were made by the Act. Section 9 enabled the parties to suits and their spouses to be admissible witnesses. Section 11 conferred on the Registrar of the Court power to tax costs, settle issues and deeds, extend time in undefended suits, allow proceedings to be carried on in forma pauperis, examine witnesses in alimony applications and generally to discharge in the Divorce Jurisdiction other necessary duties which, at Common Law would be the preserve of the Prothonotary. Section 17 enabled the Judge exercising the jurisdiction to refer matters of law to the Full Court for decision, if he thought fit.

By the consolidating Act of 1899 it was declared that "there shall be vested in the Supreme Court jurisdiction in respect of divorces a mensa et thoro suits of nullity of marriage suits for dissolution of marriage suits for restitution of conjugal rights suits for jactitation of marriage and in all causes suits and matters matrimonial (except in respect of marriage licences)".
This jurisdiction was to be the matrimonial causes jurisdiction of the Supreme Court and all the powers and authorities conferred by the Act were to be exercised in the same way as were the other powers jurisdictions and authorities given to or vested in the Court. The jurisdiction was to be exercised by a Judge appointed for that purpose or by any Judge acting in his place or having co-ordinate jurisdiction with him, the decrees of such Judges having equal validity to decrees of the Full Court. In all suits and proceedings, other than those for dissolution, the Court was empowered to act and give relief as closely as possible in accordance with the practice and rules of the English Ecclesiastical Courts prior to the passing of 20 & 21 Vic. c. 85. However, as was pointed out by Davidson, J., in C v. C, this section of the 1899 Act did not "necessitate the adoption of any practice of the Ecclesiastical Courts unless in the opinion of this Court such practice is as nearly as may be conformable to the principles and rules on which those Courts acted".
NOTES

1. Dated respectively 2nd. April, 1787 and 4th. February, 1814.
2. HRA I/XII, 56.
3. HRA IV/I, 63.
4. Id. 374.
5. Id. 861.
6. Id. 596.
7. HRA I/XI, 497.
8. HRA IV/I, 616.
9. Id. 548.
10. HRA I/XII, 112.
15. From the text in the Parliamentary Library. I am under special obligation to Mr. David Barkla, B.A., of that Library for his assistance in tracing copies of this and other obsolete Bills for my reference.
18. 28th. June, 1862, 4.
22. Collection of Miscellaneous Speeches and Papers, 7 (Mitchell Library 308/F14).
24. Section 2.
26. Section 7.
27. (1898) 19 NSWR D, 12.
28. At 18.
29. (1886) 7 NSWR D, 9.
30. "An Act for the prevention of scab in Sheep".
31. At 11.
32. (1880) 1 NSWR D, 1.
33. At 4.
34. V & P 1873-1874 (1).
35. xl.
36. 1 SR D, 32; 18 WN 260.
37. Section 9.
38. Section 10.
39. 5 NSWR D, 1.
40. Martin, CJ., Windeyer and Innes, JJ.
41. At 4.
42. Section 3.
43. Section 4.
44. Section 5.
45. Section 7.
46. Section 11.
47. Alfred Stephen's Book of Press Cuttings re Divorce Extension Bill (Mitchell Library Q347.6/N), 16.
48. Sydney Morning Herald, 21st March, 1888 - "Parkes ... continuously voted against it, as did also Sir Alfred Stephen, who opposed it from the first". The two statesmen evidently changed their minds simultaneously, Stephen writing to Parkes: "I entreat your aid, all-powerful - if given, in the getting of a hearing for the Divorce Bill ... I know what yr. views are. If not favorable, I shd not intrude mine". Parkes Correspondence "S" 116-117 (Mitchell Library A928).
51. Petition organized amongst Dioceses of the Church of England and amongst other Protestant denominations by Canon Selwyn (Mitchell Library Q193.1/P).
52. Daily Telegraph, 26th October, 1887.
54. 29th. April, 1886.
55. (1888) (Mitchell Library 173.1/S).
56. Id. xv.
57. Id. 13.
58. 4th. May, 1886.
59. 19th. March, 1887.
60. The Evening News, 23rd. May, 1887.


63. Id. 71.

64. Id. page marked 'E'.

65. Id. 83.

66. Sydney Morning Herald, 6th December, 1890.

67. Alfred Stephen's Book of Press Cuttings, cited supra, 'e'.

68. Sydney Morning Herald, 31st. December, 1892.

69. Section 3.

70. Section 6.

71. Section 2.

72. Section 5.

73. Section 6.

74. Section 8.

75. Section 16.

76. Section 4 (1).

77. Section 4 (2).

78. Section 5.

79. (1939) 56 WN, 185.

80. At 188.
CONCLUSION

Viewed at the close of the nineteenth century, the Supreme Court of 1824 could only be described as having been dismembered. The sole reminder of its plenary authority lay in the direction of appeals from the several jurisdictions to the Banco Court. 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. Further again, if a Judge considered that a case before him, though partly cognisable in his own jurisdiction, ought in substance to have been brought in another jurisdiction, he might refuse relief and force the parties to proceed again in the other jurisdiction. This was often a source of hardship. In the High Court in 1910, Isaacs, J., observed that "in New South Wales, alone of all the Australian States, does there exist the antiquated separation of legal procedure which invites ... technical, expensive and protracted litigation ... which might very easily (lead) to a gross miscarriage of justice".

The injustice may be described as stemming from an assimilation of the word "jurisdiction" to the word "Court". Where statutes in colonial times regulated the constitution of the Supreme Court in its various jurisdictions and the appointment of special Judges to control and exercise those jurisdictions, it was wrongly assumed that new Courts had thereby been created.
The Equity Jurisdiction of the Supreme Court by a type of legal fiction became the Equity Court, the Bankruptcy Jurisdiction became the Bankruptcy Court and so on. With the sanction of long usage this transparent fallacy so secured the concept of a Supreme Court constituted by a number of subordinate Courts that it required the intervention of Parliament to attempt ameliorating the severity of the dismemberment. It is not appropriate here to consider the Supreme Court Procedure Act, 1957, beyond observing that its machinery for allowing the transfer of actions from one jurisdiction of the Court to another in certain cases, in the present submission, adds to the confusion. By regarding the separation of jurisdictions as a separation of Courts the legislature has countenanced the defect it purported to cure.

A legal historian may be excused for shirking the guise of prophet and, in the present case, seeking to foretell whether a Judicature Act system would be of benefit in New South Wales. Suffice to say that, on historical grounds, there seems no necessity for such a change. The Supreme Court has been shown in its constitution always to have been a single Court administering a single law. No legislative change, other than the acquisition of certain State jurisdictions by the Federal Courts, has ever weakened that position, but practice and precedent have been responsible for the perseverance of such a monument of artificiality and oppression.
1. Assuming the appeal was not direct to the Privy Council.

2. Turner v. The New South Wales Mont de Piete Deposit and Investment Co. Limited, (1910) 10 CLR, 539 at 554.

3. See generally, 3 SLR 83 ("Law and Equity in New South Wales after the Supreme Court Procedure Act, 1957", K. S. Jacobs), also, for example, Boag v. Lee (1957) 75 WN, 77, N.S.W. Rutile Mining Co. Pty. Limited v. Eagle Metal and Industrial Products Pty. Limited 1960 SR (NSW) 495.