EQUITY'S CAPACITY FOR CHILD-BEARING – A NEW SOUTH WALES ADDENDUM

THE HON. MR. JUSTICE SUGERMAN *

The General Editor has asked me to supplement, from the peculiarly New South Wales viewpoint, the article which Sir Raymond Evershed, M.R., contributed to the first issue of this Review[1] under the title "Equity is not to be presumed to be past the age of child-bearing". I say from the New South Wales viewpoint with reference rather to the actual institutions of this State than to any particular attitude towards them. Attitudes vary, and I speak in no representative capacity. Civil procedure in New South Wales, in its broad outlines, has largely been arrested at the stage reached in England immediately before the Judicature Act.[2] The particular branch with which this paper is concerned, the relationship between the administration of equitable principles and remedies and the administration of legal principles and remedies, virtually crystallised in 1880 in the form which had been attained in England some twenty years, or thereabouts, previously. It is this state of our institutions, as a fact, which has suggested that some supplementary observations might be of interest.

The Supreme Court has a certain resemblance to the High Court of Justice in point of organisation. A single Court is divided into several jurisdictions with a distribution of business, so far as Common Law and Equity are concerned, broadly similar to that in England. The larger jurisdictions — Common Law, Equity, and Matrimonial Causes — are manned by specialist judges.[3] There is specialisation, too, at the Bar, especially as between common law and equity; it is perhaps not carried so far as in England, and is not accompanied by distinct corporate allegiances or geographical separation, but it exists and to a significant extent.

There are, of course, procedural differences between the jurisdictions much greater than those between the Queen's Bench and Chancery Divisions; and the procedural system as a whole differs in many important respects from the English system. Each jurisdiction has its own, characteristic, procedure. For example, common law pleading, "the most exact, if the most occult, of the sciences"[4], still prevails on the common law side, although, if I am informed correctly, a waning appreciation of its niceties has begun to require a liberal use of the power of amendment. Pleadings in equity, on the other hand, although modelled in many respects on those used under the judicature system, still show traces of their

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1 (1953) 1 *Sydney L.R.* 1.

2 By which term the Supreme Court of Judicature Act, 1873 and 1875 (Eng.), 36 & 37 Vict., c. 66 — 38 & 39 Vict., c. 77, are referred to throughout. It has been found more convenient to refer consistently to these Acts rather than to introduce references to the Supreme Court of Judicature (Consolidation) Act, 1925.

3 But see Supreme Court and Circuit Courts Act, 1900 (N.S.W.), ss. 9 (2), 15, Act No. 35, 1900—Act No. 22, 1948.

4 Pollock & Maitland, *The History of English Law* (2 ed. 1898) 612.

origin; thus, the defendant must still answer the statement of claim on oath, allegation by allegation, and the demurrer and the plea are still available. Again, at common law, trial by jury is the almost universal rule, dispensation with the jury requiring the consent of both parties[5], which is rarely given except for such formal purposes as the entry of a verdict after settlement. Equity judges, on the other hand, are not credited with the guilelessness which the apocryphal story of the waistcoat[6] is said to demonstrate, and commonly try the most difficult questions of fact without the assistance of a jury; the statutory provision which empowers trial by jury[7] is almost a dead letter in practice.

This paper is not concerned with these and similar procedural matters, important as they might be as subjects for separate studies.[8] Beneath the superficial similarity which I have mentioned is a difference of a fundamental nature. Two essential characteristics of the system set up by the Judicature Act are not to be found in the New South Wales system. These are (i) concurrent administration of law and equity as provided for in s. 24, and (ii) express enactment for the prevalence of the rules of equity over the rules of the common law in the event of conflict or variance between them as found in s. 25 (11).[9] In the result, the relationships between the two jurisdictions of the one Court are, substantially, the relationships which existed between the Court of Chancery and the Common Law Courts. It is with this situation and some of its consequences that the present paper, as a supplement to Sir Raymond Evershed's article, is concerned.

When the Supreme Court was set up in 1823 it was constituted as both a "Court of Record", with the powers of the Courts of King's Bench, Common Pleas, and Exchequer, and a "Court of Equity", with the powers of the Lord High Chancellor.[10] This was, in a sense, an anticipation of one essential feature of the Judicature Act, which merged existing Courts into one new Court and conferred upon it their several powers. But, very naturally, no one imagined in 1823 that the newly established Court was intended to exercise its powers in combination, applying law and equity concurrently in each civil cause or matter which should come before it. From the beginning the jurisdictions were kept distinct, although exercised originally by the same Full Court. When, by 1840, the pressure of work had become too great for this arrangement, the equity business was entrusted to a single Judge designated for that purpose.[11] Here was the beginning of the present system whereunder the Equitable Jurisdiction (including company work, and with the Probate and Lunacy Jurisdictions as appendages) is, under the Equity Act, 1901 (N.S.W.), administered by a Chief Judge in Equity and, normally, one other Judge of the Court.

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[5] Supreme Court Procedure Act, 1900 (N.S.W.), s. 3, Act No. 49, 1900—Act No. 42, 1924.

[6] Referred to in Sir Raymond Evershed's article, 1 *Sydney L.R.* 1.

[7] Equity Act 1901 (N.S.W.) s. 51, Act No. 24, 1900—Act No. 41, 1947. The task of the Equity Judge has been aptly described by the learned writer of "A Dream of Fair Judges", repr. (1945) 19 A.L.J. 43:

> "To sift with painful toil discordant tales,
> And o'er dull pleadings pore."

[8] Very little of this kind has been done. See also Evatt, J.'s important study of the Jury System, (1936) A.L.J. (Supplement) 49, and for a useful survey on broad lines see the chapter on "Procedure and Pleading" contributed by Mr. F. C. Hutley, of the New South Wales Bar, to the volume *Australia, No. 2* in the series on the British Commonwealth under the general editorship of Professor Keeton.

[9] The specific provisions of paras. (2)-(8) of s. 25 have been copied in New South Wales—Infants Custody and Settlements Act, 1899-1934 (N.S.W.), s. 10D; Act No. 39, 1899—Acts No. 20, 1934, Conveyancing Act 1919 (N.S.W.), Act No. 6, 1919—Act No. 29, 1943, ss. 9-13; Equity Act, 1901 (N.S.W.), s. 16.

[10] 4 Geo. 5, c. 96; Charter of Justice of Oct. 13, 1823; 9 Geo. 5, c. 83.

[11] 4 Vict. No. 22. Suggestions then and thereafter made for the constitution of an entirely separate Court of Equity were not adopted. For an account of them see Dr. Currey's unpublished thesis "Chapters in the Legal History of New South Wales, 1788-1863".

The common injunction is available as a means of regulating the relationship between the two jurisdictions and securing that the rules of Equity shall prevail. A suitor may still be driven from one side of Queen's Square to the other to obtain complete relief; he may "still get in one room of the Supreme Court an injunction from the Chief Judge in Equity to restrain his opponent from proceeding in the adjoining room to eject him on the strength of a legal title."[12] In practice the common injunction is not sought as frequently as one might be led to expect. To some extent the necessity for it is removed by the statutory provisions which allow pleading on equitable grounds, although that is not completely so.[13] Those provisions have not cut down the Equity Court's jurisdiction to restrain a litigant from proceeding at Common Law, but it may refuse to interfere where the matters relied on can be raised there by a pleading on equitable grounds.[14]

Otherwise the relationship between the two jurisdictions is governed by legislation modelled upon the English legislation of the mid-nineteenth century. Certain provisions of the Common Law Procedure Act, 1854 (Eng.)[15], were adopted in 1857 and are now represented by ss. 95-99 and ss. 176-179 of the Common Law Procedure Act, 1899 (N.S.W.). The former allow the pleading of pleas and replications on equitable grounds. As a consequence of the limitations imposed by common law procedure, the Court has followed the earlier English practice of permitting such pleadings only where a Court of Equity would grant an unconditional, perpetual and absolute injunction.[16] The latter confer upon the common law side of the Court a power, which is rarely invoked, to grant injunctions restraining the repetition or continuance of wrongful acts already committed.

Extensions of jurisdiction effected by the earlier English legislation were adopted, as regards the Equity side, in 1880. Into the Equity Act of that year provisions were introduced which were modelled upon s. 62 of the Chancery Procedure Act, 1852 (Eng.)[17], s. 2 of Lord Cairn's Act[18], and s. 1 of Rolt's Act.[19] These provisions are now to be found in ss. 8 and 9 of the Equity Act, 1901 (N.S.W.). Section 8 empowers the Court in its equitable jurisdiction to determine legal rights and titles and questions of law requiring to be determined or arising in proceedings for equitable relief. Section 9 enables it to award damages in addition to or in substitution for an injunction or specific performance in cases where it has jurisdiction to entertain an application for the relevant equitable relief.

Section 4 of the Equity Act, 1880 (N.S.W.)[20] (which was the original of s. 8 of the 1901 Act) at first seemed to threaten to convert the Equity Court into a court of more general jurisdiction. In compounding that section from s. 62 of the Chancery Procedure Act, 1852 (Eng.), and s. 1 of Rolt's Act, the draftsman concluded with the words: "and no suit in equity shall be open to objection on the ground that the remedy or appropriate remedy is in some other jurisdiction". In *Horsley* v. *Ramsay*[21] some account, but not a very clear account, was given

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[12] *Per* Higgins, J., *Maiden* v. *Maiden* (1908) 7 C.L.R. 727, 743.
[13] See later.
[14] Common Law Procedure Act, 1899 (N.S.W.), s. 99, Act No. 21, 1899—Act No. 44, 1940; *Brittain* v. *Hawkes & Co. Ltd.* (1933) 33 S.R. 564 (F.C.).
[15] 17 & 18 Vict., c. 125.
[16] See Common Law Procedure Act, 1899 (N.S.W.), s. 98.
[17] 15 & 16 Vict., c. 86.
[18] 21 & 22 Vict., c. 27.
[19] 25 & 26 Vict., c. 42.
[20] Act No. 18, 1880.
[21] (1889) 10 N.S.W.L.R. 41, 45 (Eq.)
[22] (1891) 12 N.S.W. L.R. 135, 141 (Eq.).

of what was intended by the insertion of those words. The view of the effect of s. 4 (and its successor, s. 8) which has prevailed was enunciated in *Cameron* v. *Cameron*.

> Section 4 does not make this Court a Court of law. The Primary Judge sits in this Court to exercise the jurisdiction of the Supreme Court in equity, and it is only for that purpose that he can sit here, but under s. 4 his powers in any suit or proceeding in equity are extended so as to enable him to deal incidentally with matters arising in an equity suit, which but for that section must have been dealt with by the common law Courts.[22]

That view has been followed in subsequent cases[23], although there has been a certain liberality, which has not escaped criticism[24], as to the range of associated matters to which equitable jurisdiction is attracted once a claim to some equitable relief is established.[25]

There have been two other threats to the purity of the Equitable Jurisdiction. But it has successfully resisted both of them.

First, some of the early Justices of the High Court of Australia, and notably its first Chief Justice, were impressed with the unity of the Court as constituted under the Charter of Justice, and tended to the view that to proceed in an inappropriate jurisdiction was a mere procedural irregularity which might with propriety be ignored.[26] But that view could not prevail, and has not prevailed, against a long and uniform course of judicial practice and legislative enactment. Equity Judges, treating the substance rather than the form of a proceeding as determinative of its character, were not deterred thereby from their consistent course of declining to allow the Equity Court to be turned into a Court of Law.[27]

Secondly, when s. 10 of the Equity Act, 1901 (N.S.W.), was remodelled by s. 18 of the Administration of Justice Act, 1924 (N.S.W.)[28], along the lines of Order XXV Rule V of the Rules of the Supreme Court, expectations were aroused that, under this new power to "make binding declarations of right whether any consequential relief is or could be claimed or not", it might become possible to secure declarations of legal rights and, more particularly, as to the construction of contracts and other instruments operating at law. But these expectations were not fulfilled. When, in *Tooth & Co. Ltd.* v. *Coombes*[29], a declaration was sought as to the construction of the covenants of a lease, Harvey, C.J. in Eq., said that to allow this would amount to a most material alteration of the power of the Equity Court and the scope of its jurisdiction. "Divorce suits, libel actions, bankruptcy proceedings, probate suits and even criminal proceedings might be instituted in this court under the guise of asking for a declaration of rights".[30] He held, and in *David Jones Ltd.* v. *Leventhal*[31] the High Court approved of the decision, that the power to make binding declarations of rights is limited to proceedings for equitable relief or relating to equitable rights and titles.

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[23] E.g., *Merrick* v. *Ridge* (1899) 18 N.S.W.L.R. 29 (Eq.); *Wright* v. *Carter* (1923) 23 S.R. 555, 567; but see *per* Griffith, C.J., *Maiden* v. *Maiden* (1908) 7 C.L.R. at 735-36.

[24] *Maiden* v. *Maiden*, *per* Higgins, J., (1908) 7 C.L.R. at 746-47.

[25] E.g., *Australian Joint Stock Bank* v. *Dodds* (1891) 8 W.N. 31 (judgment on the covenant for payment in a suit for foreclosure); *Wright* v. *Carter* (1923) 23 S.R. 555 (damages for breaches of other covenants of the agreement sued on).

[26] *McLaughlin* v. *Fosbery* (1903) 1 C.L.R. 546;; *Maiden* v. *Maiden* (1908) 7 C.L.R. 727; *Hill* v. *Ziymack* (1908) 7 C.L.R. 352, 367-68. *Cf. Cobar Corporation Ltd.* v. *Attorney General for New South Wales* (1910) 9 C.L.R. 379.

[27] See e.g., *Merrick* v. *Ridge* (1897) 18 N.S.W.L.R. 29 (Eq.), before *Maiden* v. *Maiden* (*supra*) *and Hawdon* v. *Khan* (1920) 37 W.N. 131, after *Maiden* v. *Maiden* (*supra*).

[28] Act No. 42, 1924.

[29] (1925) 42 W.N. 93.

[30] *Id.* at 94. *Cf. per* Isaacs, J. (as he then was), *Langman* v. *Handover* (1929) 43 C.L.R. 334, 343.

[31] (1927) 40 C.L.R. 357.

I do not wish to be understood as questioning this limitation as a question of construction, or in point of convenience so long as the Court remains divided into distinct jurisdictions each with specialised functions. As a matter of construction it seems to follow inevitably from the alteration of the expression "action or proceeding" in Order XXV Rule 5 to "suit" in section 10 of the Equity Act, and from the introduction of the subject of declaratory orders into that Act amongst the powers of the Equity Court. The question of convenience which I have mentioned is a consequence of the division of the Court into jurisdictions, each with its own proper functions. The power to make binding declarations of right without consequential relief is a most useful and beneficial power. Brougham spoke of its value as long ago as 1828[32], as a power then already existing in the Scottish Courts. It is capable of the most extensive application. That Mr. Justice Harvey's suggestion that it might be used in divorce matters was not far-fetched is shown by the recent English decision in *Har-Shefi* v. *Har Shefi*.[33] Its use in some constitutional litigation goes some way towards bearing out the same learned Judge's suggestion that it might provide a means of testing questions which otherwise would have to be tested in criminal proceedings. The question of convenience is whether the whole of this extensive and varied jurisdiction should become the province of a single division of the Court whose ordinary functions are of a particular and limited character.

When I come to consider, by way of supplementing Sir Raymond Evershed's article, what may have been the effect of the perpetuation of the pre-Judicature system upon the capacity of equity in New South Wales to bear issue (i.e. as compared with that of her elderly English sister), I believe that I should start with His Lordship's observation that "the truth is that the so-called 'fusion' of law and equity was and is referable to matters of procedure rather than of substance." But I should first turn back for a moment to his earlier suggestion that the terms of s. 25 (11) of the Judicature Act — the fact, indeed, of the enactment itself — seem inevitably to have put a stop to invention.

I do not think that it is possible to test this statement against, as an index, "the inventive scope of the Equity Judges of New South Wales," working under a system which does not include anything corresponding to section 25 (11). These have worked out and applied equitable principles and rules to new situations as they have arisen and, more particularly, to situations arising from peculiarly local conditions. But it cannot be said that New South Wales Judges, with their freedom from s. 25 (11), have displayed any greater proclivity than their English brethren towards the "invention", in Sir Raymond Evershed's sense, of entirely novel rules, that is to say their enunciation "for the first time to give a remedy for a particular injustice".

New South Wales is not, it must be remembered, isolated from the main current of English equity. The foundations of its equity is the inheritance under 9 Geo. 4, c. 83, s. 24 of "all laws and statutes in force within the realm of England at the time of the passing of this Act . . . so far as the same can be applied within the said Colony". Judgments of the English Courts are frequently cited and commonly followed. The ultimate appeal is to a tribunal whose membership is for the most part of English lawyers and largely coincident with that of the final tribunal for deciding questions of English law. The appellate tribunal usually resorted to, the High Court of Australia, includes, as about one half of its membership, Justices who come from States that have the Judicature system.

[32] In the House of Commons, 18 *H.C.D.* (2nd ser.) 127, 178-79, quoted in Chafee, *Cases on Equitable Remedies* (1938) 440.
[33] (1953) 1 All E.R. 783.

Moreover, in 1926, that Court laid down in *Sexton* v. *Horton*[34] a rule for its own governance that generally it should follow decisions of the Court of Appeal unless some manifest error appears therein. In *Sexton* v. *Horton* a decision of the Court of Appeal was followed in preference to the High Court's own previous decision. The same course was taken in *Waghorn* v. *Waghorn*.[35] It was not taken in *Wright* v. *Wright*[36], where the High Court adhered to a decision of its own. What is noteworthy here, however, is that one of the rare instances of the High Court's refusal to follow a Court of Appeal decision on the ground of manifest error was its refusal in *Cowell* v. *Rosehill Racecourse Ltd.*[37] to follow *Hurst* v. *Picture Theatres Ltd.*[38] It may be added, as an interesting complication and a warning against facile generalisation as to the effect of a system of procedure upon the attitudes of those who have been trained in it, that the majority of the High Court who were against *Hurst's Case* included all the Justices who came from Judicature-system States; the sole supporter of *Hurst's Case* was one of the New South Wales Justices.

Thus, on the footing that s. 25 (11) is, as Sir Raymond Evershed suggests, a brake on invention, that brake is capable of operating by a sort of remote control in New South Wales as well. However, as the sequel will show, such small evidence as there is suggests that thus far New South Wales has not stood in need of an external check upon "invention".

I return to the starting point and to the question whether, if the procreative capacity of Equity in New South Wales is not greater by reason of the procedural differences between itself and England, it is, thereby, less. If the Judicature Act neither creates new rights nor alters existing rights but merely changes procedure[39] —if, in effect, s. 25 (11) is no more than a necessary corollary of the merger of the Courts and the abolition of the common injunction—there seems to be no reason why the difference between the two systems of procedure should of itself prevent the attainment in the Courts of New South Wales of any result which can be attained in the English Courts. The result in question may be a product of "inventive" activity on the part of the English Judges in their dealing with equitable rules and principles. But there appears to be no reason of a purely procedural character why the invented principle or rule should not be adopted and applied in New South Wales if the Courts which form part of the judicial system of New South Wales (which expression, as has been seen, is not limited to the Courts of New South Wales) are prepared to accept it. And the premiss with which I have started is one which, despite occasional difficulty, has wide acceptance and the support of great authority.

The machinery whereby the party who would benefit from the application of the novel principle or rule may seek to have it applied is at hand in New South Wales. Its use may involve a special skill and a certain staying power—skill in selecting the appropriate tribunal and procedure, and staying power where it is necessary to pursue the matter through two proceedings. In some situations it may be necessary to postulate that common law pleadings perform their functions with the efficacy which is claimed for them, since it may be difficult to deal with a situation arising *ex improviso* by resorting to the Equity Court for an injunction. But it would seem, if the premiss is correct, that a litigant or potential litigant in New South Wales who seeks the application of some novelty in equitable principle invented by the English Courts or, for that

[34] (1926) 38 C.L.R. 240.
[35] (1941) 65 C.L.R. 289.
[36] (1948) 77 C.L.R. 191.
[37] (1936) 56 C.L.R. 605.
[38] (1915) 1 K.B. 1 (C.A.).
[39] *Britain* v. *Rossiter* (1882) 11 Q.B.D. 123, 129.

matter, would like to persuade the New South Wales Courts to engage in "invention" for themselves, is not shut out from the attempt, and that whether or not the attempt will succeed depends on other than procedural considerations.

The best test would be afforded by the combination of an English decision expressed to be dependent upon the Judicature Act and the subsequent occurrence of the same problem in the New South Wales Courts. Reported instances of this are few. The important one, and I think the only one which casts any light on the general question, is furnished by *Hurst* v. *Picture Theatres Ltd.*[40] and *Cowell* v. *Rosehill Racecourse Co. Ltd.*[41] Since *Cowell's Case* it is scarcely necessary to refer to the earlier case of *Naylor* v. *Canterbury Park Racecourse Co. Ltd.*[42] But it is as well to mention that the concluding paragraph of the judgment may well embody a misconception of the rule whereby the scope of pleading on equitable grounds on the common law side is limited.

In *Cowell's Case* both Dixon, J. (as he then was)[43], who was of the majority, and Evatt, J.[44], who dissented on the questions of equitable principle, were of opinion that there was no purely procedural bar to the application of *Hurst's Case* in New South Wales. I quote from the judgment of Dixon, J., at p. 634.:

> No doubt if an equitable interest or an equity were considered to arise out of a contract the performance of which was limited only to a few hours, it might be difficult to invoke the jurisdiction of a court of equity in time to secure its performance or prevent a specific breach. But on the hypothesis that the contract fell within the cognizance of equity, the parties would, after the event, be compellable so to deal with the rights and liabilities resulting at law from what had been done as to give effect to the equities. Thus, if it were true that the licence conferred an equitable interest or the contract gave rise to an equity against the revocation of the licence, then although practical considerations might prevent the Court of Chancery from giving effect antecedently to the rights with which its doctrines supposedly invested the licensee, yet *ex post facto* it would not permit the other party to assert at law any right inconsistent with the equitable position. On the hypothesis stated, there would be no difficulty in a court of equity restraining a licensor who had purported to revoke a licence revocable at law but irrevocable in equity from asserting in any legal proceeding, whether by way of defence or otherwise, that he had revoked the licence. Nor do I see why after the event any conditions should be attached to the injunction. In other words, if the hypothesis were sound, I do not see why in New South Wales by means of an equitable replication the same result would not be produced, as would, in that event, ensue under a Judicature system.

What I have quoted seems to have the support of the Court of Appeal in the *Winter Garden Case*[45] (the relevant passage from Lord Green, M.R.'s judgment being quoted in Sir Raymond Evershed's article), and of Lord Uthwatt in the House of Lords. For the purposes of the present discussion it does not matter whether the plaintiff could plead on equitable grounds or would be constrained to go into equity for an injunction, however important the difference might be for other reasons. Dixon, J., and Evatt, J., in *Cowell's Case* differed from the view of the Supreme Court in *Naylor* v. *Canterbury Park Racecourse Co. Ltd.* as to the non-availability, as a matter of procedure, of a replication on equitable grounds.

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[40] (1915) 1 K.B. 1.
[41] (1936) 56 C.L.R. 605.
[42] (1935) 35 S.R. 281 (F.C.)
[43] (1936) 56 C.L.R. at 632-33, 634.
[44] (1936) 56 C.L.R. at 643 *et seq.*
[45] *Winter Garden Theatre (London) Ltd.* v. *Millennium Productions Ltd.* (1946) 115 L.J. (Ch.) 297, 302-03 (C.A.); (1948) A.C. 173, 202.

Of the conflict between *Cowell's Case* and *Hurst's Case* no more need be said than that the majority in *Cowell's Case* declined to follow *Hurst's Case* as being in error in point of the relevant legal and equitable principles and their application. In effect, *Hurst's Case* was wrong even as a decision of a Court governed by the Judicature Act. More particularly was it wrong as a purported application of equitable principles. "But I am unable to believe," Dixon, J., said[46], "that any equity exists as a result of which the plaintiff could meet the defendant's justification" (i.e. the defendant's plea of *molliter manus imposuit* to the plaintiff's count in assault). He continued:

> This opinion I base upon the substantial ground that a patron of a public amusement who pays for admission obtains by the contract so formed and by acting on the licence it imports no equity against the subsequent revocation of the licence and the exercise by the proprietor of his common law right of expelling the patron. The rights conferred upon the plaintiff by the contract possess none of the characteristics which bring legal rights within the protection of equitable remedies, and the position of the plaintiff at law gives him no title under any recognizable equitable principle to relief against the exercise by the defendant of his legal rights. No right of a proprietary nature is given. The contract is not of a kind which courts of equity have ever enforced specifically. It is not an attempt to confer a right by parol agreement which at law might have been effectually granted by a deed. There is no clear negative stipulation the breach of which would be restrained by injunction.

And, a little later (after examining the purpose, the absence of material interest, and the nature of the mutual undertakings which may have to be implied): "The nature of such a contract takes it outside the scope of the equitable doctrines regulating the application of the remedies of specific performance or injunction".

Cowell's Case, then, furnishes no ground for the view that any difficulty arising merely from the difference in procedures would preclude the application of *Hurst's Case* in New South Wales (whether one proceeding would suffice or two proceedings would be necessary, for that purpose). It affords no ground for the view that, if the principles upon which *Hurst's Case* proceeds had met with approval, the result could not have been obtained under the New South Wales procedure. The expressed opinions of two of the Justices were against that view. As to the other Justices, I should doubt the value of any attempt to infer from judgments which are wholly or mainly concerned with the question of the correctness of *Hurst's Case, in point of principle*, what their opinions as to the effect of the procedural differences would have been had they thought differently on that question. It cannot be concluded that, in that event, at least a majority might not have been found in favour of the applicability in New South Wales of *Hurst's Case*, by one procedure or the other.

I should also hesitate to express an opinion as to what the views of the High Court would have been had a situation such as that in the *Winter Garden Case*[47] come before it instead of a *Hurst Case* situation. In addition to differences in facts which might affect the question of principle, there are differences in facts between the *Winter Garden Case* and *Hurst's Case* which might affect the question of procedural difficulty, if there be one. Thus, if there be indeed difficulty in the *Hurst* situation because before action brought the plaintiff had in fact been expelled and the period of the licence had terminated, the situation in the *Winter Garden Case* was that the plaintiff was still in possession and the contest

[46] (1936) 56 C.L.R. at 633
[47] (1948) A.C. 173.

was whether under the agreement reasonable notice of termination was required and, if so, whether the notice given was reasonable. If, in point of principle, a contract such as the *Winter Garden* contract attracts the equitable remedies of specific performance or injunction, the only form of relief involved is direct intervention by injunction to restrain a threatened wrongful expulsion. There is not raised the problem, if it be a problem, of the retroactive operation of equitable relief to convert into an actionable trespass an act which was not a trespass at law when it was committed.[48]

No purpose would be served by discussing at length the speeches in the House of Lords on the *Winter Garden Case*[49], since the result seems to be inconclusive except on the two precise points on which the decision turned which are not here relevant. It may be observed, however, that there are exhibited two approaches to the effect of the Judicature Act — one which tends to say, without more, that the Judicature Act has altered, or may have altered, the position since *Wood* v. *Leadbitter*[50] and one which tends to analyse the situation in terms of what a Court of Equity would do.[51] This difference in approach is as old as *Walsh* v. *Lonsdale*[52], and *Britain* v. *Rossiter*[53], and may be observed also as between majority and dissentient in such cases at *Hurst* v. *Picture Theatres Ltd.*[54] and *Craddock Bros.* v. *Hunt.*[55] The difference in approach does not necessarily affect the premiss upon which the discussion has thus far proceeded. It all depends upon, (a) whether broader approach, if I may call it such, is merely a compendious method of stating what is involved in the more precise approach, and, (b), whether the result is capable of analysis in terms of the more precise approach. If the answer is "No" to both (a) and (b), then you would seem to have a decision so dependent upon the Judicature Act that it could not be applied in New South Wales, unless the case belonged to the first class of those which I am now about to mention.

Two other instances may be mentioned of the combination of circumstances earlier referred to in which, a decision having been given in expressed reliance on the Judicature Act, the same problem is afterwards presented to the New South Wales Courts. These are off the main line but are not without subsidiary interest, the first of them in particular.

In *Craddock Bros.* v. *Hunt*[56] and *United States of America* v. *Motor Trucks Ltd.*[57] conclusions were reached with respect to specific performance of rectified contracts for the sale of land which were opposed to weighty pre-Judicature Act authority. Lord Sterndale, M.R., in *Craddock Bros.* v. *Hunt*, and Lord Birkenhead for the Judicial Committee in *United States of America* v. *Motor Trucks Ltd.*, supported the result by reference to the Judicature Act. Lord Sterndale's actual reasoning, however, seems to have no dependence on the Judicature Act nor to lead to conclusions which a Court of Equity could not have reached without its assistance; and in neither case is there indicated the manner in which the result depends upon the Judicature Act. When the problem came before Long Innes, J. (as he then was), in *Montgomery* v. *Beeby*[58], His Honour felt the same difficulty about the reliance on the Judicature Act as had been felt by the dissenting Lord Justice in *Craddock Bros.* v. *Hunt.* He said[59]:

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[48] *Cf.* Starke, J., *Cowell's Case* (1936) 56 C.L.R. at 629, and Phillimore, L.J. (dissenting) in *Hurst's Case* (1915) 1 K.B. at 18.
[49] (1948) A.C. 143.
[50] (1845) 13 M. & W. 838 — see e.g., *per* Viscount Simon, (1948) A.C. at 191.
[51] See e.g. *per* Lord Uthwatt, (1948) A.C. at 202.
[52] (1882) 21 Ch.D. 9.
[53] (1882) 11 Q.B.D. 123.
[54] (1915) 1 K.B. 1.
[55] (1923) 2 Ch. 136.
[56] *Ibid.*
[57] (1924) A.C. 196.
[58] (1930) 30 S.R. 394.
[59] *Id.* at 398.

I find it difficult to read the later decisions without coming to the conclusion that the Court of Appeal and the Judicial Committee of the Privy Council held the opinion that the rule (i.e. the old rule laid down by the pre-Judicature Act cases) was not well-founded, and that they seized upon the Judicature Act, 1873, as giving them the opportunity of saying that the rule no longer obtained without formally overruling, or refusing to follow, the previous decisions.

Hurst's Case[60] and *Craddock Bros.* v. *Hunt* are alike in their expressed dependence on the Judicature Act. They differ in actual dependence. *Hurst's Case* is dependent at least in a procedural sense, that is in the sense that the Judicature Act, if it did not enable a result to be produced which could not have been produced before, at least simplified the procedural machinery. It does not seem possible to say that *Craddock Bros.* v. *Hunt* was in any sense dependent upon the Judicature Act; even before the Judicature Act the whole matter would have fallen within the jurisdiction of a Court of Equity. I doubt whether the decision may be said to amount to "invention"; rather was it a correction of what appeared to the majority of the Court of Appeal to be error in earlier decisions. From the New South Wales Court's point of view the distinction does not seem to matter. Whether it be an "invention", a refinement, a new application, or a correction, that is effected in express reliance on the Judicature Act, the real question for the New South Wales Court seems to be whether it agrees and approves in point of principle.

The second of the two instances shows that there may be decisions of the English Court which cannot be followed in New South Wales because the Court has acted pursuant to a statutory power, that is a power conferred by the Judicature Act or a rule made thereunder and not derived from one of the merged Courts. In England a borrower in a transaction which contravenes the money-lending legislation may obtain a declaration of the invalidity of a security given for the loan without offering to do equity by repaying the amount actually advanced with reasonable interest.[61] The reason is that the power to make binding declarations of right under Order XXV Rule 5 is statutory, and not founded on equitable principles. In New South Wales, on the other hand, because of the limitation already mentioned on the Court's power to grant declaratory relief, the borrower must fall back on the equity of restoration or rehabilitation and must therefore offer such repayment.[62] That is so, at least, where the security is legal and there is no ground for injunctive relief. The position, perhaps, is open to question where the security is equitable and the title involved is, therefore, within the limited power to award purely declaratory relief.

Thus far what I have discussed is related mainly to the absence from New South Wales of any express legislative provision in terms of s. 25 (11) of the Judicature Act. It remains to make mention of a quite different question related mainly to the absence of the Judicature Act provisions for the concurrent administration of law and equity.

Whether the survival of the old system of procedure in New South Wales has any effect, one way or the other, upon the development of equitable principles is not the same question as that of its practical working efficacy, more particularly in comparison with the judicature system. This latter question is not an easy one to discuss, remembering that we are limited to the one topic of

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[60] (1915) 1 K.B. 1.

[61] *Chapman* v. *Michaelson* (1909) 1 Ch. 238.

[62] *Langman* v. *Handover* (1929) 43 C.L.R. 334; see also dissenting judgment of Isaacs, J. (as he then was), *Schnelle* v. *Dent* (1924) 35 C.L.R. 494, 506 *et seq.*

the absence of a concurrent administration of law and equity. When that topic is viewed in isolation from the rest of the larger subject of procedural reform of which it forms a part there is not a great deal to be said about it.

In broad terms, the major inconveniences of the older system which are here relevant are two. First, two proceedings may sometimes be necessary in order to do complete justice where one would suffice under the Judicature system. In actual practice the occurrence of this situation is not frequent. That may not be an altogether reliable guide, because there is no means of knowing how often litigants are deterred by expense or other considerations.

Secondly, proceedings in which common law relief on common law principles and equitable relief on equitable principles may be sought as distinct alternatives are not possible. I say as distinct alternatives by way of excluding cases under s. 9 of the Equity Act, 1901 (N.S.W.), where the power to grant an alternative legal remedy depends upon the existence of a jurisdiction to grant equitable relief. And I do not refer to those cases in which no more is required than a precise appreciation by the moving party's advisers of the character of the relief to which the circumstances entitle him and the proceedings necessary to obtain it. I do not refer, that is, to those cases where any difficulty may and ought to be resolved by a preliminary exercise of that precision of thought which the system is said to engender. There is a residuum of cases, perhaps not large, in which, because of their novelty and uncertainty as to how the law will be determined or the facts found, no amount of precise thought will remove the risk of a fruitless proceeding, involving the necessity of starting all over again. These are cases in which the moving party may fail not because he is entitled to no relief at all, but because he has mistaken his forum, the mistake not being attributable to want of proper consideration. To the risks of litigation which no procedural machinery may be able to avert is added one which is not unavoidable in this sense and which is unconnected with the merits of the proceedings.

There is a line of argument whose unstated assumption seems to be that these possibly small groups of difficult cases may well be ignored since for the purposes of the great bulk of litigation, which falls clearly on one or the other side of the line, it would not matter whether there were one Court or two. The system works well—that is to say, it works well enough. And there is another line of argument which is concerned with precision of thought. I am not very sure whether the argument is that the older system requires precise thought for its working on a high level (which is true), or that it is unique in requiring precision of thought for that purpose, or that of its own force, and ignoring considerations of inherent capacity and education, it induces precise thinking (neither of which is necessarily true).

However, I am not concerned in this paper to prosecute inquiry into arguments commonly advanced in favour of the retention of the older system. These arguments have it in common that they invite attention to the wider question of the basic postulates of a whole system of civil procedure, and that is beyond the scope of this paper. I am content to append a note of some of the results which flow from the limitation already mentioned upon the Court's power to make binding declarations of right. These may be considered to be applications of precise thinking towards practical ends which lack utility. (As I have said before, I am not to be taken as questioning the limitation upon the power to make declaratory orders as a matter of the construction of the legislation or as a necessary consequence of the system of which it forms part.)

The results which I have mentioned are: A tenant holding under an agreement for a lease may, it would seem, obtain declaratory relief because the title

involved is equitable; a tenant holding under a lease may not.[63] I have suggested above the possibility of a similar distinction, having further important consequences, between a mortgagor under a legal mortgage, and a mortgagor under an equitable mortgage, who seeks a declaration as to the validity of the mortgage. The existence of some equitable right or interest which is claimed against the plaintiff may be negatived by a declaratory judgment[64], but not the existence of some claimed legal right or interest.[65] A tenant who desires to assign but whose landlord refuses consent may not obtain a declaration as to the propriety of the proposed assignment[66]; he must find an assignee who is content to accept the risk of forfeiture. The whole field of contracts (except such as may create equitable interests), and of commercial contracts in particular, is excluded from the area of declaratory relief. A party to a contract whose meaning is uncertain and disputed has no means of asking the Court to determine its meaning except to act on his own construction, risking breach and even the possibility of being treated as having repudiated.[67]

Consequences such as these are perhaps only secondarily attributable to the absence of provision for the completely concurrent administration of law and equity. Primarily they are due, as I have pointed out, to the particular mode which was adopted of conferring power to make purely declaratory orders. In a practical sense it is possible to regard them, but with due caution about statistical estimates where there are no statistics, as of wider significance than the two disabilities which I earlier mentioned.

I set out to prepare this paper with no very clear idea of what would be required as a New South Wales supplement to Sir Raymond Evershed's article. I found as I went along that it was necessary to make a selection from amongst the topics which suggested themselves and have therefore sought: First, to give an account, no longer than was necessary for the purposes of what was to follow, of the relevant salient features of the New South Wales system and its major differences, in relevant respects, from the Judicature system; secondly, to examine whether the persistence of the older system in New South Wales is, relatively to the situation under the Judicature system, an impediment in itself to the development of equitable principle by judicial decision; and, thirdly, to indicate some of the major inconveniences of the older system, some inherent, and one perhaps to be regarded rather as a secondary result capable of being remedied, if that is desired, without disturbing the general structure, by legislation framed with care and precision towards that end. I have not set out in this paper to deal with such matters as a general comparison of the two systems, why the Judicature system has not been adopted in New South Wales, and whether it ought to be adopted. Hence I have stopped short of topics which it has seemed to me would be more at home in such a general survey.

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[63] *Tooth & Co. Ltd.* v. *Coombes* (1925) 42 W.N. 93; *David Jones Ltd.* v. *Leventhal* (1927) 40 C.L.R. 357.

[64] *Hume* v. *Monro* (1941) 65 C.L.R. 351; *Hume* v. *Monro* (No. 2) (1943) 67 C.L.R. 461.

[65] *Langman* v. *Handover* (1929) 43 C.L.R. 357.

[66] *Harvey* v. Walker (1946) 46 S.R. 73; (1946) 46 S.R. 180 (H.C.). I am, of course, speaking without regard to the provisions of ss. 62A and 62B of the Landlord and Tenant (Amendment) Act, 1948 (introduced by the Landlord and Tenant (Amendment) Act, 1952) which confers certain powers upon District Courts.

[67] *Luna Park (N.S.W.) Ltd.* v. *Tramways Advertising Pty. Ltd.* (1938) 61 C.L.R. 286, 304-05; but see *James Shaffe Ltd.* v. *Findlay Durham and Brodie* (1953) 1 W.L.R. 106.