FUSION OR SEPARATION?
HISTORICAL NOTES ON THE DIVISION OF THE LEGAL PROFESSION IN NEW SOUTH WALES†

The emergence of the two branches of the practising legal profession in England, barristers and solicitors, may be regarded either as an unfortunate historical accident, or as a natural and essential step in the evolution of the practice of the law, based upon necessary principles of division of labour and professional ethic. In some common law jurisdictions, most notably the United States of America, the view has been taken that a formal division of the profession into barristers and solicitors is undesirable, and in America and many parts of the British Commonwealth, including four of the Australian States, the legal profession is fused. In others, however, the distinction between the solicitor who deals directly with the lay client and the barrister, who conducts business through the solicitor, has been maintained, as in the United Kingdom, or, after the profession has grown for some time, has been created, as happened in New South Wales some 46 years after the founding of the Colony. A similar separation now taking place in Northern Rhodesia shows that the arguments as to the desirability of a split or amalgamated profession are by no means dead. It may thus be of interest to trace the process whereby New South Wales acquired, and has since kept, a divided legal profession, and the arguments relating to it; these being of real importance, since in New South Wales, the division did not happen by chance.

By the time that the Colony of New South Wales was founded the two chief branches of the profession were already in existence in England. The Inns of Court, at which barristers were trained and by which they were called to the Bar, had been in existence for some four hundred years. Since the middle of the seventeenth century, attorneys had not been permitted to be members of the four great Inns, and with the decay of the Inns of Chancery which had been the Inns specially appropriated to attorneys, The Society of Gentlemen Practicers in the Courts of Law and Equity was founded in 1739.[1] In 1788 this Society changed its name to the Law Society and by the 1830's the Incorporated Law Society of the United Kingdom had come into existence to control the solicitors' profession, which can probably be said to have emerged as a separate branch of the legal profession at least as early as the eighteenth century. Further, by the time the Colony of New South Wales was established, the lawyers in the United States of America had begun to organize themselves on different lines from their English brethren.[2] Hence although it was not to be expected in the existing circumstances of the young Australian Colony that academic argument in relation to the form of the legal profession would be a

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The following abbreviations have been used: *H.R.A.*: *Historical Records of Australia* (citing Series, Volume and page numbers). *V. & P.*: *Votes and Proceedings of the Parliament of New South Wales.*

[1] T. F. T. Plucknett, *A Concise History of the Common Law* (1948) 214. But see H. H. L. Bellot "Exclusion of Attorneys from the Inns of Court" (1910) 26 *L.Q.R.* 137.

[2] See A. P. Blaustein and C. O. Porter, *The American Lawyer* (1954) 163 *et seq.* and Roscoe Pound, *The Lawyer from Antiquity to Modern Times* (1953) cc. vi, vii and viii.

matter of immediate importance, nevertheless an example other than the English one was available to any who might be interested.

Until 1815, when the first solicitors arrived in Sydney from England, there were no legal practitioners qualified to appear before the newly constituted Supreme Court of Civil Judicature in New South Wales. The Judges Advocate, who were responsible for the holding of Criminal and Civil Courts in the Colony, had before that date been "constantly called upon to give advice . . . upon all occasions where an action (was) about to be brought or defended".[3]

In 1811 Ellis Bent, the then Judge Advocate, had "earnestly recommended"[4] that two barristers and two attorneys be induced to emigrate to the young Colony. Enquiries were made through the Colonial Office and two solicitors were selected, each being guaranteed a salary of £300 p.a. payable out of colonial revenue.[5] W. H. Moore and F. Garling were the two chosen, the former arriving in the Colony in January, 1815, and the latter in August of the same year. Prior to this, litigants had recourse to the Judge Advocate and to a number of ex-convicts who had been trained in the law and who acted on occasions as agents specially appointed to conduct cases in Court; the Judge Advocate being "reluctantly induced . . . from necessity"[6] to adopt this course. The refusal of J. H. Bent, first Judge of the Supreme Court established in 1814, to permit ex-convicts to appear before him caused the closing of the Supreme Court itself for some years.[7]

Section 10 of the Charter of Justice of 1823 empowered the Supreme Court to admit to practise before it persons who had been called as barristers or enrolled as Advocates in Great Britain or Ireland, or as writers, attorneys or solicitors in one of the Superior Courts at Westminster, Dublin or Edinburgh. It was expressly provided that those so admitted by the Supreme Court might practise in both branches of the profession. Wardell and Wentworth[8] were the first barristers admitted under the Charter, on September 10, 1824. Eight days later they moved the Court to call upon the attorneys to show cause why they should not be restricted to their own province as in England. The Court granted a rule calling on the solicitors to show cause, four days later, why they should not retire from the Bar.

On the appointed day all six practising solicitors in the Colony appeared—Garling, who remarked that he had intended to retire from the Bar, but would not yield to compulsion, Moore, Rowe, James Norton, George Allen and Henry Chambers. All six spoke in opposition to the rule and, in the result, the Chief Justice, Francis Forbes, decided against the construction of s.10 which the barristers had sought to give it.[9] However, he said that he hoped a division of the profession would soon be made. This prospect of the lawyers fighting among

[3] Ellis Bent to Lord Liverpool, *H.R.A.* IV/i 60.

[4] *Id.* at 64.

[5] In his despatch of Feb. 13, 1814, Earl Bathurst had written to Governor Macquarie as follows: "I have, at the Recommendation of Mr. Bent (this was J. H. Bent, the first Judge of the Supreme Court of 1814) selected two Solicitors of highly respectable Characters to proceed by an early Opportunity to the Colony. The Salaries, which I have led them to expect, are £300 per ann., as under that amount I find it impossible to obtain the Services of any Persons of Respectability and Knowledge". *H.R.A.* I/viii, 139. See also S. E. Napier and E. N. Daly, *The Genesis and Growth of Solicitors' Associations in New South Wales* (1937) 4.

[6] Ellis Bent to Lord Bathurst *H.R.A.* IV/i 136.

[7] Garling's arrival in Sydney on Aug. 8, 1815, made the propositions of Bent, J. untenable as he then had two "free" solicitors to conduct cases before him. Garling was appointed first Crown Solicitor of the Colony and, at the death of Ellis Bent, Judge Advocate, was appointed Deputy Judge Advocate, a position which he held until October 5 when John Wylde arrived and took up the duties of that office (See J. M. Bennett, "The Deputy Judge-Advocates of New South Wales", 2 *Syd. Law Rev.*, 501). Garling then reverted to the position of Crown Solicitor, in addition to which he enjoyed a large private practice.

[8] Wentworth had gone to England in 1816 to study law, had entered the Inner Temple in 1817 and was called to the Bar by that Inn in 1822.

[9] Wentworth argued that the framers of the Charter of Justice had never intended

themselves caught the public imagination of the time, and the newspapers were not slow to take sides. *The Gazette*, in an editorial on the Judge's decision, commented that "in the event of a Bar being established here on the same footing as in the mother country, such an arrangement would have been inevitably depressive to the rising interests of the colony. We are not old enough, nor are we in possession of sufficient wealth to sustain an independent Bar had the rule been made".[10] Despite newspaper criticism, power to effect a separation within the profession was given to the Supreme Court by an Order in Council of October, 1824, and under s.16 of the statute 9 George IV c. 83. There was some delay in the drawing up of the necessary rules of court, but they were finally published in September 1829, although they did not have immediate operation. Those already admitted to the Court were given a choice of which branch they would follow, while thereafter the right to practise as barristers was restricted to those called as barristers or advocates by United Kingdom courts. Briefly, those who fell within the following groups were deemed to have qualified as solicitors: (1) persons actually admitted as solicitors, attorneys, proctors, or writers to the signet in some one or other of the Superior Courts of the United Kingdom; (2) persons who had been articled to a practising solicitor in England or New South Wales for a total of five years (wholly in either place, or partly in each); (3) persons who had been for five years clerks in the office of the New South Wales Supreme Court. This rule became operative in 1834. The solicitors who preferred the Bar, but had not made their election, opposed its operation and again *The Gazette* took their side in the dispute, but this opposition was unsuccessful.[11]

Under the Charter of Justice, as has been seen, only barristers trained in the United Kingdom were eligible to be called to the Bar by the Supreme Court of New South Wales. In the 1830's and 40's local feeling grew that Australians educated in Australia should be eligible for call in New South Wales, and G. R. Nichols, a locally born solicitor, became the protagonist of this view. The Home Government, notably Lord John Russell and Lord Stanley, favoured this proposal, but the Legislative Council opposed it and, in 1840, refused to grant a prayer from Nichols that "the Judges (of the Supreme Court) should admit as barristers such persons as they upon examination might deem to be professionally or otherwise qualified."[12]

Hence the desirability of opening the Bar to locally educated Australians came to be used as an argument in favour of amalgamating the profession. In 1846 a Bill was introduced to abolish the division which had been made in 1834. Edward Brewster, who introduced the Bill, argued that the division was "unsuited to the circumstances of the Colony and prejudicial to the interests of the community at large",[13] amalgamation would cheapen and accelerate legal proceedings and enable the locally educated to practise at the Bar. The matter was referred, on the motion of Wentworth, to a Select Committee of the House.

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that, when barristers arrived in the Colony, the attorneys should continue to practise as both barristers and solicitors. Section 10 of the Charter, he suggested, was ungrammatical and, in order to discover its meaning, s.9 should be read with it.

[10] *Sydney Gazette*, 23/9/1824.

[11] *Sydney Gazette*, 12/2/1835. Although the rule became operative in 1834, it is interesting to notice that an order in the following terms was made in country districts in 1842: "It is ordered that Mr. . . . one of the Attornies of the Supreme Court who has hitherto been allowed to act as Attorney and Advocate in the Court of General Quarter Sessions of the Peace for this District be allowed to elect which branch of the Profession he will in future practise in the said Court. And it is hereby further ordered that henceforth no other attorney of the Supreme Court shall be allowed to practise in this Court except as an Attorney". From a miscellaneous collection of Supreme Court Rules and Orders in an unclassified box of the State Archives (Supreme Court) Papers; quoted by permission of the Trustees of the Mitchell Library, Sydney.

[12] *V. & P.* 1840, 172.

[13] 2 *V. & P.* 1846, 201.

The chief arguments in favour of amalgamation of the two branches of the profession which were advanced before the Select Committee were: firstly, that it would reduce legal costs, secondly, that separation provided a cloak for the incompetence of attorneys who could avoid difficulties by seeking Counsel's opinion and, thirdly, that amalgamation would allow native-born Australians, educated wholly in Australia, to practise at the Bar.

The respective arguments against these, as later approved by the Select Committee were, briefly, as follows. First, the Committee said, "there can be no doubt that whilst the amalgamation which is now sought to be re-established, did exist, the expenses of law suits were not smaller, nor even so small, as they have been since the division of the profession".[14] In this the Committee was particularly guided by the evidence of John Gurner who had been Chief Clerk in the Supreme Court. He stated that he had originally opposed the division of the profession, but having had the opportunity of seeing the divided system in practice, considered that "the business, on the whole, is better done, and that there are fewer speculative actions brought".[15] Second, the Committee quoted with approval the opinion of the Chief Justice, Sir Alfred Stephen—

> I think it important . . . to maintain the separation, in reference to higher ends and objects than the mere subtraction of a pound or two occasionally from an Attorney's bill. It is of vast importance to have a learned, efficient, dignified and able Bar. But the Colonial Bar has until of late years had a low reputation. And one great cause of this has been, the allowing of half educated men to practise in both branches of the profession. There is not sufficient, under such a system, to reward a man of greater amount of talent, and higher station in society, for undergoing severe study.[16]

Mr. Justice a'Beckett reinforced the Chief Justice's opinion by stating his belief that amalgamation would cause the administration of justice to suffer as giving more scope for cunning and trickery.[17] Third, Wentworth largely destroyed the force of the argument concerning the locally educated by having the Select Committee, of which, incidentally, he was Chairman, instructed to report, if they found against amalgamation, upon "the best mode of providing for the admission of youth educated in the Colony to practise as advocates in its different courts".[18]

Some witnesses before the Committee opposed amalgamation because it was contrary to the principle of division of labour and, in their view, efficiency. Specialization of function was, they argued, inevitable if the status of the profession were to be maintained and the public interest safeguarded. The Bench, almost the whole of the Senior Bar and a number of solicitors gave evidence against amalgamation. The arguments against amalgamation were successful and the Select Committee finally reported that

> the alleged multiplication of labour which is complained of as the cause of such increased expense to the public, has no foundation; and . . . that the division of the profession which now exists is strictly a division of labour, and attended with the usual results of such a division—superior skill and cheapness.[19]

The assertions of the principal witness[20] for amalgamation were rejected and

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[14] 2 *V. & P.* 1847, 417.
[15] 2 *V. & P.* 1846, 387.
[16] 2 *V. & P.* 1847, 419. Stephen, C.J. also stated: "I am decidedly of the opinion that the amalgamation of the two branches of the legal profession would not in the end benefit either; while it would be detrimental to the character of both and would certainly not be attended with advantage to the public." *Id.* at 467.
[17] *Id.* at 423.
[18] 2 *V. & P.* 1846, 385.
[19] 2 *V. & P.* 1847, 417.
[20] Mr. Johnson, a solicitor of the Supreme Court.

said to be based on "an obvious fallacy,—that the profession of the law is not a division of labour, but a multiplication". According to the Committee his proposition was that

> the division of practitioners into a number of branches is strictly a division, whereas the accumulation of practitioners in each branch is strictly a multiplication. No doubt it would be extremely beneficial, if there were business sufficient, for practitioners to confine themselves wholly to one branch; but it is palpable, that the necessity of employing one legal practitioner to instruct another in the same suit, causes a multiplication of labour.[21]

In denial of this the Committee stated

> The multiplication of labour which he adverts to, arises, it is alleged, from the necessity which exists, in the present state of the profession, that one practitioner should instruct another. But would there be any less labour if the Barrister were to receive his instructions direct from the client? He must be instructed by someone; and if he had to gain information in this way, which he at present derives from the Attorney, the labour of so obtaining it would, probably, be greater than at present and must be paid for in addition to his brief.[22]

Although the Committee reported against amalgamation it made a number of suggestions aimed *inter alia*, at the reduction of costs, the simplification of procedure and the creation of a process by which colonial youth might satisfy local tests and qualify for the New South Wales Bar. The work of the Committee in relation to the last of these became the basis for the Barristers' Admission Act of 1848.[23] By this Act the Barristers' Admission Board was created, to consist of the Judges of the Supreme Court, the Attorney-General and two barristers elected each year by the practising members of the New South Wales Bar. Every candidate considered by the Board to be a fit and proper person to become a barrister was to be admitted to the Bar by the Supreme Court Judges. The qualifications for admission were (i) that the candidate should satisfy the Board that he was a person of good fame and character, and (ii) that he should pass such examinations in Law, Greek, Latin, Mathematics and other subjects as the Board should establish by the rules that they were empowered to make under the Act. The first set of rules was published in April, 1849, setting out a relatively detailed curriculum containing set books for study in Law, Latin, Greek and Mathematics. By a Statute of 1855,[24] Barristers who had trained at the Bar of New South Wales were made eligible for judicial offices in the State.

As has been seen, the settlement made in 1847, following the Parliamentary Select Committee's work, was given great strength by the opinions of W. C. Wentworth and Sir Alfred Stephen, both of whom were in favour of maintaining the distinction between the two branches of the profession. That the two branches have since remained distinct, largely without comment or criticism of a serious nature, has been due not merely to the efficiency with which the system has worked, but also to the weight attached to the opinions of those two famous lawyers. However, it would be wrong to give the impression that the distinction within the profession has been accepted since the 1840's wholly without argument, since on at least one important occasion the problem has been raised and discussed at some length. This occurred as an

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[21] 2 *V. & P.* 1847, 418.
[22] *Ibid.*
[23] 11 Vic. No. 57.
[24] 19 Vic. No. 31. This Act was followed by the Act 25 Vic. No. 9 which removed the remaining restrictions as to judicial office relating to barristers trained in New South Wales. Other Statutes concerning the educational and other requirements for admission to either branch of the profession were, 20 Vic. 14, 22 Vic. 23, 39 Vic. 32, 46 Vic. 2, 55 Vic. 31. The current Act in force is The Legal Practitioners Act (1898-1954).

unintended result of the Law Institute's efforts in the period 1917-1935 to obtain legislation aimed at the supervision of the solicitors' profession, the protection of solicitors and of the general public. Basically, the Law Institute was seeking the enactment of a measure granting the Institute statutory powers of enquiry similar to those enjoyed by the English, Victorian, South Australian and New Zealand Law Societies.[25] Various draft measures were considered by the Government and on June 5, 1930, the Attorney-General, the Hon. F. S. Boyce, introduced in the Legislative Council a Bill which had previously been submitted to, and approved by, the Law Institute. Although the Bill was given its second reading in the Legislative Council it failed to reach the Lower House before the Government went out of office. In the following year the new Attorney-General, the Hon. A. A. Lysaght, a former solicitor, but then a member of the Bar, introduced a quite different Administration of Justice Bill under which, apart from other important provisions such as the payment of a bond of £1,000 by all solicitors, the two branches of the profession were to be amalgamated, and no wig, gown or other distinctive robes were to be worn by barristers or solicitors in any Court.[26]

The Judges of the Supreme Court were asked to give their opinion on the Bill and their comments are of considerable interest. They did not consider that any beneficial result would flow from the proposed amalgamation of the two branches of the profession. In their view—

> The demarcation along natural lines between the classes of work done by solicitors and barristers respectively makes for efficiency, for real economy, and for the prompt despatch of business. . . . In law, as in medicine or engineering, or any other comprehensive science, the highest efficiency is to be attained only by specialization. This specialization is called for not only in the study of the law, but also in its practice. There is a broad line of demarcation between the functions ordinarily discharged in the course of litigation by solicitors and by members of the Bar. Under the law as it stands at present every solicitor has the right of audience in every Court where a barrister can be heard, and many of them practise as advocates with great and deserved success. But a solicitor has many duties and responsibilities towards his clients from which a barrister is free, some connected with litigation, and some of an entirely different character. These, if his practice as an advocate is extensive enough to keep him for the greater part of the day in the Courts, he must entrust to partners or clerks, so that in the end the demarcation between the two branches of the profession, even if nominally abolished, would be in his case fully maintained.[27]

The judges did not think it to be in the public interest that

> men who wish to devote themselves to the profession of advocacy, with all its heavy responsibilities, should be required to submit to an unnecessary training in another branch of the legal profession, and to take on themselves a new load of duties and responsibilities which are not required in their chosen calling and which may seriously hamper them in following it.[28]

For these and other reasons, notably the difficulties which the proposed Bill would cause in relation to the admission of barristers and solicitors, and the heavy burden of investigating complaints which it would place upon the Prothonotary, the Judges gave the unanimous opinion that the Bill would prove unworkable in practice. The Bill was therefore dropped and, since that time,

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[25] For a more detailed account of the work of the Incorporated Law Institute of New South Wales in this regard, see S. E. Napier and E. N. Daly, *op. cit. supra* n. 5, 22-24.

[26] *Id.* at 24.

[27] *Id.* at 25 and see R. Z. De Ferranti in (1951) 25 *A.L.J.* 298, 306.

[28] *Ibid.*

no attempt has been made to amalgamate the legal profession in New South Wales.

Many of the legal institutions of New South Wales have developed *ad hoc*, by chance and accident, but the splitting of the legal profession into two branches was not of this kind; it was deliberately intended and designed. In practice it has worked successfully, although the relation which this result bears to the arguments put forward in favour of it is clearly debatable. The most important of these, however, in the authors' opinion, is the judges' view that even were the formal distinction between the barrister and the solicitor to be abolished, it would re-assert itself in fact. Fusion or division may work equally well in practice, but whatever may be the formal legal position, this will only be so as long as the lawyer realises that his position is one "of the highest trust and confidence to the client"[29] on the one hand, while on the other there is "an equally high relation of trust and confidence as an officer of the court, both to the court and to the public".[30]

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[29] R. Pound, *The Lawyer from Antiquity to Modern Times* (1953) 353.
[30] *Ibid.*

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