

## Chapter 7

### Five Judicature Fallacies

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The scene is an undergraduate legal history class:

Teacher: Listen to this passage about the *Judicature* legislation:

(1) The Judicature legislation was an English Act of 1873. (2) Its purpose was to reform the Chancery court, and (3) in particular to prevent parties from going back and forth from law to equity, with enormous delay and expense, popularised by Charles Dickens. (4) It took until 1970 for the same legislation to be enacted in New South Wales. (5) It caused the fusion of law and equity.

Is there *any* aspect of that which is correct?

Richard: Is this another example of getting us to understand something by learning what it is not?

Esther: It's the *via negativa*!

Teacher: Thomas Aquinas would be pleased to hear that. But let's start with "an English Act of 1873" – how is that wrong?

Richard: I've seen reference to the *Judicature Acts 1873-1875*, which I've never really understood; is it something to do with that?

Teacher: That's right. Lord Selborne's original 1873 Act<sup>1</sup> was not only to achieve "fusion" between the various separate superior courts so as to avoid "double litigation", but also to abolish the "double appeal" to the House of Lords<sup>2</sup> (the judicial quality in the House of Lords was variable,<sup>3</sup> and there was a problem when the Chancellor could sit in

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1 *Supreme Court of Judicature Act 1873* (36 & 37 Vict c 66).

2 Selborne said that "I desired to put an end to the expense and delay incident to the system of double Appeals" (*Memorials Part II Personal and Political 1865-1895* (MacMillan & Co, London, 1898), 305).

3 Gladstone described them as "generally second rate men" (Gladstone to Selborne, 27 January 1872) and Sir John Coleridge (the Attorney-General) had likened them to the "smallest dwarfs" (Coleridge to Sir W Heathcote, 19 August 1860); the latter two references are cited by Steele, "The Judicial House of Lords: Abolition and Restoration 1873-6", in Blom-Cooper, Dickson & Drewry (eds), *The Judicial House of Lords* (OUP, Oxford, 2009), 13-29, 15.

This is a preview. Not all pages are shown.