THE DEVELOPMENT OF THE OFFICE OF MASTER IN EQUITY IN NEW SOUTH WALES

I. *The Masters in Chancery in England*

"The Masters in Chancery," wrote D. M. Kerly, "held an old and honourable office dating from before the Conquest."[1] Old the office undoubtedly was, but how honourable at certain periods of its long life is quite another matter. The purpose of this essay, however, is not so much to stress the decay and eventual reform of the administrative offices in the English Chancery Court —topics upon which much has been written—but rather to give a brief sketch of the origins and development of the office of Master in England, and of its establishment and growth in New South Wales. Some attempt will then be made to show the continuity, or lack of it, in the development of the office in the two jurisdictions.

The early history of the official staffs in English Courts of Law is extremely obscure,[2] and a large part of our information concerning them is drawn from sources that are not over-accurate. According to Fleta, in the Middle Ages there were associated with the Chancellor "honest and prudent clerks . . . who had a full knowledge of the laws and customs of England; whose duty it was to hear and examine the prayers and complaints of petitioners, and, by royal writs, to give the fitting remedies for the injuries which they had brought to light".[3] At an early date the number of these clerks appears to have been fixed at twelve, and twelve it remained. Though they are referred to indifferently as *collaterales, socii,* or *praeceptores,* all these titles simply seem to imply that they assisted the Chancellor. In the Middle Ages they were paid partly through court fees, the normal mode of payment of mediaeval court officials, largely in kind, being quartered in the King's house and being given allowances of clothes, food and drink. Later they were furnished with a separate dwelling.[4]

The right to appoint to the office of Master came to vest in the Chancellor himself in the reign of Edward IV, although one exception to this was the royal right of appointing their chief, the Master of the Rolls. And, despite complaints that their offices had been usurped, it is clear that considerable profits accrued from the office of Master, since in 1621 it could be asserted by Coke that eight of the members had paid £150 each for their offices.[5] The right to appoint remained in the Chancellor until 1833.

The duties of the Masters in the Middle Ages were varied and various, and Holdsworth summarises them as follows.[6] First, they superintended the issue of all original writs, though by the first Elizabeth's time this had narrowed to the issuing of writs of grace only. Secondly, they acted occasionally as royal secretaries. Thirdly, they attended the House of Lords without writ

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[1] D. M. Kerly, *An Historical Sketch of the Equitable Jurisdiction of the Court of Chancery* (1890) 59.

[2] See T. F. T. Plucknett, *A Concise History of the Common Law* (2 ed. 1936), 256.

[3] Fleta II, 13, i. See generally Sir W. S. Holdsworth, *A History of English Law,* vol. i (3 ed. 1922) 416 *et seq.*

[4] W. S. Holdsworth, *op. cit.* 417.

[5] *Ibid.*

[6] W. S. Holdsworth, *op. cit.* 417-20.

and were often nominated triers of petitioners by that House. As far as precedence was concerned they came to rank above the Attorney and Solicitor-General, the King's Counsel and the Sergeants, until in 1576 one of their number, Dr. Barkley, was rash enough to address the House without leave. From that time forward they ranked below the Sergeants. Fourthly, they assisted the Council and Chancery in many branches of their jurisdiction and, clearly, it was necessary for them to be acquainted not only with the common law, but with canon and civil law also.[7]

Just as the duties of the Prothonotaries and the other clerks in the Common Law Courts[8] became more specialised with the growth of those courts, so too with the growth of Chancery jurisdiction the functions of the Masters became narrower and more detailed. Special Examiners and Masters Extraordinary were appointed to examine witnesses, and this left the Masters with the chief task of assisting the Chancellor in hearing cases and interlocutory matters. The Chancellor frequently delegated these matters to them, and Bacon's Orders defined and restricted the causes which could be so delegated, the practice having been carried to excess. "The effect of his Orders was to fix the position of Masters as assistants to the court, whose duty it was to report upon matters referred to them." "Their position became more definite with the development of the jurisdiction of . . . the Master of the Rolls,"[9] as in effect a vice-chancellor and eventually the most active judge of the court, special commissions dating from the time of Wolsey giving him an enlarged jurisdiction differing from the other eleven Masters.[10]

The added powers given to the Master of the Rolls were not sufficient, however, to meet the demands upon the Court's time caused by its growing jurisdiction. If anything the growth of the Court itself was marked by a growing inefficiency in its administrative operations. While the offices of Lord Chancellor and Master of the Rolls took an upward course, that of the other Masters was a downward one.[11] Downward, too, was the course of another class of officers attached to the Court, the Six Clerks.[12] These officials were supposed to supervise the steps taken in every cause, one of them always appearing in early times. But from the early seventeenth century onwards they appeared only nominally, on each side, as the parties' attorneys.[13] "These officials made great profits from the copies of proceedings their clients were bound to take from them and for which they charged exhorbitant fees."[14] The work was generally unnecessary and the payments made to men who, from the seventeenth century onwards, performed it by underpaid deputies.

II. *Criticism of Chancery Officials*

As early as the fourteenth century the office holders in the Chancery court had been criticised, and in 1382 the Commons had complained of the Masters that they were "over fatt both in boddie and purse, and over well furred in their benefices, and put the King to veiry great cost more than needed".[15] This criticism, however, and others prior to the seventeenth century, may well be explicable rather as a part of the battle for jurisdiction between courts

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[7] D. M. Kerly, *op. cit.* 59, 60.
[8] See R. W. Bentham and J. M. Bennett, "The Office of Prothonotary in England and New South Wales" (1959) 3 *Sydney Law Rev.*, 47.
[9] W. S. Holdsworth, *op. cit.* 418.
[10] D. M. Kerly, *op. cit.* 127.
[11] *Id.* at 59.
[12] W. S. Holdsworth, *op. cit.* 421-23.
[13] D. M. Kerly, *op. cit.* 128.
[14] *Ibid.*
[15] D. M. Kerly, *op. cit.* 59.

than as a genuine grievance. But it is clear enough that from at least as early as Elizabethan times the attacks upon the Court itself, and upon its office holders, both individually and as a group, had real substance. The openess to bribery of the court officers from the Lord Chancellor and Masters downwards —a tendency likely to increase rather than decrease as offices came to be performed by deputy—was not least among the discontents to which Chancery administration gave rise.

The officials of the Court were recruited, as has been seen, in the same manner as those in the common law courts; they were usually life appointments and they were paid upon the same plan; the more fees, the more salary. As the practice of discharge of duty by deputy spread, valuable sinecures were created for which much would be paid, while the underpaid deputies who actually did the work would seek to recoup themselves by questionable practices, frequently concealing the business from their superiors and keeping the fees.[16] An attack upon any one of the officials came to be viewed as most dangerous by all those interested in the patronage of the Court. "It followed that all those who, from their experience of the court, were most competent to reform it, were the most interested in maintaining it in its existing condition."[17] Not all the attacks by the common lawyers in the House of Commons were without substance or made in a spirit of self-interest.

The system of appointing and paying officials appears to have caused worse effects in the Chancery than in the common law courts for a number of reasons. Briefly, these appear to have been—first, equity cases frequently involved the taking of accounts and enquiries and this made them, for the most part, more lengthy than common law actions. Second, the fact that the procedure of the Court was wholly written gave another opportunity for official corruption; often parties were forced to obtain unnecessary copies of unduly lengthy documents. Third, the practice of the Court was unsettled, and it would be true to say that, in this regard at least, seventeenth century equity did vary with the Chancellor's foot, despite the efforts of Ellesmere and Bacon. Holdsworth gives many illustrations of uncertainty drawn from contemporary sources[18] and it would seem that the seventeenth-century Chancellors themselves —partly from lack of time, partly from lack of competence—were largely unable to check abuses among the Masters and the clerks.

A determined attack was made upon abuses in the Court in the Commonwealth period. "A mystery of wickedness and a standing cheat" was one description of the Court used in a parliamentary debate in 1653.[19] The Nominated Parliament of that year appointed a committee to draw up legislation abolishing the Court, and among its proposals was one that no official should exercise his office by deputy and another that the scale of fees should be drastically cut back. Before these proposals could become law, however, Parliament was dissolved. Reform under a later Cromwellian ordinance[20] was short-lived, legislation was not effected and with the Restoration there was a return to the old unreformed judicial system, and although parliamentary enquiries were made in 1689 into the number and fees of officials, legislation introduced in 1690 again proved abortive.

According to Holdsworth ". . . the sale of the office of Master was carried on with greater eagerness as the value of the office rose".[21] In 1621, £150 had been the price paid by eight Masters for their offices, by the time of the Revolution it had risen to £1,000 and from the evidence given against Lord Macclesfield a century later it appears that Master Ede had offered £5,000 for the

[16] And see generally W. S. Holdsworth, *op. cit.* 424 *et. seq.*
[17] *Id.* at 425.
[18] *Id.* at 427, 428.
[19] Quoted by C. P. Cooper, *Chancery*, 7, 8 and see W. S. Holdsworth, *op. cit.* 430-33.
[20] As to the effect of this ordinance see W. S. Holdsworth, *op. cit.* at 433, 434.
[21] W. S. Holdsworth, *op. cit.* 439.

post, later carrying 5,000 guineas in gold and banknotes to the Chancellor's house.[22] The reason for the increase was that the money in Court was under the absolute control of the Master, who was not bound to account for any interest received. As the money in Court was constantly increasing, so too did the interest payable to the Masters. The Masters, however, were not content with this, and in the Macclesfield impeachment a deficit of £100,871/6/8 was discovered in the accounts of four of the Masters. Much of this had been lost through speculation of the Masters in the South Sea Company. As a result of these happenings two statutes were passed[23] depriving the Master of control of suitors' money, and it became impossible thereafter to sell masterships, though they remained important pieces of patronage within the Lord Chancellor's grant.

No other substantial reforms followed from the Macclesfield inquiry and it was not until the nineteenth century that the administration of the Court was completely reorganised. At the very time the first Master of the Supreme Court of New South Wales, William Carter, was appointed,[24] the Westminster Parliament was debating the question of Chancery reform, the Chancellorship of Eldon having brought to a head the ancient complaints about the delays and abuses of the Chancery. As will be seen, Sir Francis Forbes, the first Chief Justice of New South Wales, was loath to introduce the office of Master into the new colony, but though he gave as his reasons that in an early stage of society there would be little equity work and the office would be a sinecure, it is likely that he had in mind the abuses and delays of the Masters' offices in England and was hardly eager to see them transplanted.[25]

The Commissioners presided over by Lord Eldon, who reported to Parliament in 1826, can be taken to have given a moderately accurate account of these delays. Very few cases, said the Commissioners, could be brought to a final decision without inquiries before a Master. According to Kerly—

> A large portion of the business of the Court was administrative, and the enquiries for creditors and next of kin, the ascertaining of classes of legatees, the sale of estates and distributions of the proceeds, and the taking of accounts, which the administration involved, were conducted in the Masters' offices, and there too discussions on the sufficiency of answers, objections to pleadings for scandal, and many other interlocutory matters were heard. The offices were under no direct control by the judges, and their business was conducted privately without the salutary influence which an open court always exerts on the administration of justice, but their chief defect was the frequent misconduct and incapacity of the Masters themselves, who had, and whose clerks had, a direct interest in the protraction of the proceedings before them, and who, when they had the desire, lacked the necessary dignity and authority to check the delays, and irregularities of shuffling or dishonest litigants. They, as the Chancellor and his deputies, could not take the direct evidence of witnesses, but were obliged in every case to search through masses of affidavits for the facts on which they founded their reports to the Court. The method of appeal from their decision, by motion to the Court, leading, if successful, to fresh enquiries, added to the expenses and delays the system entailed.[26]

Such was the situation in England when the New South Wales Act of 1823[27] came into force. Within the following half-century the English scene was to be radically altered in accordance with modern notions of public service, while at

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[22] Ede's evidence is reproduced in detail in W. S. Holdsworth, *op. cit.* at 439.
[23] 12 Geo. 1, c. 32; 12 Geo. 1, c. 33.
[24] *Infra* p. 509.
[25] *Infra* p. 510.
[26] D. M. Kerly, *op. cit.* 272, 273.
[27] 9 Geo. 4, c. 96.

the same time the office of Master in Equity—but again one based on those modern ideas—was to take root in New South Wales.

III. *Reform*

In England, 1833[28] saw the appointment of Masters transferred to the Crown. They were given fixed salaries, the taking of fees and gratuities became an indictable offence, court fees were fixed and lowered and it was provided that the famous, or rather infamous, Six Clerks were to be reduced to two. Nine years later, these and other useless offices were abolished: in the future costs were to be taxed by a Taxing Master. The Act of 1852[29] and the Judicature Acts[30] gave a yet more complete measure of reform, while an Act passed in 1879[31] established a new Central Office of the Supreme Court, in which were merged the existing official staffs of all branches of the new Supreme Court, including the staff of the Chancery Division. The Judicature Acts and the legislation subsequent upon them having rid the Masters' offices of their old traditions, the Chief Clerks in 1892 were allowed to take the title of Masters of the Supreme Court.

IV. *The Master in Equity in New South Wales*

The first recommendation that such an office should be set up in the Colony was made by Mr. Justice J. H. Bent in November, 1815. In a letter to Lord Bathurst he wrote: "another indispensable 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 the accounts".[32] 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 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."[33] 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, 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.[34] Commissioner Bigge considered that this action was "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".[35]

By the New South Wales Act (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"[36] 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

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[28] 3 and 4 Will. 4, c. 94.
[29] 15 and 16 Vic., cc. 80, 86, 87.
[30] 36 and 37 Vic., c. 66.
[31] 42 and 43 Vic., c. 78.
[32] *Historical Records of Australia* (hereinafter cited as *H.R.A.)* IV/i, 168.
[33] *Id.* 782.
[34] *Id.* 828.
[35] J. T. Bigge. *Report of the Commissioner of Inquiry on the Judicial Establishments of New South Wales and Van Diemen's Land.* (Ordered to be printed 4th July, 1823) 13. *Cf. H.R.A.* IV/i, 371 and 375.
[36] S. 17.

and belong to the said Court the following Officers that is to say a Registrar a Prothonotary *a Master* and a Keeper of Records".[37] It is conceived that the Master so appointed was not only Master in Equity, but Master of the Court, having extensive duties at Law. This is confirmed by a letter written by James Stephen, Jnr. in 1823, in which he stated: "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 of King's Bench in England".[38] 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.[39] In pursuance of the Patent, William Carter was by Warrant appointed "Master of the Supreme Court" in December, 1823.[40]

V. *The Functions of the Office in New South Wales*

A very clear statement of the dual functions of the Master as a ministerial officer of all departments of the Court was made by Mr. Attorney-General Gellibrand of Van Diemen's Land in a review of the office in that Territory. 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.[41]

This differentiation of functions is more enlightening than the official statement of the Master's duties in New South Wales, which were set out by James Stephen, Junior, under six headings:

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

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[37] S. 2.

[38] *H.R.A.* IV/i, 486. The Registrar of the Court similarly exercised his duties at Law and in Equity: *id.* 496.

[39] *Id.* 527-529. *Cf.* the views of Lt. Governor Arthur and Attorney-General Gellibrand of Van Diemen's Land. *H.R.A.* III/iv, 197.

[40] *Id.* 526, *H.R.A.* I/xi, 192.

[41] *H.R.A.* III/iv, 199.

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".[42]

Chief Justice Forbes seemed not to appreciate the full scope of the Master's intended duties. Writing in 1827 he complained that the office was a sinecure because "in an early stage of society, there is comparatively but little occasion for resorting to a Court of Equity".[43] He went on to say that the Master had "comparatively very few duties, properly official, to perform in the Supreme Court" and that in three and a half years only eight cases on simple matters of fact had been referred to him.[44] In his own words—"the Mass of Business in this Colony is done at the Criminal and Civil sittings of the Court. With these the Master has nothing to do except tax costs, a duty which, under our simple rules of practice, does not require particular skill, gives no trouble and occupies very little time".[45] Even with the addition of examinations *de bene esse* the Chief Justice found it hard to keep the Master adequately employed. This attitude is hardly reconcilable with the elaborate and comprehensive duties which Gellibrand and Stephen had in mind, but there is no doubt that by confusion on the part of some person, readily understandable in view of the situation in England at the time—whether the Chief Justice or his advisers—the office of Master became associated with the Equity branch of the Court. The Governor in a despatch dated December, 1827, referred to Carter by the title of "Master in Chancery"[46] and thereafter it was largely taken for granted that the Master was purely an officer of the Equity Court.

In conformity with his policy of abandoning the ministerial offices named in the Letters Patent of 1823, Forbes recommended in 1828 that the title of Master be abolished;[47] a vacancy having occurred through Carter's acceptance of the office of Sheriff. Governor Darling considered that there was no legal objection to the abolition and welcomed the opportunity of saving some hundreds of pounds annual salary.

So far as legality was concerned, the Governor soon found it desirable to change his mind, as contending claims were made by various authorities to exercise the gift of appointment to the vacancy. The Chief Justice claimed the right to regulate the proceedings of all ministerial offices[48] and prompted the following comments from the Governor—

> May I be permitted to ask on what ground you are induced to consider the arrangement for the performance of the duties of Master of the Supreme Court . . . to be legal? I find, on referring to the 9th Section of the Charter it is ordained and directed that all persons, who shall and may be *appointed to any Office in the said Court, whereof the duties shall correspond to those of Master, shall be so appointed by His Majesty*. The Chief Justice being empowered only to appoint to such other Office as is

[42] *H.R.A.* IV/i, 494: *cf. H.R.A.* I/xi, 192.
[43] *H.R.A.* I/xiii, 681.
[44] *Ibid.*
[45] *Ibid.*
[46] *Id.* 648.
[47] *Id.* 682.
[48] *Id.* 808.

> not therein specially named . . ., or the duties of which do not correspond with those Offices last mentioned.[49]

Two days later, in a letter strongly derogatory of the Chief Justice, the Governor wrote to Huskisson affirming that he considered *ultra vires* the proposal to abolish the Master's office as being inconsistent with the Letters Patent of 1823.[50] While it may be said that the Governor's contentions were cogent as regarded the *appointment* of the officers specifically named in the Patent, they were certainly not so well applied to Forbes' plan. The Chief Justice, as well as the Governor, had power to suspend the ministerial officers from their duties pending confirmation of Royal concurrence. The Chief Justice could himself appoint and regulate the duties of clerks of the Court; and, moreover, he could make appointments of this kind without any reference to the Crown.

The whole controversy, so far at least as the Master was concerned, came to an abrupt end with the arrival in the Colony of Thomas Macquoid who came to take up the office of Sheriff as the nominee of Sir George Murray, then Secretary for State. Carter had no option but to surrender the Shrievalty, though he lost no time in retrieving his former status as Master.[51]

Having to do what he could with the existing machinery, Forbes caused a rule of court to be made in September, 1829, in which the increase of court business was recited with a proposal to establish three separate court offices—the Registrar's, Master's and Chief Clerk's office respectively. This rule made it clear beyond any doubt that the Master was henceforth to be primarily an equity officer. In his office—

> 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.[52]

This reorganization did nothing to stimulate the Equity Court which was in a decadent condition, and when, in 1832, Carter was declared insolvent and dismissed, the opportunity was taken to abolish the Mastership entirely.

VI. *The Emergence of the Modern Office*

So the position remained for eight years. During this time the publicity directed to the jurisdiction by Willis, J.[53] and the natural consequences of expanding commerce brought a gradual revival of equity business. By 1839 Governor Gipps recommended to Lord Glenelg that "it should be left to the Local Legislature to establish (if necessary) one or more Masters in Chancery".[54] The Local Legislature did in fact consider the step a necessary one and, in the following year, ordained by the Administration of Justice Act (4 Vic. No. 22) that the office of Master *in Equity* be revived.[55] This was, of course,

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[49] *Id.* 809.
[50] *Id.* 813.
[51] *H.R.A.* I/xii, 782, I/xv, 205.
[52] Rule of 30th September, 1829, in Supreme Court Papers, Bundle 34 from the original in possession of the Trustees of the Mitchell Library, Sydney.
[53] Of greater eminence was the recommendation of Dowling, C.J., in 1838 that: "although the office of Master in Equity in the Supreme Court was abolished some years since, for reasons, then sufficiently cogent, it ought to be reinstituted, in consideration of the growing importance of this branch of the Court's jurisdiction. This Officer should be a Barrister of competent knowledge of the usages and practice of the English Equity Court". (1840) *V. & P.* 167.
[54] *Id.* 156.
[55] S. 22 "It shall and may be lawful for the Governor . . . subject to the approval of

only a partial revival of the former office of Master, as it related solely to the Equity jurisdiction.[56] The office of Master on the Common Law side was never re-established. The Act went on to empower the Governor, subject to Royal approval, to appoint a barrister of England or Ireland of at least five years standing to such office. The latter requirement was shattering to the hopes of the Chief Clerk, H. B. Bradley, who had been acting Master and who had confidently expected appointment to the new position. He was not a barrister, could not be considered, and therefore resigned.[57] The first recipient of the title was Dr. Kinchela, but his tenure was of only a few months because of his ill health. William Carter, who had recovered from his financial embarrassment, was accordingly recommended to the office by Governor Gipps. But Lord Stanley had his own ideas who should be appointed and he gave the Governor directions to install S. F. Milford with a salary of £1,000 per year.[58] Carter was to take the newly-created position of Registrar-General (the old office of Registrar, but detached from the Court).

In approving of the revival of the Master's office, Lord Stanley decided to enlarge its scope. In addition to matters arising on the equity side of the Court, all duties connected with the administration of intestates' estates or of estates of persons dying in the Colony without legal representatives were to rest with the Master. His Lordship's expressed hope of a greater assimilation to the English office of Master in Chancery[59] was soon realized as the local officer's true utility came to be appreciated. An immense amount of work covering the taxation of costs, passing of accounts, taking of examinations *de bene esse*, settlement of minutes, determination of warrants to show cause, of warrants to amend, and of references, fully occupied the time of Master Milford. He sat in public chambers on several days in each week and usually had a number of matters listed for hearing on each day. By 1844 the Judges had no hesitation in assuring the Governor that the Master's salary was certainly not too high, especially as he served as Registrar, Examiner and Six-Clerk in addition to his ordinary equity work. The judges acknowledged "the very important nature of the Master's duties, and their extent and great responsibility, every day increasing" as well as "the enormous amount of property with which he has to deal";[60] not to mention the great volume of reference work which the judges themselves delegated to the Master in the hope of lightening their own burdens —a somewhat vain hope, as a speculative appeal was quite to be expected.

One of the Master's most responsible tasks was that of taking the *viva voce* evidence of witnesses. This was a cumbersome system, though it was simpler and less wasteful than the old system of written interrogatories. The idea had its origin in a suggestion by Willis, J., adopted in 1838, that witnesses be examined orally in open court; but it was not favoured by the judiciary or profession, who found it expensive and inconvenient.[61] To overcome this, the examination was delegated to the Master who then submitted his transcript of the evidence to the primary judge. Although this method answered in cases where there was no contention as to facts, it was quite inadequate to resolve disputes: its dilatoriness was prodigious, as all the evidence had to be transcribed by the Master and then read back orally to the Judge in court. The benefits of *viva voce* examination at first hand were lost so far as the judge

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Her Majesty to appoint a Barrister of England or Ireland of at least five years standing to discharge the duties of the same together with such other duties belonging to the said Court as may be comparable with such office at such salary as may be deemed reasonable."

[56] *Cf.* Alfred Stephen, *The Constitution, Rules, and Practice of the Supreme Court of New South Wales* (1843-45) 65.

[57] (1843) *V. & P.* 304.

[58] *Id.* Stanley to Gipps, 26th August, 1842.

[59] *Id.* 310 *cf.* Stephen, *op. cit.* 305.

[60] (1844) *V. & P.* 408.

[61] (1847) 2 *V. & P.* 475.

was concerned and, as one commentator remarked, "a thing is very different when put on paper to what it would appear if heard from the mouth of the witness".[62] Despite strong criticism and a vigorous body of opinion that references should be abandoned in favour of trial by jury,[63] the old system held its ground.

In the 1850's, equity business lapsed back into another period of darkness due to the painful slowing of litigation by tedious and wasteful procedure. It was at this stage that the office of Master became subject to one of those anachronisms which have come to characterize the legal system of New South Wales. The Imperial Statute 15 & 16 Vic. c. 80 had dispensed with the Masters in Chancery, yet, four years later, a Colonial Rule prescribed that the Master should carry out all the duties "discharged in England by the Masters, Examiners, Registrars, and Clerks of the High Court of Chancery".[64] If, as result, the local Master theoretically had no duties to perform, the practical position was quite different! The delays which were strangling the Equity Court certainly cut down the number of pure equity matters before the Master; but the other miscellaneous duties with which Lord Stanley had invested him were far from static. By 1855 the burden of insolvency business had become far too heavy for one man and the Chief Justice had to intervene to confine the work within reasonable bounds. Sir Alfred Stephen observed that "the very able and learned" Master who performed 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".[65] In 1858 one of the commissioners enquiring into the proposition to appoint a fourth Judge asked a witness whether the duties of the Master could not conveniently be vested in a fourth Judge, were one appointed. The answer clearly was that the formal matters before the court were ample to occupy the Master's attention and that a Judge was required in addition to, not in substitution for, the Master.[66] The witness explained that a vast proportion of references on particulars of accounts, investigations of title and the like did not lend themselves to performance by the Equity Judge himself.[67]

George Hibbert Deffell, who was appointed Master in Equity in 1857 was reluctantly obliged to continue the duties of Commissioner of Insolvent Estates, which the Government had seen fit to retain in the Master's department. Deffell lost no time in approaching the Attorney-General to protest at the unfair volume of work cast upon him. In December, 1865, he sent a letter of resignation to the Attorney-General, but this was ignored. By the following year, he declared to the Government that he was unable to satisfy his oaths of office and that, so long as he had to attend to creditors and insolvents, he could not give paramount attention to the interests of Equity suitors.[68] He accordingly asked to be released from the office of Master in Equity, quoting the approval of the Judges, who were satisfied of the "impossibility of a continuance, as at present, without a denial of justice *pro tanto* to suitors and to creditors and insolvents. through (the Master's) being unable simultaneously to discharge the heavy and daily duties of the two departments".[69]

At this stage the Government did act; Deffell was relieved of his duties as Master in Equity and Arthur Todd Holroyd admitted to his place. The opportunity was taken to investigate thoroughly the functions of the Master's office

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[62] (1858) 1 *V. & P.* 1189 (48).
[63] (1847) 2 *V. & P.* 456, (19).
[64] General Rules of Court, 1st March, 1856, r. 2.
[65] (1855) 1 *V. & P.* 689.
[66] (1858) 1 *V. & P.* 1189 (53).
[67] *Id.* (55).
[68] (1866) 1 *V. & P.* 818.
[69] *Id.* 819.

and, at the same time, to consider whether the office itself might 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 entire abolition, chiefly because of its associations with slow methods.[70] Two solicitors who gave evidence before the Committee were also keenly in favour of ending the Mastership. Mr. W. G. A. Fitzhardinge, complaining of "the enormous and useless expense",[71] 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?"[72] said, "Certainly; there would be less delay and less expense, that is, independently of the question whether it is necessary to go to the Master's office at all".[73]

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 administrative 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 England. 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.[74]

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.[75] 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 conveniently be passed over to the Judge. There was only one realistic solution—to retain the office.

The Equity Act of 1880 and the *Regulae Generales* of 1883,[76] while consolidating a rambling mass of equity law, made the position of the Master in Equity rather more vague than it had been before. The Rules of 1856 had at least circumscribed the Master's duties by reference to obsolete English practice. As there was no comparable practice in England by 1880, an attempt to codify what the Master (and indeed the other ministerial officers of the Supreme Court) should do was not ventured. As a result, the responsibilities and functions of the Master were scattered throughout Act and Rules as chance disposed. In the Equity Act, 1889, it was prescribed that the Master should tax costs and carry out such enquiries as had previously been customary and,

[70] (1868-9) 1 *V. & P.* 977 (171).
[71] *Id.* 987 (283).
[72] *Id.* 990 (355).
[73] *Ibid.*
[74] *Id.* 980 (182).
[75] *Id.* 969 (53).
[76] These are printed in *The Practice in Equity* by W. Gregory Walker (1884).

in other respects, investigate matters which the judges decided to place before him (s.66). He was to have specific power to issue advertisements, to summon parties and witnesses, to administer oaths and take affidavits and acknowledgements of any persons excepting married women (s.67). He was relieved of his former burden of having to take *viva voce* evidence in all cases; the objectionable old procedure being at last abandoned (s.31); though he could be called upon by a judge to make an oral examination of parties or take interrogatories (s.67) and any *party* to a suit could still subpoena a witness before the Master (s.47). All equitable pleadings were filed in the Master's office (s.6. s.18); summonses and writs were signed by him (R.7) and statements of defence, sworn pleas and answers to interrogatories were to be taken before him (R.11). By order of a judge (s.65) and in all appeal cases (s.76) the Master was to settle the decrees or orders of the Court and he had the responsibility of passing and signing all except chamber orders (R.6).[77] One of the most important items was the Master's jurisdiction on references and enquiries from the Court (RR.186ff.) in which cases he had a fair measure of discretion to decide what proceedings should be taken before him (R.191), what parties should appear (R.192), or whether he should proceed *ex parte* (R.197) and what documents should be produced (R.194).

In this regard he had quite wide procedural powers and could, for instance, dispense with service (R.204), order production of documents (ss.25-26), expunge scandalous and irrelevant matter (R.207) and take evidence as he saw fit if it had been previously tendered in court (R.201). He could, however, be required to certify to the Court exactly what proceedings had been taken before him (R.199). In references the Master would endorse his decision on the papers, after which no further evidence could be given without leave of the Court, though the decision could be altered before a final certificate was signed (R.208): in this connexion it may be noted that the Master's decisions were normally embodied in a certificate or report (s.68), which could not be excepted to after adoption and signature by a judge (s.69). The Master could state special circumstances in his report (R.221) and could, if necessary, make separate reports (R.222)and separate reports on matters involving debts and legacies (R.223).

In the Master's hands lay much administrative and financial business. He had a general power as taxing officer between party and party (R.263). He was accorded substantial discretions, especially a general power to disallow or reduce costs (R.230), and to decide upon costs in some more particular instances, as where petitions or affidavits were lengthy or improper (R.253), or where affidavits had been prepared or settled by counsel (R.258), or more than one counsel briefed (R.263). He alone had the right to regulate the fees of scientific and expert witnesses (s.46). Moneys being paid into Court and other assets lodged with the Court came into the custody of the Master (R.163) and he had power to operate on them (RR.161-162), retransfer or otherwise deal with them as ordered (RR.165-166). In administration suits, creditors could come in to prove before him (R.214). He was to approve all sales by the Court (R.231) and appoint auctioneers for sale (R.232): he took security from receivers (R.234) and otherwise controlled their functions (RR.235-239): he settled conveyances if required by the Court (R.229), and he could appoint guardians, new trustees and receivers (R.210).

The Equity Rules of 1902, with some additions, continued the assortment of functions which had thus been laid down. Master Barton (who assumed the office in 1886)[78] prepared a paper in 1902 commenting on the duties of

[77] The Court and the Master had a very wide power under R.158 to settle or pass decrees or orders without notice or appointment.

[78] The subsequent Masters and the dates of the appointments have been: Henry Francis Barton (1886), Henry Percy Owen (1903), William Arthur Parker (1919), John Russell

the office.[79] That paper, with other commentaries on current practice, is readily accessible and the present writers will not duplicate its ground, beyond drawing attention to the exclusion of the Master in Equity from the provisions of the Public Service Act.[80] This unintelligible distinction between the Master and the other ministerial officers of the Court is, no doubt, in keeping with an office which, throughout its history in England and in New South Wales, has been decidedly curious. It is, in modern New South Wales, an office with many functions unheard of at the time of the Masters in Chancery, yet which retains its essential link with an English legal system brought to an end over a century ago. The only serious attempt to introduce the Judicature System in New South Wales proved a seed which either fell on barren ground or was choked by thorns.[81] Whether through lethargy or conservatism, or both, the office of Master (along with the ministerial offices and practice of the Supreme Court generally) remains as it has always been and, in the view of the present writers, does not suffer on the ministerial side for being so.

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Hooton (1941), Edward Naasson Dawes (1959).

[79] W. A. Parker, *Equity Practice* (1949) 259 *et. seq.*

[80] (1959) 3 *Sydney Law Rev.* 68, n. 206.

[81] (1935) 143 *Parliamentary Debates* (N.S.W.) 6052.

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