Tradition and Experiment: Some Australian Legal Attitudes of the Nineteenth Century

"At the present time, Australia is regarded as having emerged from the colonial state . . . However, in the field of ideas, its status is still colonial, and this is very apparent in the sphere of legal ideas . . ."

Thus wrote a critic of procedure in 1950,[1] and recently Professor Castles has said much the same of our nineteenth century court systems.[2] Within limits of space, we seek to test such general views by *samples* from three strata of law-making and legal administration—the parliaments, the courts, and the legal profession of nineteenth century Australia.

Our reasons for including "Legislation" and "The Courts" will be obvious. "The Profession" is, we think, an appropriate if neglected part of the trilogy. The law and quasi-legal practice of the English-style profession's workings are an integral and intimate part of "lawyers' law", an area in which lawyers, by wise providence or by default, hold real political and legislative power. It is also a part of law more interwoven with the social past of the old, distant and different society of England than other functional parts of our statute and common law. It is an area in which Australian legal creativity might have been expected to show itself often and anon.

I LEGISLATION

Lord Carnarvon declared in 1859 that "there can be few subjects of greater importance to the welfare of the entire body which is united under the government of the British Crown, than the maintenance of uniformity of legislation, as far as practicable, in matters of social and domestic interest".[3] Such an approach was, however, exceptional in Colonial Office thinking, and not borne out in general practice. As early as 1827 James Stephen, that great architect of colonial policy, had made it clear that "it certainly has never been required that the Law of England should be made the inflexible model for all Colonial Legislation".[4] Indeed, he deprecated the automatic adoption of English laws for, in his view, "the closest parallelism in forms, will, in such cases, often involve the widest deviation in substance".[5] No more could be expected than a happy medium wherein "colonists had to be kept both from a large-scale borrowing and a thoughtless ditching of English laws, institutions, and business practices"[6].

1. Hutley F.C. "Procedure and Pleading" in Paton G.W. ed. *The British Commonwealth: The Development of Its Laws and Constitutions—Australia* London 1952 177.
2. Castles A.C. *An Introduction to Australian Legal History* Sydney 1971 103.
3. Carnarvon to MacDonald (Governor of South Australia), 1st June 1859. C.O. 13/99 fols. 92–3.
4. Report of 4th August 1827, C.O. 323/44 fol. 53. C.O. 323/42 370. For a definitive treatment of the reception of English common law and statutes in Australia, see Castles *op. cit.* chapters IX and X.
5. Report of 10th June 1847, C.O. 323/54 fol. 340. Cf. Eddy J.J. *Britain and the Australian Colonies 1818–1831* Oxford 1969 29–30.
6. Knaplund P. *James Stephen and the British Colonial System 1813–1847* Madison 1935 255. Stephen determined to convince Gladstone "that he cannot govern Colonies by bestowing his subtlety and fostering advice on them and treating them like children". Quoted Barron T. and Cable K.J. "The Diary of James Stephen, 1846" (1969) 13 *Historical Studies* 503 at 506.

Thus, within the greater part of the nineteenth century, legislative uniformity throughout the Empire was not encouraged for its own sake. There were cases where a common standard was valuable, especially in areas of "lawyers' law" where imperial Acts "codified" or settled complex legal principles. Chalmers' *Sale of Goods Act*[7] is an enduring example. Otherwise, excepting laws affecting personal status, of which more is said below, the Colonial Office sympathized with local legislative experiments, and actively discouraged servile conformity:

> "On balance, the bias within the Office was against uniformity, and against the literal translation of English law on to the colonial statute book, except in those few cases where uniformity was clearly desirable in order to avoid confusion, or where no obvious harm would ensue. Officials within the Office were always well aware of the material differences between their own country and the various colonial societies, differences which made any hoped-for certainty in adopting English laws a mere illusion. They were also aware, and becoming increasingly so, that a healthy, stable society is one which frames its laws to suit its own situation".[8]

Of course, English precedent was not ignored. English laws were frequently used as models but, in Australia, their application was usually neither mechanical nor uncritical.[9] Even in the years before 1850 the Australian Legislators often made it plain that they were not, and had no intention of being, mere copyists.[10]

The Judicature Acts

On the other hand, the growth of legal institutions in nineteenth century Australia might suggest a studied conformity to English patterns of development and change. Professor Castles sees it as an almost passive process:

> "With some exceptions, the stimulus for the changes which occurred was to be derivative. With court systems established on English models and legislatures attuned to adapting British reforms to Australian conditions, rather than engaging in locally inspired efforts of law reform, the majority of key reforms

7. 56 & 57 Vict. c. 71 passed in 1894, though designated the *Sale of Goods Act*, 1893.
8. Swinfen D.B. *Imperial Control of Colonial Legislation 1813–1865* Oxford 1970 76–77. For the later working out of such policies see Keith A.B. *Imperial Unity and the Dominions* Oxford 1916 Introduction; and for a pertinent comment on the converse question of repugnancy see Roberts-Wray (Sir) Kenneth *Commonwealth and Colonial Law* London 1966 400. Cf. Campbell Enid "Colonial Legislation and the Laws of England" (1965) 2 *Univ. of Tasmania Law Rev.* 148.
9. In those cases where simple transcription had been employed, statute law reform was often quickly stimulated. In introducing his Bill for the consolidation of Victoria's statutes in 1864 Higinbotham said that: "Both the structure and arrangement of the statute laws of the colony were open to very serious objections. Some of the older statutes had been adopted textually from English Acts, and the consequence had been that certain provisions of the English law, applicable only to the condition of things existing in England, had been introduced, although wholly unsuitable to the condition of this colony" *Victorian Hansard* vol. X 18.
10. Currey C.H. "The Influence of the English Law Reformers of the Early 19th Century on the Law of New South Wales" (1937) 23 *R.A.H.S. Journal* 227 at 240. There were, however, cases where maintaining precedent made uniformity a practical necessity: "In the case of Acts which were in force in England as well as in [Victoria], the draftsmen were instructed not to depart, even in form, from the terms of the English Acts, because it was extremely desirable to have the benefit of English decisions" (Higinbotham) *Victorian Hansard op. cit.* 20. Cf. Lilley's address on the Queensland Law of Partnership Bill 1866 *Q.P.D.* Vol. 3 102.

in the Australian court system between 1850 and 1900 could be traced directly to changes already instituted in Britain".[11]

Such a broad statement surely does less than justice to last century's Australian promoters of law reform.[12] From the first Chief Justice of New South Wales onwards, many distinguished lawyers sought to change the local legal institutions,[13] but their greatest problem was to secure legislative attention. After Responsible Government, elective politicians thought legal procedure and jurisdictions of courts not to be vote-catching issues. English reforms of that kind were often adopted here only because they needed minimal parliamentary debate, having been tested and discussed "at Home".

Responses to the English *Judicature Acts* 1873–5 are the best examples of Australian attitudes, which ranged from artless adoption of English precedent to its critical rejection. South Australia, Queensland and Western Australia fell in with the reform. Victoria and Tasmania did likewise after hesitation and dispute. New South Wales declined to accept the judicature system. South Australia's first attempt to copy the Act failed, because local lawyer-politicians criticised its operation in England.[14] In Western Australia, by way of contrast, acceptance of the English changes was spontaneous:

> "The local Bill was not introduced because at present there was any imperfection in the law or its administration, but because the operations of the Colonial Court should be technically adjusted with those of the higher courts in England. [It] need hardly be pointed out how desirable it was that the procedure of our Supreme Court should as far as possible be kept assimilated to, and governed by, the rules and regulations of the English Courts".[15]

Victorians debated the same question for many years from 1873, and the judicature system was only agreed to after a Royal Commission, headed by Stawell, C.J., clearly recommended it.[16] In New South Wales more independent spirits prevailed. Despite strong supporters of the system, parliament was not interested, and it needed only one powerful lawyer in the Legislative Council critical of the working of the Judicature Acts in England to delay their importation for a century.[17]

No universal rule emerged in the nineteenth century from Australian attitudes to English enactments affecting legal institutions and procedure. In wider areas of law, the Colonies generally worked out their own requirements, sometimes making major innovations in the process. The various Real Property statutes, introducing the Torrens system of land title registration, were the most cele-

11. *Op. cit.* 103. Australia was in no special position: "The charters of justice did not create a rigid uniformity throughout the Empire . . . [but] efforts were made to establish a certain outward similarity of pattern for courts and judicial procedure" Knaplund *op. cit.* 229.
12. See generally for some examples Currey *op. cit.* and Bennett J.M. "Historical Trends in Australian Law Reform" (1970) 9 Univ of W.A. Law Rev. 211.
13. The subject remains to be fully researched, but for some preliminary observations see Currey C.H. "Chapters on the Legal History of New South Wales, 1788–1863" LL.D. thesis (n.d.) Sydney 295–6; Bennett *op. cit.* and references therein, particularly to the work of Stephen, Higinbotham, Lilley and Griffith.
14. *S.A.P.D.* (1876) 902.
15. *W.A.P.D.* (1880) vol. V 145.
16. *V & P* (Vic) (1880–1) III no. 28.
17. F.M. Darley, as demonstrated repeatedly in introducing the Equity Bill in 1879 and 1880 and in his condemnation of a Reform in Administration of Law and Equity Bill in 1881—*N.S.W.P.D.* 1st series vol. 6 1872.

brated of them;[18] Australian mining laws were another example.[19] But, in respect of laws affecting personal status, the Colonial Office long insisted[20] that English models be followed. Of the operation, and eventual collapse, of this policy two instances—the laws of bankruptcy and of divorce—will be considered here.

Bankruptcy

It would require a very long article even to sketch the historical vagaries of this complex field of law on a national basis. The presently relevant principles emerge from a sampling of, and are typified by, legislative developments in the three eastern mainland Colonies.[21]

The first local statute, "An Act for the Relief of Debtors" (1830),[22] was passed in New South Wales for a trial period, but not renewed. Heavy reliance on English law made it "unsuitable to the State of Society in the Colony", and conducive to fraud.[23] There followed flux and reflux between tradition and experiment, between boom and depression, and between lenient and stringent treatment of insolvents, manifested in many enactments tested but discarded. In 1841 a moderate measure became law,[24] based on a Bill which Burton, J., had developed while at Cape Colony, and which Alfred Stephen, when Attorney-General of Tasmania, had introduced there with amendments. Its policies of rejecting imprisonment for debt as unpractical, and of discouraging forced sales of insolvents' assets were thought by Burton "a beneficial departure from the English Laws".[25] The Colonial Office therefore suspended "Her Majesty's decision" until the Act could be judged from experience.[26] In 1843 a Select Committee thought it "founded in justice and reason"[27] but, acknowledging that it was inadequate,[28] recommended radical changes enacted as 7 Vic. No. 19. Imprison-

18. See Pike D. "Introduction of the Real Property Act in South Australia" (1961) 1 Adelaide Law Rev. 169 Torrens R.R. *Handy Book on the Real Property Act of South Australia (1860)* Adelaide 1862. Hogg J.E. *The Australian Torrens System* London 1905.
19. O'Hare C.W. "A History of Mining Law in Australia" (1971) 45 A.L.J. 281.
20. For the narrowing even of this policy in the twentieth century see debates on the Statute of Westminster Bill, notably *P.D.* (Commons) (1931) vol. 260 cols. 247 272.
21. It must be emphasized that, in the early years of each of these colonies, the jurisdiction now described as "bankruptcy" was designated "insolvency". Insolvency was then descriptive of the whole genus of persons whose liabilities exceeded their assets; bankrupts were that species restricted to traders by the 13 Eliz. I c. 7.
22. 11 Geo. IV No. 7 (NSW). There had been an elementary, but inadequate, provision for getting in and distributing insolvents' estates under sections XXII and XXIII of the New South Wales Act 4 Geo. IV c. 96.
23. Bourke to Goderich 19th March 1832 *Historical Records of Australia* (hereafter *H.R.A.*) I/XVI 566. For an eloquent apology for colonial experiment see an essay by Edward Smith Hall "Observations on a Bill now before the Legislative Council of New South Wales . . . addressed to the Members of the Legislative Council, the Merchants, traders and others of New South Wales" Sydney 1838 3.
24. 5 Vic. No. 17 (NSW); *H.R.A.* I/XXI 726. For a comment on the contemporary economic background and its results see Butlin S.J. *Foundations of the Australian Monetary System* Melbourne 1953 320–324.
25. Burton W.W. *The Insolvent Law of New South Wales With Practical Directions and Forms* Sydney 1842 6.
26. Stanley to Gipps 27th February 1843 *H.R.A.* I/XXII 573.
27. For Gipps' reservations see *H.R.A.* I/XXIII 181.
28. An opinion strenuously shared by the colonial press e.g. *Syd. M. Herald* 30th July 1840 2f 31st August 1843 3b; *The Australian* 7th May 1842 2c: "The Insolvent Law is working very badly. A large number of disreputable persons have taken ample advantage of a measure, which, excellent as it no doubt is in many parts, is found practically to work entirely in favour of the debtor, and to the severe detriment of the creditor".

ment for debt was thereby abolished, and Governor Gipps deliberated anxiously before assenting to the Bill:

> "It appeared to me that, in a matter of so much importance, a Colonial Legislature ought scarcely to take the lead of Parliament; and I even doubted whether an enactment, which went on to deprive creditors of a right, which (whether it be a barbarous one or not) the Law of England has for centuries allowed to them, might not be repugnant to [that] Law."[29]

The Colonial Office declined to fall in with the experiment until receiving reports from the Governor, the Judges, and principal merchants and landholders as to the working of the Act.[30]

By 1862, revision and consolidation of the Colony's insolvency laws were mooted, the sponsor complaining that too much reliance had been placed on English legislation.[31] The idea was still under review when the *Bankruptcy Act*, 32 & 33 Vict. c. 71, of 1869, assimilated the English laws of bankruptcy and in-insolvency. Suggestions that the local law conform were resisted by Stephen who considered it simpler and less expensive, though not always so well expressed. He thought the English Act contained some improvements "too bold for colonial origination", outweighed by changes which were not improvements:

> "The truth is, that no Bankruptcy system in England has survived a generation . . . In New South Wales, we have had but one general law, and with certain amendments, it has existed now, forty years."[32]

The last *Insolvency Act* was passed in 1874, but it still failed to answer the purpose. By 1883 many draft Bankruptcy Bills had been prepared, but abandoned,[33] and there was general agreement that the revised English law of that year[34] was superior. It formed the basis for the *Bankruptcy Act* of 1887 which, in consolidated form, governed the colonial law for the remainder of the century. Even so, many intervening amendments had to be made because the English model had been copied too closely[35] and some politicians remained convinced that the old insolvency law had worked better in practice.[36]

In Victoria, the century witnessed a repetition of the same see-saw process. Although the Colony inherited the insolvency statutes of New South Wales, an independent review was made of them. Several unsuccessful attempts to vary the law were proposed before 1857 when Attorney-General Stawell announced that a major revision was in hand. Many complaints followed its constant postponement thereafter.[37] Late in 1859 a Bill "to amend the Laws relating to Insolvent Debtors" was introduced. It sought to assimilate local law to the

29. Gipps to Stanley 1st January 1844 *H.R.A.* I/XXIII 291.
30. Stanley to Gipps 28th October 1844 *H.R.A.* I/XXIV 59.
31. *Journal of Legislative Council* (NSW) vol. 9 I 635 at 643 *et seq.* (McFarland).
32. "Memorandum of Sir Alfred Stephen C.J. for a New Bankrupt Law, proposed in 1871 to the Law Commission of New South Wales" Alfred Stephen Public Papers vol. 4 in Mitchell Library Sydney (hereafter M.L.) Q328.91/S.
33. *Syd. M. Herald* 3rd August 1883.
34. 46 & 47 Vict. c. 52.
35. "There were certain differences in connexion with our own circumstances here that were not sufficiently taken into consideration when that Act was being dealt with" *N.S.W.P.D.* 1st series vol. 85 3596.
36. *Ibid.* e.g. at 3598 (MacLaughlin).
37. Thus, one politician grumbled that insolvency reform was always promised for the next session "an epoch that seemed to recede as they advanced towards it" *Victorian Hansard* vol. IV 371.

English *Bankruptcy Consolidation Act* 1849 and to "the Bill recently introduced in the Imperial Parliament by Lord John Russell, with the sanction of the mercantile community of London".[38] However, the second reading was allowed to lapse, and a somewhat different Bill in the following year was discharged. Two Select Committees, appointed in 1861 to examine the administration of the existing Insolvency Acts, declared that the Insolvent Court was grossly inefficient, and its proceedings were "circuitous, dilatory and needlessly expensive".[39]

They rejected completely the Chief Insolvent Commissioner's proposal that the English bankruptcy system be restored. It was thought not only inconvenient, but also "difficult, if not absolutely impracticable" of adoption and, even if it could be effected, "the decisions of the English courts would still remain comparatively useless as a guide".[40] So there seemed no incentive to adopt a traditionalist approach but, after several abortive Bills had been brought forward, a consolidating measure was passed in 1865, directed, paradoxically, to assimilating the colonial law more closely to that of England. In many respects it solved nothing:

> "It was as simple for an insolvent to pass through the court under the present law as it was for a man to go through the ceremony at the Governor's *levee*. All that the insolvent did was to go into court, and make his bow to the Chief Commissioner, and he was discharged. The insolvency laws were, in fact, most outrageous, and held out inducements for frauds of the grossest description."[41]

Attorney-General Higinbotham acknowledged that the Colony's law was unsatisfactory, as was England's law, though for different reasons. He introduced a new Bill in 1867,[42] partly experimental—it proposed setting up a separate Court of Insolvency—and partly traditional—it was largely based on a measure introduced in the previous session of the House of Commons. The Bill was referred to a Select Committee by the Legislative Council; numerous amendments were proposed, but the Government allowed it to lapse. Then, on the very point of passing in 1869, another Bill, re-drafted to suit local conditions, was also abandoned when news was received of the enactment of the English *Bankruptcy Act* 32 & 33 Vict. c. 71. Tradition prevailed again, the English measure being substantially taken across into the Victorian *Insolvency Act* of 1871. It was widely criticized; one writer in 1895 claimed that its continuance "[spoke] well for the indifference of the Legislature to the interests of the commercial world rather than for the perfection of its provisions".[43] Writing of the Act in 1899, P.D. Phillips summed up the continuing paradox:

> "Our Act of 1871 was a new departure, closely following English Bankruptcy legislation, which hitherto we had not done; and is one of a series of Acts, of which the Judicature Act is an example, in which we have adopted English precedent as a safe and certain guide, not always without subsequent regret."[44]

38. *Ibid.* vol. V 172.
39. *V & P* (Vic.) (1861–2) II D no. 14 iv.
40. *Ibid.* v.
41. *Victorian Hansard* vol. XI 825.
42. *V.P.D.* vol. 3 682. The Bill was strongly criticized by some speakers on its second reading, and Higinbotham in reply readily admitted that "we cannot obtain any assistance from the experience of the mother country, because opinion is as much divided there as it is here as to what a good insolvency law should be" *ibid.* vol. 4 859.
43. Anon. *Insolvency Reform* Melbourne Varley Bros. pamphlet 1895 3.
44. *A Treatise on The Insolvency Law in Force in the Colony of Victoria* Melbourne 1899 30.

Queensland also derived its foundation insolvency laws from New South Wales. Attorney-General Pring re-appraised them and sponsored a new statute in 1864. Based partly on English and South Australian legislation,[45] it was original enough for him to boast that "no honourable member would be able to taunt him with having presented the transcript of a measure that was to be found in any statute book in the world".[46] Nonetheless it worked so badly that a Select Committee was appointed in 1865 to examine it. Lilley complained that it had borrowed too heavily, without resolving for itself the Colony's own requirements:

> "There had been too much of that wholesale adoption of imperial and colonial Acts, which were rushed through on the assumption that what others had passed must be excellent, and was worthy of adoption by this colony. If all he heard was true, that style of legislation had been most unfortunate in regard to the insolvency law . . . there was not a single part of it which would stand the test of examination."[47]

In 1874 Griffith introduced a Private Member's Bill assimilating the Colony's law to the substance of the 1869 Act. The procedural portions he rejected as entirely unsuited to Queensland's circumstances. Trenchantly attacked in the Upper House, the Bill was said to have been drawn and presented by Griffith acting professionally for certain commercial men. The English Act was there criticized and the protest made that "if the Bill became law in its present shape, it would create such an amount of litigation as was never heard of before—in fact, that it was a Bill simply for lawyers".[48] But, after narrowly escaping reference to a Select Committee, it was enacted. Censured locally as a patchwork and "the most ambiguous Act that was ever passed",[49] it was acclaimed in the *Victorian Review* for 1881 as "undoubtedly superior to that of any other Colony".[50] With slight amendments made in 1876 it continued in force for many years.

So the paradox remained: some admired the English models, some rejected them. The Colonial Office favoured uniformity. In the result, concerted efforts to be independent and to devise a local statutory solution to the problem of bankruptcy were rarely given the chance to succeed. The Australian mercantile community knew what it wanted, but was usually frustrated by the hesitant adoption of new English laws. In this strange chapter of uncertainty, deference to tradition was unhealthy, and the course of bankruptcy law reform was weakened by it.

Divorce

The Colonial Office, from the first settlement of Australia, prohibited matrimonial causes there. So strongly did it advocate the sanctity of the marriage tie, and the consistency of all imperial divorce laws, that its policy hardened as the nineteenth century advanced.[51] A private Act of the New South Wales

45. For a synopsis of the South Australian position see *Guide to the S.A. Insolvent Acts* Adelaide 1885.
46. *Q.P.D.* vol. 2 402.
47. *Ibid.* 403. Cf. criticism in Harding G.R. *The Acts and Rules Relating to Insolvency* Brisbane 1887 xxxvii.
48. *Q.P.D.* vol. 17 656.
49. *Q.P.D.* vol. 21 1056.
50. 502.
51. See generally Bennett J.M. "The Establishment of Divorce Laws in New South Wales" (1963) 4 Sydney Law Rev. 241. See also Keith *op. cit. supra* note 8 139 and Keith A.B. *Responsible Government in the Dominions* 2nd ed. Oxford 1928 961.

Parliament, passed in 1853 to dissolve an outrageous marriage, was disallowed on reservation for the Queen's assent.[52]

When the English *Divorce Act* of 1857 became law, the Colonial Office urged its uniform adoption.[53] Minor variations might be made, but "the serious questions which might arise from differences of legislation on that portion of the subject which relates to dissolution of marriage or divorces *a vinculo matrimonii,* questions possibly affecting the validity of marriages contracted in one part of the Empire after divorce in another, and consequent legitimacy of offspring" rendered it "advisable" that significant variations be reserved. South Australia, in 1858,[54] followed the English model,[55] as did Tasmania in 1860,[56] though it gave even greater relief, in some respects, to wives when deserted or judicially separated than was the case in England. A Western Australian Ordinance of 1863[57] recited the benefits of conformity: "to obviate the danger which may arise as well to public morality as to family interests, if the law of this Colony on the subject differed materially from that of the mother country, it is expedient to adopt the provisions of the recent Statutes amending the law . . . in England". A similar substantive measure was adopted for Queensland in 1864[58] but "for some years there was no divorce business at all".[59] By 1875 that position had changed and the local Act was amended to keep up with English developments.

The foregoing measures were neither literal copies of the English model, nor wholly consistent as between one Colony and the next. As time went on, each legislature went its own way, and differences between the supposedly uniform divorce laws became wider. However, until 1888, the Colonial Office would allow no material deviation, as the Victorian Parliament discovered in 1860. Its Bill proposed several major innovations, including separation for drunkenness, and dissolution after desertion for only four years. Excepting the latter, most of the experimental clauses were abandoned in committee. Some Members opposed on religious grounds the automatic adoption of the English Act, one of them asking whether "because a law had been passed in England, a country in a totally different position from this colony, a transcript of it was to be executed here to bind the consciences of a large class of the community against their will?"[60] Others contested the very need to conform, and one "objected to the abject following of English precedent, and thought the Colony ought to set an example to England, as it had done by its adoption of universal suffrage and ballot".[61] Determined to force the issue, both Chambers carried the Bill. The Colonial Office registered its high displeasure by prolonged silence, after

52. Currey C.H. "The Law of Marriage and Divorce in New South Wales (1788–1858)" (1955) 41 *R.A.H.S. Journal* 97 at 111.
53. By general despatch of 7th April 1858. The imperial Act of 1857 was 20 & 21 Vict. c. 85.
54. Act No. 22 of 1858 (SA) "to Amend the Law Relating to Divorce and Matrimonial Causes in South Australia".
55. The sequence of legislation presented in the Historical Introduction to Toose Watson & Benjafield *Australian Divorce Law and Practice* Sydney 1968 c is not wholly accurate.
56. 24 Vic. No. 1 (Tas) "An Act to vest in the Supreme Court Jurisdiction in respect of Divorce and Matrimonial Causes".
57. 27 Vic. No. 19 (WA) "An Ordinance to regulate Divorce and Matrimonial Causes". It went on, somewhat inconsistently, to create an entirely new Divorce Court, investing it with exclusive jurisdiction. That curious tribunal survived until united with the Supreme Court in 1880.
58. 28 Vic. No. 29 (Q) "An Act to Establish a Divorce and Matrimonial Causes Jurisdiction in the Supreme Court".
59. *Q.P.D.* vol. 18 148.
60. *Victorian Hansard* vol. V 789 (O'Shanassy).
61. *Ibid.* 791 (Prendergast).

twelve months of which the Victorian legislators decided to yield, and passed a Bill from which the offending clause was deleted, and which did not have to be reserved.[62]

In New South Wales a slow battle for independence on this subject, and thus on virtually all subjects of legislation, was fought to a victory over the Colonial Office. James Martin, as Attorney-General, strongly resisted adopting the English *Divorce Act* of 1857 because he considered it to work badly.[63] Holroyd's Divorce and Matrimonial Causes Bill of 1862 was the first of many fruitless attempts to legislate, most of them sponsored by Buchanan in the face of religious opposition. By 1873 a basic enactment was secured.[64] Controversy turned, not on it, but on an amending measure first brought forward in 1866. It had the support of Sir Alfred Stephen,[65] but suffered several tactical vicissitudes before being passed in 1887, reserved, and, disallowed. The Colonial Office found it at variance from the established imperial law, and declined to entertain it without a mandate from the electors, and an assurance that the other Australian Colonies would adopt a similar alteration to their laws.[66]

Sir Henry Parkes showed his power as an elder statesman in unifying local resistance. It mattered little, he insisted, as to the divergent views of Members on divorce, the critical question concerned the constitutional rights of a supposedly independent Parliament. To uphold those rights he urged that the offending measure be re-enacted and sent back until assent was obtained.[67] He inspired considerable support and, although several annual attempts to pass the Bill failed through Parliament's prorogation, it was enacted in 1892.[68] Neild, its sponsor over the final few years, looked back on the events of 1887 with this summary of the downfall of imperial dominance over "personal status" statutes:

> "That [1887] Bill has an historical interest, because it was the last measure to go from any Australasian Parliament to be pigeon-holed in Downing Street—the last that on being sent to England failed to receive the royal assent, and I take it that it will be the last that will be vetoed by [that] office . . .[69] I think

62. 25 Vic. No. 125 (Vic) "An Act to Amend the Law relating to Divorce and Matrimonial Causes".
63. Bennett *op. cit. supra* note 51 243.
64. 36 Vic. No. 9 (NSW) "An Act to confer jurisdiction on the Supreme Court in Divorce and Matrimonial Causes".
65. See generally Rutledge M.D. "Some aspects of the life and work of Sir Alfred Stephen (1802–1894)" M.A. thesis (1965) A.N.U.
66. Despatch of 27th January 1888.
67. *N.S.W.P.D.* 1st series vol. 38 1618. Melville's remark (at 1626) that "I object strongly and honestly to some gentleman by the same of Lord Knutsford, whom nobody in New South Wales knows anything about, and who, probably, knows as little of New South Wales as New South Wales knows of him—I object to his advising any person to refuse assent to what this Parliament, after two general elections, has passed" is reminiscent of Higinbotham's petulant reference to "a person named Rogers" at the Colonial Office. See e.g. Palmer Vance *National Portraits* Melbourne 1948 93 at 102; Swinfen, *op. cit. supra* note 8, 30.
68. As 55 Vic. No. 37 (NSW) published as "55 Vic. No.—not yet assented to" in *Statutes of N.S.W.* 1891 to 1892 184.
69. Cf. Lord Chancellor Sankey's address on moving the second reading of the Statute of Westminster Bill *P.D.* (Lords) (1931) vol. 83 col. 178: "There was always a power in the Crown to disallow an Act of a Colonial Legislature. I have searched the records and I think the last occasion upon which that power was exercised was as far back as the year 1873 . . . The doctrine of reservation was a doctrine whereby a Colonial Governor could reserve an Act passed by a Colonial Legislature till the pleasure or the opinion of His Majesty was known. That power has long since become obsolete".

that in matters of such moment we are sufficiently large to set our own house in order."[70]

The Colonial Office had to bow to the undoubted merit of that argument. For the most part its power of superintending Australian laws had come to an end, and in its place those Colonies had very nearly become absolute masters of their own legislative destinies.

II THE COURTS

"The course of the courts", wrote Sir Harrison Moore, "has been to stand by the established rule of English law, and let the legislature provide for special conditions arising in the colony".[71] He discerned an anxious desire to preserve uniformity, which stemmed not from fondness for tradition or symmetry, nor from "imported judges". It sprang from recognizing the mother country's richer and more complete experience in the application of law, which the narrowness of a small community could not furnish, coupled with the convenience of using English decisions and textbooks. "Divergence", he said, "would mean uncertainty, diminishing only as costly litigation settled the law".[72] Before 1900, generally speaking, Australian judges did take a conservative view. The classic statement of it from the bench was made in 1847 by Dickinson, J., who thought that "a colonial court should always follow in the footsteps of the English judges along those paths which they have indicated".[73] Less creditable was the interpretation of South Australia's "uncompromising dogmatist", Boothby, J., who

> ". . . sincerely regarded himself as the champion of English judicial standards and never mitigated his abhorrence of colonial crudities and the impertinent suggestion of those who had never eaten dinners at Inns of Court 'that rules formulated by the finest English minds and buttressed by centuries of tradition should be set aside for antipodean convenience'."[74]

Although a policy of uniformity was general in the first half of the nineteenth century, there were signs from 1850 of a more independent approach. In *Williamson's Case* of 1856 the Supreme Court of New South Wales declined to conform to a decision of an English Superior Court, though it indicated that "the greatest respect" would always be paid to such decisions.[75] In Queensland, Cockle, C.J., was likewise disposed to give "every consideration to cases decided by eminent judges", but thought that the court's first responsibility was to

70. *N.S.W.P.D.* 1st series vol. 53 1511. In some ways, the independence thus secured opened the way for a "mania of diversity" in legislation – Beasley F.R. and Baker R.W. "The Need for Co-operation in State and Commonwealth Laws" (1949) 23 A.L.J. 188 at 192–3.
71. "A Century of Victorian Law" (1934) 16 *Jnl of Comparative Legislation and International Law* 3rd series 175 at 182. In one particular aspect of uniformity, the judges had from early times exercised a significant responsibility: "The all-important question of how much of English law should be established in a colony interested [James] Stephen a great deal. Generally speaking, he held that this must vary with time and place, and that the judges rather than the legislators should decide on this point" Knaplund *op. cit. supra* note 6 231.
72. *Ibid.* 183.
73. *R.* v. *Morley* (1847) 1 Legge 389 at 391. For a comment on the "unsoundness" of such a view see Roberts-Wray *op. cit. supra* note 8 565–6.
74. Pike *op. cit. supra* note 19 185. For a sympathetic assessment of Boothby's role see Roberts-Wray *op. cit.* 396–7.
75. *Williamson* v. *The New South Wales Marine Assurance Co.* (1856) 2 Legge 975.

give judgement of its own.[76] In a case where he thought English authority out of touch with the times he did not hesitate to say that "the state of the law might have escaped notice at home, but it ought not to escape notice here",[77] and to act accordingly.

By 1875 Martin, C.J., laid down that the Supreme Court of New South Wales would not be bound by the mere opinion of any judge of any court, and that its only superior was the Privy Council.[78] A decade later, the Victorian Supreme Court, reversing its earlier policy,[79] re-echoed that view:

> "We always entertain and consider the opinions of English judges with the respect which the eminence of the authors demands; but we are not bound by the decisions of any English Court except the Privy Council, and upon points of practice we have less hesitation in differing from them than upon questions of law."[80]

In Western Australia, Hensman, J., stated a similar attitude. He was prepared to be bound by the Privy Council, House of Lords, or "any court of a distinctly higher nature".[81] But he would not recognize the Colony's Supreme Court as necessarily bound by the decision of any English judge; the court was under a duty to follow its own judgement. The course of Tasmanian decision was to the same end. In *Parker* v. *The Queen,* for instance, the Supreme Court held that it would follow certain English practice because, in the circumstances, "it entirely commends itself to us", but not because the court was obliged to do so.[82]

So strong was the mood of judicial independence towards the end of the century that there was even dissatisfaction expressed publicly from the colonial bench as to the operation of appeals to the Privy Council.[83] Hence there was, in judicial administration of the law, a type of progressive conservatism, neither wholly traditional, nor wholly experimental. The Supreme Courts were seen as their own masters, under the Privy Council; yet, subject to criticism, English decisions were generally preferred as the criteria by which to interpret and apply the colonial laws.

III THE PROFESSION

Even without barristers, lawyers in private practice lent colour to the *demimondaine* settlement at Sydney before 1824.[84] In September of that year, the young William Charles Wentworth returned from England with his university friend Robert Wardell. Each was newly admitted to the English Bar, a *cachet* which no other private practitioner in the Colony possessed.

76. *R.* v. *Archibald* (1869) 2 Q.S.C.R. 47 at 51.
77. *R.* v. *Coath* (1871) 2 Q.S.C.R. 178 at 183–4.
78. *Ex parte Dunne* (1875) 13 S.C.R. 210 at 217.
79. "This Court will follow the Queen's Bench practice on all occasions" *McMullen* v. *Phillips* (1861) 1 W. & W. (L) 15.
80. *Gannon* v. *White* (1886) 12 V.L.R. 589 at 595. Cf. Webb T.P. *A Compendium of the Imperial Law and Statutes in force in the Colony of Victoria* Melbourne 1892 164–5.
81. *R.* v. *Wainscot* (1899) 1 W.A.L.R. 77 at 89.
82. (1898) 1 T.L.R. 91 at 114.
83. Bennett J.M. ed. *A History of The New South Wales Bar* Sydney 1969 265–6 note 197. For proposals as to an Imperial Court of Appeal and as to regulating more explicitly the Privy Council's role see "Minutes of Proceedings of the Colonial Conference 1907" Cd. 3523 66 and 268.
84. On Eagar, Crossley *et. al.* see e.g. Bennett *op. cit.* 8–28.

The Native Son[85] was home, burning to "master my profession",[86] to put down the Exclusives, and to "lead the Colony".[87] He was ill disposed to share the *mystique* of advocacy with such as Garling and Moore,[88] mere attorneys in English eyes. Yet the fact was that he had come into a "fused" profession. By the new Charter of Justice of 1823, the Supreme Court was required to "admit and enrol .... persons to act *as well* in the character of Barristers and Advocates as of Proctors, Attornies and Solicitors".[89]

Not for decades yet would English lawyers be called to arms against Fusion,[90] that notion "more like a revolution than anything which could be looked forward to in England".[91] Whence this anticipation at "Botany Bay" of professional liberalism still nascent at Home?

One obvious explanation lies in the necessities of a young, ill-favoured colony. Less obvious explanations, however, should be considered. James Stephen, the principal draftsman of the Charter, was no slavish proponent of English legal forms for new colonies.[92] In preparing the Charter, Stephen had assistance from New South Wales' Chief Justice-elect, Francis Forbes, an advanced liberal, even suspected by a conservative brother of "American sympathies".[93] The United States had indeed forsaken the *pas de deux* of barristers and attornies, moved by the spirit of the frontier and new world democracy.[94] Forbes discarded the judicial wig until more self-important brethren cajoled him into conformity.[95] He it was who decreed simpler court forms and procedures in advance of any then devised in England;[96] brethren and successors removed them when recasting the infant profession in the English mould.

On the day of their admission to the local profession, Wentworth and Wardell coolly asked the Chief Justice to order the six or seven existing practitioners to refrain henceforth from advocacy.[97] The application was refused. This was only the first round; in the meantime, Wentworth did not disdain to use his rights of fused practice. If his bills as solicitor were trimmed, the taxing officer might feel the caustic of the Native Son's complaint. Such a letter survives; after a conventional opening, it goes off tangentially upon the point which really rankled: "Though I have been degraded against my will to a level with the old practitioners . . . here——I will never quietly allow myself to be ousted of that scale of fees to which the higher branch of the profession to which I really belong, entitles me."[98] So the new King Street courthouse re-echoed the old edict of Lincoln's Inn: "There ought always to be observed a difference between

85. The engaging soubriquet is Manning Clark's: *A History of Australia* II Melbourne 1968 Ch. 3.
86. Letter to his father from England 1823. Quoted in Melbourne A.C.V. *William Charles Wentworth* Brisbane 1934 35.
87. Letter to his father 10th March 1820. In Wentworth Papers Mss. in M.L., A756, 215C.
88. The Colony's first private practitioners, then still in practice.
89. Letters Patent 12th October 1823 pursuant to 4 Geo. IV c. 96. Clause X.
90. I.e. a single order of lawyers entitled to act as advocates as well as 'office lawyers', alone or in partnership. For brevity, we shall call this system and its approximations "Fusion", as contrasted with "Division".
91. William Shaen, (1867) 43 L.T. 445.
92. *Supra*, section I.
93. By Dowling J. See Currey C.H. *Sir Francis Forbes* Sydney 1968 5.
94. Wham B. "The Barrister and Solicitor in British Practice: The Desirability of a Similar Distinction in the United States". (1935) 21 A.B.A.J. 486, 492.
95. *The Australian* 26th September 1846, 2192.
96. Currey *op. cit.* 109–110.
97. *Sydney Gazette* 16th September 1824; Bennett ed. *op. cit.* 34–36.
98. Wentworth W.C. *Legal Letter Book* Mss. in M.L., A1440, 103. (8th June 1825.)

a counsellor-at-law . . . and solicitors which are but ministerial persons and of an inferior nature . . ."[99] The edict would reverberate in the colonial parliaments to come.

With Wentworth a cause delayed was a vendetta begun. By 1835 he and Wardell, with the sympathy of Justices Dowling and Burton,[100] had secured a rule of doubtful validity[101] dividing the little profession in formal English style. Forbes, C.J., is said to have regretted the change.[102] Stout opposition by the non-barrister lawyers was in vain.[103] The most critical of them was fined for contempt of court, almost certainly at the instance of Burton, J.[104] While his case was *sub judice,* Burton proclaimed at a public dinner that he would see Division through, regardless of "the demon popularity".[105] And so the law was changed, effectively by a handful of English barristers and judges, before an elected legislature existed, and without reference to the nominee Legislative Council. Thus ended the strongest possibility of a distinctively Australian law and practice of the legal profession. The antipodean Fusion was extinguished, just as the English law reform movement began to canvass the idea at Home. Prospects for immigrant barristers took a sharp turn for the better.[106]

"Experiment" in England

Yet soon, at Home and in Australia, conservative practitioners would have to recite that Division is part of the nature of the most fundamental things.[107] In reality, Division was a composition of fairly recent origin, still volatile and unstable. The Bar, of course, was an ancient profession. Indeed the point here is that for centuries it had been *the* legal profession.[108] Until 1800, and even later, the distinction between barristers and attorneys was not a division *within or between* learned *professions,*[109]but rather a distinction between an established profession and an ill-organised body of semi-skilled, low-status aides. The reality behnid the "two branches" metaphor is broadly this: in the period 1750–1850[110] the hitherto sub-professional solicitors gained a status which, if still *well below* that of the original legal caste, was now high enough for them to be called a "profession", in modern middle-class terms. For a time (perhaps 1830–1860)

99. Quoted in Birks M. *Gentlemen of The Law* London 1960 106.
100. Cf. Therry R. *Reminiscences of Thirty Five Years' Residence in New South Wales and Victoria* London 1863 340–341. "Burton . . . had been spouting Tory sentiments ever since he took his seat on the Bench in December of 1832." Clark *op. cit.* 220.
101. *Ex parte Brewster, Syd. Herald* 6th August 1846; *Ex parte Digby* (1889) 6 W.N. (N.S.W.) 90.
102. Currey *op. cit.* 448, quoting Lady Forbes' claim, after Forbes' death, that Forbes deeply regretted the change to Division. It seems unlikely that the widow would have remembered such a point so clearly, or restated it so strongly, had not Forbes made it to *her* forcefully and, perhaps, often.
103. Bennett ed. *op. cit.* 46–51.
104. *Syd. Herald* 23rd March 1835, 2; 30th March 1835, 3.
105. *Ibid.* 19th March 1835, 2.
106. Dean (Sir) Arthur *A Multitude of Counsellors* Melbourne 1968 28.
107. E.g. S.W. Griffith *Q.P.D.* (1872) vol. 14 512, (1867) 43 *L.T.* 445, *Evershed Report* H.M.S.O. 1953 Cmd. 8878 para. 779.
108. Jackson R.M. *The Machinery of Justice in England* 5th Edn. Cambridge 1964 234; Birks *op. cit.* 3–4.
109. It is submitted that the semantic play possible here leaves the substance of the point unaffected. Cf. Reader W.J. *Professional Men* London 1966 1. This thesis cannot be developed here: see e.g. Robson R. *The Attorney in Eighteenth-Century England* Cambridge 1959 144, Holdsworth *H.E.L.* xii 4, Birks *op. cit.* 176, 251, Reader *op. cit.* 69, (1899) 107 *L.T.* 525.
110. *Doe d. Bennett* v. *Hale* (1850) 117 E.R. 423; 117 E.R. 444.

there was a real possibility that the rising class would force entry to the old profession, and dilute its status and privileges. But the upward thrust of the new men was diverted into the compromise of Division—a second legal profession, discreetly subordinate, but with first access to the public and particularly to conveyancing. As late as 1850, "timeless customs" of Division were in reality still being crystallised and carefully embedded in lawyers' law and practice.[111] The compromise remained unstable until the late nineteenth century, and minor tremors still occur in our time.

The controversy surrounding the new County Courts of 1846 exposed and exacerbated tensions between the old profession and the new. For a time it seemed that the "draft settlement" of Division might be torn up. The decentralisation and relative simplicity of the new courts were deplored by those enjoying the "political advantages" of "a concentrated profession".[112] Worse for juniors were the statutory rights of audience of solicitors in the new courts. Feeling was high in the North Country and Midlands,[113] where upper-class customs did not receive the degree of deference expected in the *environs* of Westminster Hall. For a time, solicitors became "the real 'Bar' of several county courts", which was declared a "most objectionable monopoly and a crying evil".[114]

These were lean years for the Bar.[115] Lord Denman, L.C.J., did nothing for morale by suggesting[116] that surplus counsel emigrate, instead of seeking more restrictive practices at Home. In this connection, England's loss may not always have been the colonies' gain. Queensland's Lilley, C.J., an independent spirit, accused some Inns of swelling funds by certifying "export" barristers for colonial practice only.[117] If this were true, the standards of some who looked down on Fusion in our colonies may have been less than imposing. There were few academic controls on *any* admissions to the English Bar at this time.[118]

The interest of the more idealistic Fusionists in legal education was not seen as a redeeming feature. It might turn away from the Inns of Court young men of "generous natures and lofty lineage" and destroy the character of the Inns forever.[119] "This restless spirit of ambition on the part . . . of solicitors will grow in proportion as they become more highly educated . . . [T]his is an argument against making the [solicitors'] examination too stiff . . ."[120] Discourse on legal education is now fashionable. Those who wish to be penetrating might ponder the possible inter-relation of legal education's peculiar problems and the history of Division and Fusion.

In the 1850's, a Birmingham barrister, Kennedy, daringly advertised himself as a "Cheap Law Society", ready to dispense with the separate solicitor. The *Law Times* was scandalised, yet "Mr. Kennedy only *says* what many feel, and *does* what many are desirous of doing".[121] The power of the common law dealt

111. Abel-Smith and Stevens *Lawyers and the Courts* London 1967 221; *In Search of Justice* London 1968 38. Consider *Ex p. Cole* (1779) 1 Doug. 114, *Collier* v. *Hicks and Ors.* (1830) 2 B & Ad. 663, *Exp. Bateman* (1845) 6 Q.B. 853, *Doe d. Bennett* v. *Hale* (1850) 15 Q.B. 171 117 E.R. 423.
112. (1837) 1 *Jurist* 665.
113. See e.g. (1847) 11 *Jurist* 273 on "Manifestos" then current.
114. 4 *Jurist* (N.S.) 234.
115. See e.g. (1851) 15 *Jurist* 289—juniors permitted to sit in county courts seeking work.
116. (1852) 20 *L.T.* 73.
117. *In Re Bannatyne* (1888) 3 Q.L.J.R. 75, 77.
118. Gower L.C.B. "English Legal Training" (1950) 13 Mod. L. R. 137, 142–5.
119. (1852) 16 Law Rev. and Qtly. Journal 183.
120. (1852) 20 L.T. 85.
121. *Ibid.* at 26.

with Kennedy[122] in a manner which one modern Lord Justice considers less than gentle.[123] In 1857, it was still possible for a liberal and scholarly attorney to be dismissed as professionally "brought up from hand to mouth, as attorneys generally are,"[124] but the better opinion now favoured courtesy to the other "branch" in public.[125] Emphasis gradually shifted towards functional, public-interest arguments for Division,[126] although the off-record position doubtless changed more slowly. Prosperity in conveyancing,[127] more tact in inter-"branch" relations, and other inducements to conformity made the central issue quiescent in England by 1900. Symptoms of the old tension still flare now and then.[128]

"Tradition" in Australia

It seems more than coincidence that agitation to reverse Division in New South Wales arose in 1846, the year of the English County Courts legislation. A group including barristers Edward Brewster, Robert Lowe, Archibald Michie and solicitor James Martin tried unsuccessfully in 1846–7 to restore the Fusion of the Charter, first in the Supreme Court,[129] and then in the unicameral legislature, the part-nominee Legislative Council.[130]

In the Supreme Court, two judges held that the Division rule of 1835 was *intra vires* the Charter. Stephen, C.J., the only judge to give reasons, held that the rule was *ultra vires,* but should be observed because it had been acted upon for some ten years. This drew the tart comment that "[N]ot possessing a will corresponding to his understanding . . . [Stephen] was in no disposition to brave the body of opinion or of prejudice before which he . . . was speaking."[131]

In the Council, Brewster argued in Benthamite vein that every consideration of impartial reason was against the monopoly, autocracy, rigidity and cost of Division. It was hopeless to look to the judges for relief, for their "sympathies . . . were with the Bar". It was not too late to reverse the judge-made rule, but "every hour it was allowed to exist it would take firmer root, and more prejudice [would be] created in its favour."[132] Wentworth was still most active on the issue, and now adamantly opposed to change. Yet the bill passed the first reading, after debate, by sixteen votes to nine. Lowe's *Atlas* rejoiced that an "ancient and time-honoured abuse" was about to vanish, despite the power of Wentworth, who had relatives at the Bar "desperately opposed to the measure".[133] However, Wentworth had the bill referred to a select committee of Council. He presided, and dominated the examination of witnesses.

One of these was Samuel Milford, Master in Equity, later resident judge at Moreton Bay. He resembled Eldon as drawn by Bagehot, petrified by the danger of making anything more, or of making anything less. Unification was simply inconceivable. Division alone made lawyers noble; at the same time, Milford was against free counsel for poor litigants, for such counsel would feel "no interest".[134]

122. *Kennedy* v. *Broun* (1863) 13 C.B.N.S. 677.
123. *Rondel* v. *Worsley* [1966] 3 A.E.R. 657, 670–1. (C.A.)
124. (1857) 3 *Jurist* (N.S.) 513.
125. *Doe d. Bennett* v. *Hale* 117 ER at 429.
126. E.g. *The Times* 5th January 1884 ("Monopoly of the Bar".)
127. Abel Smith and Stevens *Lawyers and the Courts* 23.
128. See e.g. *Manchester Guardian* 21st May 1965 (Multiple complaints of Law Society); (1970) 120 New L.J. 1077–8 (Audience rights, judgeships.)
129. *Ex p. Brewster, Syd. M. Herald* 6th August 1846 2–3.
130. *Ibid.* 16th September 1846–2.
131. *Ibid.* 1st September 1846–2.
132. *Ibid.* 16th September 1846–2.
133. *The Atlas* 19th September 1846 445.
134. *V. & P.* (N.S.W.) (1846) II 405 para. 156.

He was against rules to allow lawyers to transfer from one "branch" to another, for "it would be degrading the [Bar] to allow its members to fall back upon the lower branch".[135] Robert Johnson, solicitor, thought that Fusion would help to flush incompetents out of both "branches". Division allowed too much clerical work to pose as professional, and too much ordinary professional work to seem specialist.[136] Rational division of labour would be better achieved within a unified profession.[137] James Martin[138] spoke as trenchantly as any Australian lawyer has ventured to do publicly on this subject. Martin deeply resented the fact that no one could qualify for the Bar at that time without being first admitted in Britain. He was for Fusion and reform of legal education; the two went hand in hand.[139] Legal education should be controlled neither by the judges nor the Bar. The former were even more illiberal than the latter.[140] The claim that Division enhanced the independence of counsel was a myth; if they did not bend to clients, they bent to judges, Crown law officers, and patrons among solicitors.[141]

Stephen, C.J., was against change. Only the "most flippant" solicitors wished to "intrude upon the province of the Bar".[142] His brother a'Beckett, J., penned a lurid warning against a fused profession peopled by "pettifoggers . . . tricksters and hucksters . . . bloodsuckers of costs . . . the cunning—unprincipled—conceited—shallow . . ."[143] It really was too much for his Honour's punctuation.

All that emerged from the committee was a local means of qualifying for the Bar,[144] an irresistible reform. Thus confirmed, the Division of New South Wales was inherited upon separation by Victoria in 1851 and Queensland in 1859. In the 1860's, the Cribb brothers in Brisbane,[145] and other merchants in Melbourne[146] moved their new parliaments for Fusion and, as they thought, more reasonably-priced and expeditious legal services. Each attempt failed. The northern Bar then obtained the added protection of a ban on "visiting" counsel from other colonies, extant today.[147]

In 1869 a Sydney barrister, T.J. Fisher, published his pamphlet, *Colonial Law Reform,* with an appendix on Fusion. It would, he claimed, increase competition and incentive in the profession, and reduce expense. It would need, and encourage, better education; Fisher envisaged a "Lyceum of Justice". In the absence of legally-qualified disciples of Fisher in the local parliament, John Stewart, a veterinary surgeon, entered unequal battle against the legal contingents. His bill passed a second reading in the lower House in 1872.[148] Like many Fusion bills of the period, it was merely a "cross-practice" measure, that is, it would

135. *Ibid.* 406 para. 166.
136. *V. & P.* (1847) II 428 para. 27, 459 para. 64.
137. *Ibid.* 428–9 paras. 39–41.
138. Solicitor. Barrister 1856. Chief Justice 1873–1886.
139. *V. & P.* (N.S.W.) (1847) II 452 para. 52.
140. *Ibid.* 451 paras. 30–31.
141. *Ibid.* 452 para. 52.
142. *Ibid.* 468 para. 7.
143. *Ibid.* 424.
144. *Barristers Act of* 1848.
145. *The Courier* 22nd May 1861.
146. Vroland R.N. "Organisation of the Legal Profession in Australia" in Paton ed. *The British Commonwealth etc* (*supra*) 203, 204.
147. *In Re Owen* (1865) 1 Q.S.C.R. 139, *In Re Holmes* [1944] Q.W.N. 33, *Nation* 17th April 1965, 17.
148. *V. & P.* (NSW) (1872) I 375.

have allowed barristers to practise *as* solicitors, and *vice versa,* without real unification. This *naive* approach greatly underestimated the influence of two distinct legal orders.

In 1871, a second attempt in Queensland was made by the Ipswich solicitor, John Malbon Thompson. Thompson, sometime Minister for Lands, was related to the Windeyer family of Sydney. Like most, if not all Fusion measures of the period, Thompson's was a private member's bill. (Looser party ties and more leisurely parliaments then made the private member's bill at once more common and more likely to succeed. Reform of lawyers' law is seldom exciting enough to feature in a modern party programme.) Thompson tried again in 1872[149] and 1874.[150] On every occasion, he faced the implacable opposition of Samuel Griffith, who had staked his considerable talents on the infant Bar of Queensland. Fusion might blur the prestige of the court lawyer, and upset the order of advancement to the bench, especially predictable in a small jurisdiction. Deep down, Griffith hated Fusion as a "communistic"[151] levelling of lawyers to a "dead level of mediocrity".[152] He would oppose it "on every occasion, by every means in his power".[153] Soon he would lead a profession which nullified a Fusion Act; in 1897 he and two former public opponents of that Act would deliver its judicial *coup de grace.*[154]

In Thompson's view, Division wasted time and money, and condoned excessive delegation of responsibility. It put the real power of the common law and the courts in the hands of too few, especially in a small profession: "The public here [are] still at the mercy of the Bar and bench . . . If the profession . . . were amalgamated, the bench would be subjected to many phases of talent. Among a large body of practitioners some might be found of such strong minds as to check the bench."[155] It may be significant that Thompson completed his professional life in Sydney.[156]

Thompson's 1874 attempt earned the support—rare in this field—of a distinguished counsel, patently disinterested. This was the brilliant liberal, Charles Lilley Q.C.,[157] a giant in the early cause of Queensland education. In Lilley's view, Fusion transcended inter-"branch" jealousies and mundane details of costs. It would force better education upon the profession generally. It would give more lawyers independence and responsibility in the law; a more socially-sensitive body of lawyers' law should result.[158] It was an argument superior to many of the trivialities and shallow assertions on the issue which bespatter the colonial *Hansards.*

1875 saw fresh activity in the Victorian and New South Wales parliaments. In Melbourne, the initiative was taken by theatrical manager, E.G.Coppin, who had successfully carried local Torrens Title legislation over lawyers' opposition. Amongst Coppin's supporters was solicitor McKean, whose anecdotal method was not inferior to much of the solemn argumentation:

149. *Q.P.D.* (1872) Vol. 14 46 *et seq.*
150. *Q.P.D.* (1874) Vol. 16 79 *et seq.*
151. *Q.P.D.* (1874) Vol. 16, 82; *Q.P.D.* (1881) Vol. 35, 320.
152. *Q.P.D.* (1874) Vol. 16, 82.
153. *Ibid.* 86.
154. *Re Walker* (1879) 8 Q.L.J.R. 61.
155. *Q.P.D.* (1871) Vol. 12 53.
156. Mennell P. *The Dictionary of Australasian Biography* London 1892 464.
157. Supreme Court Justice 1874–79; Chief Justice 1879–1893.
158. *Q.P.D.* (1872) Vol. 14 100–101.

"I was amused the other day, when having a law-book under my arm, a gentleman, also an attorney, stopped me . . . 'Ah, McKean', said he, 'buying another law-book, I see.'
'Yes', I replied.
'What a fellow you are', he rejoined.
'I never buy law-books. I advise them to take counsel's opinion."[159]

Coppin was allegedly assailed with "rude and coarse personalities . . . by more than one Victorian barrister".[160] His Sydney counterpart withdrew his bill without debate.[161]

In Queensland, in 1877, Thompson's bill made a comeback, in charge of W.H. Walsh, a quick-witted grazier, sometime Speaker of the northern parliament. Thompson was not prepared to bear further professional displeasure as prime mover. The bill passed the Assembly, to fall foul of the nominee upper house, led by Griffith's men, solicitors Browne and Charles Mein. Mein was a school, and lifelong, friend of Griffith; when Queensland's Fusion Act of 1881 made solicitors eligible for the Supreme Court bench, Mein did not disdain the benefit of this provision, conferred by Griffith.[162]

The peak of fusionist activity was reached in the decade 1881–1891. J.P. Abbott, a respected solicitor and grazier, brought a "cross-practice" bill before the New South Wales Assembly. The Charter of Justice (he argued) had wisely planned Fusion for Australia, and the divisionist *fiat* of an unrepresentative group in 1835 should be reversed.[163] A unified profession would be more responsible to the public, and less expensive. Another M.L.A. felt no hope on this point: legal process grew ever more tortuous with the passage of time. "The only way to have cheap law is to arm [a man] with a tomahawk."[164] After great resistance from his professional colleagues, Abbott abandoned his proposals. One bystander thought it "the most interesting debate of a class character" in the House for some time.[165]

In the Queensland parliament, by 1881, there was a McIlwraith government, more attuned to grazing and commercial interests than to Griffith's legal *coterie*. Thompson's bill, now much battered and bereft of any noticeable legal assistance in its drafting, became the *Legal Practitioners Act* of 1881. Its preamble showed clearly enough what its supporters meant to enact: "An Act to Relieve and Otherwise Benefit Suitors by Abolishing the Division of Practice between Barristers and Solicitors." However, Griffith had been very active in the committee stages. The operative section was merely a "cross-practice" one. After passage of the Act, separate rolls, examinations etc. for the "branches" continued, and professional arrangements went on as before.[166]

Even as the Act stood, determined and unobstructed use of its provisions might have had drastic effects on Division in a small agrarian community.[167] However,

159. *V.P.D.* (1875–6) Vol. 21, 860.
160. Michie A., Q.C. "What Legislation May Do for the Legal Profession" *Victorian Review* (1880) II at 159.
161. R.B. Smith; *V. & P.* (N.S.W.) (1875) I 72–3.
162. Mennell *op. cit.* 318; cf. *Q.P.D.* (1877) Vol. 22 148–150.
163. *N.S.W.P.D.* 1st Series (1881) 381.
164. *Ibid.* 524. (Angus Cameron).
165. *Ibid.* 526.
166. *In Re McCawley* [1918] St. R. Qd. 62, 98.
167. Cf. Chubb Q.C. of Brisbane, in *Legal Professions Practice Bill: Minutes of Evidence Taken at the Bar of the Legislative Council* Melbourne 1884 137 para. 3082: "[I]f the ice was broken by some courageous barrister . . . amalgamations would [quickly] exist here, in fact as well as in name."

obstruction occurred, and some evidence of it has survived—a surprising amount, considering the delicacy of the subject, and the efficacy of purely verbal communications in a small community. The first "amalgams" did not last long, and few were keen to succeed them. One, F.F. Swanwick, was soon removed from the roll.[168] He was no angel, although the offences for which he was pursued do not seem very grave. He was accused *inter alia* of appearing before an electoral tribunal without proper instructions; the complainant here was one of Griffith's old campaign agents, whose name was a byword for electoral irregularity.[169] The same complainant later bought-up debts in order to bankrupt Swanwick, "a proceeding which he dare not take against any other lawyer".[170] The non-conforming lawyer is apt to receive hypercritical scrutiny. Personal isolation and withdrawal of normal professional accommodations[171] can conduce to actions useful to support pre-existing prejudice. The judges were not unaware of the pressures operating at this time.[172]

Another Queensland "amalgam" who struck trouble was Charles Cansdell. After brief experiment, he wrote in a local law journal: "I was . . . informed by several solicitors that they dare not brief me . . . [I]n the streets, and even at the table of the Union Club, I have been insulted by observations addressed at, but not to me, by members of both branches . . ."[173] He petitioned Attorney General Pope Cooper, apparently without success, to relieve him from ostracism.[174] The "amalgam" was a "nondescript animal", who should "stick to one branch . . . or the other".[175] "It is not a myth", declared the eminently respectable J.G. Drake in 1889, "there is undoubtedly an organisation to prevent the [1881] Act from coming into force".[176] Cansdell moved his practice to Sydney. The Act was a dead letter long before it was repealed in 1938. The *Australian Law Journal* then blandly observed: "In Queensland, the effect of the enactment was possibly less than was intended by the legislature."[177]

In 1883, a fusion bill passed the New South Wales Assembly, but not the nominee Council. In 1884, the Victorian upper chamber diverted a similar bill into an enquiry at the bar of the House. Most of the questioning was by the "sturdy conservative"[178] Dr. Hearn, whose severity was reserved for lesser members of the legal profession proposing change. His colleague Dr. Madden considered Division a truth derivable from the holy writ of Adam Smith's economics.[179] Judge Rogers thought that Division belonged to an earlier stage in solicitors' educational and social evolution.[180] Judge Cope took the earthier view that solicitors were jealous of counsel's relatively uncontrolled fees.[181] Sir—

168. *In re F. ff. Swanwick Ex p. Bain* (1882) 1 Q.L.J.R. 117.
169. Bernays C.A. *Queensland Politics During Sixty Years 1859–1919* Brisbane 1919 101.
170. Law report, quoting Swanwick's counsel, in Brisbane *Telegraph* 9th December 1882.
171. "Their Honours knew . . . he was a kind of Ishmaelite."—*Telegraph* 9th May 1882. (Law report). Cf. Weyrauch W.O. *The Personality of Lawyers* Yale 1964 2–3, 241.
172. *Re Swanwick* (1882) 1 Q.L.J.R. 70 at 71 per Lilley C.J. and Harding J. The latter was wont to regale the more sycophantic juniors with anti-"amalgam" humour: *Q.P.D.* (1889) Vol. 58 1582.
173. Quoted *Q.P.D.* (1889) Vol. 58 1581–2.
174. *Ibid.*; see also *Bar Minutes* Qld. State Archives File C.R.S. 334, 2nd July, 13th October 1881.
175. *Q.P.D.* (1889) Vol. 58, 1582–3 (Rees Jones).
176. *Ibid.* 1582.
177. (1938) 12 A.L.J. 324.
178. *The Age* 21st August 1884, 4.
179. *Minutes of Evidence* (*supra*) 8.
180. *V.P.D.* (1884) Vol. 46 1123.
181. *Minutes of Evidence* 14, paras. 291–2.

Archibald Michie (who as young counsel had appeared before Wentworth's select committee of 1847) still thought that Division "gets rid of a vast deal of responsibility".[182] Costs favoured the habitual referrer to counsel; much solicitors' work was only clerical.[183] Lilley C.J. of Queensland was still "in favour of what I regard as the true reform in the profession—that is, one legal profession, without an arbitrary division . . . and one sufficient standard of education".[184] One counsel considered the very idea of a fusion bill to be a gross impertinence:

"*Q*. Are you aware that a similar Bill to this has passed the lower House in Sydney three times?
A. I think any Bill will pass a lower House . . .
Q. You are aware that a nominee Upper House rejected the Bill . . .?
A. Yes, that is just what I would expect a nominee House to do—it was very wise and prudent."[185]

The Victorian Upper House was similarly prudent and wise. It rejected Fusion bills passed by the Assembly, often by large majorities, in 1878, 1879, 1881, 1883, 1884, 1885, 1886 and 1890. Still, these were nervous times. It was not only Mrs. Isaacs who was concerned for the security of the Bar including her son Isaac.[186] In 1891, the dam of the Legislative Council gave way, and the sophisticated *Legal Profession Practice Act* (Vic.) was put upon the statute book.

It had often been said that the Act would fail, being against the order of Nature. In the event, Nature was not unaided by art. Had not Dr. Madden himself (Chief Justice from 1892) said that "if a number of barristers choose to lay their heads together . . . they can effectively nullify any [such] legislation"?[187] Two weeks after the Act came into effect, a new "Bar Association" announced that it would boycott "amalgams", as well as "pure" counsel who did not join the Association.[188] The solicitors held an excited but ineffectual council of war; traditional status as *untermenschen* numbed the nerve of action.[189] The liberal *Age* castigated the "desperate and thoroughly despicable tactics" of a "highly respectable body of conspirators against the law".[190] Prominent Association men at this stage were Isaac Isaacs and H.B. Higgins, future High Court justices,[191] liberals in many things, but not in this. Only later would Isaacs discover that "whatever tends to defeat an enactment is necessarily against public policy".[192] The Attorney General, Shiels, could find no evidence of combination against the Act,[193] which is surprising, for he was named first chairman of the Bar Association.[194] Nevertheless, when even the conservative *Argus* found the Association "indistinguishable from trade unionism in its latest and most degrading form",[195]

182. *Ibid*. 36, para. 741.
183. *Ibid*. 46, paras. 903–4; 47 paras. 922–3.
184. *Ibid*. 141.
185. *Ibid*. 74 paras. 1530, 1532. (MacDermott M.L.C.).
186. See the letter quoted in Cowen Z. *Isaac Isaacs* Melbourne 1967 7.
187. *V.P.D.* (1875–6) Vol. 21 859.
188. *The Age* 5th December 1891, 8.
189. *Ibid*., 17th December 1891 5.
190. *Ibid*., 5th December 1891 8.
191. Sawer G. "Division of a Fused Legal Profession: The Australian Experience" (1966) 16 Univ. of Toronto L.J. 245, 251.
192. *Wilkinson* v. *Osborne* (1915) 21 C.L.R. 89, 98.
193. *V.P.D.* (1891) Vol. 68 2883–4, 3115.
194. *The Age* 5th December 1891 8.
195. *The Argus* 15th December 1891 5.

it was clearly time to revert to Fabian methods. There were well-publicised resignations from the Association, which was then formally dissolved. Only Dr. Madden remained publicly impenitent.[196]

In the new law year, certain judges were not at pains to conceal their dislike of "amalgams".[197] Rulings on counsel's fees favoured "pure" counsel.[198] It was perfectly clear to solicitors that their voices were unwelcome in the higher courts.[199]

Laymen who at first thought the Act a victory were dismayed to see how little they had gained "after many years of agitation".[200] Had not even the Attorney General conceded that their brainchild had the support of the whole community?[201] Eventually they obtained a Royal Commission on reform of legal procedure. Several informed and articulate witnesses gave clear evidence of defeasance of the Act.[202] However, Madden, C.J., blandly told the Commissioners that he could think of nothing which could make the 1891 Act more effective.[203] In Mr. Justice Hodges' view, it was simply that divisionist lawyers were a better class of men.[204] The Commission's Report ignored the issue. The Commission's chairman was H.B. Higgins, prominent in the Bar Association in 1891–2. Thus the Act passed into limbo, leaving an improved system of education and little else,[205] apart from a record of unusual activity by interested professionals. The tactics and attitudes which thus prevailed continue to command approval in the local profession.[206]

In 1892 the solicitor—M.L.A., Crick, tried to bring New South Wales into line with the *de jure* Fusion of Queensland and Victoria. Fusion has had nobler disciples, but "Paddy" Crick was no mean protagonist.[207] When his bill reached the upper House, Sir Julian Salomons, a leader of the Bar, devised a compromise which Crick accepted: henceforth solicitors would have full rights of audience in their own and their partners' cases.[208] It has been said that this inter-"branch" treaty saved modern New South Wales from Fusion.[209]

"Whatever is, is right"

The controversies of the eastern colonies passed Tasmania, South Australia and Western Australia by. In constitutional history, they did not inherit the N.S.W. law of Division. They were given Fusion as a practical measure at foundation, and no interest was strong enough to disturb the pattern before it was well

196. *Ibid.*, 5th February 1892 6.
197. Sawer *loc. cit.* 253.
198. E.g. *Portland and Western District Freezing Co.* v. *Austral Otis Co. Ltd.* (1897) 23 V.L.R. 462; *Hayes* v. *Jones* [1926] V.L.R. 459.
199. Victorian *Parliamentary Papers* (Assembly) Session 1899–1900 III 166 paras. 3460–1; *Ibid.*, 285 para. 6024.
200. *The Argus* 9th December 1891 6.
201. *V.P.D.* (1891) Vol. 68 2883.
202. Vic. *Parl. Papers* (Assembly) Session 1899–1900 III 167 paras. 3460–1; 267 para. 5623; 285 paras. 6024–5.
203. *Ibid.*, 340 para. 7109.
204. *Ibid.*, 391 para. 7922.
205. Yet see *Legal Profession Practice Act* 1958 (Vic.) ss. 4, 5.
206. Dean *op. cit. supra* note 106 101, 107.
207. Crick "looked like a prize-fighter, dressed like a tramp, talked like a bullocky, and to complete the pattern of popular virtues, owned champion racehorses". Struck off for corruption in government, 1906. Cf. Martin A.W. and Wardle P. *Members of the Legislative Assembly of New South Wales 1856–1901* Canberra 1959 47.
208. 55 Vic. No. 31 (1892); see now *Legal Practitioners Act* 1898 (N.S.W.) S. 15. Solicitors had, from 1842, been given such rights in certain inferior courts.
209. 25 A.L.J. 313 (Maughan K.C.).

settled. Yet it was a weak form of Fusion in every case. The "two-tier" costs of Division (separate solicitors' costs and relatively uncontrolled counsel's fees) were retained—a compromising feature much stressed by conservatives in the debates to which we have referred. Thus the primitive Fusion in these latter colonies disturbed few of the fundamental assumptions of Division. For that reason, perhaps, it was not until the 1950's that Australia's "fused" advocates, encouraged by their counterparts in other States,[210] discerned a sufficient status-interest in Division by private combination. "Voluntary" bars have been set up in South Australia,[211] Western Australia[212] and the Australian Capital Territory.[213] In each place the judges have given their blessing; it will be interesting to see how long these Bars remain truly voluntary. A similar venture in Hobart petered out in the early 1960's.[214]

Few pieces of English law proved more durable in nineteenth century Australia than the law and practice of Division. It lay at the heart of lawyers' law; it concerned the balanced interests of the legal professions; it was usually a closed book to the laity; and the relevant legislative power was effectively that of the successful practitioners. They had no wish to inject new ideas of English lay and legal journals into a deep consideration of the professional structure best for the future Australia. The critique of English Division was left to the minor lawyers and to laymen. Only the relative informality of the colonial parliaments made critique of a sort possible. But the parliaments (and select committees) were inevitably blunt instruments. Bald assertions and *ad hominem* arguments were the order of the day. There were few Lilleys to speak out, rationally and with prestige. There was little or no independent scholarship to draw upon.[215] Conservatives were naturally not unhappy to see debate bogged down in details, or stultified by closed circuits.[216] If all could not be had at once, then there should be no change.[217] If the motives of liberals were not purer than humanity attains, then their case was unsound.

Inevitably the issue of costs (usually without statistics, realities of daily practice, or questioning of basic assumptions)[218] was the banner around which liberals and conservatives tried to rally the popular interest which the topic could hardly sustain. The man in the street was naturally not much interested in internecine jealousies, or in difficult arguments concerning diffusion of responsibility, depression of legal education, or over-inflation of work. Nor had he much time for the "ethical" defences of Division,[219] those functional variants of a frank

210. *C.P.D.* (Senate) (1969) 1498 Col. 1, 1503 Col. 2.
211. Sawer *loc. cit.* 258.
212. Information supplied by Secretary W.A. Law Society 22nd November 1968.
213. Sawer *loc. cit.* 260. For an unsuccessful attempt to make Division *de jure* in the A.C.T. see C.P.D. (Senate) (1969) 1461 *et passim.*
214. Crisp M.P. *History and Status of the Legal Profession in Tasmania* Hobart 1968 25.
215. There are quicker and safer returns for academic research today.
216. E.g. debates on costs in which a continuing two-tier system was taken as axiomatic.
217. E.g. educational standards of solicitors were allegedly too low for Fusion; *ergo* no Fusion, and consequently no impulse to educational change.
218. E.g. as to two-tier costs, continuation of professional status for all existing work etc.
219. I.e. the argument that a separate Bar can maintain higher ethical standards, on the principle that a black sheep in a small flock is easier to detect. The metaphor usually covers the patently corrupt only, not the dilatory or incompetent. It implies that a lower standard in the other "branch" is acceptable in the interests of Division, if not of the public. For a more breathtaking form of this argument, see Griffith [(*Q.P.D.*) (1872) Vol. 14 509] and Madden [*Mis. of Evidence supra* 6 para. 116] who suggest that if counsel can leave any "gingering-up" of witnesses to separate solicitors, there is in some way an overall ethical gain.

English *elitism* surviving well enough itself in the air of colonial chambers. These defences were plausible in the vast profession of England; few asked whether they validly applied to the little self-contained professions of colonial Australia. Such was the quality of the debate at large. It was over before our contemporary conditions and modern legal education began to arrive.

In Australia as in England, Division was enacted not by parliament, but in the *interstices* of an interested profession. On at least seventeen occasions in the last century popular Houses of our legislatures passed Fusion bills. On only two occasions, nominee upper Houses allowed such bills to become law. Each resultant Act was nullified by active and passive professional influence after the legislative process was complete. After the Victorian chapter, it appeared that even the best-conceived bill would need a standing commission to implement it. That was beyond the resources and the philosophy of our colonial legislatures. Before an educated public opinion could be formed, the day of the private member's bill was over.

Modern man may pride himself in the social and scientific advances made since the age of Queen Victoria, but legal attitudes change more slowly. Within Parliament, the courts and the legal profession itself in contemporary Australia there is a continuing awkwardness as between tradition and experiment in the realms of lawyers' law. So far as politicians are concerned, a number share with their great-grandfathers an antipathy to legalistic statutes.[220] Lawyers, on the other hand, are hoist with the petard of their training and experience:

> "The lawyer . . . is more involved with form than substance. He looks at legislation and policies as they impinge on an individual citizen and thinks naturally of such things as procedural safeguards. For him the public good is perhaps best seen as an elephant that needs to be carefully chained."[221]

The power of legal precedent remains too as a sheet-anchor for the continuity of attitudes of by-gone days.

Through one of those strange cycles of history, regard is usually no longer had to English and external developments to preserve the *status quo*, but rather to provide ideas for innovation and reform. Ironically, Australian attitudes have now so settled into imported nineteenth-century "traditions" that the stimulus to legal "experiment" in this modern nation often comes from other countries. In that sense, too many legal ideas in Australia are still, in our view, "colonial". The adventurously independent spirit which, undaunted by failure, so inspired local law reform thinking in the nineteenth century, has largely gone the way of groats and guineas. But current sympathy for law reform may perhaps see the renaissance of more aggressively experimental attitudes with inevitable reassessments of traditional values. That should not suggest that all that is old must be bad, and all that is new must be good. The best regulated legal community is surely the one which strikes a happy medium between past experience

220. Several reassurances of that are to be found, for example, in the debates in the N.S.W. Legislative Assembly and Legislative Council on the Supreme Court Bill between March and September 1970.

221. Robson J.L. "Legal Trends Within New Zealand" in Robson ed. *The British Commonwealth: The Development of Its Laws and Constitutions—New Zealand* London 1967 498.

and the needs of the present and of the future, thereby encouraging change while tempering "experiment" with "tradition". Australian legal attitudes of last century were directed to, but generally fell short of, that objective.

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